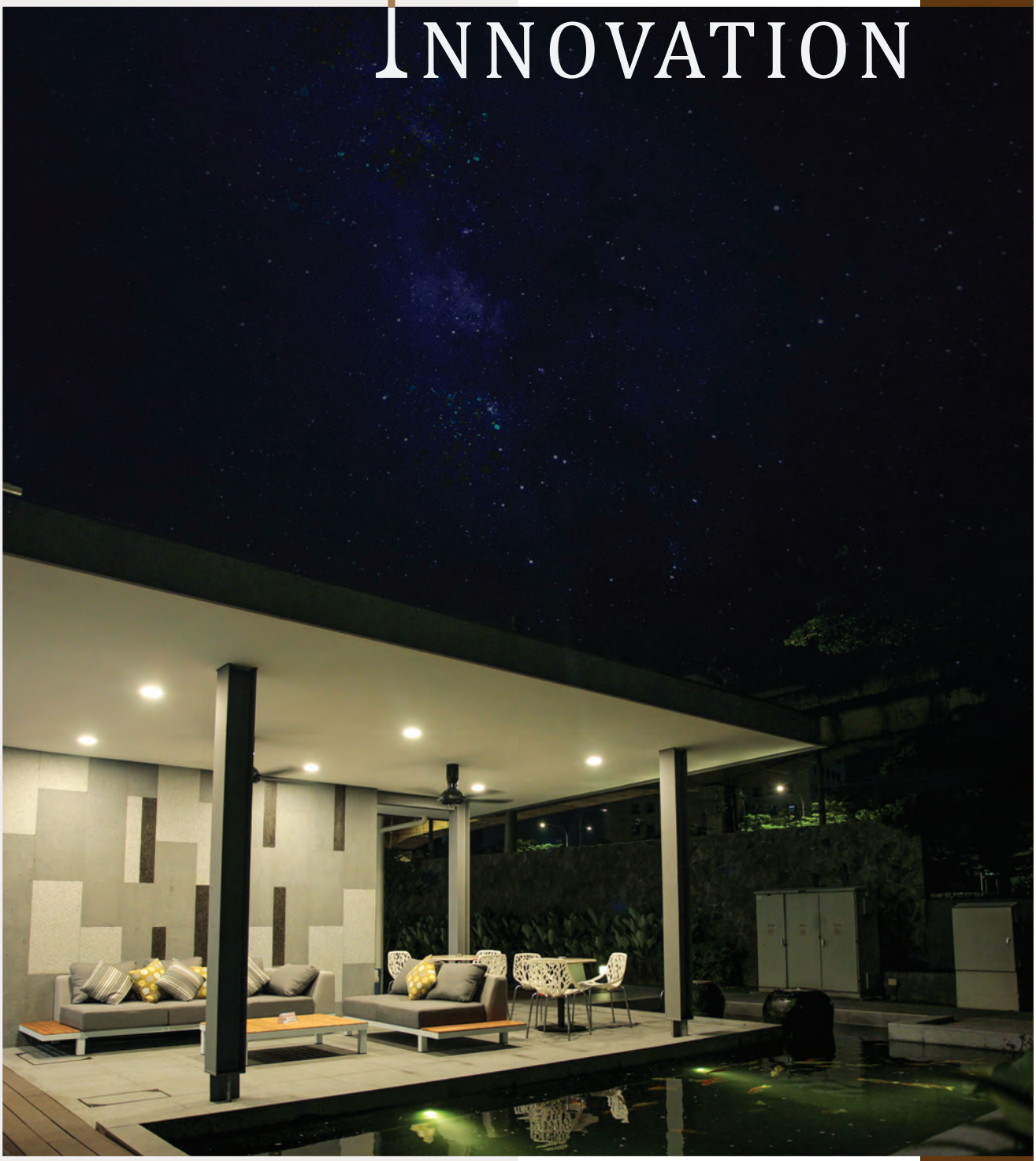
ASIAN INTERNATIONAL ARBITRATION CENTRE

NEWSLETTER #02
AUGUST 2020

# EMBRACING INNOVATION



www.aiac.world

AIAC SEPTEMBER

# SPORTS MONTH

2020

AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE

★ CPD Points available ★

**1st**

**WEBINAR SERIES**
Building Your Career as a Sports Arbitrator

**4th**

**WORKSHOP** on Introduction to Sports Dispute Resolution

**8th**

**WEBINAR SERIES**
Employment and Contractual Issues in Sports: Recent Developments Post COVID-19

**11th**

**WORKSHOP** on Understanding Esports: Legal Rights and Implications

**15th**

**WEBINAR SERIES**
The Challenges in Regulating Sports: From Gender Equality to Anti-Doping Requirements

**18th**

**WORKSHOP** on Negotiating Sports Contracts and Agreements: What to Expect

**22nd**

**WEBINAR SERIES**
International Sports Arbitration and Athletes Rights – Maintaining a Level Playing Field

**29th**

**WEBINAR SERIES**
Sports Mediation: An Underused Tool in Resolving Sporting Disputes

For more information, please email to events@aiac.world

# TABLE OF CONTENTS




NEWSLETTER #02

August 2020



ASIAN INTERNATIONAL ARBITRATION CENTRE

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

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



*This edition of the AIAC Newsletter has been edited and designed by the AIAC Newsletter Team. Edited by: Nivvy Venkatraman & Chelsea Pollard. Copy-edited by: Mohammed Fakrullah Bahadun. Designed by: Mohammad Syahir Alias & Nurul Ain Sumarji. Distributed by: Asian International Arbitration Centre.


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

# FROM THE EDITOR'S DESK

Welcome to the August 2020 edition of the Asian International Arbitration Centre's (AIAC) Newsletter! We hope that you are all continuing to keep safe and well during this rather extraordinary period.

If someone had told us a year ago that a virus would bring the whole world to a standstill for the majority of 2020, we probably would have said that person watches too many apocalyptic movies! But as they say, "never say never".

Although the COVID-19 pandemic continues to be a serious threat despite being in its 5th month, we are now entering the "recovery" phase, as countries and economies are slowly adapting to the "new normal" with widespread implementation of social distancing and contact-tracing measures across all sector and industries. The AIAC is proud to share that we implemented strict standard operating procedures ("SOPs") even prior to the enactment of the widespread lockdowns, in line with our commitment to always ensure a safe environment for all our visitors, employees and patrons. Hearings at the premises have also recommenced, subject to adherence with the SOPs in place. We are hopeful that with the efflux of time, a breakthrough will be made to curtail the proliferation of the pandemic and enable us to welcome you all back for seminars, conferences and evening talks at the Bangunan Sulaiman.

Looking back at the past four months, we are very proud of our recent achievements and commitment towards the development of ADR around the world, even in the absence of a Director. From a Case Management perspective, we understand that the absence of a Director does have specific procedural implications as highlighted in our Special Bulletin dated 6th May 2020. However, we are confident that a suitable individual will soon helm the Directorship to steer the AIAC towards even greater accomplishments in this new decade.

Between March and July 2020, the AIAC organised over 50 webinars with a total viewership of over 10,000 across our Zoom and Facebook Live platforms. We are also proud and honoured to share that our achievements were mentioned by the Honourable Minister Dato' Takiyuddin Bin Hassan, Minister in the Prime Minister's Department for Parliament and Law in the Keynote Speech during Minister's Mandate Ceremony in July 2020. The success of ADR Online: An AIAC Webinar Series is attributable not only to the array of topics explored in the webinars but also to the diversity and expertise of our wonderful panellists who generously made the time to impart their knowledge and wisdom to our audience. Some notable speakers we have had in our webinar series include Sir Vivian Ramsey (Independent Arbitrator & Former Justice of the High Court of England and Wales), Meg Kinnear (Secretary-General of ICSID), Her Excellency the Honourable Margaret Beazley AC QC (39th Governor of New South Wales, Australia), YA Dato' Lee Swee Seng (Justice of the Court of Appeal, Malaysia), Honorable Justice S. Ravindra Bhat (Justice of the Supreme Court of India), as well as YA. Dato' Lim Chong Fong (Justice of the High Court of Kuala Lumpur, Malaysia). We are confident that the topics raised during the course of these webinars will undoubtedly pave the way for more dialogue on the subjects discussed, which will positively spur more significant advancements in these areas.

Aside from our ADR Online series, the AIAC has also collaborated with a number of institutions for several additional webinars, namely the Centre for Mediation and Conciliation (CMC) of the Bombay Chamber of Commerce, the Malaysian Institute of Arbitrators (MIArb), the Young Arbitration Practitioners Group (India), the Indian International & Domestic Arbitration Centre (iiDAC), the Young Society of Construction Law (YSCL) Malaysia and India, the Malaysian Corporate Counsel Association (MCCA), the Malaysian-German Chamber of Commerce and Industry (MGCC) and many more. Indeed, our drive to continuously

promote the development of ADR throughout the region through strategic collaborations did not waver even in these challenging times.

Possibly our most resounding and heartening event in recent times was the launch of the AIAC's inaugural Diversity in Arbitration Week held between 14th and 17th July 2020. During the week, the AIAC hosted 90-minute webinars each day on select topics relating to diversity in arbitration. The first webinar was co-organised by the Equal Representation in Arbitration Pledge and focussed on gender diversity. The second webinar involved a collaboration with the Asia-Pacific Forum for International Arbitration on issues relating to age diversity. The third webinar was a collaborative venture with the Chartered Institute of Arbitrators Malaysia Branch focusing on professional diversity. The final webinar, organised in conjunction with #CareersinArbitration, focused on racial and ethnic diversity. The event proved to be a remarkable success with overwhelming feedback and generous comments received over the course of the week. On that note, we truly believe that all credit and praise should go to all the brilliant speakers from across the globe, without whose support, participation and dedication, our Diversity in Arbitration Week would not have been made possible.

In terms of the AIAC's service offerings, it is undeniable that technology has and will continue to transform arbitration (and broadly speaking, legal) practice in this new decade. Indeed, the appetite for virtual proceedings is growing as a result of the COVID-19 pandemic, as well as its associated time and cost advantages. As the world moves online with travel restrictions and social distancing measures still in place, the AIAC is proud to share that we will be launching our very own Virtual Arbitration Protocol (VAP) and Virtual Mediation Protocol (VMP), aimed at providing streamlined guidelines for the conduct of virtual hearings at the AIAC. Our VAP and VMP have been specifically tailored to ensure that they are completely user friendly and formulated in simple language to assist participants in understanding the mechanics of virtual proceedings. In this regard, we have included a short piece as part of this Newsletter on the AIAC's present virtual hearing offerings.

No newsletter would be complete without industry contributions. What makes this edition of the AIAC Newsletter more special is that it contains the first of a two-part series that will canvass the practice of arbitration in emerging arbitration jurisdictions.

On that note, we would like to thank our Special Contributors – Chiann Bao, Dzung Mahn Nguyen, Ng Jern-Fei QC, May Tai, Meg Kinnear, Olivia Natasha Maryatmo, Patricia-Ann T. Prodigalidad, Tan Sri Dato' Cecil Abraham and Vanina Sucharitkul – for their invaluable insights in this Newsletter.

In terms of other recent initiatives, the AIAC's Young Practitioners Group (YPG) launched its own webinar series titled "*Careers 2.0: Find Your Niche*", with the first webinar taking place on 28th August 2020. This series is aimed at providing students and young practitioners a platform to connect with experienced practitioners from all over the world who can share their success stories and give tips on building careers in specialised areas of ADR.

"*DREx Talk – Kuala Lumpur 2020*" (20th August 2020), the very first held in the Southeast Asia region, and a first of a kind "*Merdeka Special*" programme focused on Indonesia (24th and 25th August 2020) and Malaysia (27th August 2020).

With respect to our upcoming events, the AIAC is proud to share that we will be continuing with our tradition of organising the AIAC September Sports Month 2020. With the new norm in mind, we will be replacing the International Sports Law Conference with ADR Online: An AIAC Webinar Series - AIAC September Sports Month, where our panel of sports law experts will canvass a range of contemporary issues in sports law. We will also be continuing with our AIAC September Sports Month Workshop Series, aimed at providing a platform for knowledge sharing for those interested in sports law and sports ADR.

With all these exciting initiatives under our belt, we are excited to continue marching through 2020 and continue trailblazing the development of ADR in these pressing times. While this year has been nothing but novel, it nevertheless provides us with the opportunity to continue learning, generating new and innovative ideas, and communicating with our peers across borders. Till next issue, happy reading!

**- AIAC Newsletter Team**

# BREAKING THROUGH THE GLASS CEILING AND BEYOND

## • IN CONVERSATION WITH CHIANN BAO AND MAY TAI

Chiann Bao

May Tai

Given that we are now in the 21st Century, it may seem trite to some that terms such as "gender diversity" and "equal opportunity" are still prevalent in all sectors. Indeed, if you look at the legal profession as a whole, female participation in the industry has drastically increased since the start of the 20th Century, with some jurisdictions reporting a greater number of female law graduates than male law graduates. Many large law firms have also fortified their diversity efforts by establishing diversity committees to promote a more inclusive workplace culture, and thus increasing the retention rates of working parents, ethnic minorities and LGTBIQ lawyers. However, the presence of female practitioners, especially those of culturally diverse or minority backgrounds, at the top echelon of arbitration practice is rare. Against this background, two female arbitration powerhouses who have left their mark in the world of international arbitration are Chiann Bao[1] and May Tai[2]. The AIAC recently had the pleasure of interviewing these two arbitration superstars who shared their journeys as culturally diverse females at the top of their arbitration game, the responses to which are reproduced below.

***1. What inspired you to become a lawyer and pursue a career in international arbitration?***

**Chiann**: The inspiration came from the process of applying for the Fulbright scholarship. With a blank page to fill to discuss my proposal for the grant, I typed in topics I found to be of interest, and in a way, personal to me, including, "dispute resolution" and "east and west." Google's output was arbitration and mediation. Seeing as I was drawn to the idea of resolving problems and was intrigued by the influence of culture on arbitration, it was certainly worth exploring, I thought. It turned out to be the perfect fit.

**May**: I loved reading and learning new things as a child so becoming a lawyer made sense because you spend your time essentially learning about your client's business, their problems and how to solve them. As a junior lawyer, I decided to pursue a career in international arbitration because although I trained to become a lawyer in the UK, I always planned to come back to Asia to practise and international arbitration gave me the career mobility to do so.

***2. What have been some of the highlights of your career to date?***

**Chiann**: The singular career-changing highlight has to have been working as an arbitration assistant for Neil Kaplan. By answering an advertisement in the Vis Moot Alumni newsletter, I fortuitously landed a job in London working for a year as an arbitration assistant to someone who has become a lifelong mentor and friend.

A close second was my time as Secretary-General at the Hong Kong International Arbitration Centre (HKIAC). Taking the leap of faith and moving my family from New York to Hong Kong was another game-changing moment in my career. At the HKIAC, I discovered that institutional work was in my DNA and thrived on each challenge and opportunity.

---

[1]Chiann Bao is a member of Arbitration Chambers. With almost 20 years of experience working in Hong Kong, New York and London, she practises exclusively as an arbitrator and mediator, Chiann is listed on the panel of the major arbitration institutions and has served as tribunal chair, co-arbitrator and sole arbitrator in ad hoc and institutional arbitrations under the rules of the major arbitral institutions. She is a fellow of the Chartered Institute of Arbitrators and a CEDR-accredited mediator. Prior to becoming an independent arbitrator, Chiann worked in private practice where she focused on complex international arbitration and litigation, acting as counsel for corporates, state-owned enterprises and states in a range of disputes in various sectors. She currently serves as a vice president of the ICC Court of Arbitration, and from 2010 to 2016 she served as the secretary general of the Hong Kong International Arbitration Centre. Chiann is the chair of the ICC Commission's task force on ADR and arbitration. She is also a member of the ICC Belt and Road Initiative Commission.

[2]May Tai is Managing Partner of the Herbert Smith Freehills' Asia offices. She specialises in cross-border China-related and regional Asian disputes and contentious regulatory matters. Her practice covers a range of commercial disputes and regulatory issues. She has advised governments, government-owned entities and commercial clients (including financial institutions and energy companies) in Asia, Europe and the United States, including acting as counsel and advocate in arbitrations under various rules and court proceedings. May is based in Hong Kong but has previously spent time in Herbert Smith Freehills' Shanghai and Beijing offices, and has also practised in London, Singapore and Tokyo. She has published several articles on arbitration and dispute resolution, and speaks Bahasa (Malaysian and Indonesian), Chinese (Mandarin and Cantonese) and English, and is qualified as a solicitor of England and Wales and Hong Kong. May is a CEDR accredited mediator and an arbitrator in the HKIAC List of Arbitrators.

Another highlight was working with a stellar team in representing New York City in a dispute against the developers of World Trade Centers in New York. This was not only a meaningful matter professionally, but personally as well.

**May**: Becoming HSF's first female, Asian, Managing Partner for Greater China and now Asia has certainly been one of the highlights of my career to date.

Also, co-leading a team on the highest-value Singapore International Arbitration Centre (SIAC) arbitration ever filed, representing one of the largest Chinese SOEs and working with (and against) some of the best and most brilliant lawyers, has been really fun and challenging in equal measures.

My first advocacy experience as an associate in the Peace Palace at The Hague many years ago, representing a Malaysian company in claims against an African state, was also a big highlight.

**3. In your opinion, how important are gender and racial/ethnic diversity for the advancement of international arbitration?**

**Chiann**: Diversity, in all forms, is key, not only to the advancement of international arbitration but fundamentally, to its legitimacy. Without varying perspectives, international arbitration will not only fail to advance, but it will also not be able to continue living up to its name. It is not simply about diversity-speak and, although important, it is not even about measuring success by numbers. Certainly, these efforts are important, but diversity must be internalised and sustained. Institutions, corporations, law firms, chambers, and individuals must believe that diversity is better – better for the system, better for business, better for society.

**May**: I firmly believe diverse teams deliver better outcomes. In international arbitration, it is particularly important because the parties usually come from different cultural, national, linguistic, and legal backgrounds, and you need a diversity of interpretations and views to achieve an optimal outcome.

**4. In your experience, do gender, and ethnic/racial diversity and equality issues exist in international arbitration, and if so, what are some of these issues?**

**Chiann**: I think it goes without saying that there are issues. Otherwise, we wouldn't have to have these conversations. In my mind, there are three core issues: pipeline, access and subconscious biases. The issue of pipeline, of course, is the fact that pedigree can matter. If you grow up in a kampung, your starting point will inevitably be different than the person who grows up in Kuala Lumpur. Even without this stark contrast, the point is that a person's upbringing can have an important impact on how available international arbitration is to them. Access, as an issue, is fairly self-explanatory and similar to that of pipeline. Of course, education is an important key to access. However, obtaining opportunities may still take more effort for the underrepresented candidates in our field. And finally, subconscious bias. Everyone is susceptible to subconscious bias. Even those who fall into the diverse category will hold their own biases. As with all such issues, the first step is acknowledging the issue and then proactively dealing with these biases when confronted with a situation that challenges your subconscious bias.

It should also be said that these issues can be magnified when one possesses multiple underrepresented factors, including race, class and gender. Indeed, it is well-acknowledged that each diverse attribute can raise its own set of challenges. However, when these traits intersect, and one possesses multiple characteristics recognised as "diverse", unique issues arise which may not be wholly addressed by efforts intended for one particular factor.

**May**: These issues exist in every profession and sector. In international arbitration, I think we are quite lucky in being forced to tackle these issues as a business imperative. In a regular day's work, I will deal with clients of varied nationalities, often in several different languages. From my perspective, successful international arbitration practitioners are ahead of the game because diversity is our bread and butter.

**5. What role should arbitral institutions play in addressing the gender and/or racial/ethnic diversity issues raised in arbitration?**

**Chiann**: Institutions can ask those who qualify as diverse "to dance."[3] Empowered as an appointing authority under its own rules or by way of another avenue, institutions play a key role in a practitioner's first or early arbitral appointments. Institutions have the benefit of having not only existing information about arbitrators but also access to information at their disposal. Indeed, they can proactively identify new talent and provide opportunities for a broader and more diverse range of candidates to serve as arbitrators.

In addition, as the large majority of appointments are made by parties, institutions play an equally important role in creating soft opportunities to enhance the profiles of unknown talent, rather than simply perpetuating the stereotypical known talent to legitimise the institution's own reputation.

**May**: Institutions are in a unique position of being able to look into the future, see where we are headed, and lead change. I think this needs to be done sensitively by bringing users (parties and lawyers) along one step at a time. Challenging the status quo and vested interests can be quite confronting. Successful institutions recognise that.

**6. What sort of cross-cultural issues are commonly encountered in arbitration proceedings, and how can counsels and arbitrators effectively deal with such issues?**

**Chiann**: Cross-cultural issues are an inherent part of international arbitration proceedings. Common issues include miscommunication as a result of language barriers, lack of appreciation of business practices that are cultural in nature, and legal customs derived from local adjudication systems. As with subconscious bias, acknowledging that there may be such issues is the first step. By doing so, both counsels and arbitrators can pre-empt issues by addressing them at the outset and then bearing these potential issues in mind throughout the proceedings, with a view to ensuring that the determination of the substantive issues is not tainted by these cross-cultural issues.

**May**: A large part of an arbitration lawyer's job is communication; with clients, with opponents, and with tribunals. It takes time to understand one another to avoid miscommunication and

[3] Referencing the quote by Verna Myers: "Diversity is being invited to the party. Inclusion is being asked to dance".

misunderstandings. This can be achieved by not only by speaking the client's language but also understanding the client's business culture. This requires diverse teams with a mixture of backgrounds and language skills, as well as genuine cultural sensitivity.

**7. In your career to date, have you ever experienced the loss of an opportunity or a negative experience that you considered was attributable to your gender and/or ethnicity? How did you deal with this situation?**

**Chiann**: It is hard to say. I am not sure I can say that gender and/or ethnicity have squarely contributed to a loss of opportunity or a negative experience, but I do think lack of commonality (whether it be gender, ethnicity, other backgrounds) with those who had the ability to offer opportunities can sometimes contribute to fewer opportunities. At the same time, I am sure other opportunities have been made available to me that might not otherwise be open to me if I did not have the characteristics I possess.

**May**: I'm sure it has happened because I have witnessed lawyers and arbitrators who are ruled out because of their gender and/or ethnicity and/or age. At the same time, I believe I have gained more opportunities because of my diverse background than I have lost opportunities.

**8. In your opinion, are there any practices in arbitration which, on the face of things, may not be prejudicial, but in reality, they are?**

**Chiann**: Any practices that may have existed are now diminished as a result of the awareness the community has on the various issues. However, one thing that I have observed is the tendency to require additional areas of expertise from diverse candidates for any role in international arbitration that may not be required of other candidates. Language expertise is a good example. In this region, in particular, I see language as being a prerequisite for job applications, and yet those hiring may not possess those skills. What often ends up happening is that junior lawyers are relegated to translation tasks and then lose out on opportunities to build the requisite skills necessary for promotion.

**May**: Those that are most obviously prejudicial have been changed or are changing. I've had hearings take place across the Chinese New Year holiday three years in a row now, and my last one was interrupted because of COVID-19-related travel restrictions. In our line of work, the client always comes first, and if a non-Chinese tribunal is going to deny you a public holiday, you can't complain too much (… although my mother still does).

**9. Are you aware of any initiatives that presently exist to address the gender and/or ethnic/racial diversity issues in arbitration practice?**

**Chiann**: The well-known initiatives are, of course, ArbitalWomen and the ERA Pledge. I have recently been asked to join the steering committee of a newly formed grouping called REAL (Racial Equality for Arbitration Lawyers) whose mission is to focus on racial equality and representation of other un(der)represented groups within any jurisdiction engaged in international arbitration. Another one is the Rising Arbitrators Initiative. I am a member of its Advisory Board, and its mission is to address issues younger arbitrators might face and address age diversity. What is interesting is that the rising arbitrators (as well as practitioners) in our world are more diverse than ever so I am optimistic that with the directed efforts of these initiatives, hopefully they will be pushing an open door. The challenge will be sustaining efforts as these arbitrators and practitioners mature to ensure that the doors not only stay open but also open even more widely (and internationally) as they gain seniority.

**May**: There are a lot of initiatives – from organisations such as ArbitralWomen and the ERA Pledge to targets and initiatives at arbitral institutions to improve diversity. At my firm - Herbert Smith Freehills - we think an organisation cannot succeed if its leadership is not representative of those that it aims to lead. The firm has spent a lot of time creating a more gender-diverse partnership. It took close to four years, but the firm has now been able to sustain and grow its pipeline of talented women through targeted career development programmes, sponsorship of candidates, and mentoring and coaching.

Also, in October 2019, the firm launched its Asia Multicultural Network which showcased a unique and inspiring video series that uncovered how the region's different cultures, histories and languages have moulded the participants, their outlook, and ambitions.

**10. Both of you have an illustrious international career, having practised arbitration in several Eastern and Western jurisdictions over the years. When you commenced your legal careers, did you believe that you were accorded sufficient support and mentorship to transition into the legal profession? What is the importance of mentoring in the early stages of a young lawyer's career?**

**Chiann**: As a young lawyer, support or mentorship was something I neither thought much about nor was it proactively offered. I just continued down the path that fit my interest. At the same time, I should say that I also didn't appreciate that, by working as an arbitration assistant, I had fallen into a lifelong mentor relationship. As I gained seniority, mentoring became exponentially more important and I proactively sought mentorship from a range of individuals I admired, both my contemporaries and those senior to me.

In hindsight, I do think that mentors are very important at an early stage and it would have been good to seek a mentor earlier on as it is always good to get feedback on your thoughts and ideas. I should say though that it is important to bear in mind that, as a mentee, the aim is not to become your mentor(s) but rather recognise your strengths and find your own path with the wisdom of your mentor(s).

**May**: Yes, when I was a junior lawyer, there were a lot of people who promoted and encouraged me and recognised the importance of diversity. It would be remiss of me not to do as much as, if not more than, my mentors did for me.

The landscape has changed a lot since I started my career, particularly as regards to gender diversity. Now 66% of our China arbitration partners, and 35% of the entire Mainland China partnership, are now female. This is a great achievement which, as a firm, we are very proud of, but there is always more we can do – and we will do – our focus on gender and our other D&I priorities

in Asia are changing people's lives and our business for the better. There is one thing I have learned which is there isn't a "one size fits all" approach, especially throughout Asia; it's a huge territory with numerous different languages, cultural attitudes and norms. So it means what worked for me when I was starting my career, may not work for the young lawyers of today. It is about continuing to learn, evolve and support one another as times continue to change.

**11. Similar to the term "glass ceiling", the term "bamboo ceiling" has been coined to describe the obstacles and barriers faced by racial/ethnic minorities in Western jurisdictions to climb the corporate leadership ladder. Both of your careers to date, however, suggest that you have shattered both proverbial ceilings. In your opinion, does a bamboo ceiling exist in international arbitration? Why or why not?**

**Chiann**: It is hard to discount the feeling that there is such a ceiling, whether it be made of bamboo or glass or any other material. However, I want to believe that such a structure does not actually exist in reality. Rather, any perceived ceiling is likely due to many factors, including the lack of role models at the top, and the lack of connectivity as suggested earlier and the natural geographic siloing of ethnic practitioners. All of these factors are matters of perception and in that regard, it is up to us, including the "diverse" practitioners to change our mindset.

**May**: I believe that in many organisations (including my own), a bamboo ceiling does not exist but sometimes, because of lack of the right role models, we may think that it exists and therefore limit ourselves through our beliefs.

I hope that the work we have done in our firm – by profiling the right role models, encouraging them to take high profile leadership roles, and by addressing the obstacles and barriers faced by gender, racial/ethnic minorities – will allow more people to succeed.

**12. Across the globe in the legal profession, it has been observed that the attrition rate of female lawyers is high. What advice would you give to young female lawyers who decide to embark upon a career in international arbitration, especially those who have or are planning to start a family?**

**Chiann**: When looking for a work environment, look for one where you know you see successful leaders who have managed to have a family. In a client-oriented profession, there will always be competing demands on time, but I think it is a matter of finding a firm culture where conversations about such issues can be open and honest.

**May**: My advice would be work for a firm that has the same values as you and has people in leadership positions that are there to support you and the decisions you make for your life.

I would also advise associates not to be shy about sharing your goals and ambitions with your partners, mentors and sponsors. Unless you start to believe it and say it, no one else will start to buy into your promotion case.

In terms of family, what we have done at Herbert Smith Freehills is to introduce a new parental policy which has the aim to support all employees who want to pursue a successful career whilst raising children. It applies to employees regardless of gender and sexual orientation, and regardless of whether the baby/babies are through birth, adoption or surrogacy. It also allows leave entitlement to be shared between primary and secondary carer, enabling both parents to be involved in the child's life. We need to instil a culture where everyone is entitled to a long and successful career, and family is the responsibility of both males and females.

**13. What advice would you give to young or seasoned arbitration practitioners who have been subject to prejudicial remarks during the course of their careers?**

**Chiann**: If it is appropriate to speak up, United States Representative Alexandra Ocasio-Cortez's speech is a model answer, and I encourage you to watch and learn the calm and depersonalised manner in which she responded to a prejudicial remark.[4] When it is not appropriate to do so, remind yourself of two things: "take it like water off a duck's back" and "you can't teach old dogs new tricks." In short, it's all about resilience, and with such remarks, it is not your problem, it's theirs.

**May**: Embrace your diversity. Mine has helped me become a successful lawyer. Not only do I question my assumptions about other people and other cultures, but I also challenge those imposed by others. If you hear something you don't like (and which is wrong), correct the speaker if you are in a position to. If you are not, just ignore it and move on. It won't hurt you in the long run. There are plenty of people who will think differently from that person.

[4] Link to the video is available here: https://www.youtube.com/watch?v=LI4ueUtkRQ0.

# VIRTUAL HEARINGS AT THE AIAC

The idea of virtual hearings is not novel to the world of arbitration. Indeed, as a tech-savvy arbitral institution, the AIAC has had virtual hearing solutions available for the use of parties for quite some time. Such services are available for the use in both ad hoc and AIAC administered proceedings.

Presently, the AIAC is able to assist in the conduct of virtual hearings by offering parties and tribunals access to its licensed versions of the Zoom and Webex platforms. Both these platforms have been used in both adjudication and arbitration proceedings at the AIAC, especially in the context of pre-hearing conferences and/or meetings.


The AIAC also has hearings rooms set up with Polycom facilities. This enables individuals to participate in virtual hearings physically from the AIAC. For instance, we were recently requested to provide services in an administered proceeding where the witnesses intend to participate in the hearing using the AIAC's Polycom system, given that they are based in Malaysia, whilst all the parties and the tribunal intend to participate in the hearing virtually from a range of locations. We have also had instances where the parties and the tribunal have been physically present at the AIAC, and the use of the Polycom system was necessitated for the virtual participation of experts and/or other witnesses in the proceedings. Moreover, the AIAC has collaborated with other institutions when either arbitrators, parties, counsel, or witnesses are located in Malaysia and require assistance in accessing a virtual hearing and/or meeting.

Upon the appointment of a New Director to the AIAC, it is envisioned that greater investments will be made into the digitisation of the AIAC's services, including the expansion of the AIAC's virtual hearing solutions. To further this endeavour, the AIAC is presently working on drafting protocols for Virtual Arbitration Proceedings (VAP) and Virtual Mediation Proceedings (VMP).

The purpose of the VAP and VMP protocols will be to provide guidelines to participants of virtual proceedings for the efficient conduct and management of such proceedings, as well as to better enable the AIAC to provide the requisite technical support to facilitate these virtual proceedings. The protocols will be supported by Guides which will contain tips and/or recommendations for participants to consider when setting up their virtual hearing venues, and also for completing the AIAC's virtual proceedings' paperwork.

For further information on the virtual hearing solutions available at the AIAC (including the pricing of our services), please contact our Reservations Team at reservations.team@aiac.world.

# ADR Online:
# An AIAC Webinar Series

One of the hallmarks of the AIAC's success to date is its investment in capacity building and knowledge sharing initiatives. The COVID-19 Pandemic presented the AIAC with the innovative opportunity to reconnect with its vast contact base of arbitrators, adjudicators, mediators, industry experts, academics, and students, through its thought-provoking and informative webinar series "ADR Online: An AIAC Webinar Series". The mission of the series is to explore contemporaneous and niche topics in ADR to stimulate further discussion on the challenges, opportunities, and future of ADR in Asia and beyond. Since its inception in March 2020, the AIAC's Webinar Series has hosted over 50 webinars, including the AIAC's coveted Diversity in Arbitration Week. This section will provide a summary of the webinars hosted between 1st April 2020 and 31st July 2020 (save for Diversity in Arbitration Week which will be covered separately in this Newsletter).

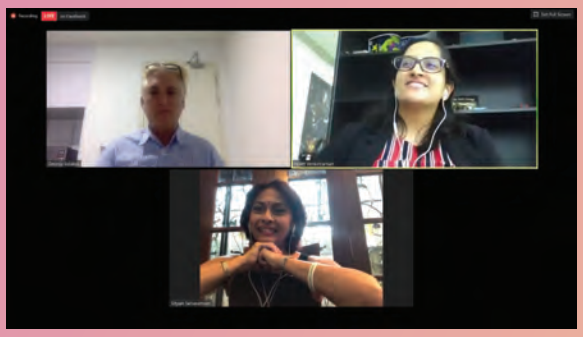
**Arbitration Proceedings in a Contactless Society, Impact of COVID-19 and Beyond (1st April 2020)**


The AIAC always endeavours to stay at the forefront of providing the arbitration community with the most up-to-date practical information. When the global lockdown had just kicked in, we immediately organised a webinar on its impact on arbitration. This webinar's panel comprised Antolín Fernández Antuña (Antuña and Partners), Gustavo Laborde (Laborde Law), and Friedrich Rosenfeld (Hanefeld Rechtsanwälte), with Tony Ng (AIAC) moderating the session.

The panel discussed some tricky issues, including whether proper service can be effected electronically at the initial stage of arbitration proceedings, the availability (or rather the absence) of interim measures especially from courts, the collection and presentation of evidence when parties and counsels are away from their workplace, the effectiveness of virtual hearings, and delays in the conclusion of arbitration proceedings.

While the discussion might have raised more questions than answers, it was a helpful reminder to practitioners on the various procedural difficulties in arbitration, which were not present back in the "normal" days. The situation might be uncertain for the foreseeable future, but the panel was optimistic that with its adaptability, the arbitration community would quickly find the right solutions to any hurdles.

**Exploring the Intersection of Insolvency and ADR (2nd April 2020)**



This webinar deliberated the risk of insolvency faced by many local and global businesses due to the financial strains attributable to the COVID-19 Pandemic. The panel composed of George Kelakos (Kelakos Advisors LLC) and Sitpah Selvaratnam (Tommy Thomas), with Nivvy Venkatraman (AIAC) moderating the session.

The webinar commenced with a panel discussion about the test for solvency for companies and the variances in different jurisdictions, followed by an overview of the Malaysian insolvency regime (including proposals for the restructuring of debt, judicial management, receiverships, and appointment of liquidators in compulsory winding-up proceedings) and the US regime. The discussion then explored the frameworks available for cross-border insolvency (in particular, international laws for the initiation of proceedings in local courts) and how alternative dispute resolution mechanisms, such as mediation, are effective in preserving relationships while facilitating corporate restructuring arrangements to keep companies and businesses afloat. The panel also shared their personal experiences of where insolvency issues have arisen in arbitration proceedings. The tough question as to whether the COVID-19 Pandemic will lead to an increase in companies becoming insolvent was discussed. It was emphasised that a quick evaluation of the circumstances was necessary to minimise a company's exposure to insolvency (including assessing a company's financial position, attempting to negotiate and mediate a dispute, and if that fails, initiating a claim as soon as is possible).

**Protecting your Domain Names: The UDRP Mechanism (3rd April 2020)**


In this webinar, the panellists - Dr. Christopher To (Gilt Chambers), Bahari Yeow Tien Hong[1] (Lee Hishammuddin Allen & Gledhill), and Diana Rahman (AIAC) (Moderator) – discussed both the legal and practical aspects of the domain name dispute resolution mechanism under the ICANN's Uniform Domain-Name Dispute-Resolution Policy (UDRP).

Recognising that not many are familiar with the workings of the UDRP process, Dr. To started off his presentation by explaining how domain names operate, touching on the types and elements of domain names as well as the multi-sectional domain name registry process. Dr. To also made reference to the 2019 Verisign Report, where it was reported that the first quarter of 2019 closed with a whopping 351.8 million domain name registrations across all top-level domains (TLDs). References were also made to notable domain name transactions that were reported, signifying the increasingly large value that is attached to domain names. Following this, the viewers were then provided with a detailed explanation of the elements required to establish a successful complaint as well as a step by step guide to the UDRP process.

From a practical standpoint, Mr. Yeow shared useful tips and strategies to consider prior to lodging a complaint. The strategies shared include registering the trademark, picking the right forum to file a complaint, and aiming for the right remedy at the end of a case. Mr. Yeow also made reference to the UDRP decision in <dumbledore.com>, where Warner Bros' complaint was dismissed on the grounds that the registrant had legitimate rights and interests in the domain. Before closing, the panel also shared their views on the versatility of the UDRP mechanism, since even amidst the implementation of travel restrictions and movement control orders, UDRP proceedings remain unaffected as the entire dispute is resolved online.

**Rebuilding the Construction Industry Post COVID-19 (6th April 2020)**

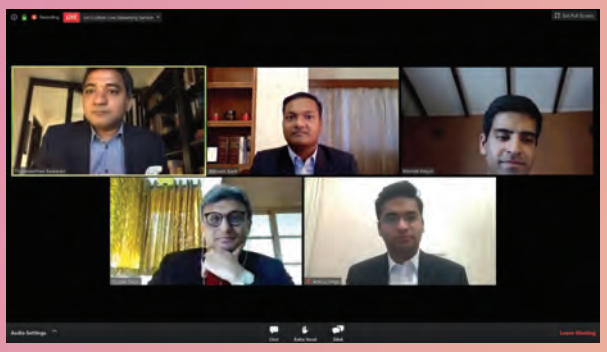
In collaboration with the Society of Construction Law (SCL), Malaysia, this webinar featured Foo Joon Liang (Gan Partnership), Rohan Arasoo Jeyabalah (Harold & Lam Partnership), and Hor Shirley (Raja, Darryl & Loh). The webinar was moderated by Shannon Rajan (Skrine) in his capacity as the President of SCL, Malaysia.

The panel of speakers discussed the steps that contractors should take to manage risks arising from the COVID-19 Pandemic and the Movement Control Order (MCO), specifically in the context of the PAM 2018, PWD 208A, and the AIAC Standard Form of Building Contracts 2019.

Consideration was also given to topical issues such as the nature of force majeure events under each of these standard form contracts, whether the current crisis can be treated as one being "beyond the control of contracted parties", and whether a contractor would be entitled to an extension of time should the MCO impact their ability to complete the contract.

[1]Bahari Yeow Tien Hong has now moved to Gan Partnership (Malaysia)

**ADR at Crossroads: Strategic Considerations for Indian and Southeast Asian Parties (7th April 2020)**

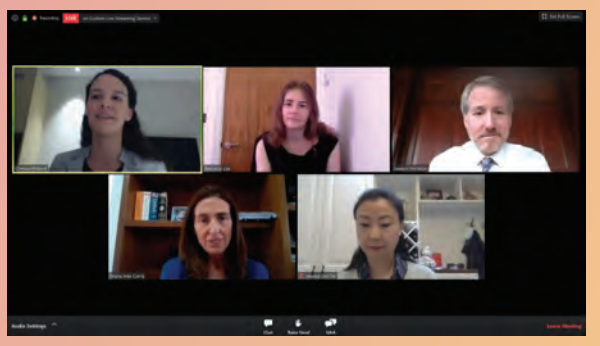


This webinar evaluated the economic impact of the COVID-19 Pandemic in India and Southeast Asia on projects and contract continuity. The panel consisted of Vyapak Desai (Nishith Desai Associates), Thayananthan Baskaran (Baskaran), Aditya Singh (White & Case LLP), and Montek Mayal (FTI Consulting India), with Abinash Barik (AIAC) moderating the session.

The panel broached the topic of strategies and tactics that may be explored by Southeast Asian as well as Indian parties, aimed towards achieving realistic time-bound resolutions. The speakers engaged in a discussion of Indian law and its governance over issues that have arisen following the COVID-19 Pandemic (including the contractual construct of 'force majeure' and the common law doctrine of frustration). The panel also discussed the applicability and viability of 'foreign' international arbitration and the powers of the Indian courts.

The panel highlighted the key factors to be considered by conflicting parties, such as the nature of the disrupting event, any State action (*i.e.*, legislation), and the nature of the contract (*i.e.*, short-term or long-term relationship). Last but not least, the panel shared the disruptions experienced in arbitration due to the COVID-19 Pandemic which were primarily categorised into two categories, the first being procedural disruptions (*e.g.*, a change in facts, sudden postponements to the schedule, etc.) and the second being disruptions occurring behind-the-scenes (*e.g.*, some counsels citing the Pandemic as an excuse for their lack of preparation, etc.).

**Current Trends in Arbitration Careers (8th April 2020)**



As countries implement controls on movement, the hiring landscape in arbitration is bound to change. Lawyers across the globe are working from home, and many countries have either already postponed bar exams, or are considering it. Students and young practitioners wishing to make career changes are left with questions on how this is going to impact their options.

Supported by the AIAC's Young Practitioners' Group and the American Society of International Law, this webinar consisted of a diverse international panel, namely Jessica Fei (King & Wood Mallesons), Amanda Lee (Seymours), Joseph Profaizer (Paul Hastings), and María Inés Corrá (Bomchil), with Chelsea Pollard (AIAC) moderating.

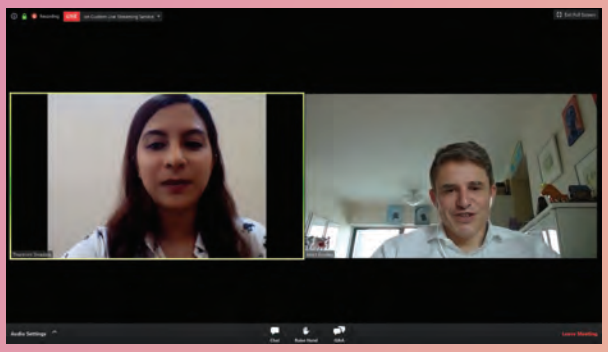
The panel provided an overview of career trends in the international arbitration industry prior to the onset of the Pandemic. It then proceeded with highlighting the current uncertainties posed for employment and internship opportunities due to the Pandemic. The panel also addresses concerns on how the movement control orders (MCO) will affect career opportunities and their thoughts on the future market. The panel emphasised the need for students and young practitioners to expand their legal acumen and ability to adapt. The importance of honing legal, language, technical, and networking skills, and developing a professional social media presence were illustrated.

**Changing Tides: Has Advocacy Been Transformed? (9th April 2020)**

Tribunals and judicial systems have been in existence for and evolved over thousands of years. Similar to today, lawyers of ancient times were said to be "learned in the law, powerful in oratory and debate, zealous in upholding the law of the land, devoted to the interests of their clients, and true to the finest ethics of their profession". In this session, Marion Smith QC (39 Essex Chambers) and Edwin Glasgow CBE QC (39 Essex Chambers), along Albertus Aldio Primadi (AIAC) (Moderator), discussed the transformation of the art of advocacy over the years.

The session is kicked-off with an explanation from each of the speakers on the style of advocacy in litigation, arbitration and mediation. There was a general consensus from the floor that each forum requires a different approach of advocacy. The panel then shared their personal view on online dispute resolution and the use of video conferencing – how it eliminates the presence of the intimacy between the parties and the third party, and how the third party should be equipped to handle that situation. The panel also shared with the audience how present-day lawyers tend to deliver their arguments in a more straightforward and concise manner, compared to lawyers in the previous era where adding jargon and flair seemed to be a regular occasion. As a last remark, both panellists gave practical advice to the audience on how to develop their advocacy skills and other helpful tips.

**Understanding Capital Markets with Matthew Emsley (13th April 2020)**



This webinar was centred on understanding capital markets, with a particular focus on the future of financial markets in 2020 following the COVID-19 Pandemic. Conducted in an interview style, Tharshini Sivadass (AIAC) interviewed Matthew Emsley (Herbert Smith Freehills, Hong Kong) to glean his insights on the functioning of capital markets and the implication of COVID-19 on financial markets, while also discussing the practice of capital markets law.

The interview commenced with an overview of the different types of financial markets and the fields of law that capital markets law interacts with (such as securities law, company law, dispute resolution, and intellectual property). They also discussed the role of a capital markets lawyer in dealing with the Hong Kong Stock Exchange and regulators, and the surprising initial confusion faced by international lawyers when they are required to liaise with the Hong Kong Stock Exchange. Mr. Emsley also shared the highlights of his career which included great insight into the development of the economy, the deals he had worked on for different businesses (e.g., for his favourite UK football team and diamond retailers) and his personal tips for young lawyers. On a sombre note, the impact of the recession on Hong Kong's capital markets was approached, and Mr. Emsley was able to share that the financial markets were not too adversely impacted and this was attributable to the regional nature of the same (with listings coming in from countries like China and Singapore). The focus then shifted to the impact of the Pandemic, where it was remarked that there is still a high level of activity as companies prepare for the markets to be ready again (e.g., attempt to roll over debt by the issuance of bonds), as well as the strategies adopted by governments, companies, and banks in these times.

**A Sports Arbitration Response to the COVID-19 Pandemic: A Game Changer? (14th April 2020)**


This webinar sought to address the question, to what extent will the COVID-19 Pandemic be a game-changer to the world of sports? Centred on the legal and commercial implications resultant on sports and athletes following this unprecedented situation, this webinar was styled as a back and forth discussion between Nick De Marco QC (Blackstone Chambers) and Angela Collins (Professional Footballers Australia), with Richard Wee (Richard Wee Chambers) moderating the session.

The discussion commenced with the panel's insights on the topic of contractual disputes, in the wake of the postponement of sports tournaments due to the Pandemic. The discussion then turned to the Pandemic's impact on the health of sports players (for example, take football players who take part in a sport that regularly involves mass gatherings, not only when they are playing in a stadium before an audience, but also when they are in training). The focus then turned to the side effects of postponements (such as questions on the duration for how long should a tournament be reasonably postponed and reduction in players' wages) and then, the key considerations for termination of tournaments (such as broadcasting and sponsorship disruptions, which are vital for sports). The panel also shared their views on closed-door competitions and whether this was truly a proactive approach, given public policy.

**2020 Economic Stimulus Package: What it Means for You and Your Business (16th April 2020)**

The Government of Malaysia, in response to the COVID-19 Pandemic, introduced the 2020 Economic Stimulus Package with several follow-up measures ("ESPs"). The ESPs aimed to promote economic growth by providing incentives to local enterprises and businesses, as well as providing financial relief to certain individuals. The panellists – Jason Tan Jia Xin (Lee Hishammuddin Allen & Gledhill), Stefanie Low Geok Ping (Deloitte Tax Services Sdn Bhd), Anand Raj (Shearn Delamore & Co) and Albertus Aldio Primadi (AIAC) (Moderator) – dissected and discussed the various ESPs.

Prior to the implementation of the Movement Control Order ("MCO"), the Government had considered innovative schemes in order to promote Malaysia's economic growth such as tax exemptions, instalment deferments for SMEs, and domestic travel incentives such as vouchers, and allowance for duty-free purchases. During the MCO, the Government next introduced the "Mak Cik Kiah" Economic Stimulus Package. The speakers critically examined measures such as the provision of tax deductions for private landlords giving rental discounts for SME business premises, and if this could and should be extended to all corporations. Looking in turn at the wage subsidy programme which allows enterprises to claim up to RM1,200.00 per employee as part of an employee retention programme for the private sector, the speakers questioned, and then concluded, that significantly more could be done by the Government. In doing so, the speakers drew comparisons from the efforts of governments in other

jurisdictions to boost their economies, highlighting initiatives such as tax rate reductions both at the corporate and individual levels and exemptions for income tax as a whole. Also suggested was the idea of extending the Government's offer of wage subsidies to major corporations and not just SMEs, particularly in industries such as manufacturing, to avoid large scale retrenchments.

Useful tips that were shared by the speakers during this webinar included saving PDF copies of all issued directives because things keep changing as we move along. The saved copied would act as an important reminder to keep an eye on the applicable extensions of time that have been granted. Last but not least, it was urged that if Malaysia believed the extent of the ESPs was insufficient, then as a nation, it should collectively convey these thoughts to the Parliament.

**Mediation Post COVID-19: The Way Forward (17th April 2020)**

The panellists of this webinar considered whether there is a preference for mediation in their respective jurisdictions, and also whether the COVID-19 Pandemic will change perceptions towards the possible benefits mediation can provide for parties, in a world where "*winning may not translate to cash flow*". This webinar was moderated by Diana Rahman (AIAC).

Shanti Abraham (Shanti Abraham & Associates) explored the benefits of mediation, provided an overview of the mediation process, and explained how Malaysian professionals are ready to embrace and contribute to mediation. Offering a Singaporean perspective, See Chern Yang (Drew & Napier LLC) shared the efforts of the Singapore International Mediation Institute (SIMI) in training and assessing mediators, the benefits of an enforcement provision within the Singaporean Mediation Act 2017 in recording mediated settlement agreements as court orders, the duty placed upon lawyers to advise their clients on the different ways a dispute may be resolved which includes mediation, and the various industry-specific mediation schemes in place for healthcare, private education, tenancy, consumers, employment issues, and even for disputes with real estate agents. Anil Xavier (Indian Institute of Arbitration & Mediation) suggested that mediation may increase following COVID-19, particularly during the beginning stages after the easing of lockdowns, with everything increasingly being hosted virtually and companies being financially constrained to initiate litigation and arbitration proceedings, and the risks associated with enforcements.

The panellists considered the importance of security for online mediation proceedings, to ensure that the proceedings remain private and confidential (for example, having a protected virtual meeting room on a secure platform). They also explained the key differences between the process of mediation, negotiation and conciliation. To wrap everything up, it was noted that the challenges faced by mediation today could very well be the norm of the future.

**Debating the Realities of Working from Home: Tik Tok, Pyjamas, Doraemon and More (20th April 2020)**

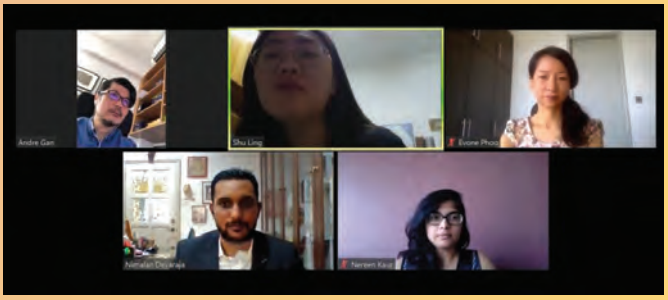
The dynamic discussions during this Special Debate Webinar centred around the boons and banes of being mandated to work from home during the Pandemic. The debaters were Celine Chelladurai (Celine & Oommen) and Sanjay Mohanasundram (Sanjay Mohan Advocates & Solicitors). The debate was moderated by Edward Kuruvilla (Christopher & Lee Ong).

It was commented that although working from home may be downright impractical for a litigation lawyer due to court responsibilities and the need for interpersonal communication with stakeholders, one should avoid developing a tunnel vision on the restrictions imposed during the MCO. Instead, they should focus on the aftermath and the sunshine waiting on the other side. However, with respect to a lawyer's office-related duties, working from home could prove to be highly efficient and productive.

In light of COVID-19 Pandemic, it was mused that keeping up with work has been a common challenge. As we are uncertain of how the future will pan out, the speakers agreed that learning new skills and methods is the best way forward. To achieve productivity at work, as well as to schedule regular virtual meetings, which operate as the new normal, and ensure that the clients' expectations are met, free or paid software such as to-do lists, Toggl and Zoom are useful tools that can be used by law firms to keep people connected and on top of their jobs.

The general consensus was, if everyone shifts towards a home centric workplace, discipline will come into play. Working from home does not bar an individual from physically meeting clients. In fact, professional development could be enhanced even though face to face meetings are limited.

**A Young Lawyer's Wellbeing and Mental Health – The Impact of the COVID-19 Pandemic (21st April 2020)**



Certain implications of the COVID-19 Pandemic are the prevalence of social distancing (which has left some individuals feeling isolated, pressurised, and/or unsupported), and a growing concern for job security due to the financial constraints placed on businesses and individuals. The panellists of this webinar – Andre

Gan (Wong & Partners), Nereen Kaur (Christopher & Lee Ong), Evone Phoo (MClinical Psych (HELP)) and Nimalan Devaraja (Skrine) – took this opportunity to explore the impact of the Pandemic on young lawyers' mindsets. This webinar was moderated by Teoh Shu Ling (AIAC).

The challenges faced by young lawyers that were identified by the panel included physical constraints in daily life, inefficacy and longer hours, and social and professional isolation, amongst others. In order to address these challenges, the speakers agreed that there is a need for employers to exhibit strong leadership qualities during this crisis and identify common areas of concern among younger practitioners. In relation to dealing with anxiety, it was highlighted that coping mechanisms should be explored and professional assistance should be sought for those who need it through organisations such as Befrienders and mental health associations.

The speakers stressed the need to understand that perfection may not be possible at all times. While all employees have collective fears with respect to retrenchment, timely and honest conversations on employment issues could help things fall into place. Communication is the key, and reaching out to those who are struggling might be necessary. An understanding that everyone is processing the situation and react differently is essential. Hence, it is important to recognise our limited capacity. Amid all this, the most important thing to remember is that you can only help others when you are also looking after yourself.

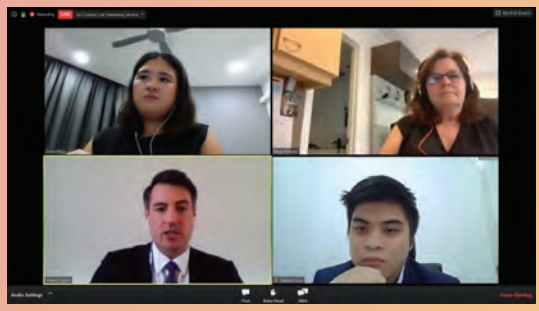
**Impact of COVID-19 on Shipping Disputes (22nd April 2020)**

A panel of experienced shipping lawyers from Malaysia and Singapore discussed the legal impact of COVID-19 on the shipping industry. The panel comprised of Philip Teoh (Azmi & Associates), Jeremy Mark Joseph (Joseph & Partners), Paul Aston (Holman Fenwick Willan), and Maureen Poh (Helmsman LLC), with Tony Ng (AIAC) moderating the session.

With the supply chain heavily disrupted by the Pandemic, the shipping industry has been facing an exceptionally wide-range of complicated legal issues. The panel first outlined a list of those issues, such as force majeure, deviation, delays, and cargo insurance. Since players in the shipping industry are often interconnected, the panel cautioned that parties should review their contracts with extreme care to analyse their rights before committing to any legal action.

On a more positive note, the panel expressed their optimism that the Pandemic would push legal practitioners to be more open-minded to the use of virtual platforms for hearings.

**The Future of Investment Arbitration: The ICSID Rules and Regulations Amendments (23rd April 2020)**



In this webinar, the panellists – Meg Kinnear (ICSID), Monty Taylor (Arnold & Porter), Daniel Chua (Herbert Smith Freehills), and Irene Mira (AIAC)(Moderator) – discussed the recent amendments to the ICSID Rules and Regulations, these amendments being the largest and most extensive to date.

At the outset, a summary of the key proposals for the amendment of ICSID Rules and Regulations was provided. It was envisioned that the final version of the amended ICSID Rules & Regulations would probably be quite similar to Working Paper No. 4. Three points of amendments were considered: expedited arbitral proceedings, investor-state mediation, and additional facility proceedings.

The panel pointed out that investment arbitration is not always limited to significant disputes of high quantum. In fact, there have been quite a number of "micro" claims, i.e., claims amounting to around a few million US dollars. Expedited arbitration procedures may be suitable for these claims. However, automatic application of expedited procedures based on claim amounts may not be straightforward, especially since it is difficult to define what small claims are – a small claim for some states may not be small for others. Moreover, small claims can often be legally complicated.

For investor-state mediation, the panel opined that although it has gained traction in recent years, it is a rather new age concept for legal practitioners and its use has, so far, been minimal. It was also expressed that the use of the mediation in investor-state disputes poses certain peculiar difficulties which are absent in mediation with just commercial parties.

On the other hand, the proposed amendments to the ICSID additional facility proceedings introduced the inclusion of Regional Economic Integration Organizations (REIOs) as a party to such proceedings. As it is widely known, the ICSID additional facility proceedings take place where the disputing parties are not ICSID Contracting States or nationals of a Contracting State. The inclusion of REIOs is not without reason as numerous States enter into international investment agreements as regional organisations.

No one can assure what the future holds for investment arbitration, as this niche area continues to develop at a fast pace. Concerted efforts by all users and stakeholders of investment arbitration, as can be seen in the amendment process of the ICSID Rules & Regulations, remain pivotal to produce efficient procedures in investment arbitration, and to ensure access to justice in respect thereof is always available.

**Asian Energy Disputes: Project Finance, Price Review and Arbitrations (24th April 2020)**

The panellists – Ooi Huey Miin (Raja, Darryl & Loh), Elodie Dulac (King & Spalding (Singapore) LLP, Nicholas Lingard (Freshfields Bruckhaus Deringer), and Abinash Barik (AIAC) – provided an overview of the impact of COVID-19 Pandemic on energy project financing and disputes.

The importance of risk analysis in the financing of energy projects was highlighted. It was also stressed that in this trying time, parties to energy projects should endeavour to preserve their contracts and work out some solutions rather than collapsing them.

It was further recommended that, in disputes, parties should review their contractual provisions to make sure that any pre-conditions for disputes, such as notice or negotiation requirements, should be met before taking any further legal action. If parties wish to terminate their contracts based on force majeure, the force majeure events listed out in the contract as well as their exclusions must be studied carefully.

It was also expressed that the energy market is always a politically sensitive industry. The Pandemic may give rise to state protectionism, which in turn will lead to disputes. An outline was also provided for the complications in energy dispute procedures since typical energy projects involve numerous parties.

**Sports in the New Age of Physical Distancing: What an Athlete, a Sport Practitioner and Sporting Associations Have to Say About It (27th April 2020)**

The spread of the COVID-19 Pandemic saw many sports competitions being postponed, which gave way to anxieties over pay cuts, the renegotiation of terms relating to contractual benefits, and endorsements, among numerous other issues typical to the niche. To discuss these issues, the panel for this webinar comprised of Low Wee Wern (Professional Squash Athlete & Asian Games Team Gold Medalist), Thomas Delaye-Fortin (Badminton World Federation), and Paul Hayes QC (39 Essex Chambers). The session was moderated by Diana Rahman (AIAC).

Ms. Low stressed the importance of staying physically and mentally healthy while maintaining social distancing. In addition, she elaborated on the contractual obligations and regulations (*i.e.*, whether a contract will be considered null and void in the event where an athlete is unable to compete for more than six months). Notably, she evaluated relationships with sponsors, which are expected to be affected by the reduction in sports-related engagements due to the Pandemic.

Sports stakeholders around the world are facing challenges in anticipation of the sporting world's eventual return to normalcy. From a sport governing body's perspective, Mr. Delaye-Fortin highlighted an overall outlook of the current situation and explained key aspects considered by sports bodies when contractual obligations are restructured. He also discussed the implications of postponing sports competitions, as well as the issues relating to anti-doping regulations.

From a legal standpoint, Mr. Hayes shared the risks faced by global sports bodies and athletes in respect of contractual obligations between the sponsors and broadcasters under a commercial agreement. He also discussed sports arbitration and the pros and cons of online hearing platforms.

**The Elephant in the Room: What is a Good Arbitral Award (28th April 2020)**

As different arbitral seats impose different rules and standards, the global users and stakeholders of arbitration also have different approaches and benchmarks in drafting and assessing a good, or rather, enforceable, arbitral award. A panel comprising of Sir Vivian Ramsey (International Judge and Arbitrator), Shanti Mogan (Shearn Delamore & Co), Gitta Satryani (Herbert Smith Freehills), Irene Mira (AIAC), and Tan Swee Im (39 Essex Chambers)(Moderator) addressed this issue.

From AIAC's perspective as an arbitral institution, Ms. Mira presented the features and mechanism of technical review of draft final awards in AIAC administered proceedings. She also pointed out common mistakes that are found in the draft final awards.

Ms. Mogan shared her practical point of views on deficiencies in arbitral awards that are used by lawyers in their bid to have awards set aside. She also highlighted different grounds of challenges made on arbitral awards, particularly from Malaysia's legal framework and jurisprudence.

Expanding on Ms Mogan's points, Ms. Satryani explored the peculiarities of requirements for an enforceable award from selected Southeast Asian jurisdictions in terms of and how one can maximise the enforceability of the award. She further spoke about procedural issues with regard to correction of arbitral awards and the enforceability aspects of the same.

Sir Vivian Ramsey then shared his experiences from the Judiciary, counsel, and arbitrator's point of view on what features that may be considered to make sure the arbitral award serves its purpose. Noting the presentations of his fellow Speakers, Sir Vivian opined that while there is no hard-and-fast rule when it comes to arbitral awards, it is of utmost importance for one, regardless of one's role in the proceedings, to know, aside from the law, the procedural aspects and facts of the case as these will be incorporated in the arbitral award.

**Keeping Confidentiality: How to Safeguard your Privacy in ODR (30th April 2020)**

The gradual but steady shift from traditional in-person dispute resolution hearings to today's virtual platforms and the growing popularity of Online Dispute Resolution ("ODR"), has raised serious concerns for confidentiality, privacy, and security – case in point being the Zoom meeting "bombings". The panellists of this webinar – Anil Changaroth (ChangAroth Chambers LLC & InterNational Consultancy), Laura Keily (Immediation), Deepak Pillai (Christopher & Lee Ong) and Chelsea Pollard (AIAC) (Moderator) – explored these challenges, the solutions, and steps towards creating a more secure virtual venue for the parties to a virtual hearing.

In discussing virtual hearings, the panellists canvassed the benefits and risks associated with cloud platforms such as Zoom, Microsoft Teams, Webex, Skype for Business, and BlueJeans. Additionally, they highlighted the role that is played by service providers (for example, various arbitral institutions), as well as service tools which provide specific technological support for arbitrations and mediations (*e.g.*, Immediation's products and services). Collectively, virtual hearing and ODR service providers strive to protect parties' privacy by ensuring their platforms are encrypted and secure against third parties.

Aside from the usual concerns, if the virtual hearing or ODR service is sufficiently user-friendly and cost-efficient, the panel highlighted key factors which parties should look for in deciding their service provider. These included the privacy policies of the organisation, the reliability of their service (*i.e.*, is the organisation a specialist provider using its own web conferencing platform or relying on external third-party providers), and security measures such as end-to-end encryption for all chats, meetings, calendars, and document sharing.

It was also considered essential to give thought to the inherent features offered by the virtual hearing and ODR programme. For example, specialised platforms such as Immediation have features catered to privileged information, can place restrictions on document viewings, and even contain a force mute function, all in the interest of protecting vulnerable witnesses and participants to a mediation. Interestingly, it was admitted that in cases of security breaches, turning towards the platform provider may be futile and instead parties should obtain cyber protection insurance so that there is some recourse available.

**Cultural Differences in International Arbitration (6th May 2020)**


Unlike court proceedings, practitioners from different legal backgrounds and jurisdictions carry their legal traditions and experiences to arbitration. While there are still differences in how arbitration proceedings are conducted between common law and civil law lawyers, seasoned arbitration practitioners nowadays are comfortable in handling arbitration with opposing counsels from different legal tradition. The "cultural differences" between counsels or arbitrators are not as evident as in the past. Nevertheless, the panellists – Dr. Clarisse von Wunschheim (Altenburger), Eliseo Castineira (Castineira Law), Dr. Lars Markert (Nishimura & Asahi), Alan Thambiayah (The Arbitration Chambers), and Tony Ng (AIAC) (Moderator) – shared some interesting and diverging views regarding document production and cross-examination from common and civil law perspectives.

The panel also pointed out that it is often the case that the cultural background of the clients affects arbitration proceedings to a larger extent than the legal cultural differences between counsels of different jurisdictions.

**Damaging Defects: Liability and Resolving Construction Disaster Disputes (7th May 2020)**


This informative webinar explored liability insurance in the context of construction disasters. The panel comprised Nadesh Ganabaskaran (Malek, Paulian & Gan), Rajendra Navaratnam (Azman Davidson & Co), Ronan Collins (Gamuda), and Ir. Pooba Mahalingam (Talent Asia Training & Consulting), with Kevin Prakash (Mohanadass Partnership) moderating the session. The panellists delved into in-depth discussions regarding liability, in addition to the duty owed to the public to release the findings of investigations, along with the various means by which such disputes can be resolved.

Mr. Navaratnam provided a brief overview of the different types of construction disasters and analysed case studies he was involved in. He stressed the importance of evidence gathering and the inherent need to appoint a good adjuster. He also discussed the necessity of hiring competent experts and for counsels to understand the evidence, in addition to addressing issues of cause and responsibility.

Ir. Mahalingam shared his insights on the role of the loss adjuster, who is the professional appointed by the insurance company to undertake the investigation of the loss. As the adjuster is the first on the site to file a report, Ir. Mahalingam discussed cases, concerns, and challenges related to the essential work of assessing the loss, such as the late appointment of an adjuster, removal of evidence by police or other authorities, etc.

Mr. Ganabaskaran emphasised the issues faced by practitioners in relation to evidence and the terms of the contract. He examined the Contractors' All Risk Insurance in detail, discussing the clauses on liability, exclusion clauses, the dispute clause, and the adjuster's report in detail.

Mr. Collins provided a contractor's perspective on disputes and insurance liability. He emphasised the need to put systems and processes in place to manage risks and liabilities in order to ensure that the renewal of insurance policies does not lead to massive costs for contractors.

**Statutory Rescue: Whether Introducing a COVID-19 Act can Save the Economy? (8th May 2020)**

As the COVID-19 Pandemic has led to the frustration of contracts and use of force majeure clauses, governments are considering what steps they can take to safeguard their economies. Singapore, for example, has enacted the COVID-19 Temporary Measures Bill (the "**COVID Act**"), whereas other countries have seemingly preferred to take a more hands-off approach. This webinar dissected the COVID Act and considered the utility of a similar mechanism in Malaysia. The panel comprised of Dato' Derrick Fernandez (Sage 3), Sitpah Selvaratnam (Tommy Thomas), and Prakash Pillai (Clyde & Co), with Lee Shih[2] (Skrine) moderating the session.

The voting poll raised during the webinar displayed that the audience considered that Malaysia needs a COVID Act. From a legal perspective, the panellists shared that a COVID Act would provide businesses with the time and space to turn around their cash flow deficits, especially in the context of freezes on debt recovery. The panellists also touched upon the need to have a central agency to deal with feasible restructuring. Drawing a comparison to and analysing the Danaharta Act set up by the Government of Malaysia during the edge of recession, the panellists discussed whether such legislation, which was passed to revive the financial sector, would be capable of stimulating the economy. The discussion concluded with an encouragement to look into the features and mechanisms of Singapore's COVID Act, as a starting point, to see whether Malaysia could implement something similar for SMEs to assist with debt restructuring efforts.

**Navigating Turbulent Skies: Alternative Dispute Resolution in the Aviation Sector (11th May 2020)**

This webinar provided a comprehensive overview of the challenges faced by today's aviation industry. The panellists – Datin Shelina Razaly Wahi (Abdullah Chan & Co), Peter Coles (Clyde & Co), Gavin Kealey QC (7 King's Bench Walk), and Tharshini Sivadass (AIAC)(Moderator) – considered the current commercial challenges faced by various aviation stakeholders including airline owners, airport operators, manufacturers, insurance providers, and consumers.

The panel briefly outlined the specific concerns of the different players within the industry, the distinctions in concerns between full-service airlines and low-cost carriers, the importance of parties' negotiating specific clauses in contracts (for example, the re-delivery condition), as well as the formulation of the pivotal legal concepts of force majeure and frustration within a contract, and how these operate in the context of the Pandemic. Emphasis was placed on the importance of aviation insurance policies incorporating clauses that are tailored to the precise risks to which airlines and manufacturers are exposed, and to the commercial exigencies within which they operate. It was also noted that while most airlines appeared to have in place sufficient regulations to cope with operating during the Pandemic, many major airlines did run into serious solvency issues. In relation to conserving cash flow, airlines have requested that their staff take unpaid leave and pay-cuts, even forced lay-offs, and that consumers accept credits instead of refunds. Governments worldwide have also had to consider whether to funnel financial aid towards protecting the entire aerospace supply chain and undertake creative ways to support these aviation businesses.

On the topic of resolving disputes using either arbitration or litigation, it was pointed out that the confidentiality of arbitration proceedings was both a burden and a benefit – on the one hand, it limits the availability of precedent on the meaning of standard contract terms, although, at the same time, it minimises the parties' need to air their dirty laundry in public. Interestingly in Malaysia, the experts noted that it is rare for a lessor to have to resort to initiating court action to regain possession of an aircraft because airlines rarely want to run the risk of triggering a chain of defaults.

[2]Since this webinar Lee Shih has moved to Lim Chee Wee Partnership

**IP and Tech Disputes - To Litigate or Arbitrate? (13th May 2020)**

In this webinar, the panellists – Soh Kar Liang (ASEAN Intellectual Property Association), Amita Haylock (Mayer Brown), Diana Rahman (AIAC), and Karen Abraham (Shearn Delamore & Co.) (Moderator) – discussed the application and practicality of different dispute resolution mechanisms for intellectual property (IP) disputes in the region. Prior to the COVID-19 Pandemic, the world's economic rise prompted countries like Singapore and Hong Kong to implement alternative services to resolve IP disputes, alongside the traditional court-based systems. Additionally, recent amendments to the domestic laws have addressed the issue of the arbitrability of IP disputes. The panel highlighted that Malaysia should consider following the implementation of such evolution into its IP legal framework.

The speakers concurred that the main advantages of using arbitration for IP disputes include party autonomy, confidentiality, ease of enforcement, and the existence of a single procedure. On the other hand, it is important for parties to note that courts may uphold the principle of non-arbitrability for disputes contradicting public policies.

In conclusion, the panellist compared model clauses provided by different arbitration institutions which may be utilised to promote the use of IP-related arbitration, especially in the current economic climate.

**Arbitration Tales: Predicting the Future Through the Looking-Glass of Past Recessions (18th May 2020)**

By looking into the previous recessions and its aftermath in the Asia-Pacific region, the panellists – Tan Swee Im (39 Essex Chambers), The Hon. Wayne Martin AC QC (39 Essex Chambers), David Bateson (39 Essex Chambers), Quentin Pak (Burford Capital), and Chelsea Pollard (AIAC) (Moderator) – examined the landscape of ADR and put forth their predictions for its future.

Ms. Tan discussed the consequences of the 1980s share market crash and 1997 "Tom Yum" Financial Crisis on businesses and individuals. She also analysed various ADR methods available today and stressed that in order to ensure end-user efficiency, lawyers must examine what the best fit for their cases is.

The Hon. Wayne Martin AC QC examined the Singapore Convention and the advantages of mediation. He remarked that arbitration could sometimes be more expensive than litigation. In instances where cash-strapped companies are looking to get back into the market to make the most of government-initiated economic stimulus schemes, mediation may be an excellent option to resolve pending disputes, given time and cost.

Mr. Bateson discussed the necessary considerations for online dispute resolution and virtual hearings. He emphasised the importance of pre-hearing test-runs, secured virtual breakout rooms, good quality audio devices, and 360-degree cameras in witness' rooms. He also examined the role of written agreements between parties to conduct virtual hearings in order to avoid enforcement issues.

Mr. Pak analysed the evolving role of third-party funding in arbitration in preserving cash flow for businesses and its advantages as a corporate financial tool. One element he mentioned that could be used in Malaysia, despite its limit on third-party funding, was the purchasing of awards by funders who then proceed with the enforcement and allow parties early access to needed capital. He remarked that even companies with sufficient capital and strong legal teams favour third party funding as a way to allocate risks.

**Essential Skills for Securing your Next Legal Job (20th May 2020)**

In this webinar, the panellists – Sarah Thomas (Morrison & Foerster), Lam Ko Luen (Shook Lin & Bok), Mathias Cheung (Atkin Chambers), and Teoh Shu Ling (AIAC) (Moderator) – discussed the best practices and techniques for job seekers in the current legal market. Topics discussed included face-to-face and virtual interview skills, resume faux pas, and pitfalls in responding to common interview questions.

According to the panellists, one of the most common mistakes that candidates make during a face-to-face interview is failing to research the firm adequately and to appreciate what the prospective employer is looking for. Furthermore, while it is easy for a prospective employer to assess in an interview whether a candidate is presentable and likeable, it is often very difficult to assess whether the candidate can deliver a well-written and well-researched work product. Although firms often do not require writing samples, candidates should consider preparing a few well-drafted writing samples to share with prospective employers proactively.

Interestingly, it was not considered very essential to have an understanding of international arbitration principles while applying for a junior lawyer position in the field, as principles and practice of arbitration can be learnt on the job. However, a junior

lawyer is often expected to possess strong legal research skills and writing skills. The speakers also agreed that sending a follow-up or thank you note after an interview is often frowned upon. If the prospective employer is interested in hiring you, they will follow up.

**Ethics in International Arbitration: Regulatory Body to be in charge of Disciplinary Matters in Arbitration? (21st May 2020)**

Do ethics apply to arbitration lawyers who are not practising anymore and have given up their license, or to arbitrators who are not lawyers? Should it be fair to relieve non-practitioners from the ethical burden and possible regulatory sanctions, or otherwise subject them to ethical rules to a certain extent? The panellists – Chiann Bao (Arbitration Chambers), Catherine Ann Rogers (Penn State Law; Queen Mary; Arbitrator Intelligence), Camilla Godman (Chartered Institute of Arbitrators Asia Pacific), and Abinash Barik (AIAC) (Moderator) – of this webinar tried to tackle these thorny questions.

There are many sources of references for ethical standards for arbitrators with varying details, both from organisational guidelines and standards set by arbitral institutions. The panel considered that while global coordination is necessary for more uniform standards, it cautioned that pragmatic differentiation is needed to accommodate differing arbitrator roles. The panel also outlined that arbitrators should be more adapted in using technology for online hearings and managing risks of cyber-security.

Unlike lawyers, arbitrators cannot be debarred. Additionally, it might not be sufficient that arbitrators' misconduct is only subject to reputational sanctions. The panel discussed the various possibilities of sanctions such as global disciplinary processes and also the need to enhance transparency. Furthermore, it highlighted the importance of reputational damage in ensuring that arbitrators conduct arbitrations in an ethical manner. For example, the initiative of Arbitrator Intelligence aims to provide arbitral institutions and practitioners alike useful data and feedback from parties on arbitrators to help guide them in the selection process.

**Financial Crime in Arbitration - An Industry Perspective (27th May 2020)**

In this webinar, the panellists – Dr. Patricia Nacimiento (Herbert Smith Freehills LLP), Kwan Will Sen[3] (Skrine), Alex Tan (PwC Malaysia), and Nivvy Venkatraman (AIAC) (Moderator) – shared their insights on the potential use of arbitration for money laundering and other fraudulent purposes. Reference was made to the Russian laundromat case, the various international conventions that exist and the guidance that these frameworks can provide, as well as the increase of fraudulent companies, contracts and business ventures set up to channel money around the world. Drawing from these scenarios, the panellists pressed on the importance of the legal fraternity to conduct proper diligence on their clients and disagreeing doing individual favours that do not sit well with a lawyer's ethical obligations.

It was noted that arbitral tribunals must be swift and diligent in picking up red flags that may arise in their cases as ethics is certainly a global issue. The panellists pointed out that certainly even arbitrators are susceptible to the temptation of soliciting bribes. The panellists also tackled the lawyer's sacrosanct duty to their clients. They concluded that disclosures of suspicions of money laundering is not a breach of their duty of confidentiality, and as always, it is best to err on the side of caution, and not accept such client briefs. It was further shared that our reliance on technology, for example, banks use of artificial intelligence which is able to identify emerging patterns, is essential in detecting fraudulent transactions, particularly where there may be thousands of transactions a day.

In addressing questions by attendees, the panel of experts clarified that the local court is the only entity which can clear a person from the allegation of committing a corruption offence. The importance of the legal industry protecting the value of its brand (i.e., ensuring that 'your brand is not for rent') was also emphasised, as was the view that arbitrators must be proactive in asking the right questions and even requesting additional evidence where suspicions are aroused, rather than merely relying on what has been provided by counsels.

[3]Since this webinar Kwan Will Sen has moved to Lim Chee Wee Partnership

**Debate Special: Viability and Utility of Employment Arbitration in a Post COVID-19 World (28th May 2020)**

Industrial relations disputes and other employment-related issues are a common occurrence in all industries across the globe. As with any economic downturn, an inevitable consequence of the COVID-19 Pandemic will be increasing reports of retrenchments, redundancies, and restructuring exercises. The panellists – Donovan Cheah (Donovan & Ho), Dato' Thavalingam Thavarajah (Lee Hishammuddin Allen & Gledhill), Jack Yow (Rahmat Lim & Partners), and Albertus Aldio Primadi (AIAC) (Moderator) – of this Debate Special explored employer and employee-related concerns that have recently arisen and how these may be resolved.

An issue faced by many employers during the MCO was the loss of physical contact, and hence decreased control over the performance of their employees coupled with extensive business losses. Dato' Thavarajah went over the primary factors which companies must establish before any worker can be fired (such as, serious financial distress, undertaking immediate cost-cutting measures, such as, pay-cuts, then identifying the right role and employee to be made redundant, etc.). He then emphasised the importance of always maintaining a paper trail, as it may prove particularly useful to support a retrenchment justification.

In debating whether such employment issues should be resolved by arbitration, Mr. Cheah started by sharing an incident of Google employees staging a walk-out and including in their list of demands, the removal of the arbitral clause in their employment contracts. The view was that despite the advantages associated with arbitration, cost barriers and non-precedential nature of arbitral awards make litigation the optimal platform for resolving employment disputes. Interestingly, US research statistics shared with the attendees indicated that employees are less likely to be successful in arbitrations, and even if they do successfully prove their claims, they are awarded smaller sums in comparison to court-based litigation wins, thus demonstrating that arbitrations are inherently leveraged against employees.

With respect to the potential utility of arbitration, Mr. Yow countered that arbitration certainly offers an alternative, and is an option. Noting that it was estimated that almost a million people might lose their job in Malaysia, this begs the question of whether the court system will be able to handle a deluge of potential cases? It was suggested that arbitration may amount to the fourth wheel of justice and considering the landscape of contractual law that employment is set within, industrial relations disputes can be arbitrable. This is because benefits such as confidentiality, speed, costs in conjunction with finality, may all be well in support of employment arbitration.

**Current State of World Trade: A Level Playing Field (2nd June 2020)**


In this webinar, the panellists – Charis Tan (Peter & Kim), Lucas Bastin (Essex Court Chambers), Chandri Navarro (Hogan Lovells), Jainil Bhandari (Rajah & Tann), and Chelsea Pollard (AIAC) (Moderator) – discussed the present status and future of international trade and related disputes, against the backdrop of the COVID-19 Pandemic. Starting with the World Trade Organisation's multi-party interim appeal arbitration agreements, the panellists explained that historically, the antipathy displayed by the US culminated in it blocking appointments to the WTO Appellate Body rendering the latter, unable to function. This resulted in the creation of the multi-party interim appeal arrangement, which was never intended to replace the WTO Appellate Body but to function only as a stop-gap measure until the WTO Appellate Body is able to function again.

The panellists next explored the trade deals between the US and China and the unique dispute resolution mechanisms embedded therein. Pursuant to the dispute resolution mechanism, each country is required to create and maintain a "Bilateral Evaluation and Dispute Resolution Office"; if one country believes that the other is not upholding their commitments, then an appeal may be submitted. Failure to achieve any resolution through negotiations, allows the complaining party to suspend its obligations or adopt remedial measures and further, complaints of bad faith may enable complained-of-party to withdraw.

In relation to international trade and alternative dispute resolution, the panel did note that it may be a difficult task for an arbitral tribunal to distinguish between parties in genuine distress due to the Pandemic with those simply using the same as an excuse to get out of a bad deal. Also, it was observed that governments have been actively stepping into the fray for example, Singapore's statutory enactments to suspend certain contractual obligations which in effect, freeze lawsuits or even, stronger interventionist measures which affect investor rights such as the nationalisation of companies and the requisitioning of goods and services, like PPE and healthcare services. In these circumstances, investor-state disputes would likely arise. However, the jury is still out as to whether there will be an increase in disputes being referred to arbitration notwithstanding disputes arising between parties, as companies may want to conserve their cash.

From the perspective of shipping and trade industries and honing in on force majeure clauses, the panellists presented that there have been significant disruptions and delays to logistics and the supply chain, severe impacts to the demand side for raw materials and commodities, and to make matters worse the supply side was also impacted by the closure of businesses, factories, and manufacturing plants. It was emphasised that legal experts must pay careful attention to the wording of the force majeure clause as well as the impact of the Pandemic on the performance of the contract. A valuable takeaway was that all parties must hereafter look very closely at the drafting of their contracts.

**Confessions of a Shopaholic: Dispute Resolution and E-Commerce (4th June 2020)**

The panellists of this webinar – Dr. James Ding (Inclusive Dispute Avoidance and Resolution Office, Department of Justice Hong Kong), Joe Al-Khayat (Resolve Disputes Online), Bahari Yeow Tien Hong[3] (Lee Hishammuddin Allen & Gledhill), and Diana Rahman (AIAC) (Moderator) – provided an overview of commerce-related disputes and examined the technology-based internal dispute processes that are readily available on online shopping platforms. It was commented that the three most important elements of e-commerce are dematerialisation, de-socialisation, and de-judicialised.

We should also be aware of the challenges of e-commerce, such as the lack of identification of the provider or seller, the lack of governance by legal institutions, as well as the lack of effective remedies. However, the audience was encouraged to adapt and embrace the benefit of online dispute resolution, which is cheaper, faster and eco-friendly. To overcome the challenges, moving forward, relevant authorities were advised to provide a proper legal framework and platform to support the users and to ensure rules and regulations are complied with.

It was noted that in light of the shortcomings of offline dispute resolution, especially in relation to issues of enforcement and cost, it is worthwhile to encourage the industry to have a self-regulation mechanism for the respective online dispute resolution platforms. The panellists felt that governments should be involved and actively participate in governing the law in relation to e-commerce disputes. The audience was encouraged to continue to embrace the digital wave and to try their best to resolve such disputes through the available online dispute resolution platforms.

**The Pulse of the Human Race: Resolving Dispute in the Life Sciences and Healthcare Sector through ADR (9th June 2020)**

With the Pandemic continuing to make headlines around the world, the life sciences and healthcare sectors are receiving increasing amounts of attention. The panellists – Charlaine Adrienne Chin (Raja, Darryl & Loh), James Kwan (Hogan Lovells), Timothy Siaw (Shearn Delamore & Co.), and Tharshini Sivadass (AIAC) (Moderator) – provided a unique perspective into the world of legal disputes within these niche sectors. The panel shared examples of common disputes which arise in this sphere of legal practice including product liability claims, breaches of manufacturing agreements, disputes stemming from distribution agreements (including termination of the same), conflicts following mergers and acquisitions ("M&A") in relation to working capital or breaches of representations and warranties, and also instances of class action litigation.

According to the panel, the nature of disputes in the life sciences tend to be complex, as they involve a myriad of legal issues ranging from product liability to intellectual property and employment, technicalities such as those pertaining to patents (i.e., patent claims, scope and infringement, etc.), as well as issues involving regulatory frameworks that are in place for anti-trust and competition, privacy, and data protection. In addition, there are a high amount of costs and risks which are absorbed by research and development ("R&D") efforts with statistics indicating that in fact, only one in ten thousand products finally make it to the market.

The panel also shared their insights in relation to medico-legal disputes. It was noted that arbitration tends to be too expensive for many aggrieved patients, and hence, arbitral clauses may be viewed as denying their access to justice. Also, an aggrieved patient will likely want his or her day in court. In contrast, when witnessing the growth of emerging markets in countries like Russia and China, the high level of M&A activity in recent years, and the fast-pace environment of R&D efforts, these factors make the life sciences a truly global industry, and hence, increase the relevance of arbitration in the life sciences sector witnessing the growth of emerging markets in countries like Russia and China, the high level of M&A activity in recent years, and the fast-pace environment of R&D efforts, these factors make the life sciences a truly global industry, and hence, increase the relevance of arbitration in the life sciences sector.

**Post COVID-19 and Dispute Resolution: The New Normal for Arbitration and Litigation (11th June 2020)**

In this webinar, the panellists - Angharad Parry (Twenty Essex), Gordon Nardell QC (Twenty Essex), YA Dato' Lee Swee Seng (Court of Appeal Judge, Malaysia), Her Excellency The Hon. Margaret Beazley AC QC (39th Governor of New South Wales), and Tony Ng (AIAC) (Moderator) – described how the courts in Australia, Europe, and Malaysia had been affected by the lockdown with numerous trials postponed. On the use of remote hearings by courts, YA Dato' Lee shared his experience of the first Malaysian Court of Appeal trial streamed online to the public in April 2020.

[3]Since this webinar Bahari Yeow Tien Hong has moved to Gan Partnership

But even with the use of virtual court hearings, a significant number of cases would likely still accumulate.

The panel then discussed the possibility of switching some litigation cases to arbitration. Given that parties' consent is required for arbitration, a very limited number of cases are suitable for this approach, unless parties have a common interest in resolving their disputes. The panel gave some examples of the types of cases which are suitable for this approach, *e.g.*, cases at an early stage when all parties are ready for trials, cases in which liability insurers are involved, and big project disputes.

The panel also highlighted that parties who wish to switch their litigation matters to arbitration should have a clear expectation of differences between the procedures. For example, parties should be well-aware of the issues of confidentiality and the limited grounds of appeal in arbitration.

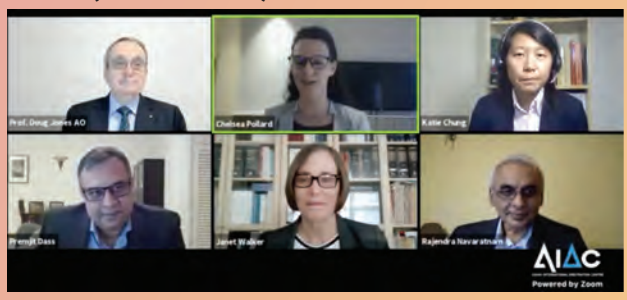
**Belt & Road After COVID-19 & ADR - Legal Business Continuing Plan (16th June 2020)**

The unprecedented spread of COVID-19 has had significant impacts on projects related to the Belt & Road Initiative ("BRI"). These are likely to undergo numerous alternations with respect to timelines, investments, and other contractual factors. This also includes labour and material shortages as well as diminished business opportunities due to the reduction of economic activities. Statistics have shown that Chinese State-Owned Enterprises have undergone a duration of suspension for one to four months and incurred costs of around fifty billion US dollars due to the impact of the Pandemic.

Against this background, the panellists – Dato' Ricky Tan (Ricky Tan & Co.), Zan Chen (DHH Law Firm), Arthur Dong (AnJie Law Firm), Sun Wei (Zhong Lun Law Firm), and Teoh Shu Ling (AIAC) (Moderator) – discussed the changes in the landscape of international trade and sales of goods contracts and set out a checklist for international traders, in particular, scrutinising the language of force majeure clauses in contracts and the indication of the governing law of contracts.

With respect to the challenges to the BRI, the panellists explored methods to overcome these challenges, such as changing the role of Chinese private finance as well as the BRI corporation. As there are expected to be a large number of contractual disputes, it was emphasised that online dispute resolution may play a critical role. However, consideration needs to be given to whether participants will be able to cope with the insufficiencies of online dispute resolution.

**Roundtable on Managing Expert Witnesses: Hot-Tubbing Included! (18th June 2020)**




During this webinar, the panellists, which included Prof. Doug Jones AO (Atkin Chambers), Prof. Janet Walker (Int-Arb Arbitrators), Rajendra Navaratnam (Azman Davidson & Co.), Katie Chung (Norton Rose Fulbright (Asia) LLP), and Premjit Dass (Ankura), and Chelsea Pollard (AIAC) (Moderator), the various ways in which experts can be managed throughout the proceedings was discussed.

Sharing their stories, the panellists noted that when experts are of different technical backgrounds, and they do not previously discuss the matter, it can result in a situation of 'ships passing in the night'. Additionally, issues can arise when experts are unable to agree on the method of analysis for preparing reports. Commenting on the shadow that has been cast by 'hired guns', the panellists also emphasised the need to ensure independence as a seasoned expert witness, given that their essential role is to assist the arbitral tribunal.

It was further remarked that often, a good expert witness in international arbitration should be able to identify, clearly explain, and set out what are both the small and large differences between the expert reports to the tribunal, and why their's should be the preferred report. As such, an expert witness realising and understanding the scope and dynamics of this role (*i.e.*, in narrowing these differences down), is critical. A parting tip shared was that counsels, in working with their experts, should try to facilitate discussions and co-operation with the experts of the opposing party, in order establish a common ground that will enhance assistance to the arbitral tribunal. The takeaway from this webinar was that arbitral tribunals should be more proactive and interventionist at the case management stage of the arbitration, because the tribunal plays an essential role in managing the expert witnesses, particularly in instances where hot-tubbing of expert witnesses are involved.

**Seat Shopping: The Important Considerations in Choosing Your Seat (23rd June 2020)**


As arbitration gains more popularity, the procedural impacts that arise from the arbitral seat conundrum seem to be more prevalent than ever. Ambiguous arbitration clauses or even pathological arbitration clauses render no help either.

In this webinar moderated by Irene Mira (AIAC), Mohanadass Kanagasabai (Mohanadass Partnership) kickstarted the discussion by providing an overview of the landmark case of *Thai-Lao Lignite Co. Ltd and Hongsa Lignite Co. Ltd. v The Government of the Lao People's Democratic Republic* which resulted in epic and complex enforcement and setting aside proceeding of an arbitral award, which spanned over five years in four different jurisdictions, including Malaysia. He opined that the procedural issues of the case are very convoluted and that the case serves as a great example to affirm the importance of carefully drafting an arbitration clause for contracts and choosing the proper arbitral seat.

Professor Marike Paulsson (Albright Stonebridge Group) echoed Mr Kanagasabai's sentiment. She further presented on how arbitration practice, especially when it comes to enforcement and setting aside procedures, have majorly evolved 62 years after the New York Convention on the Recognition and Enforcement of Foreign Arbitral was launched. She shared some crucial procedural items that one may consider in deciding arbitral seats. In that regard, she mentioned a reference to the CIArb London Centenary Principles.

Mr Dennis Wilson (Independent Barrister, Mediator, and Arbitrator) adding his agreement to Professor Paulson's and Mr Kanagasabai's opinions and addressed how questions in relation to "seats" of mediation in light of the Singapore Convention may or may not mirror the same issues in arbitration. The panellists agreed that there shall be a strike of balance between the commercial needs of the parties and legal certainties when choosing an arbitral seat. Afterall, one does not just aim to win their case, but also to have an enforceable award which records such.

**Resolving Banking Disputes in the Covid-19 Era: Tailor-Made Solutions (25th June 2020)**

This webinar was centred on understanding the interplay between the banking and finance industry and arbitration, with a particular focus on the benefits of and perceptions associated with the use of arbitration in the industry. The panel comprised Siraj Omar SC (Drew & Napier LLC), Sheila Ahuja (Allen & Overy (Asia) Pte Ltd), Lim Koon Huan (Skrine), and Jelisa Tan (SIDREC), with Nivvy Venkatraman (AIAC) moderating the session.

The discussion commenced with an exploration of the typical disputes encountered in the industry, followed by an overview of the common misconceptions associated with arbitration practice by industry stakeholders (such as the unavailability of emergency measures, lack of precedent, concerns of enforceability, etc.). The focus then turned to instances where litigation would be preferred to arbitration (*e.g.*, where no cross-border issues are involved), issues of arbitrability with respect to certain financial disputes (*e.g.*, when the dispute touches on public policy issues such as insolvency or share registrations), the nature of Islamic finance disputes and potential for such disputes to be referred to arbitration, as well as the role of ADR providers such as SIDREC providing alternative mechanisms for resolving specific financing disputes. Consideration was also given to the utility to financial institutions in using investor-state dispute settlement mechanisms to resolve their disputes, as well as the mechanics of drafting an effective arbitration clause in financing contract (specifically, giving due consideration to the seat and expertise of arbitrators).

**AIAC-CMC Webinar - Judiciary and ADR: Embracing Mediation for Justice Post COVID (27th June 2020)**

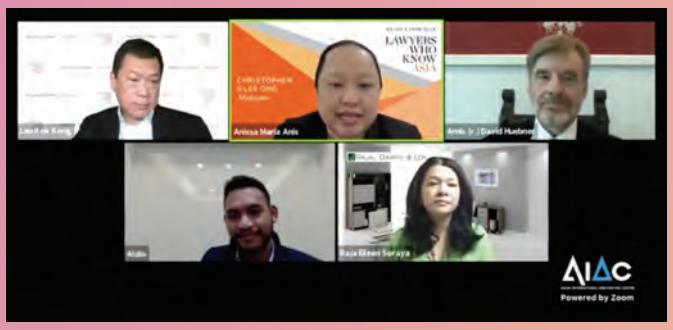

The COVID-19 Pandemic has undeniably affected all facets of life, and access to justice has become difficult due to the implementation of nationwide lockdowns and movement control orders. This, of course, is quite apart from the major disruptions to the ability of the world community to perform functions essential to society which we continue to witness on a daily basis. These occurrences are expected to lead to a surge in disputes and litigation in courts. Despite courts nowadays being more accessible and receptive to the use of virtual platforms, this webinar considered whether litigation should be the only option for disputing parties, or whether mediation would serve as a more accessible option. The panellists who shared their views on this topic were The Hon. Justice S. Ravindra Bhat (Supreme Court of India Judge), The Hon. Justice Dato' Lim Chong Fong (High Court of Kuala Lumpur Judge), Sriram Panchu (The Mediation Chambers), Shanti Abraham (Shanti Abraham & Associates). The session was jointly moderated by Anuroop Omkar (CMC) and Diana Rahman (AIAC).

The panellists opined that we should embrace mediation as it has now become an effective tool for post-COVID-19 disputes. The panellists explored the concept of mediation, starting from understanding the history of mediation in Malaysia to its development, followed by the application of mediation from the perspective of India. Instead of merely agreeing on mediation, the panellists urged parties to understand the rationale and purpose behind mediation, since mediation is a journey of finding realisation to the solution over the problem.

The speakers noted that there were several mediation centres available in Malaysia. The Hon. Justice Dato' Lim Chong Fong also shared a few practice directions issued by the court to further encourage cases to be sent to mediation.

As the Singapore Mediation Convention will come into play for private mediation resolved by the parties as compared to court mediation, it was also emphasised there is a need for the Rules of Court to be amended to incorporate the procedure involved.

**Lights! Camera! ADR: Arbitration and Mediation in the Entertainment and Media Industry (30th June 2020)**




This dynamic webinar focussed on the prospective areas of disputes, as well as the benefits and limitations of mediation and arbitration, for the film and media sectors, when compared to litigation before the courts. The panellists – Raja Eileen Soraya (Raja, Darryl & Loh), Anissa Maria Anis (Christopher & Lee Ong), Amb. (r.) David Huebner, C.Arb (Huebner Arbitration), Lau Kok Keng (Rajah & Tann Singapore LLP), and Albertus Aldio Primadi (AIAC) (Moderator) – also analysed the drafting of submission agreements and dispute resolution clauses in contracts in the film and media sector.

Ms. Anis emphasised the fast-paced and unique nature of the entertainment and media industry, spanning from book adaptations and Oscar-nominated films to TikTok videos. Mr. Lau discussed platforms like Zoom and Netflix, as well as the rising intellectual property issues related to music concerts and sports telecasts. He emphasised the need for specialised domain knowledge to resolve related disputes and discussed the advantages of cost-efficient dispute resolution techniques. Ms. Soraya examined defamation in the entertainment world. She emphasised the anonymity of the internet is contributing to an increase in defamation claims and analysed the related cross-border issues, balancing it with freedom of speech. Carrying on the discussion, Amb. Huebner described the entertainment and media industry as thousands of moving parts intricately connected so as to be impervious to natural boundaries. Among other topics, he analysed virtual reality entertainment and e-sports and discussed the benefits of arbitrating related claims.

**Show Me the Money: The Importance of Expert Evaluations in Arbitration (2nd July 2020)**


In this session, the panel discussed the use of experts in arbitration proceedings. The panel consisted of Bronwyn Lincoln (Corrs Chambers Westgarth), K. Luan Tran (King & Spalding), Vikki Wall (Haberman Ilett UK Ltd), and Peter Bird (Berkeley Research Group LLC), with Abinash Barik (AIAC) moderating the session.

The role of experts in arbitration and examples of circumstances where a tribunal may need to appoint its own expert were canvassed, for example, when the tribunal needs assistance to go through the expert reports presented by parties. The focus then moved to the factors in determining whether an expert witness is needed from a counsel's perspective. Such factors were considered to include time, cost and complexity of the case, with emphasis placed on choosing experts with the utmost care given that their independence, integrity and clarity in their opinions are very crucial. Some of the valuation methods used by experts were then explored, where it was considered that an understanding of what is being assessed and the basis for such valuation were imperative. Finally, there was an interesting discussion of case studies concerning valuation in different sectors, including the medical, solar power and fast-moving consumer goods industries.

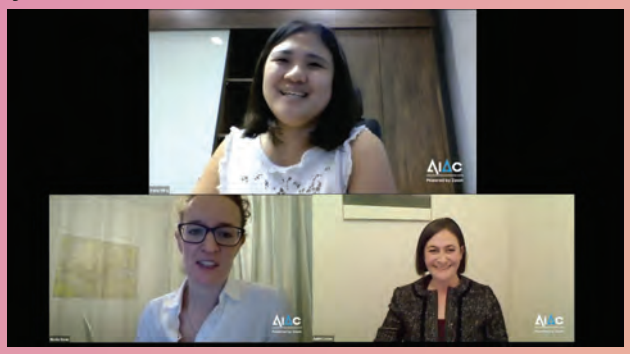
**The Balancing Act: Responding to COVID-19 and Investment Treaty Protections (7th July 2020)**

This webinar focused on international investments in the context of the Pandemic, with a particular focus on the concept of investment protection. The panel comprised Dr. Mariel Dimsey (CMS International Arbitration Group) and Dr. Crina Baltag (Stockholm University), with Lim Tse Wei (Herbert Smith Freehills) moderating the session.

The panel kicked off their discussion by distinguishing what amounts to an investment as well as who may be considered an investor in the context of international investment agreements. Bilateral investment treaties, regional agreements, and free trade agreements were unanimously viewed as the key instruments which ultimately stipulate the extent of protections which are accorded following the agreement between the host state, home state, and the foreign investor. Furthermore, the International Centre for Settlement of Investment Disputes (ICSID) has progressively served as an effective forum to help promote international investment by providing confidence in the dispute resolution process. On the other hand, parties should not consider certain clauses like the most-favoured-nation (MFN) to be a fundamental base for unfair treatment. The concessions, privileges, or immunities granted to one nation in a trade agreement should not affect the required action of a host state that has been agreed to in an investment treaty, denoting protection by way of equal treatment for all countries.

The webinar concluded with the call for balancing exercises with the State's regulatory powers, and their responses towards the Pandemic, to ensure that the normative content of the fair and equitable standard prevails.

**Environment Arbitration: To Revisit or To Recalibrate? (22nd July 2020)**



The world has taken dramatic turns on the environmental front. Increasing concerns such as climate change and greenhouse gas emissions, to name but a few, are taking place across the globe. Irene Mira (AIAC) moderated this webinar which addressed how environmental issues, in particular, climate change, arise in international arbitration. Judith Levine (Judith Levine Arbitration) started the discussion by introducing the international legal framework of the UN Framework Convention Climate Change, the Kyoto Protocol, and the Paris Agreement as well as emphasising that arbitration is only one of the many potential dispute resolution mechanism for environmental issues.

Nicola Swan (Chapman Tripp) then presented on the categories and examples of climate change-related commercial disputes and touched upon domestic litigation before national courts for such disputes, as well as the challenges encountered in the same. In addition to commercial disputes, Ms. Levine spoke about different types of disputes between private and public parties such as investor-state arbitration which revolves around public international law aspects of, amongst others, environmental protection measures and regulation of renewable energy. Ms. Swan also described the international human rights claims in relation to environmental issues which is featured in the IBA Climate Justice Report.

Both Ms. Swan and Ms. Levine also discussed the proposals for a special court to entertain environment disputes. They agreed that the nature and workings of arbitration are sufficient and flexible to facilitate environmental disputes. They further highlighted expertise, accessibility, and expedition as key factors in responding to the fast-paced area of environmental law and disputes.

**Multi-Party Arbitration: Too Many Cooks in the Kitchen? (28th July 2020)**

Arbitration can become very complex when multiple parties are involved, one of the reasons being that arbitration is a consensual process, and obtaining consent between two disputing parties is difficult, let alone when that number increases.

This panel consisted of Nadia Darwazeh (Clyde & Co), John Gaffney (Al Tamimi & Company), and Philipp Hanusch (Baker McKenzie), with Tony Ng (AIAC) moderating the session.

The speakers first mentioned that multi-party arbitration had become common in recent years. When an arbitral institution revised its rules, significant effort was often spent on revising the provisions relating to multi-party arbitration.

The panel outlined the different arbitral institution rules on consolidations and joinders. The rules are largely similar with subtle differences. The timing of requests, i.e., when joinder or consolation requests can be submitted, and the deciders of the applications vary between institutions. The panel also reviewed the arbitrator appointment procedures in multi-party arbitration. An improperly constituted tribunal will render an award ultimately unenforceable.

To avoid unnecessary legal hiccups during disputes, the panel recommended commercial parties to carefully review and to draft the dispute resolution clauses, rather than scattering the same in inter-related contractual documents in a transaction.

**MESA Energy, Infrastructure & Resource Disputes: Avoidance and Resolution in 2020s (30th July 2020)**


The panellists of this webinar were Erin Miller Rankin (Freshfields Bruckhaus Deringer), Tejas Karia (Shardul Amarchand Mangaldas), and Avinash Pradhan (Rajah & Tann Asia). Abinash Barik (AIAC) moderated the session. The session explored the economic impact of the COVID-19 Pandemic on the Middle East and South Asia (MESA), and its extension to energy, infrastructure & resource (EIR) projects.

The panel pointed out that the EIR market was historically always political. This might be more so after the start of the Pandemic since different governments might try to step in to protect their own national interests. The panel predicted that a lot of EIR parties probably would be cash-strapped. It was advisable that the market players should seek to renegotiate their contracts to avoid the chain-effect of mass insolvencies.

When it comes to disputes, it was considered vital that parties strive to keep proper documentation and records. If necessary, lawyers and experts should be engaged at the right stages to manage and analyse the disputes properly.

# CHRONICLES OF THE BAR:

## IN CONVERSATION WITH NG JERN-FEI QC

A career at the Bar is a coveted vocation, not only due to its inherent prestige and the varied caseload but also due to the need for barristers to be highly intelligent and thrive on fast-paced advocacy. The level of precision and ability to think on one's feet that is required for success is akin to that of Formula 1 drivers who must perform under intense pressure and high speed. Indeed, a vast number of arbitrators these days have prior or contemporaneous success at the Bar, an attribute which undoubtedly adds a further dimension to one's career as an international arbitrator. The AIAC recently had the opportunity to interview Ng Jern-Fei QC[1] who has enjoyed global success not only at the Bar but also in international arbitration, the responses to which are reproduced below.

**1. *What motivated you to become a barrister, and what inspired you to specialise in international arbitration?***

I have always considered myself to be an accidental barrister. I did not originally set out to pursue a career at the Bar, and upon completing my law degree at Cambridge, I had planned to return to Malaysia to practise. However, whilst at Bar School in London, I was told that it would be impossible for someone with my background to pursue a career at the English Bar – that was like a red rag to the bull, and I decided to apply to see how far I would get in the process. Some 20 years later, I am pleased to report: so far so good.

I consider myself to be more of a commercial disputes specialist rather than an international arbitration specialist per se. I regularly appear not just before arbitration tribunals but also before courts in different jurisdictions, including, in recent years, the Grand Court of the Cayman Islands and the European Court of Justice in Luxembourg (and of course the English courts).

**2. *What does a typical day look like for you?***

I'm not sure there is such a thing as a typical day for me! Before the restrictions imposed by COVID-19, I might find myself appearing as counsel in a heavy arbitration in Hong Kong one week, sitting as an arbitrator in another arbitration in KL the next week, and then off to see some clients in the manufacturing heartlands in southern China the week thereafter before rounding off the month in the Commercial Court in London!

**3. *What are some of the highlights in your journey to taking silk?***

I think the highlight for me was my silk applications interview, in which the first question I was asked was about what I considered to be the quality that I thought set me apart from the silks I had appeared against. My answer was: resilience. I told the panel about how I had not set out to become a barrister; about the inherent probabilities of someone like me who went to his local school in Petaling Jaya would even be sitting before them interviewing to become a silk.

Yet, there I was. And it was down to resilience – of not accepting that there was a settled order to things and in upending expectations.

***Ng Jern-Fei QC***

[1]Ng Jern-Fei QC is barrister at Essex Court Chambers in London. He was appointed Queen's Counsel in 2018 at the age of 38, making him one of the youngest QCs to be appointed. He is described in the legal directories as a "*highly skilled strategist and terrific advocate*"; "*a formidable advocate*"; with "*first-class advocacy skills*" that is both "*smooth and persuasive*". He "*comes up with extremely clever points*" and has an ability to "*present practical legal solutions that not only win you the battles, but also the war.*" "*He shows tenacity in fighting his client's corner and has the ability to swiftly produce forceful oral rebuttals*"; "*will fight like a gladiator to win the case*"; "*very proactive and, once instructed, takes control of a case and pushes it forward to the advantage of the client*"; "*super intelligent, very knowledgeable*". Mr. Ng QC has acted as counsel in over 100 arbitrations and as arbitrator in 27 cases over the past 15 years. He is recommended as a leading practitioner in the most recent editions of *The Legal 500 UK* (six areas of practice), *Chambers UK* (three areas of practice), *Legal 500 Asia-Pacific* (three areas of practice), *Chambers Asia* (three areas of practice), and *Chambers Global* (three areas of practice).

4. ***Like many things in life, oral advocacy is something which can be developed and refined with practice, patience, and persistence. Reflecting on your early years at the Bar, how would you describe your advocacy skills at the commencement of your career? What did you do to improve your advocacy skills to the level they are now?***

I remember vividly the very first trial I did. I appeared before some far-flung County Court, in which I acted for a credit card company in a claim against a litigant-in-person in respect of an unpaid credit card debt. It was a disaster. The defendant was a single mother on benefits who was unable to settle her debt because she had been dismissed from her job by none other than the credit card company who I was acting for! I made the mistake of telling the judge that whilst I sympathised with the defendant's predicament, a debt is a debt, and it must be repaid, only for the judge to tell me that any tears I, or my clients, shed are crocodile tears, and that I was only there for a pound of her flesh. I almost responded, as a matter of instinct, "*Yes, that's right, but what's your real point*", but then ended up thinking the better of it!

On a more serious note, it was these sort of rough experiences as a junior barrister that helped me develop the advocacy skills I needed to do what I now do.

5. ***Are the oral advocacy skills required in international commercial arbitration and international investment arbitration proceedings similar or different? How?***

I don't think they are very different actually. Nor do I think the advocacy skills involved in arbitration are different from those used in litigation. The ability to identify the key issue in a case (what I like to call a 'wedge' issue) is paramount, as is the ability to cross-examine effectively

6. ***The COVID-19 pandemic has resulted in a fair number of arbitration proceedings being conducted virtually. What has your experience been in participating in a virtual arbitration proceeding? Do you have a preference towards either in-person hearings or virtual hearings, and if so, why?***

I have had very positive experiences of virtual hearings to date, having done three as counsel and two as arbitrator. One of those I did as counsel was perhaps one of the most complicated ones that the HKIAC has ever had on its books to date – it involved 11 factual/expert witnesses giving evidence from 8 cities and in 3 different languages. I don't have a preference for either in-person or virtual hearings – I am equally comfortable with either.

7. ***Is it necessary for counsel to modify their advocacy style when participating in a virtual hearing?***

Very much so! This is a topic that has been covered extensively in a webinar featuring myself, Prof. Gary Born (President of the SIAC Court of Arbitration), Eva Kalnina (Partner, Schellenberg Wittmer) and Kevin Nash (SIAC Deputy Registrar & Centre Director). The recording of the webinar is available for viewing on my LinkedIn page.

8. ***One of the intriguing aspects of international arbitration is the potential cultural diversity of the parties, tribunal, and counsel in a proceeding. In your experience, does a lawyer need to modify their communication and/or advocacy style when interacting with a culturally diverse tribunal and/or cross-examining a culturally diverse witness? If so, how does one go about the same?***

Yes, they do. I am not sure I can give a general answer to the question, but this happens all the time in many cases in which I am involved. In one case I recently did, I had to switch between English, Mandarin and Cantonese when exploring meanings of words and phrases used in the case in which allegations of fraudulent misrepresentation were made. Then there was another case in which I had someone challenge my interpretation of the word 'contoh' in Bahasa, which was surreal given that I had been studying BM since I was 7.

9. ***Your success at the English Bar is considered inspirational to many, especially Malaysians. Did you have to overcome any hurdles or failures to gain acceptance and recognition at the English Bar?***

There were a lot of hurdles, some tangible others less so. The biggest hurdle of all was one of perception. Fairly early on in my practice, people would sometimes assume when I walked into a hearing that I was the work experience student, and there were others who would make presumptions about my abilities as an advocate. As I grew older, I minded these things less – I now worry less about being underestimated by opponents and more about being overestimated!

10. ***What are your thoughts on work/life balance and a career at the Bar?***

I really enjoy what I do, and I don't really think about work/life balance in the orthodox way because that rather proceeds on the basis that they are mutually exclusive. My study desk is on the top floor of my house and, since lockdown was imposed, I often find myself working at my desk only to have my kids trying to entertain me in the loft by showing off their latest dance moves to me or by swimming in the makeshift pool that sits in the rooftop terrace next to my study area. And sometimes my kids decide to participate in my Zoom meetings to offer their latest pearls of wisdom to whomever it is I happen to be speaking to. Thus, no need to balance – it all happens at the same time.

11. ***Although there is a general perception that lawyers are all born with a gift-for-the-gab, not all lawyers are born orators. What advice would you give to a young lawyer who wishes to embark upon a career at the Bar but may not necessarily have polished oratory skills?***

To me, the single most important oratory skill you can and should master as an advocate is the skill of cross-examination. Cross-examination is the lifeblood of the work an advocate does. You are not really a complete advocate if you are unable to and are uncomfortable with cross-examining a witness. Nobody is born with cross-examination skills. Practice makes perfect. And thorough preparation is important too.

# NAVIGATING CONFLICTS OF INTEREST IN THE DRAFT CODE OF CONDUCT FOR ADJUDICATORS IN INVESTOR-STATE DISPUTE SETTLEMENT[1]

*By Meg Kinnear[2] and Irene Mira[3]*

## I. Introduction

On 1st May 2020, the International Centre for Settlement of Investment Disputes ("ICSID") and the United Nations Commission on International Trade Law ("UNCITRAL") jointly released the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (the "Draft Code").[4] The Draft Code was created by both ICSID and UNCITRAL in light of ongoing investor-state dispute settlement ("ISDS") reform discussions amongst global users and stakeholders in recent years. The Draft Code itself could not be timelier as ICSID and UNCITRAL have been working extensively on ISDS reform through, amongst others, the amendments of ICSID rules and regulations,[5] and the Working Group III on ISDS reform[6], respectively.

Once finalised, the Draft Code would be applicable only to arbitrators, members of international ad hoc, annulment or appeal committees, and judges on a permanent mechanism for the settlement of investor-State disputes (collectively referred to as "Adjudicators"), their assistants, and candidates proposed as Adjudicators.[7] In formulating the Draft Code, ICSID and UNCITRAL take into account a variety of similar codes of conduct in different trade and investment agreements, such as the North American Free Trade Agreement, Australia – Japan Free Trade Agreement, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, EU – Vietnam Free Trade Agreement, and Indonesia – Australia Comprehensive Economic Partnership Agreement, to name but a few.[8] This approach reflects ISDS users' demands vis-à-vis professional and ethical codes of conduct for adjudicators in ISDS.

Although the Draft Code covers a wide range of topics such as duties and responsibilities of Adjudicators, fees and expenses of Adjudicators, and enforcement of the code of conduct, this article exclusively focuses on the issues in respect of conflicts of interest.

**Meg Kinnear**

**Irene Mira**

[1] These comments are made exclusively in the authors personal capacity and are not necessarily the views of the institution with which they are associated.
[2] Vice President, World Bank Group and ICSID Secretary-General.
[3] International Case Counsel at AIAC & Core Member of the AIAC Young Practitioner Group's Investment Arbitration Committee.
[4] The Draft Code is accessible at: https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_ISDS.pdf
[5] For more information about the ICSID Rules & Regulations Amendments Process and the relevant Working Papers, please visit: https://icsid.worldbank.org/resources/rules-and-regulations/amendments
[6] For more information about UNCITRAL Working Group III and its work and agenda on ISDS reform, please visit: https://uncitral.un.org/en/working_groups/3/investor-state
[7] See Article 1.1 of the Draft Code.
[8] See the Summary of Codes of Conduct in FTAs that is accessible at: https://icsid.worldbank.org/sites/default/files/amendments/Annex_B_Codes_Conduct.pdf

## II. Conflicts of Interest and ongoing disclosure obligations under the Draft Code

At the outset, although conflicts of interest and disclosure thereof are addressed primarily in Article 5 of the Draft Code, it bears mention that the current Draft Code is structured in a way to emphasise disclosure of conflicts of interest as continuing obligations, and the provisions in the Draft Code must be read collectively. To that end, the following table is a concise starting point:

| Article(s) | Topic(s) covered |
|---|---|
| Article 1 to Article 2 | Definitions and Application of the Code |
| Article 3 | Duties and Responsibilities for Adjudicators which embody the main principles of the Code |
| Article 4 to Article 9 | Elaboration of Duties and Responsibilities: Independence and Impartiality, Conflicts of Interest, Limit on Multiple Roles, Integrity, Fairness and Competence, Availability, Diligence, Civility, and Efficiency as well as Confidentiality which are the "extension of arms" of Article 3. |
| Article 10 to Article 11 | Pre-Appointment Interviews of potential Adjudicators and Fees and Expenses of Adjudicators. |
| Article 12 | Enforcement of the Code |

**Article 3 of the Draft Code** makes clear that the duties and obligations of Adjudicators are ongoing in practice and must be observed at all times. These duties and obligations include independence and impartiality, avoidance of conflicts of interest, and availability and commitment to perform duties as Adjudicators diligently and efficiently.

A further list of circumstances that constitute independence and impartiality are found in **Article 4 of the Draft Code**. **Article 5 of the Draft Code** covers the types of interests and affiliations that Adjudicators must avoid, and the extent of disclosure required in ISDS proceedings they are involved in. **Article 5(1)** is the umbrella provision, requiring avoidance of direct or indirect conflict of interest that could reasonably be considered to affect independence or impartiality. It imposes an obligation to make reasonable efforts to become aware of and disclose such conflicts. **Article 5(2)** gives specific examples of the types of disclosure that are mandated under this general duty. It includes the following:

a) Any professional, business, and other significant relationships within the past five (5) years with the parties and their counsels, any present or past adjudicators or experts in the proceedings, and any third party with a direct or indirect financial interest in the outcome of the proceedings;

b) Any direct or indirect financial interest in the proceeding or its outcome and in any legal proceedings, be it court or other forms of panel, that involves questions that may be decided in the relevant proceeding;

c) Any other arbitration cases in which the candidates and Adjudicators have been or are currently acting as, for instance, parties' legal representatives, arbitrators, experts, or annulment committee members; and

d) A list of publications and/or relevant public speeches by the candidates or Adjudicators.

While Article 5 of the Draft Code defines disclosure obligations extensively, **Article 5(4) of the Draft Code** attempts to filter out any disclosures of conflicts of interest, relationships, or other matters that are trivial and have no bearing[9] on the candidates' roles and Adjudicators in the relevant ISDS proceedings.

It is a well-known fact that issues of "double-hatting", repeat appointment, lack of diversity, and regeneration of the arbitral pool have been raised in recent ISDS discussions with many commentators attributing these concerns to conflicts of interest. To date, the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") have been the predominant soft law instrument to determine the existence of conflicts of interest. It must be noted here that both the Draft Code and the IBA Guidelines have the same goals of avoiding conflicts of interest in ISDS proceedings and ensuring objective and fair dispute resolution. The IBA Guidelines have the famous "traffic light" scheme, each of which provides waivable and non-waivable circumstances that give rise to potential and apparent conflicts of interest. The Draft Code is much different in that regard as it does not implement the same scheme. This is because it elaborates on the relevant duties, particularly in **Articles 4 to 11** it recognises the highly fact-dependent nature of the endeavour, and it does not (as of now) regulate challenge procedure in cases where conflicts of interest arise.

[9] Emphasis added.
[10] Commentary 67 on Article 6 of the Draft Code.
[11] Commentary 68 on Article 6 of the Draft Code. See also: Chiara Giorgetti, "*ICSID and UNCITRAL Publish the Anticipated Draft of the Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, Kluwer Arbitration Blog, 2 May 2020, http://arbitrationblog.kluwerarbitration.com/2020/05/02/icsid-and-uncitral-publish-the-anticipated-draft-of-the-code-of-conduct-for-adjudicators-in-investor-state-dispute-settlement/?doing_wp_cron=1591825453.1183118820190429687500 and Vanina Sucharitkul, " CSID and UNCITRAL Draft Code of Conduct: Potential Ban on Multiple Roles Could Negatively Impact Gender and Regional Diversity, as well as Generational Renewal", Kluwer Arbitration Blog, 20 June 2020, http://arbitrationblog.kluwerarbitration.com/2020/06/20/icsid-and-uncitral-draft-code-of-conduct-potential-ban-on-multiple-roles-could-negatively-impact-gender-and-regional-diversity-as-well-as-generational-renewal/?doing_wp_cron=1597135387.5116879940032958984375
[12] *Ibid*.
[13] Further information is available at: https://uncitral.un.org/en/codeofconduct

A more specific question that has been raised is whether double-hatting is sufficiently dealt with in the current **Articles 3 to 11 of the Draft Code**. This specific issue is addressed in **Article 6 of the Draft Code** concerning limitations on adjudicators taking on multiple roles simultaneously. The Draft Code presents policy options (in square brackets) to address "double-hatting" in ISDS. The first policy question in **Article 6 of the Draft Code** is whether the Code should impose an outright prohibition on double-hatting or whether the Code should require disclosure of circumstances that could constitute "double-hatting".[10] While the former is easier to implement as an outright ban, it requires a clear definition of prohibited double-hatting and may create adverse practical impacts. The potential impacts of a prohibition include interference with party autonomy in choosing Adjudicators, an economic bar to new entrants into the field (generally younger ISDS practitioners who wish to transition into Adjudicator roles), and a constraint on gender and regional diversity among Adjudicators.[11] Additionally, an outright ban on double hatting could limit the ability to appoint those with subject matter expertise gained in practice and would favour candidates with academic or judicial backgrounds. A plausible option to address these concerns might be a time-phased limit on the number of cases in which an Adjudicator may take on multiple roles at the beginning of his or her career as an Adjudicator, although this is difficult to reconcile with the overall goal to avoid such conflict.[12] It is also worth noting that such a mechanism would work well with **Article 10 of the Draft Code** on pre-appointment interviews, as the pre-appointment stage is an opportune time to gauge any conflict of interest and thus enables parties and Adjudicators to make informed decisions in making and accepting appointments.

**Article 6** also requires policy choices to be made in defining an impermissible overlap in roles for the purposes of the Code. The draft provision suggests several factors that might (or might not) be relevant: the temporal proximity of the cases in which the Adjudicator played a role, the presence of the same parties, the same facts, or having the same treaty at issue. As a result, further discussion is required as to the exact circumstances in which impermissible double-hatting occurs.

### III. Conclusion

Conflicts of interest and related issues are sensitive issues to regulate, especially in ISDS. The Draft Code is still far from final. Whether the end product of the Draft Code will be a stand-alone instrument akin to the IBA Guidelines or whether it could be incorporated through an omnibus treaty or other investment treaties and agreements remains unknown.

In keeping with the momentum and substance of ISDS practices and policies, both ICSID and UNCITRAL welcome comments on the Draft Code from States, international organisations and other stakeholders, until 15th October 2020.[13] Having been accorded observer status at sessions convened by the UNCITRAL Working Groups and as an institution with a facilities cooperation agreement with ICSID, the AIAC takes a keen interest in these questions and has submitted its comments on the Draft Code to support the development of ISDS reform and will continue to participate in any other initiatives.

# ADR Online: Special An AIAC Webinar Series

## Diversity in Arbitration Week

One of the unique advantages of international arbitration is the opportunity for counsels, parties, experts, witnesses and arbitrators of diverse backgrounds to come together to resolve a dispute. This melting pot of individuals from divergent academic, professional, age, gender, racial and ethnic backgrounds is what gives arbitration a genuinely international and wholesome character. But how far have we truly come from the adage that arbitration is "pale, male and stale"? Indeed, in times of movements such as #BlackLivesMatter, thought seriously needs to be given to whether stakeholders in the world of international arbitration are doing enough to cultivate and support diversity and inclusion in arbitration practice.

In this spirit, the AIAC launched its inaugural Diversity in Arbitration Week ("DAW") (as part of its ADR Online: An AIAC Webinar Special Series) between 14th and 17th July 2020. During the week, 90-minute webinars were held each day on select topics relating to diversity in arbitration, specifically, gender, age, professional and racial and ethnic diversity. What culminated was a weeks' worth of engaging and insightful discussion on where we are, where we need to go and what needs to be done to enhance the facets of diversity in arbitration.

### Gender

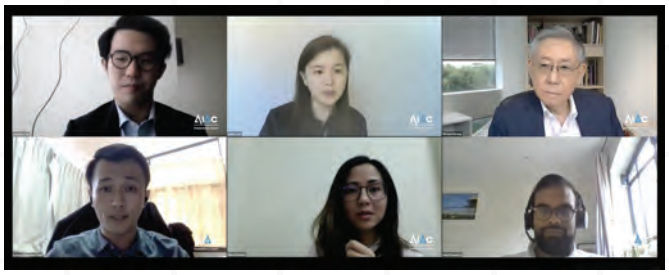
Gender diversity is arguably the most prominent aspect of diversity which is being addressed by the legal profession. A step towards enhancing gender diversity in arbitration is participation by individuals, firms, arbitral institutions and other organisations in the Equal Representation in Arbitration ("ERA") Pledge. To understand more about the unique experience of female arbitrators in practice, the AIAC collaborated with the ERA Pledge for DAW to present a webinar titled "**Remotely Personal**". Opening remarks for the webinar were delivered by Sitpah Selvaratnam (Tommy Thomas and ERA Global Steering Committee) with Mohanadass Kanagasabai (Mohanadass Partnership) expertly moderating the webinar. The panel comprised of six (6) female arbitrators – Juliet Blanch (Arbitration Chambers), Briana Young (Herbert Smith Freehills), Tan Swee Im (39 Essex Chambers), Christine Artero (The Arbitration Chambers Pte Ltd), Patricia Saiz Gonzales (ESADE Law School) and Olufunke Adekoya, SAN (ÁELEX) – all of whom shared stories of the explicit and implicit biases faced in their careers whilst stressing the importance of female practitioners being given opportunities, based on merit, to excel in their careers.


**SUPPORTING ORGANISATIONS**

ARBITRATOR INTELLIGENCE · ARBITRAL WOMEN · ACICA Australian Centre for International Commercial Arbitration · AFIA Asia-Pacific Forum for International Arbitration · ICCA International Council for Commercial Arbitration · gar · CIArb · TDM transnational-dispute-management.com · OGEMID · WWA · IPBA Inter-Pacific Bar Association · #CAREERS IN ARBITRATION · Equal Representation in Arbitration

Despite society having progressed in a general sense, it was commented that there remains a societal expectation that women continue to shoulder most household and parental responsibilities, which places an additional layer of stress for working women, particularly female lawyers. Even though certain companies and law firms have become more receptive to the needs of working parents through flexible working arrangements, which has increased female retention rates, this is only the tip of the iceberg. More pressing from an arbitration perspective are pipeline leak and repeat appointment issues. These are premised on the fact that when it comes to nominating arbitrators to clients, the persons with the most significant influence in the names suggested will be those at the top of the practice group. Until more women make it to the top of their respective practice areas, the chance of increasing female nominations is slim. This is coupled with the fact that when selecting arbitrators, parties are risk-averse and would either opt for a well-known arbitrator or a person they have worked with before. Unless the head of practice is willing to nominate a lesser-known female arbitrator to their client, this presents another hurdle.

Enter the ERA Pledge, which has the objective of improving the profile and representation of women in arbitration and appointing women as arbitrators on an equal opportunity basis. Since its inception in 2016, the ERA Pledge has significantly improved female arbitrator appointments with the LCIA recently winning the ERA Pledge GAR Award 2020 for appointing 43% female arbitrators in 2018. Although this is undoubtedly a step in the right direction, more can be done by law firms and arbitral institutions alike to increase female representation in arbitration, whether by providing mentorship and promotion opportunities for talented and capable female lawyers or by making a concerted effort to nominate and/or appoint more female practitioners as arbitrators. Nevertheless, female practitioners themselves also have a role to play since only if they increase their visibility will they increase their chances of appointment, despite the systematic challenges.



## Age

Age and, by proxy, experience, were also two vital aspects of diversity touched upon during DAW, predominately in the content of young practitioners finding their stepping-stones into international arbitration, and eventually landing their first appointment as arbitrators. In collaboration with the Asia-Pacific Forum for International Arbitration ("AFIA"), the second webinar of the series was titled, "**Roundtable on Age Diversity in International Arbitration – An Imagined or Real Problem**". Opening Remarks for the webinar were delivered by Jonathan Lim (Wilmer Cutler Pickering Hale and Dorr LLP and Co-Chair of AFIA) with nifty moderation by Janice Lee (Harry Elias Partnership). The panel comprised Diana Rahman (AIAC), Emmanuel Duncan Chua (Chevron Corporation – immediate past), Dr. Michael Hwang SC (Michael Hwang Chambers LLC) and Isuru Devendra (Latham & Watkins).

What became apparent was that the importance of and perceptions attached to age appeared to differ depending on the arbitrator stakeholder in question. From a counsel's perspective, the preference was for a practitioner with sufficient experience in and understanding of the subject matter of the dispute. Hence, age, gender and/or cultural backgrounds were not considered prohibitive factors for nomination as an arbitrator. In fact, it was opined that counsels embrace diversity in the tribunal. From a client's perspective, the preference is towards young arbitrators, primarily driven by more seasoned arbitrators being high in demand and thus having a packed schedule and being more expensive. In addition to time and cost efficiencies, choosing a young and astute arbitrator has the added advantage of bringing high energy levels to the proceedings, which is generally welcomed by clients.

Arbitral institutions were once again considered uniquely placed to reduce age barriers. Notably, in 2019, 30 of the 155 appointments made by the Director of the AIAC were to first-time arbitrators, with nearly 50% of these first-time arbitrators aged 45 and under.

Although there is no magic formula for young practitioners trying to break into the industry and forge their arbitration careers, it was unanimous that specialised knowledge in a particular area of the law, such as, maritime, technology, finance, etc., whilst being cognisant that smaller is better (in terms of the claim amount and complexity of the dispute) for one's first few appointments, would give an individual a competitive advantage to land their first appointment.


## Professional

A key benefit of arbitration as a method of alternative dispute resolution is the ability of a party to choose an arbitrator that has specific subject matter expertise relevant to the individual dispute. Theoretically, this means that rather than opting for an arbitrator who is legally trained, the parties have the option of choosing industry professionals with practical or specialist expertise in the relevant subject matter. In collaboration with the Chartered Institute of Arbitrators ("CIArb") Malaysia Branch, the third webinar of DAW was aptly titled, "**Professional Diversity in Arbitration – Inevitable or Idealistic?**". Opening Remarks were delivered by Foo Joon Liang (Gan Partnership and Chairperson of CIArb

Malaysia Branch) with the session being craftily moderated by Choon Hon Leng (Raja, Darryl & Loh). The panel consisted of legally trained and industry professional arbitrators – namely, Ir. Harbans Singh K.S. (Dispute Resolution Chambers), Karina Albers (algeny and Karina Albers), Daniel Tan Chun Hao (Tan Chun Hao Advocates & Solicitors), Fatima Balfaqeeh (RKAH Consultancy), Suzanne Rattray (Rankin Engineering Consultants) and Professor Philip Yang (Philip Yang & Co., Ltd) – all of whom shared their unique journeys into arbitration as well as the benefits and shortcomings of having industry professionals as part of the arbitral tribunal.

The general theme was that industry professionals who act as arbitrators, especially those with substantive industry expertise, can bring a great deal of pragmatism to a proceeding since more complex commercial transactions are created by commercial people and not by lawyers. This industry experience would also position industry professional arbitrators better to discern whether any material information is being hidden and needs to be drawn out of the parties and/or witnesses. Notwithstanding this, industry professional arbitrators need to develop an understanding of the law and ADR processes in order to be most effective in an arbitration. Emphasis was also placed on the need for users of the arbitration process to be mindful of how information which may be relevant to a dispute is recorded and ensuring that the right people are entrusted with such recording responsibilities. With respect to novice arbitrators who are industry professionals, an observation was made that although there is access to ADR training programs through CIArb and other reputable institutions, courses in arbitration tend to be theoretical as opposed to having practical role-playing or hearing observation components, both of which would be beneficial for budding industry professional arbitrators. In this light, institutions and training providers were urged to focus on fostering practical skills.


## Race and Ethnicity

Undoubtedly, when it comes to diversity, the elephant in the room tends to be racial and ethnic diversity which was the theme of the final DAW webinar. In collaboration with #CareersinArbitration, the fourth and final webinar was titled, "**Globalising Arbitration - Enhancing Racial and Ethnic Diversity**". Amanda Lee (Seymours Solicitors and Founder of #CareersinArbitration) gave the Opening Remarks with Catherine Ann Rogers (Arbitrator Intelligence, Queen Mary and Penn State Law (on leave)) brilliantly moderating the session. The stellar panel was composed of Dr. Emilia Onyema (SOAS University of London), Dr. Kabir Duggal (Arnold & Porter Kaye Scholer LLP), Professor Darius Chan (Fountain Court Chambers), Sarah Malik (SOL International Ltd) and Thiago Del Pozzo Zanelato (Pinheiro Neto Advogados).

The efforts of initiatives such as the ERA Pledge, the African Promise, the Arbitrator Intelligence questionnaire, and even the AIAC's DAW were noted for promoting racial and ethnic diversity in arbitration. However, the lack of communal efforts that have been put into action to close the racial and ethnic gap was lamented. Emphasis was also placed on the importance of understanding the struggle of an intersectional individual fighting a battle against gender, ethnic and racial issues, and thus becoming implicitly marginalised at multiple levels whilst trying to engage with the rest of the industry. An appreciation of the nuances culture can have on the conduct of a proceeding, including the communication (or miscommunication) of information or evidence in a proceeding, was also considered imperative to enhance racial and ethnic diversity in arbitration. Interestingly, however, it was observed that counsels do not place much emphasis on racial and ethnic diversity due to the entrenched systems of party-appointed arbitrators and repeat appointments.

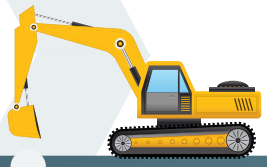
Arbitral institutions and counsels were once again considered best placed with moving things forward. For instance, arbitral institutions could be more proactive in approaching the unknown and finding raw talent. At the same time, counsels could take an active role in persuading their clients in having a diverse panel.

## Conclusion

The key takeaway from the DAW discourse is that there is most certainly room for improvement when it comes to enhancing diversity in arbitration. However, the power to effect change does not lie with one individual or organisation; rather, collective and concerted efforts are required from all international arbitration stakeholders and participants to close the diversity gap. Although initiatives already exist to address some of the existing barriers to diversity, this does not mean we can be complacent that a resolution to diversity issues is imminent. Finally, in discussing these crucial issues of diversity, it is also imperative that such is translated into the inclusion of diversity not only on panels but in the essential discussions shaping the industry.

The AIAC would like to take this opportunity to thank the supporting organisations of DAW for their kind support in marketing this event – Arbitrator Intelligence, ArbitralWomen, ACICA, AFIA, ICCA, GAR, CIArb Malaysia Branch, TDM/OGEMID, WWA, IPBA, #CareersinArbitration and ERA.

# AIAC CERTIFICATE IN ADJUDICATION



**19th - 23rd September 2020**

**9:00 a.m. - 6:00 p.m.**

**Auditorium, AIAC**

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

## CPD / CCD Points

| | |
|---|---|
| Bar Council Malaysia | 10 CPD Points |
| Construction Industry Development Board (CIDB) | 20 CCD Points |
| Board of Engineers Malaysia (BEM) | 22 CPD Points |
| Board of Architects Malaysia (LAM) | 3 CPD Points |
| Land Surveyors Board (LJT) | 4 CPD Points |
| Board of Quantity Surveyors Malaysia (BQSM) | 6 CPD Points |

**UNIT 1**

**THE APPLICATION OF STATUTORY ADJUDICATION TO THE CONSTRUCTION INDUSTRY**

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

**UNIT 2**

**THE PRACTICE & PROCEDURE OF ADJUDICATION UNDER THE CIPAA**

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

**UNIT 2A**

**CIPAA REGULATIONS**

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

**UNIT 3**

**FUNDAMENTALS OF CONSTRUCTION LAW**

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

**UNIT 4**

**THE CONSTRUCTION PROCESS**

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

**UNIT 5**

**WRITING ADJUDICATION DECISIONS**

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

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

# AN OVERVIEW OF EMERGING ARBITRATION JURISDICTIONS: PART I

Over the course of the past 40 years, arbitration, as an international dispute resolution mechanism, has gained significant global traction. Certain jurisdictions, such as London, Hong Kong, Singapore, Geneva, and New York, are considered arbitration powerhouses, not only for being home to preeminent arbitration firms and boutiques, but also due to the strength of the *lex arbitri*, and the relevant supporting framework, in promoting these jurisdictions as preferred seats of arbitration. Nevertheless, the role of the UNCITRAL Model Law in harmonising the global arbitration framework, as well as the proactiveness of individual arbitral institutions and the support of the judiciary, has enabled lesser-known jurisdictions to reposition themselves as emerging centres ready to have a piece of the proverbial "arbitration pie". In this regard, the AIAC decided to dedicate a portion of this Newsletter and the next edition thereafter to survey emerging arbitration jurisdictions, through the lens of leading practitioners from the relevant jurisdictions. Part I of this survey is showcased in this edition of the AIAC Newsletter and canvasses four emerging jurisdictions in the Asia-Pacific region – Malaysia (by Tan Sri Dato' Cecil Abraham) ("CA"),[1] the Philippines (by Patricia-Ann T. Prodigalidad) ("PP"),[2] Thailand (by Vanina Sucharitkul) ("VS"),[3] and Vietnam (by Dzung Mahn Nguyen) ("DN").[4]

1. ***What legislation applies to arbitrations in your jurisdiction? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration?***

**CA**: There are two Acts in force in Malaysia, namely the Arbitration Act 1952 ("1952 Act") and the 2005 Arbitration Act ("the Act"). The Act is based on the Model Law and the New Zealand Arbitration Act 1996. The 1952 Act only applies to arbitrations commenced prior to 15th March 2006.

The Act applies to both domestic and international arbitrations. It is divided into four parts. Part I contains the definition section, including important definitions of international arbitration and domestic arbitration. Parts I, II and IV apply to all arbitrations. Part III, which contains the provisions for appeals from arbitration awards on points of law, applies only to domestic arbitrations unless the parties opt-out. It does not apply to international arbitrations unless the parties opt-in.

Section 3 of the Act makes the main distinction between international and domestic arbitrations and sets out the territorial limits and scope of the Act. This section incorporates the provision for opting-in and opting-out of Parts I, II and IV of the Act in respect of domestic and international arbitrations, where the seat of the arbitration is in Malaysia. There is no equivalent provision to Section 3 of the Act in the 1952 Act. The 1952 Act applies both to domestic and international arbitrations.

**PP**: International commercial arbitration, as that term is universally understood, is generally governed by Republic Act No. 9285 (otherwise known as the "ADR Act of 2004" or simply the "ADR Act") and its implementing rules and regulations. The ADR Act expressly adopted the UNCITRAL Model Law on International Commercial Arbitration, as adopted on 21st June 1985 and approved on 11th December 1985 ("1985 UNCITRAL Model Law").

Domestic arbitration, on the other hand, is governed by Republic Act No. 876 (known as "The Arbitration Law"), as amended by the ADR Act. Arbitration of construction disputes, even if within the definition of a commercial dispute, is governed by Executive Order No. 1008 (EO 1008), or the "Construction Industry Arbitration Law" of the Philippines, as well as by the procedural rules promulgated by the Construction Industry Arbitration Commission (CIAC). The primary laws governing domestic and construction arbitrations are not patterned after the UNCITRAL Model Law.

All forms of arbitration are likewise governed by the decisions of the Philippine Supreme Court ("SC") interpreting the aforesaid laws, as these judicial pronouncements form part of the country's legal system.

Judicial proceedings arising from, relating to, or otherwise connected with an arbitration proceeding (such as applications for interim measures of protection) are governed by the SC's Special ADR Rules.

Tan Sri Dato' Cecil Abraham

Vanina Sucharitkul

Dzung Mahn Nguyen

Patricia-Ann T. Prodigalidad

[1]Tan Sri Dato' Cecil Abraham is the Senior Partner at Cecil Abraham & Partners (Malaysia). His career at the Malaysian Bar spans 50 years. His practice covers a wide breadth of areas that includes Corporate and Commercial, Environmental, Banking and Securities, Insurance, Maritime, and Competition Law as well as Arbitration. Tan Sri Dato' Abraham is also regularly appointed as an arbitrator in domestic and in international commercial arbitrations and is the only Malaysian to be regularly appointed as an arbitrator in investment treaty disputes.

[2]Patricia-Ann T. Prodigalidad is a Senior Partner at Accra Law (Philippines). She specialises in commercial litigation, white collar crime, intra-corporate disputes, banking, investments and securities litigation, anti-money laundering, corporate rehabilitation and insolvency, international commercial and construction arbitration, and intellectual property and antitrust litigation. Ms. Prodigalidad also acts as an arbitrator in international commercial and domestic arbitration, both institutional and ad hoc, as well as in Philippine construction arbitration.

[3]Vanina Sucharitkul specialises in international arbitration and advises clients on a diverse range of commercial litigation and cross-border disputes across involving commercial contracts, investigations and anti-corruption, joint ventures, hospitality, construction and infrastructure projects, environmental contamination, and investment treaty arbitration. She has experience acting as counsel and advocate in arbitrations across multiple jurisdictions under the auspices of institutions including the ICC, SIAC, HKIAC, AAA, and TAI. Ms. Sucharitkul serves as a Member of the International Court of Arbitration of the International Chamber of Commerce (ICC) and is currently sitting as arbitrator.

[4]Dzung Mahn Nguyen recently established ADR Vietnam Chambers LLC, a new platform for full time & independent arbitrators and mediators in Vietnam. He also founded Dzungsrt & Associates LLC in 1997 which has now become one of the leading arbitration law firms in Vietnam. Mr. Nguyen has served as an expert witness, and legal counsel in international arbitrations conducted under various international arbitration rules such as ICC, SIAC, JCAA and UNCITRAL and he has also been appointed as co-arbitrator and presiding arbitrator in VIAC arbitrations. He has assisted international clients in pursuing enforcement proceedings in Vietnam of many arbitral awards rendered by the ICC, ICA, GAFTA, JCAA, LMAA and SIAC.

**VS**: The Thai Arbitration Act (B.E. 2545) (2002) governs all arbitrations seated in Thailand. It is substantially based on the UNCITRAL Model Law with some minor exceptions. For example, an arbitrator may face civil liability for willful and gross negligence.[5] If an arbitrator demands or accepts benefits without lawful justification, he or she could be subject to criminal and civil liabilities.[6]

**DN**: Arbitration in Vietnam is mainly governed by Law No. 54/2010/QH12 on Commercial Arbitration ("LCA") which further guided by Resolution No. 01/2014/NQ-HDTP of the Supreme People's Court of Vietnam ("Resolution No. 01").

With regard to the enforcement of arbitral awards (both domestic and foreign arbitral awards), the Law on Enforcement of Civil Judgments 2008, as amended in 2014 ("LECJ") shall be applied. However, the foreign arbitral awards must seek recognition by the Vietnamese Court before being coercively enforced in Vietnam. The recognition of foreign arbitral awards is regulated by Part Seventh (VII) of Civil Procedure Code 2015 ("CPC") which came into force on 1st July 2016 which incorporates provisions of New York Convention 1958.

Although not officially recognised by the UNCITRAL as a Model Law country, the LCA was drafted based on the 1985 UNCITRAL Model Law as amended in 2006 ("UNCITRAL Model Law") with some local adaptations regarding the language of arbitration, the conditions for applying for interim reliefs, the grounds for setting aside arbitral awards, etc.

***2. In your practice when dealing with domestic arbitration, have you experienced more ad hoc or institutional arbitrations? If so, which arbitral institution(s) is/are commonly used to resolve commercial disputes in your jurisdiction? In your opinion, how effective are the products and services offered by the named institution(s)?***

**CA**: In the context of domestic commercial arbitrations, many cases have been subject to institutional arbitration rather than ad hoc arbitrations. Most of the domestic arbitration cases have been under the auspices of the Kuala Lumpur Regional Centre for Arbitration ("KLCRA"), now known as the Asian International Arbitration Centre ("AIAC"). The product and services offered by the AIAC have been effective.

**PP**: Based on my experience, domestic arbitration is generally institutional. As to which arbitration is more commonly involved, such depends on the nature of the dispute. For construction disputes, EO 1008 expressly vests unto CIAC original and exclusive jurisdiction over disputes arising from, or connected with, contracts involving construction in the Philippines. In view of EO 1008 and the seemingly compulsory jurisdiction of the CIAC (as pronounced by the SC), construction arbitration in the country is generally conducted under the auspices of the CIAC.

For non-construction disputes, the institutions vary. Although there are a number of arbitration centres in the country, the preeminent and dominant arbitration institution based in the Philippines is the Philippine Dispute Resolution Center, Inc. ("PDRC"), which is thus a frequent and popular choice among contracting parties. There are times, however, when the parties choose foreign institutions to administer the arbitration even if the seat remains to be in the Philippines.

In my opinion, the CIAC and the PDRC are effective in administering the arbitrations commenced before them and have been very responsive to the needs of its users. For example, when the COVID-19 pandemic struck and total lockdowns were imposed, these institutions quickly shifted to virtual proceedings and, thus, ensured that delays and disruptions were, if any, minimal. Moreover, these institutions are typically able to render awards within relatively short time frames, and these awards are generally sustained despite challenges made before higher courts.

**VS**: In practice, the use of ad hoc arbitration in Thailand is not as common as institutional arbitration. The most widely used arbitral institution is the Thailand Arbitration Institute ("TAI"), founded in 1990 and operated under the Office of the Judiciary. Although the costs are minimal, proceedings under the TAI can be rather inefficient with procedural delays compared to other regional institutions. This has opened the door for guerrilla tactics, particularly when it comes to frivolous challenges of arbitrators. In 2017, the TAI updated its Arbitration Rules to promote efficiency and deal with the procedural loopholes. Electronic filings and online document management platforms were also introduced. In 2017, the TAI conducted 115 cases. In 2019, it released amendments to its 2017 Arbitration Rules to increase the efficiency, transparency and predictability of TAI administered arbitrations.

In 2013, the Thailand Arbitration Centre (THAC) was established under the Ministry of Justice with its Arbitration Rules enacted in 2015. The THAC aims to attract international arbitrations with its competitive fees and state of the art hearing facilities in the centre of Bangkok. Although still in its early stages, it has been taking dynamic steps by holding regular conferences and trainings – over 50 since 2016. These include a training event in collaboration with the New York University School of Law and UNCITRAL. The THAC now runs its own annual ADR series. While the THAC has been very active, it remains to be seen how widely the THAC Arbitration Rules will be applied in contracts. To date, the THAC has already been used as a hearing facility in a number of proceedings and has registered close to 50 cases.

**DN**: Arbitration in Vietnam is often conducted in the form of institutional arbitration. Ad hoc arbitration is rarely used. Among 31 arbitration institutions in Vietnam,[7] Vietnam International Arbitration Centre ("VIAC") is the leading and most commonly used arbitration centre.

The current VIAC Rules of Arbitration adopt international best practice, such as rules on multiple contracts (Art. 16), consolidation (Art. 15) and expedited procedure (Art. 37).[8] It has also been observed that in certain VIAC-administered matters involving international arbitral tribunals, the proceedings have been conducted in accordance with high-quality international standards, for example, having Procedure Orders issued and applying the IBA Rules on the Taking of Evidence.

According to VIAC's Report, the average duration of an arbitral proceeding conducted at VIAC is less than six (6) months. VIAC is also one of the first arbitration institutions in Vietnam to have issued its own Code of Ethics for Arbitrators.

---

[5] Section 23 of the Thai Arbitration Act, 2002 (B.E. 2545) (AA).
[6] *Idem*
[7] The information of 31 arbitration institution can be found at the Web Portal of Ministry of Justice at <https://bttp.moj.gov.vn/qt/Pages/trong-tai-tm.aspx?Keyword=&Field=&&Page=4>, accessed on 22 July 2020.
[8] The VIAC's Rule of Arbitration can be found at the Web Portal of VIAC at <http://viac.org.vn/en/rules-of-arbitration.html>, accessed on 22 July 2020.

***3. What, if any, requirements must be met by an individual to become an arbitrator in your jurisdiction? Are there any barriers for foreign practitioners to serve as arbitrators or parties' representatives in your jurisdiction?***

**CA**: Neither Act imposes any special qualification requirements on arbitrators. Section 13 of the Act provides that no person shall be precluded by reason of nationality from acting as an arbitrator unless there is an agreement to the contrary. Arbitrators also do not need legal training. However, parties may contractually agree that arbitrators shall have specific qualifications by specifying this in their arbitration agreement or clause. It has also been suggested that as a matter of a minimum standard, an arbitrator must possess knowledge of the subject matter of the dispute.[9] Nevertheless, the High Court in *Sebiro Holdings Sdn Bhd v Bhag Singh & Anor* has held that the qualification of an arbitrator cannot be challenged in the absence of a clause to the contrary.[10]

Section 37A of the Legal Profession Act 1976, has no restrictions for international arbitrators and lawyers to participate in arbitral proceedings in Malaysia. This is implicitly reflected in Section 3A of the Act which specifies that a party to an arbitral proceeding may be represented by any party unless otherwise agreed by the Parties.

The AIAC prefers that the arbitrators listed on its panel to have sufficient arbitration training. Arbitrators are encouraged to be Fellows of the Chartered Institute of Arbitrators, and a number of the arbitrators are Chartered Arbitrators.

**PP**: Strangely, the requirements to be an arbitrator appear to differ depending on whether the proceeding is a domestic arbitration or otherwise. Notably, the ADR Act does not provide for any requirement to qualify as an arbitrator other than neutrality, impartiality and independence. However, under the old Arbitration Law (that governs domestic arbitration), an arbitrator must be "of legal age, in full enjoyment of his civil rights and know how to read and write". More importantly, the Arbitration Law further lists certain disqualifications such as relationship by blood or marriage, financial or fiduciary interest in the controversy as well as any personal bias that may prevent a fair and impartial award. For construction arbitration before the CIAC, however, the procedural rules provide that arbitrators shall be "persons in whom the business sector, particularly the stake holders of the construction industry and government, can have confidence" and "shall possess the competence, integrity and leadership qualities to resolve any construction dispute expeditiously and equitably". Nevertheless, for construction arbitration before CIAC, only CIAC-accredited arbitrators may be appointed.

Despite the foregoing, individuals who wish to be accredited in arbitral institutions in the Philippines must comply with their respective accreditation processes and requirements.

Foreign practitioners are not disqualified from serving as arbitrators in the Philippines, regardless of whether domestic, international commercial or construction arbitration. As to serving as a party representative, there is likewise no limitation due to nationality. However, such representative may not engage in the practice of Philippine law, which profession is limited to its citizens. Thus, foreign legal representatives, unless admitted to the Philippine bar, shall not be authorised to appear as counsel in any Philippine court or any quasi-judicial body even if in relation to the arbitration.

**VS**: The Thai Arbitration Act prescribes independence and impartiality as a minimum requirement for an arbitrator, along with any other requirements that may be applicable as per the parties' agreement or the applicable rules.[11] There are no other requirements for a Thai individual to become an arbitrator.

Foreign nationals, on the other hand, although permitted to sit as arbitrators, must comply with strenuous immigration and work permit laws. Foreign party representatives are also prohibited from representing clients in arbitration if the case is governed by Thai law, or the Award is to be enforced in Thailand.

However, in 2019, the Thai Arbitration Act was amended to remove certain obstacles to the participation of foreign arbitrators and party representatives in arbitration proceedings conducted in Thailand. Section 23 of the Amendment provides:

- A foreign individual appointed as arbitrator or representative in an arbitration in Thailand that is to be conducted by a government agency or organisation (like TAI or THAC), may request the agency or organisation to provide a certificate confirming this to the Thai officials for immigration and working of aliens;
- This certificate which will contain all relevant details, including the approximate duration of the arbitral proceedings, can be used to obtain a work permit allowing him or her to reside in Thailand during the time period specified in the certificate (subject to the relevant immigration laws); and
- Upon obtaining this certificate, a foreign arbitrator or representative may begin work in accordance with the applicable arbitral rules, even while his or her work permit application is pending.

It has been reported that foreign representatives have already obtained certificates and work permits under the amendment. However, cooperation between the relevant authorities, including the immigration department as well as the labour department and the arbitral institution, would be desirable to streamline the process.

In addition, the Thailand Board of Investment introduced Smart Visas for highly skilled foreign experts in 2019, a scheme that will benefit foreign arbitrators and party representatives. The Smart Visas are aimed at removing difficulties for highly-skilled foreign experts working in Alternate Dispute Resolution, including arbitrators, representatives, legal practitioners, speakers and tribunal secretaries to obtain work or re-entry permits.

**DN**: According to Art. 20 of the LCA, arbitrators must satisfy the following criteria:

(i) Having full civil legal capacity as prescribed in the Civil Code;
(ii) Possessing university degrees and having worked in the branches of their study majors for five years or more;
(iii) Not currently being a judge, prosecutor, investigator, enforcement officer, or official of a people's Court, of a people's procuracy, of an investigative agency or a judgment enforcement agency; and
(iv) Not being the one who under a criminal charge or prosecution or who are serving a criminal sentence or who have fully served a sentence but whose criminal record has not yet been cleared.

---

[9] *Salutory Avenue (M) Sdn Bhd v Malaysia Shipyard & Engineering Sdn Bhd & Anor* suggests [1999] 7 CLJ 514.
[10] [2014] 11 MLJ 761.
[11] Section 19 of the AA.

Nonetheless, in exceptional cases, an expert with high qualifications, and considerable practical experience, who only fails to satisfy the above second requirement may still be selected to act as an arbitrator.

The foreigners who meet these requirements can serve as arbitrators in both institutional and *ad hoc* arbitrations in Vietnam since the LCA does not impose any restriction on the nationality of the arbitrator. The VIAC's list of arbitrators includes 28 foreign arbitrators. From 2015 to date, parties have appointed 38 international arbitrators, both within and outside the VIAC's list of arbitrators.

Further, as regards the representation of parties, Vietnamese law allows foreign lawyers or non-lawyers to act as parties' representative in the arbitration proceedings in Vietnam by way of a power of attorney or letter of appointment of lawyers.

***4. Does the law in your jurisdiction consider certain disputes as non-arbitrable? If so, what disputes are non-arbitrable?***

**CA**: Arbitration agreements under the Act are not limited to commercial disputes, unlike the Model Law. Section 9(1) of the Act provides that an arbitration agreement may include references which arise from a relationship "whether contractual or not".

Section 4(1) of the Act expressly declares that subject matters of disputes which are "not capable of settlement by arbitration under the laws of Malaysia" are non-arbitrable, in addition to non-arbitrable matters on public policy grounds.

The notion of arbitrability of a dispute depends on the construction that is to be given to the arbitration clause. The Malaysian courts[12] have endorsed the approach in *Fiona Trust & Holding Corporation and others v Privalov and others*.[13] The courts have held that fraud,[14] civil disputes[15] relating to acts, duty or functions carried out by a statutory body and tortious claims,[16] are arbitrable. The Federal Court[17] has held that matters falling within the scope of the summary determination procedure for defaults on a registered charge under the National Land Code 1965 are non-arbitrable on public policy considerations.

**PP**: Yes, the ADR Act and its implementing rules and regulations list the following disputes and/or subject-matters as non-arbitrable, namely:

- Labour disputes;
- Civil status of persons;
- Validity of a marriage or legal separation;
- Any ground for legal separation;
- Jurisdiction of courts;
- Future legitime;
- Criminal Liability;
- Future support;
- Disputes which by law cannot be compromised; and
- Disputes referred to court-annexed mediation.

**VS**: The Arbitration Act, in line with the UNCITRAL Model Law, merely specifies arbitrable matters as "a defined legal relationship, whether contractual or not".[18] It is generally understood that this covers matters that are civil in nature, including commercial disputes and questions arising out of contractual and business relationships. Typical examples of subjects that are normally non-arbitrable include disputes involving criminal matters, divorce, bankruptcy, business rehabilitation and the appointment of the administrator of an estate.

That being said, caution should be taken in contracts with State entities which may require cabinet approval in order to enter into an arbitration agreement pursuant to the 2015 cabinet resolution.

**DN**: Pursuant to Art 2 of the LCA, the following disputes can be resolved by arbitration:

(1) Disputes between parties arising from commercial activities;
(2) Disputes arising between parties at least one of whom engages in commercial activities; and
(3) Other disputes between parties which the law stipulates that it may be resolved by arbitration.

As provided by the Commercial Law, "commercial activities" are defined as activities for profit-making purposes including sale and purchase of goods, services, investment, trade promotion, etc. Therefore, matters such as criminal, administrative, matrimonial, and labour disputes are considered to be non-arbitrable. Furthermore, the dispute may be regarded as non-arbitrable if it falls within the exclusive jurisdiction of Vietnamese laws under Article 470 of the CPC, such as cases involving rights to immovable property in Vietnam. Notably, tort claims may not be arbitrable in Vietnam.

The latest Draft Resolution guiding certain provisions of Civil Procedure Code on recognition and enforcement of foreign arbitral awards of the Supreme People's Court also clarifies some disputes which are considered as non-arbitrable, such as disputes over registration or validity of patents, industrial designs, semiconductor integrated circuit layout designs, trademarks, trade names, geographical indications, and other intellectual property rights, and disputes relating to enterprise registration, and other obligations to register or notify under the Law on Enterprise.

***5. What is the procedure for commencing arbitration in your jurisdiction? Does the law provide default rules governing the commencement of arbitral proceedings? Is there a period of limitation that parties should be aware of?***

**CA**: The parties are free to agree on the procedure to be followed by the tribunal, provided the procedure does not contravene any provisions of the Act. The parties may choose institutional arbitration rules or an ad-hoc arbitration.

---

[12] *KNM Process Systems Sdn Bhd v Mission Newenergy Ltd [2013] 1 CLJ 993; The Government of India v Cairn Energy India Pty Ltd & Ors [2014] 9 MLJ 149; RUSD Investment Bank Inc & Ors v Qatar Islamic Bank & Ors [2015] LNS 231.*
[13] *[2007] UKHL 40*
[14] *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2015] 5 AMR 30.
[15] *Pendaftar Pertubuhan Malaysia v. Establishment Tribunal Timbangtara Malaysia & Ors* [2011] 6 CLJ 684.
[16] *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394.*
[17] *Arch Reinsurance Ltd v Akay Holdings Sdn Bhd* (Federal Court Civil Appeal No. 02(f)-9-03/2016(W)). A charge registered under the National Land Code gives the charge an interest in the land with a statutory right to enforce its security by way of a sale of land under Sect. 253 of that Code, or by taking possession thereof under Sect. 271 in the event of the charger's default. The legal title in the land remains vested in the registered proprietor of the land until the sale or taking of possession.
[18] Section 11 of the AA.
[19] See *Amalgamated Metal Corporation Ltd v Khoon Seng Co* [1977] 2 Lloyd's Rep 310 at 317.

In the absence of procedural rules, the tribunal can conduct proceedings in a manner it considers appropriate. The procedure is laid out in Sections 20 to 29 of the Act. It is decided by the arbitrator, subject to any agreements that may have been reached by the parties, and is subject to the overriding rules of fairness and natural justice.[19]

Hearings are held orally unless parties agree to a document-only arbitration. The tribunal must hold an oral hearing if requested by the parties.

Section 25 of the Act sets out the procedure for identifying the issues in dispute. The parties normally would file the Points of Claim followed by Points of Defence and Counterclaim and other consequential pleadings. The tribunal can terminate proceedings if a Claimant fails to deliver the pleadings within the time stipulated. If the Respondent fails to deliver a defence or fails to appear at the hearing or produce documents, the tribunal may proceed with the arbitration and hand down an Award.

Each party must be notified of the hearing so that they can effectively prepare their case and make effective submissions. The arbitration should not proceed if one of the parties is not aware of the hearing.

There is also no requirement that the parties need to be represented by legally qualified persons and international lawyers can participate in arbitrations in Malaysia, save for the states of Sabah and Sarawak where there are restrictions on non-Sabah and non-Sarawak advocates.

Section 30 of the Limitation Act 1953 and any other written law relating to the limitation of actions applies to arbitrations. An arbitration agreement can include a clause requiring a dispute to be referred to arbitration within a specified period.

**PP**: In the absence of party agreement, the implementing rules and regulations of the ADR Act prescribe the default process by which domestic arbitration and international commercial arbitration are commenced. These implementing rules state that international commercial arbitration is commenced by the receipt by one party (that is, the respondent) of another party's (the claimant's) request to submit a particular dispute to arbitration. The commencement procedure for domestic arbitration is more detailed in view of the provisions of the old Arbitration Law (or RA 876). Domestic arbitration proceedings are commenced when the claimant delivers to the respondent a demand for arbitration containing (i) the name, address, and description of each of the parties; (ii) a description of the nature and circumstances of the dispute giving rise to the claim; (iii) a statement of the relief sought, including the amount of the claim; (iv) the relevant agreements, if any, including the arbitration agreement, a copy of which shall be attached; and (v) appointment of arbitrators and/or demand to appoint.

Notably, for institutional arbitration, the institutional rules generally provide for their respective procedures for commencement of a proceeding.

As to the statute of limitations, the Philippine Civil Code prescribes various periods for the commencement of actions. The term "action" in these statutes of limitation provisions is typically understood to refer to suits filed in the regular courts of justice. There is, as of yet, no jurisprudence available on whether the prescriptive periods for the commencement of various types of "actions" contained in the Philippine Civil Code apply to arbitrations. There is also no SC decision stating that prescriptive periods are satisfied when arbitration proceedings are commenced within these periods pursuant to the dispute resolution clauses of the agreement. There is also no clear jurisprudence on whether the commencement of an arbitration proceeding (pursuant to the parties' agreement) constitutes an extrajudicial demand that, under the Philippine Civil Code, would interrupt the running of the relevant prescriptive period (or statute of limitation). With this lack of clarity, it is recommended that contracting parties agree on this point.

**VS**: Procedures for commencement of an arbitration are subject to the arbitration agreement and the applicable arbitral rules. Thai courts do not refer disputes brought to the courts in breach of an arbitration agreement to arbitration of their own accord. The party against whom such court proceedings are brought may file an application to strike out the case which must be made no later than the date of filing of the defence or within the period for filing the statement of defence under the law. If the court is satisfied of the existence of the arbitration agreement and its validity, it must strike out the case. Pending the application to have the case dismissed, either party may commence arbitration or a tribunal already constituted may continue to proceed and render an award. In practice, Thai courts have shown willingness to enforce arbitration agreements and dismiss litigation that is commenced in breach of such agreements.

The period of limitation is specified in the Civil and Commercial Code depending on the type of dispute. Special care with limitation periods must be taken where contracts contain escalation clauses, since pre-arbitral negotiation or mediation, will not stop the clock for limitation.

**DN**: In accordance with Article 31 of the LCA, the time of commencement of arbitration proceedings, in case of institutional arbitration, shall be upon the receipt by the arbitration centre of the Statement of Claim from the Claimant. As regards ad hoc arbitration, the arbitration proceedings are deemed to have commenced when the Respondent receives the Statement of Claim from the Claimant.

In addition to the rules on determining the commencement date, the LCA requires the Statement of Claim to contain these following contents:

(a) The date on which the statement of claim is made;
(b) Names and addresses of the parties, and names and addresses of witnesses, if any;
(c) Summary of the matters in dispute;
(d) Grounds and evidence, if any, of the claim;
(e) Specific relief sought by the claimant and value of the dispute;
(f) Name and address of the person whom the Claimant selects as arbitrator or Request for an arbitrator to be appointed.

The statute of limitations to initiate arbitration proceedings is a complicated issue which shall be subject to the substantive law, such as the commercial law, the civil code, the maritime code, etc. In case the substantive law does not specify, the limitation period for commencing an arbitration shall be two years from the date of the infringement of a party's legal rights and interests.[20]

[19] See *Amalgamated Metal Corporation Ltd v Khoon Seng Co* [1977] 2 Lloyd's Rep 310 at 317.
[20] Art. 33 of the LCA.

***6. What is the procedure for commencing arbitration in your jurisdiction? Does the law provide default rules governing the commencement of arbitral proceedings? Is there a period of limitation that parties should be aware of?***

**CA**: Malaysia continues its growth as a centre for arbitration. The Act provides a coherent modern legislative framework in line with international norms and best practices. Malaysia has all the components in place to take off as a centre for international arbitration. Recent decisions of the country's courts underscore the fact that the Malaysian judiciary is now pro-arbitration.

Given the current arbitral landscape and the progressive and innovative approach taken by the AIAC in promoting Malaysia as a cost-efficient centre for dispute resolution, the country is suitably poised to tap into the significant growth of international arbitration within the member countries of the ASEAN and the Asia-Pacific region.

Section 8 of the Act expressly provides that no court may intervene in any matter governed by the Act unless otherwise provided. The Malaysian courts do not have any inherent power to take over or intervene in arbitral proceedings. This encapsulates the principles of party-autonomy and minimalist intervention by courts of law.[21] In line with these principles, it has been emphasised by the judiciary that when parties have agreed to arbitration, a court of law should be slow to interfere in the arbitration. The Malaysian courts are also taking a strict approach to intervention in arbitral proceedings in view of the provisions of Section 8 of the Act.[22]

The court can interfere if it involves obvious injustice, or where the Director of the AIAC has not made an appointment within 30 days from the request and the parties have applied to the High Court for an appointment under section 13(7) of the Act.

**PP**: Pursuant to express state policy in the ADR Act, and in furtherance of the SC's policy in favour of arbitration, local courts generally exhibit a pro-arbitration bias. Courts are generally supportive of the conduct of arbitration, defer to the competence of arbitral tribunals to resolve arbitrable disputes, and exercise restraint in interfering in arbitration proceedings unless specially permitted under the SC ADR Rules. The court's role in arbitration has been to complement, rather than supplant, the powers of the arbitral tribunal. Thus, courts have exhibited willingness to assist parties to an arbitration by granting applications for interim measures of protection, enforcing confidentiality obligations, and even assisting whenever coercive processes against third parties are necessary. Indeed, as allowed by the ADR Act, courts have even issued interim relief to preserve the status quo or preserve assets even before arbitration is actually commenced.

Courts' intervention is governed and necessarily limited by the ADR Act and the SC ADR Rules. Courts may not interfere beyond the powers provided in the SC ADR Rules to afford the arbitral tribunal the preeminent jurisdiction it exercises over disputes subject of an arbitration agreement.

**VS**: Thai courts tend to uphold arbitration agreements and dismiss attempts to undermine arbitration through court proceedings. Courts are also empowered to grant interim or provisional measures pending an arbitration.[23] Requests can be made to a court by the arbitral tribunal for a subpoena or order for submission of documents or other materials.[24]

**DN**: For foreign-seated arbitration, Vietnamese laws do not allow the courts to intervene in the arbitral proceedings.

Whereas, when the arbitration is administered by a foreign institution and has the seat of arbitration in Vietnam, such arbitration is still considered as a "foreign arbitration" under Vietnamese laws. According to Art. 5(5)(a) of Resolution No. 01, the Vietnamese Courts have authority to intervene in the arbitral proceedings, except for considering the annulment of arbitral awards, and registering foreign ad-hoc arbitral awards. Accordingly, local courts can intervene to assist foreign arbitrations seated in Vietnam through the:

- appointment of an arbitrator to establish an ad hoc arbitral tribunal;
- replacement of an arbitrator in an ad hoc arbitral tribunal;
- consideration of a petition against the decision of an arbitral tribunal that the arbitration agreement is void or incapable of being performed or about the jurisdiction of the arbitral tribunal;
- collecting evidence;
- granting interim reliefs; and
- summoning witnesses.

***7. What are the grounds to challenge arbitral awards in your jurisdiction's local court? What is the judiciary's approach to determining whether or not to grant a challenge to an arbitral award?***

**CA**: There is no appeals procedure against an award made in Malaysia under the Act. The only recourse is to set aside the award which must be made within ninety days of receipt of the award. The grounds for setting aside an award are set out in Section 37 of the Act, namely, the award is contrary to the public policy of Malaysia, fraud, or a breach of the rules of natural justice. Section 37 has been interpreted by our courts narrowly in the interests of ensuring finality and conclusiveness of the award made by a tribunal.

The courts have adopted a narrow test in determining whether an award should be set aside on the grounds of public policy. The error has to be of such a nature that the enforcement of the award would "shock the conscience", be "clearly injurious to the public good" or would contravene "fundamental notions and principles of justice". The other ground would be where there has been a breach of natural justice.

**PP**: The grounds to challenge an arbitral award depends on whether it is a domestic or an international commercial arbitration award.

For international commercial arbitral awards, the grounds available to challenge, set aside or refuse enforcement are consistent, if not identical, with the grounds provided in the 1985 UNCITRAL Model Law (as well as the New York Convention):

- a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the Philippines; or
- the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case; or

[21] *Cobrain Holdings Sdn Bhd v GDP Special Projects Sdn Bhd [2010] 1 LNS 1834*
[22] *Sunway Damansara Sdn Bhd v Malaysia National Insurance Bhd & Anor [2008] 3 MLJ 872*
[23] Section 16 of the AA.
[24] Section 33 of the AA.

- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only the part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement unless such agreement was in conflict with a provision of ADR Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with ADR Act; or
- the subject-matter of the dispute is not arbitrable under Philippine law; or
- the award is in conflict with the public policy of the Philippines.

For domestic awards, however, the grounds to challenge and vacate (not just correct) are as follows: (i) the award was procured by corruption, fraud or other undue means; (ii) there was evident partiality or corruption in the arbitral tribunal or any of its members; (iii) the arbitral tribunal was guilty of misconduct or any form of misbehaviour that has materially prejudiced the rights of any party; (iv) one or more of the arbitrators was disqualified to act as such and wilfully refrained from disclosing such disqualification; or (v) the arbitral tribunal exceeded its powers, or so imperfectly executed them, such that a complete, final and definite award upon the subject matter submitted to it was not made.

For both domestic or international commercial arbitral awards, courts are mandated by the ADR Act and the SC ADR Rules to disregard any other ground raised to question, challenge, vacate or set aside the arbitral award. And, more importantly, in line with the pro-arbitration state and judicial policy, courts are not allowed to review the merits of the award rendered by an arbitral tribunal.

**VS**: The grounds for challenging an award are as follows: (1) the incapacity of a party to the arbitration agreement; (2) the invalidity of the arbitration agreement; (3) lack of proper notice of the proceedings or other inability of a party to present its case; (4) the award deals with a dispute which is not within the scope of the arbitration agreement; (5) a flaw in the composition of the tribunal;[25] or (6) where the dispute in question was not capable of settlement by arbitration or violated public policy.[26] The court is therefore not entitled to revisit or reconsider the substantive merits of the case.

Thai courts are increasingly willing to enforce awards in disputes between private parties. However, it is not uncommon for the losing party to challenge an award then appeal any rejection of the challenge rejection. Such appeal goes directly to the Supreme Court or the Supreme Administrative Court, bypassing the Court of Appeal. This can result in a substantial delay as Supreme Court decisions can take 3-5 years. The public policy ground for annulment, particularly in cases involving State entities, can receive broad and vague interpretations. This results in a number of high-profile cases involving the State being annulled such as *Bangna Expressway Plc v ETA*,[27] and the *ITV enforcement* case. [28]

**DN**: The LCA prescribes five (5) grounds for setting aside arbitral awards, which resemble the grounds under the UNCITRAL Model Law, save for the following:

- The evidence supplied by the parties on which the Arbitral Tribunal relied to issue the award is forged; or an arbitrator receives money, assets or some other material benefits from one of the parties in dispute which affects the objectivity and impartiality of the arbitral award; and
- The arbitral award is contrary to the fundamental principles of the law of Vietnam.

In practice, it could be said that the number of arbitral awards being set aside by Vietnamese courts is still high. From 2011 to 2014, around 50% of the challenges to VIAC arbitral awards were granted.[29] From 2015 through 2017, the situation seemed to be better with only 3 VIAC awards being set aside.[30] Nevertheless, the number of awards being set aside has recently been increasing. In 2019, based on the public data of the Supreme People's Court, 5 out of 17 (or 29%) applications for annulment of arbitral awards were accepted by Vietnamese courts.[31] One of the most common grounds that the Vietnamese courts often rely on to review the arbitral award and/or grant the challenge to arbitral awards was *"the violation of the fundamental principle of Vietnamese laws"*.

***8. The jurisdiction of an arbitral tribunal is often denied by a party to an arbitration proceeding. Does your jurisdiction recognise the principle of kompetenz-kompetenz***

**CA**: The doctrine of *kompetenz-kompetenz* applies in Malaysia pursuant to Section 18(1) of the Act, which corresponds with Article 16 of the Model Law. There are two crucial aspects to the doctrine, namely, the tribunal can rule on its own jurisdiction without the need for support from the court, and the courts need not determine the issue before the tribunal has had a chance to consider it.

The jurisdiction of the tribunal includes any objections to the existence or validity of the arbitration agreement. Two types of pleas can be made to the tribunal pursuant to Section 18 of the Act, namely, the tribunal does not have jurisdiction, and it is exceeding its authority. An appeal must be lodged within 30 days to the High Court; hence the tribunal's decision on the issue of jurisdiction is not final.

In *TNB Fuel Services Sdn Bhd v China National Coal Group*,[32] the Court held that a tribunal could hear and determine a jurisdictional challenge, which is consistent with the general attitude of the courts to lean in favour of arbitration.

While an appeal is pending, the tribunal can continue the arbitral proceedings and make an award.[33] The courts are unlikely to order a stay of the arbitral proceedings unless the tribunal has no jurisdiction.

---

[25] *Section 40(1) of the AA.*
[26] *Section 40(2) of the AA.*
[27] *Supreme Court Decision No 7277/2549 (2006).*
[28] *Supreme Administrative Court Case No 349/2549 (2006).*
[29] *http://www.viac.vn/tin-tuc-su-kien/to-tung-trong-tai-toa-an-phai-ho-tro-dac-luc-n378.html, accessed on 22 July 2020.*
[30] *http://www.viac.vn/thong-ke, accessed on 22 July 2020.*
[31] *Nguyen Ngoc Minh, Nguyen Thi Thu Trang and Nguyen Thi Mai Anh, Enforceability of arbitral awards in Vietnam- alarming practice, The Asia- Pacific Arbitration Review 2021, Law Business Research, p. 103.*
[32] *[2013] 4 MLJ 857*
[33] *Section 18(9) of the Act.*

**PP**: The principle of *kompetenz-kompetenz* is expressly recognised by the various ADR laws, the SC ADR Rules, and settled jurisprudence.

**VS**: Thailand recognises the principle of kompetenz-kompetenz.[34] Specifically, the arbitral tribunal has the authority to decide upon its own jurisdiction, the existence and validity of the arbitration agreement, the validity of the appointment of the tribunal, and issues of dispute falling within the scope of its jurisdiction. Jurisdictional challenges must be raised no later than the filing of the statement of defence except where a party challenges an arbitrator or alleges that the tribunal is exceeding the scope of its authority.[35]

**DN**: Yes, the principle of kompetenz-kompetenz is recognised in Art. 43 of the LCA. Accordingly, prior to dealing with the merits of a dispute, the Tribunal is required to rule on its own jurisdiction. The Resolution 01 of the Supreme People's Court further provides that where a Statement of Claim has been filed, and the Arbitral Tribunal has been dealing with the dispute, even though the Court realises that the dispute is not subject to the jurisdiction of the Tribunal, there is no arbitration agreement, or the arbitration agreement is incapable of being performed, and one party requests the Court to resolve the dispute, the Court shall return the petition to the petitioner. Where the Court has enrolled the case, the Court shall decide to suspend the case. However, the local courts, at a request of a party, shall have the power to review such Tribunal's decision on jurisdiction. The decision of Court shall be final and binding on the parties and the Tribunal.

***9. Are the courts and arbitral tribunals entitled to award interim relief in your jurisdiction? If, so what types of relief are available to each?***

**CA**: The powers of the court to order interim measures are set out in Section 11 of the Act which was amended in 2018. A party may either before or during arbitral proceedings, apply to the High Court for the following orders:

(a) Maintain or restore the status quo pending the determination of the dispute;
(b) Take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of an arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
(d) Preserve evidence that may be relevant and material to the resolution of the dispute; or
(e) Provide security for the costs of the dispute.

Section 19 of the Act provides that unless agreed otherwise by the parties to the arbitration, a tribunal can grant interim measures analogous to those of the High Court.

Interim measures should be applied to the tribunal before an application is made to the High Court. A party may, when an application for interim measures is refused by the tribunal, make a further application pursuant to Section 11 to the High Court.

**PP**: The ADR Act expressly allows arbitral tribunals and, under certain circumstances, courts to issue interim measures of protection that are intended to: (i) prevent irreparable loss or injury; (ii) provide security for the performance of an obligation; (iii) produce or preserve evidence; or (iv) compel any other appropriate act or omission. Note: courts may issue such interim relief only under limited circumstances such as prior to the commencement of arbitration, prior to the constitution of the tribunal, or whenever a tribunal has no power to act, or is unable to act, effectively.

Among the possible interim measures of protection that a court may grant include preliminary injunction directed against a party to arbitration; preliminary attachment against property or garnishment of funds in the custody of a bank or a third person; appointment of a receiver; or detention, preservation or delivery of property.

**VS**: Under Thai law, arbitrators are not empowered to order interim measures or other forms of provisional relief. A party may, therefore, seek provisional measures from the competent court either before or during the arbitration proceedings.[36] Courts are empowered to pass orders for deposit of money as a security, seizure of property or funds, temporary injunctions to restrain a party from continuing or repeating any act, and orders directing public officials to register, modify or cancel registrations relating to property. Parties may even make emergency applications for provisional measures if they are able to prove the existence of an emergency. However, the new 2017 TAI Arbitration Rules have provided for the tribunals to order interim relief.[37] The enforcement of a tribunal's interim order may require the court's assistance where compliance is not voluntary.

**DN**: Under Article 49.2 of the LCA, the Arbitral Tribunal or the Court can grant one or more of the following interim reliefs:

(i) Prohibition of any change in the status quo of the assets in dispute;
(ii) Prohibition of acts that are adverse to the arbitration proceedings or ordering one or more specific actions to be taken by a party in dispute in order to prevent those acts;
(iii) Attachment of the assets in dispute;
(iv) The requirement of preservation, storage, sale, or disposal of any of the assets of one or all parties in dispute;
(v) A requirement of interim payment of money as between the parties; and
(vi) Prohibition of transfer of property rights of the assets in dispute.

Besides the interim reliefs listed above, the local Court has exclusive power to grant other interim reliefs under Art. 114 of the Civil Procedure Code, including inter alia:

(i) Freezing of accounts at banks, other financial institutions, or state treasuries;
(ii) Freezing of assets at places of deposit; and
(iii) Freezing of obligor's assets.

[34] Section 24 of the AA.
[35] *Idem*.
[36] Section 16 of the AA.
[37] Article 29 of the TAI Arbitration Rules 2017.

Notably, a party cannot request the Arbitral Tribunal and the local Court concurrently to order the same interim relief in an arbitration proceeding.

***10. Your jurisdiction is a party to Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). Do the grounds for refusing enforcement of an arbitral award in your jurisdiction differ from those specified in the New York Convention? Is there any limitation period applicable to enforce a foreign arbitral award in your jurisdiction?***

**CA**: Sections 38 and 39 deal with recognition and enforcement of foreign arbitral awards and the grounds for refusing same. These sections apply both to awards sought to be enforced in Malaysia in respect of domestic and foreign awards. These provisions mirror Articles 35 and 36 of the Model Law and the provisions of the New York Convention.

Section 38 sets out the procedure to enforce a foreign award[38] and allows for awards made in an international arbitration with a seat in Malaysia to be enforceable.

Section 39 deals with grounds for refusing recognition or enforcement, which grounds are exhaustive. The courts adopt a narrow interpretation of 'public policy' in setting aside applications and the same applies in respect of Section 39 of the Act.[39]

There is no decision in Malaysia which directly addresses the notion of a passive remedy in the event a party does not raise a plea of no jurisdiction.

Section 38 is a 'recognition procedure' to convert an arbitration award to a judgment and can only be done by the person holding an arbitration award, and it is impermissible to argue the merits. The arguments relating to merits are only permitted pursuant to Section 39.

International arbitral awards rendered outside the Malaysian jurisdiction are enforceable if they are issued from states which are parties to the New York Convention.

**PP**: The grounds to refuse recognition and/or enforcement of a foreign arbitral award under the ADR Act are consistent, if not identical, with the grounds provided in the New York Convention. At the moment, there is no specific period under the ADR Act within which petitions to enforce foreign arbitral awards should be filed in the Philippines.

**VS**: Thai courts are entitled to refuse enforcement on the grounds specified in the New York Convention,[40] as well as if it considers that enforcement would contravene public policy and good morals of the people.[41] In practice, Thai courts tend to apply these grounds fairly. However, the public policy ground can occasionally be broadly interpreted, particularly in cases involving State entities.

The Thai Arbitration Act requires a party seeking an enforcement to file an application with the competent court within a period of three years from the date on which the award is issued.

**DN**: The recognition of foreign arbitral awards is regulated by Part Seven of the CPC. To be considered for recognition and enforcement by Vietnamese courts, the arbitral award must "*settle the entire dispute, terminate the arbitral proceedings and be effective*".[42] Therefore, interim awards cannot be recognised and enforced in Vietnam. Besides, as mentioned above, regardless the seat of arbitration, arbitral awards issued by a foreign arbitral institution shall be considered as foreign arbitral awards, meaning that such award must be recognised by Vietnamese courts to be enforced in Vietnam.

The grounds to refuse recognition of foreign arbitral awards in the CPC are provided in Article 459 of the CPC, which resemble the grounds under the New York Convention and the UNCITRAL Model Law, except for the replacement of the public policy concept with the fundamental principles of Vietnamese law.

The time limit for a party to submit an application for the recognition and enforcement of foreign awards in Vietnam is three (3) years as from the date the arbitral award became legally effective.

***11. What are the current trends or issues affecting the use of arbitration in your jurisdiction? Would you describe your jurisdiction as pro-arbitration in nature? Why or why not?***

**CA**: Arbitration is popular in Malaysia. Many of the arbitrations that take place in Malaysia appear to be construction-based, although there are also a significant number of commercial arbitrations. A current topic amongst practitioners is whether there should be appeals to the High Court on a point of law as provided in the previous Section 42 of the Act which was repealed in 2018. There is a call for reinstating the said provision with a filter mechanism. It remains to be seen whether Section 42 will be revisited.

No Director of the AIAC that has been appointed since the demise of the previous Director. This has an impact on the registering of arbitrations by the AIAC as well as an impact on the appointment of arbitrators and adjudicators given the statutory provisions in place under the Act and the Construction Industry Payment and Adjudication Act 2012. Steps should be taken to appoint a Director on an urgent basis; otherwise, the AIAC as an arbitral institution is likely to be impaired.

It is hoped that given Malaysia is a pro-arbitration jurisdiction that remedial steps will be adopted soon to ensure the AIAC is able to reach its full potential as an attractive arbitral institution and Malaysia as a premier arbitration jurisdiction within Asia.

**PP**: The live issues that are currently subject of much debate include the binding effect of emergency arbitration decisions and/or reliefs; the extent of the coverage of the legally mandated confidentiality obligation in arbitration; the challenges arising from the CIAC's seemingly compulsory jurisdiction over construction disputes; as well as the extent of a court's power to issue interim relief even before the commencement of arbitration, and the power of an arbitral tribunal to reverse the same.

---

[38] *The way such an application is to be made is set out in Order 69 rule 8(1) of the Rules of Court 2012. The application may be made on an ex parte basis. In Tune Talk Sdn Bhd v Padda Gurtaj Singh [2019] MLJU 67, the Court of Appeal held that the provisions of Sections 38 and 39 are exhaustive and that there is no room for any other substantive requirements to be satisfied for the recognition and enforcement of an arbitral award. The Court of Appeal further held that the provisions of Order 69 rule 8(1) of the Rules of Court 2012 merely set out the procedural means to obtain enforcement and recognition of the arbitral award. An act of non-compliance with the procedural requirements is therefore not fatal.*

[39] *See Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd [2012] 5 MLJ 809 and the discussion under section 'H. Challenge and Other Actions against the Award' above.*

[40] Section 43 of the AA.

[41] Section 40(2) of the AA.

[42] Article 3.10 of the LCA.

As mentioned earlier, the Philippines has expressly adopted a state policy that is pro-arbitration. This state policy has been mirrored in various SC decisions as well as expressly prescribed in the SC ADR Rules. Indeed, this pro-arbitration policy (if not, pro-arbitration bias) is illustrated by the clear mandate of the courts to refer the parties to arbitration whenever an arbitration agreement is alleged to exist, and the pre-eminence of the arbitral tribunal's decisions vis-à-vis interim measures earlier granted by the courts. More importantly, the SC's consistent reminder in its decisions that courts are not permitted to review the merits of an arbitral award is reflective of the Philippines' pro-arbitration nature.

**VS**: Thailand is increasingly adopting a pro-arbitration attitude. The amendment to the Thai Arbitration Act to provide work permits is a positive change in the right direction. However, there are still some additional processes, such as the requirement of a pre-entry visa and a health certificate, that should be abolished. The THAC and TAI are both conducting training with the government and judiciary to improve their knowledge of arbitration. The timeline for enforcement of awards is also generally now shorter, approximately one year. From experience, the courts have readily enforced awards in cases involving private parties. In addition, the Supreme Administrative most recently reinstated a *Hopewell Holdings Company* award in a case involving the State entity.[43]

The lifting of a total ban of arbitration clauses in State contracts in 2015 is another significant development in Thailand.

**DN**: Firstly, in 2016, Vietnam adopted the Decree on Commercial Mediation No. 22/2017/ND-CP. The mediated settlement agreement could be recognised by the Vietnamese court and on that basis, shall be enforced as a court judgment in Vietnam.[44] Accordingly, it is expected that the multi-tiered dispute resolution with 'Med-Arb' and 'Arb-Med-Arb' regimes will be more and more favoured by foreign investors, as well as their local partners.

Secondly, Vietnam currently has 31 arbitration centres.[45] In December 2019, the Korean Commercial Arbitration Board was also permitted to establish an overseas office in Vietnam. The rising number of arbitral institutions in Vietnam demands that all these institutions provide the highest quality services and procedural rules to compete with each other. Also, the judicial support of the courts towards foreign arbitration seated in Vietnam has received more attention.

Thirdly, to mitigate the adverse consequences of COVID-19 pandemic, or any other pandemic may occur in the future, virtual hearings and e-documents will be more popular in Vietnam. However, it may take more time for Vietnam to study and implement virtual hearings/meetings in accordance with international standards.

Lastly, to date, Vietnam has become a party of 67 Bilateral Investment Treaties ("BITs")[46], 13 Free Trade Agreements ("FTAs"), and is in the negotiation process for three others.[47] The investor-state dispute settlement clauses under these BITs and FTAs certainly affect how the Vietnamese Government handles investment claims, as well as improve investment arbitration in Vietnam.

As stated above, the LCA has adopted fundamental principles under the UNCITRAL Model Law; the grounds to refuse the recognition and enforcement of foreign arbitral awards in the CPC basically resemble the grounds under the New York Convention. To be specific, the Claimant shall have the right to select the arbitration forum and the arbitration institution to resolve the dispute, in case parties agreed to settle their dispute by arbitration but failed to clarify the arbitration forum or a particular arbitration institution. Additionally, the Court must refuse to enrol or dismiss the case if the dispute is subject to an existing arbitration agreement.[48] Therefore, it could be said that the domestic arbitration legal regime of Vietnam adopts an arbitration-friendly approach.

However, Vietnam has not been described as a pro-arbitration jurisdiction due to some gaps between Vietnamese law, the UNCITRAL Model Law, and the New York Convention, as mentioned above. In addition, Vietnam is regarded as a jurisdiction where it is difficult to enforce foreign arbitral awards.[49] In fact, from 2015 to 2019, around 21% of the applications for recognition and enforcement were rejected by Vietnamese courts. The said situation, nevertheless, is expected to improve due to the Vietnamese government's policy to encourage the use of arbitration and ADR, as well as the upcoming legal reforms in Vietnam.

***12. In your opinion, is there a shift from Western jurisdictions to Eastern jurisdictions with regards to the preferred seat of arbitration? If so, how should ASEAN countries capitalise on this opportunity?***

**CA**: I do not see a truly major shift from Western jurisdictions to Eastern jurisdictions. There is no doubt that there has been in recent times a considerable number of arbitrations in Singapore, Hong Kong and to a limited extent, in Malaysia but it cannot be denied that most of the major commercial arbitration disputes and investment treaty claims are seated in Europe and North America. In so far as ASEAN countries are concerned, the only way in which they can take steps to attract arbitrations to this part of the world is for (i) the incorporation of appropriate local legislation to support arbitration as an alternative to domestic litigation before the national courts, (ii) national courts through their decisions to establish jurisprudence that is arbitration-friendly, (iii) there to be clear support from the business community for arbitration and (iv) ultimately, financial and political backing from the relevant Governments within the region in support of arbitration as an alternative or preferred dispute resolution mechanism.

Not all countries within Asia, and for that matter ASEAN, are strictly Model Law countries. It may be opportune to ensure harmony in the conduct of arbitration disputes and the enforcement of arbitral awards across the region that the Model Law is consistently adopted. The economic benefits of such an approach would be beneficial to the ASEAN countries as a whole, in so far as commercial arbitrations are concerned.

**PP**: In my experience, I see that contracting parties, especially those based in the ASEAN region, are now more and more willing to select seats in so-called Eastern jurisdictions with experienced arbitral institutions – such as China, Hong Kong and Singapore – where, in the past, Western jurisdictions were the predominant preference. Whether this is due to the perceived strength of the arbitration law of the seat, proximity in geography, assumed neutrality or expected cost savings, this appears to be a growing

[43] Supreme Administrative Court Case No 410-412/2557 (2019).
[44] Art. 419 CPC.
[45] The information of 31 arbitration institution can be found at the Web Portal of Ministry of Justice at <https://bttp.moj.gov.vn/qt/Pages/trong-tai-tm.aspx?Keyword=&Field=&&Page=4>, accessed on 22 July 2020.
[46] https://investmentpolicy.unctad.org/international-investment-agreements/countries/229/viet-nam, accessed on 22 July 2020.
[47] http://www.trungtamwto.vn/thong-ke/12065-tong-hop-cac-fta-cua-viet-nam-tinh-den-thang-112018, accessed on 22 July 2020.
[48] Art. 2(2) Resolution 01.
[49] Anselmo Reyes, Weixia Gu, *The developing World of Arbitration: A comparative Study of Arbitration Reform in the Asia Pacific*, Bloomsbury Publishing, 2018.

trend. The ASEAN countries, especially those whose arbitration laws are not yet fully developed, should consider revamping their laws to be competitive. In addition, jurisdictions that have arbitral institutions that are not as known outside their borders must double their efforts to ensure they become familiar to users in the region and further ensure that their rules are consistent with global best practices. As a region, it may be ideal for the ASEAN countries to consider entering into regional or multilateral conventions that would facilitate enforcement of awards across jurisdictions by, at least, simplifying or harmonising the procedural requirements therefor especially those that pertain to authentication and/or certification of arbitral awards and arbitration agreements.

**VS**: There is certainly a shift to Eastern jurisdictions, and it is largely due to the increase in cross-border trade between Western and Eastern countries. The movement to Eastern jurisdictions, such as Hong Kong and Singapore, can be attributed to the competitiveness of certain seats in terms of quality of services and competitiveness of fee structures, as well as state-of-the-art hearing facilities. ASEAN countries can and should capitalise on the opportunity that may flow from this by continuing to improve the quality of services of their institutions and hearing facilities. This may be done by employing diverse case counsel, particularly to handle large scale complex disputes where the governing law chosen by the parties is not one that is often selected. Increased business development in Western countries would be helpful, as well as a demonstration of capacity for handling disputes under Western laws. Any obstacles to foreign arbitrators in terms of immigration, work permits, VAT and tax would also be a factor. A factor that may impede certain Asian seats from becoming arbitration friendly is the rampant use of guerrilla tactics to disrupt and delay arbitral proceedings. To the extent institutions can enact measures to deter such tactics, such as through cost sanctions and imposition of good faith, this could improve the landscape. The support of the judiciary in being pro-arbitration is also key. Considerations should be made to ensure that there are streamlined processes for the enforcement of awards and any appeals with reduced time.

**DN**: We do believe that Eastern countries could potentially compete with Western countries to become a preferred seat of arbitration due to the increase in Asia-related disputes arising out of cross-border transactions, and the rise of the preferred seat in Asia which could satisfy the high-quality international standards, such as Singapore and Hong Kong. In addition, recently, the Belt & Road Initiative also encouraged a shift from Western jurisdictions to Eastern jurisdictions.

To capitalise the opportunity of the shift with regards to the preferred seat of arbitration, Vietnam, as well as other ASEAN countries, should improve its shortcomings in the field of arbitration to create an attractive arbitration destination for commercial investors, including, inter alia, (i) the adoption of UNCITRAL Model law; (ii) the development of arbitration legal framework; (iii) the reputation and quality of arbitral institutions and arbitrators; (iv) judicial support for arbitration in the jurisdiction; (v) the level of foreign direct investment and free trade; and (vi) reducing the level of corruption. Also, the ASEAN governments may, as Singapore has done, have financial policies or funds to support the arbitration and ADR activities.

In fact, the Vietnamese Government has reviewed the LCA and is considering the possibility of adopting the UNCITRAL Model Law in Vietnam. Besides, many arbitration institutions in Vietnam have revised and re-structured their respective institutional rules, such that those rules have become more foreign-friendly. It is expected that this will bring more opportunities and develop the arbitration market in Vietnam.

***13. How open is your jurisdiction to foreign young dispute resolution professionals?***

**CA**: Malaysia has encouraged young dispute resolution professionals in that there are several organisations which cater to the needs of the under-40 age bracket of practitioners. For instance, there is the Malaysian chapter of the Chartered Institute of Arbitrators ("CIArb"), the Malaysian Institute of Arbitrators ("MIArb") and also the Asian International Arbitration Centre ("AIAC"), which have dedicated forums for younger practitioners to express themselves.

It is hoped that these forums, if properly managed and run, will help develop depth in expertise in Malaysia in so far as arbitration counsel and arbitrators are concerned, which at present is somewhat lacking.

**PP**: The Philippines has seen the rise of young individuals keen on becoming ADR providers whether as arbitrators or mediators or, at least, interested in acting as party representatives in arbitration. These individuals are welcomed as members of various ADR institutions and even encouraged to get themselves accredited, regardless of age, gender or nationality.

Youth, however, is often accompanied by certain impressions, erroneous though they may be. So, in my view, young dispute resolution professionals, foreign or Filipino, may be at a disadvantage, especially at the start when their reputations are not yet fully established in this jurisdiction. Though experience and expertise are preferred by most users in the Philippines, contracting parties and their counsel are always conscious of possible arbitrators with a good reputation as to substantive knowledge and integrity. Thus, what is important is that young ADR professionals do not compromise on their integrity, impartiality and independence and keep themselves abreast of best practices in the ADR landscape.

**VS**: It is common for international law firms to employ young professionals in Thailand, but there are limits by law on the ratio of foreigners that can be employed in a company.

**DN**: The Vietnamese Government does encourage the participation of foreign young dispute resolution professionals in Vietnam. As mentioned above, there is no restriction to the participation of foreign lawyers or arbitrators in arbitral proceedings. In fact, many foreign lawyers are practising at Vietnamese law firms, and many VIAC arbitration cases have seen the participation of young foreign lawyers.

Recently, a number of workshops and conferences were held to encourage cooperation between the Vietnamese and the foreign young dispute resolution professionals. Last year, the Young ICCA had organised the first event in Vietnam on Witnesses and Experts in International Arbitration. Such activities are expected to connect the young Vietnamese practitioners with young foreign practitioners. Further, Young Vietnam ADR Group, under the auspices of VIAC, was established recently and is aimed at creating a growing community where young dispute resolution practitioners in Vietnam can share their knowledge and working experiences.

# THE ROLE OF THE SEAT OF ARBITRATION AND ITS COMPARISON OF INSTITUTIONAL RULES

*By Olivia Natasha Maryatmo[1] & Albertus Aldio Primadi[2]*

## Introduction

The seat of arbitration has various significant legal consequences as it determines the legal provisions which apply to the arbitration procedure[3] and choice of substantive law.[4] The seat of arbitration will also identify which court has the supervisory jurisdiction to set aside the arbitral award when such application is made.[5] Although parties have the liberty to pick the arbitral seat, it is common to find arbitration clauses that are silent, or even unclear, on the selection of the seat. Failures in determining the seat of the arbitration could, in particular, if one party defaults, lead to the result that the arbitration cannot proceed or even hamper the enforceability of an award.[6] The choice of institutional rules plays a vital role as it would influence the selection of the seat of arbitration, especially in cases where parties only chose the applicable institutional rules, not the seat of arbitration.[7] Each institutional rules have a different approach in determining the seat of arbitration, along with its own unique perks. This essay will stress the importance of the seat of arbitration, and will further compare and contrast the seat of arbitration provisions from four prominent institutional rules, namely the Asian International Arbitration Centre Rules 2018 ("**AIAC Rules**"), the International Court of Arbitration of the International Chamber of Commerce Institutional Rules 2017 ("**ICC Rules**"), the London Court of International Arbitration Rules 2014 ("**LCIA Rules**"), and United Nations Commission on International Trade Law and International Chamber of Commerce Institutional Rules 2010 ("**UNCITRAL Rules**").

## Concept and Terminology

To begin with, it is worth noting that 'seat' of arbitration and 'place' of arbitration virtually bear the same meaning and are often being used interchangeably.[8] The AIAC, ICC, LCIA, and UNCITRAL Rules use different terminology in labelling the seat of arbitration provision. For example, the AIAC uses *"seat of arbitration,"*[9] whereas the LCIA uses *"seat(s) of arbitration and place(s) of hearings,"*[10] and both the ICC and UNCITRAL Rules use the phrase *"place of arbitration."*[11] Therefore, even though the institutional rules use different phrases in labelling its seat of arbitration provision, the provisions are ultimately synonymous and have the same purpose in regulating the seat of arbitration.

The 'seat' of arbitration is also not to be confused with the 'venue' where arbitration meetings and hearings are conducted. It has been a universally accepted principle that parties are at liberty to hold hearings at venues outside the seat of the arbitration, and such choice is not to be construed as altering the location of the seat or law governing the arbitral proceedings.[12]

*Olivia Natasha Maryatmo*

*Albertus Aldio Primadi*

[1]Olivia Natasha Maryatmo is a full-time Legal Consultant at Enhesa and a part-time LL.M. student at the Queen Mary University of London, focusing on International Dispute Resolution. Before starting her career in Brussels, Olivia obtained her LL.B cum laude from Universitas Gadjah Mada and she also has worked at international law firms, and barristers chamber in Australia, Malaysia, Indonesia, and was involved in the drafting process of a legal guide at UNIDROIT as a research scholar.
[2]Albertus Aldio Primadi is a Senior International Case Counsel at the AIAC. Aldio graduated cum laude from Faculty of Law, Universitas Gadjah Mada, Indonesia. Aldio has advised the AIAC in a wide range of dispute resolution services: international and domestic arbitration matters (under AIAC Arbitration Rules, AIAC Fast Track Arbitration Rules, and ad hoc), adjudication matters, domain name dispute resolution cases and mediation matters under 2018 AIAC Mediation Rules. Aldio is also the Secretary-General of the AIAC Young Practitioners' Group and is responsible for initiating various youth capacity building programme to impart knowledge to the use of arbitration and alternative dispute resolution in Malaysia and abroad.
This article is for general information only and should not be relied upon as legal advice. Any comments/queries relating to this article can be sent to Olivia Natasha Maryatmo at olivianatashaa@gmail.com or Albertus Aldio Primadi at aldio@aiac.world. The views/opinions expressed in this article are those of the authors only. They do not reflect the views of AIAC unless otherwise stated.
[2]Daniel Girsberger et al., International Arbitration: Comparative and Swiss Perspectives (3rd edition, Schulthess Juristische Medien AG 2016), par. 597.
[3]Gary B. Born, International Commercial Arbitration (Second Edition), 2nd edition (© Kluwer Law International; Kluwer Law Internati, p. 2052; Redfern and Hunter, International Arbitration (Sixth Edition), 6th edition (© Kluwer Law International; Kluwer Law Internati, p. 166; Friendly Arbitration Hamburg [29 December 1998], XXIVa YBCA 13 (1999), par. 6
[5]*Thai-Lao Lignite Co Ltd & Anor v Government of The Lao People's Democratic Republic* [2017] MLJU 1196, par. 44; *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, paras. 84-85.
[6]Girsberger *et al.*, supra note 1, par. 603.
[7]Jonathan Hill, *The International and Comparative Law Quarterly* [Vol.63 No.3] 2014, p. 517; Georgios Petrochilos, *Procedural Law in International Arbitration* (Oxford Private International Law Series, 1st edn, 2004) par. 134.
[8]Petrochilos, *supra note* 8, p. 519; Gary B. Born, *supra note* 4, p. 1540.
[9]Rule 7 of AIAC Rules.
[10]Art. 16 LCIA Rules.
[11]Art. 18 ICC Rules; Art. 18 UNCITRAL Rules.
[12]Gary B. Born, supra note 4, pp. 1596 – 1597.

## Importance of the Seat of Arbitration

It is not a rare occasion to stumble upon a poorly-drafted arbitration agreement that contains an ambiguous selection of the arbitral seat. This is basically a prelude to issues which may be raised either in the arbitral proceedings themselves or in subsequent judicial proceedings.

A typical dispute arising from this scenario is the different interpretation of parties in specifying the arbitral seat. *In Government of India v. Petrocon India Limited* [2016] 3 MLJ 435, the ambiguity in the arbitration agreement, in particular on the terminology of 'seat' and 'venue,' has dragged the parties in litigating the issue for more than 13 years in three jurisdictions; Malaysia, India and the United Kingdom. In overturning the appeal, the Malaysian Federal Court ruled that the 'seat' of arbitration must be distinguished from the 'venue' of arbitration as the former refers to the law governing the proceedings whilst the latter points to the geographical place of arbitration. However, in this particular case, based on the language of the agreement and conduct of the parties, the word 'venue' bears the same meaning as 'seat.' The language in the arbitration clause gave the parties the flexibility to change the 'venue' of the arbitration to a place other than Kuala Lumpur, and by the consent order, the change of 'venue' meant that the 'seat' had also been moved to London.

An affirmation that the selection of an arbitral seat is invalid does not put an end to the saga. After such conclusion, the next question emerges as to whether the arbitration agreement remains valid and, if it is, where the correct arbitral seat will be. The Singapore Court of Appeal recently reversed the ruling of the Singapore High Court in *BNA v BNB and another [2019] SGCA 84*. The dispute resolution clause provides that "*any and all disputes shall be finally submitted to the Singapore International Arbitration Centre ("SIAC") for arbitration in Shanghai, which will be conducted in accordance with its Institutional rules*." The Court of Appeal then ruled that Shanghai, not Singapore as was determined by the High Court, was the parties' chosen arbitral seat, and thus the law of the People's Republic of China law was the governing law of the arbitration clause.

## Institutional Rules in Determining Seat

All four institutional rules embrace party autonomy, and hence parties are free to choose their seat of arbitration. In cases where parties fail to put the seat of arbitration in their agreement to arbitrate, institutional rules step in and help determine the seat. In *Merrill & Ring Forestry L.P. v. Canada*, despite the parties' failure to establish a seat, the parties have explicitly agreed on the UNCITRAL Rules applicable to the arbitration. Hence, the seat was determined in accordance with the UNCITRAL Rules.[13] Nevertheless, it is important to note that not all institutional rules take the same approach in determining the seat when parties omit the seat. For instance, in the AIAC, LCIA, and UNCITRAL Rules, the seat of arbitration will be determined by the arbitral tribunal in the absence of the agreement of the parties regarding the same.[14] While ICC Rules allow the ICC Court to fix the seat,[15] this is in contrast with the idea that the arbitral tribunal is better placed than the institution in making that decision because of its familiarity with the case.[16]

There are several practical benefits and drawbacks for each rule, whether the seat is decided by the institution or the arbitral tribunal. When an arbitral institution ultimately establishes the seat, it is considered to be time-efficient. However, an arbitral tribunal may effectively lack a say in the process, despite having the most familiarity with the case.[17] It also requires efforts from the arbitral institution as an administrator to ensure that the choice of the seat does not lead to a problematic seat that will deter qualified arbitrators from accepting their appointment.[18] When the seat is decided by the arbitral tribunal along with parties, the arbitral tribunal can become sufficiently knowledgeable of the particulars of the dispute to choose the adequate place to resolve it. However, the main drawback is that neither the AIAC, ICC, LCIA, nor the UNCITRAL Rules mention when the arbitral tribunal must establish the seat. This means that the seat may be established too late. Parties may be required to urgently constitute an arbitral tribunal, start their fact-gathering process, identify fact and expert witnesses, and do substantial dispute resolution planning (including whether local counsel is needed) without knowing for certain the seat of the arbitration and, consequently, the arbitration law that will apply to it and that may determine whether or not the award is annulled.[19]

## Default Seat

Several institutional rules provide a default seat in their seat of arbitration provision, for instance, the AIAC[20] and LCIA Rules.[21] The LCIA Rules provide a fallback seat clause, in which the seat will be London unless the arbitral tribunal determines that there is a reason to choose another location. Similarly, the AIAC Rules also provides a fallback seat – in this case, Kuala Lumpur – unless otherwise determined by the arbitral tribunal. Having a default seat is viewed as a 'safety net'[22] and a better course to guarantee legal certainty.[23] This means that if parties have specifically opted for a specific institutional rule but have either omitted or failed to mention the seat of arbitration, the institutional rules will come into play to determine the default seat. However, the default seat does not automatically apply, and it goes back to each procedure provided in the institutional rule in determining the seat. In contrast to the AIAC and LCIA Rules, neither the ICC Rules nor UNCITRAL Rules pinpoint an exact seat as a fallback seat. The ICC Rules let the ICC Court fix the seat, and the UNCITRAL Rules empower the arbitral tribunal to determine the seat.

[13] *Merrill & Ring Forestry L.P. v. Canada*, Decision [2007] (ICSID Case UNCT/07/1), par. 9.
[14] Art. 18 UNCITRAL Rules; Art. 14 AIAC Rules; Art. 16 LCIA Rules.
[15] Art. 18 ICC Rules.
[16] Maxi Scherer, et al., *Arbitrating under the 2014 LCIA Rules: A User's Guide* (1st edition, Kluwer Law International, 2015), p.189, par. 14.
[17] Anibal Sabater, *When Arbitration Begins Without a Seat*, 27 J. Int'l Arb. 443 (2010) Kluwer Law International, p. 453.
[18] *Ibid*, p. 453.
[19] *Ibid*, p.453-454.
[20] Rule 7(1) of AIAC Rules.
[21] Art. 16.2 of LCIA Rules.
[22] Rémy Gerbay, *Arbitration in England with chapters on Scotland and Ireland* (Kluwer Law International 2013) ch. 4, par. 62.
[23] Lex Mercatoria, *Comments to LCIA Rules* (Preliminary Discussion Draft) London Court of International Arbitration (LCIA), Art. 16.2

## Factors to Determine the Appropriate Seat

There are several relevant considerations regarding the appropriateness in selecting an arbitral seat, in the absence of agreement of parties and default designation by applicable rules. A variety of these considerations are identified in several international authorities.[24] To name a few, the UNCITRAL Notes on Organising Arbitral proceedings provides that:

> *"Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; and (e) location of the subject-matter in dispute and proximity of evidence."*[25]

In short, arbitral institutions and arbitral tribunals should select an arbitral seat that maximises the likelihood that the arbitral process will proceed efficiently and consistently with parties' intentions and to minimise any risk that the arbitral award will not be enforceable.

## Conclusion

Every institutional rule has a different approach in setting its seat of arbitration. Despite the similarity and common goal of party autonomy in giving parties the freedom to choose the seat of arbitration, some differences have legal consequences that affect the legal provisions applicable to the arbitration procedure, choice of substantive law, and whether the award may be set aside or vacated. Each rule has different approaches in determining the seat, the default seat, and the location of the hearings. Hence, sufficient attention should be paid to the drafting of the seat of arbitration, and parties must ensure that they opt for the institutional rules that cater to their needs and promote an efficient and cost-effective dispute resolution process.

| **LCIA INSTITUTIONAL RULES 2014** | **ICC INSTITUTIONAL RULES 2017** | **UNCITRAL INSTITUTIONAL RULES 2010** | **AIAC INSTITUTIONAL RULES 2018** |
|---|---|---|---|
| **Article 16 Seat(s) of Arbitration and Place(s) of Hearing**<br><br>16.1 The parties may agree in writing the seat (or legal place) of their arbitration at any time before the formation of the Arbitral Tribunal and, after such formation, with the prior written consent of the Arbitral Tribunal.<br><br>16.2 In default of any such agreement, the seat of the arbitration shall be London (England), unless and until the Arbitral Tribunal orders, in view of the circumstances and after having given the parties a reasonable opportunity to make written comments to the Arbitral Tribunal, that another arbitral seat is more appropriate. Such default seat shall not be considered as a relevant circumstance by the LCIA Court in appointing any arbitrators under Articles 5, 9A, 9B, 9C and 11.<br><br>16.3 The Arbitral Tribunal may hold any hearing at any convenient geographical place in consultation with the parties and hold its deliberations at any geographical place of its own choice; and if such place(s) should be elsewhere than the seat of the arbitration, the arbitration shall nonetheless be treated for all purposes as an arbitration conducted at the arbitral seat and any order or award as having been made at that seat. | **Article 18: Place of the Arbitration**<br><br>1) The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.<br><br>[…] | **Place of arbitration**<br><br>Article 18<br>1.If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.<br><br>[…] | **Rule 7 – Seat of Arbitration**<br><br>1. The Parties may agree on the seat of arbitration. Failing such agreement, the seat of arbitration shall be Kuala Lumpur, Malaysia unless the arbitral tribunal determines, having regard to the circumstances of the case, that another seat is more appropriate<br><br>[…] |

[23] *Mobil Invs. Canada Inc. v. Canada, Procedural Order No. 1 in ICSID Case No. ARB/07/4 (NAFTA) of 7 October 2009; Merril & Ring Forestry LP v. Gov't of Canada, Decision on the Place of Arbitration in NAFTA Case of 12 December 2007, available at www.naftaclaims.com; ADF Group Inc. v. U.S.A., Procedural Order No. 2 in ICSID Case No. ARB(AF)/00/1 (NAFTA) of 11 July 2001; See ICDR, Locale Determinations in International Cases 1, available at www.adr.org.*

[24] *UNCITRAL Notes on Organizing Arbitral Proceedings, ¶22; D. Caron & L. Caplan, The UNCITRAL Arbitration Rules: A Commentary 80-92* (2nd edition, 2013).

ASIAN INTERNATIONAL ARBITRATION CENTRE
*(Formerly known as KLRCA)*

6th May 2020

## Developments at the AIAC following the COVID-19 Pandemic

We are writing to update you on the various developments at the Asian International Arbitration Centre ("AIAC" or "Centre") involving case management practices, operational matters and events, which have been impacted by the COVID-19 pandemic.

Between 17th March 2020 and 3rd May 2020, the AIAC temporarily closed its premises in compliance with the Government of Malaysia's Movement Control Order ("MCO"). The implementation of the MCO came at a difficult time given the recent passing of Mr. Vinayak P. Pradhan, the late Director of the AIAC, as well as changes in the Malaysian political sphere which saw the appointment of a new majority Government as well as a new Attorney General. However, the AIAC Secretariat swiftly adapted to working from home and continued providing effective management of all ongoing alternative dispute resolution ("ADR") proceedings, including, amongst others, the organising of virtual meetings and hearings.

Pursuant to the Conditional Movement Control Order ("CMCO") issued by the Government of Malaysia on 1st May 2020, the AIAC resumed physical operations at its premises in Bangunan Sulaiman on 4th May 2020. The resumption of physical operations, however, have and will continue to be subject to strict conditions and standard operating procedures, until further notice.

In light of the ongoing CMCO phase and in the interest of transparency, we have compiled a list of Frequently Asked Questions to comprehensively address our users' and stakeholders' enquiries in addition to the announcements issued by the AIAC on 17th March 2020, 26th March 2020, 11th April 2020, 23rd April 2020 and 1st May 2020. We anticipate that a number of the issues which had arisen due to the restrictions imposed by the MCO and CMCO, as well as the matter of the pending appointment of the Director of the AIAC, will be resolved in the coming weeks.

In addition to case management services, the AIAC will continue to maintain its online presence through virtual platforms and e-resources during the CMCO Period. The AIAC's successful **ADR Online: An AIAC Webinar Series** will continue to provide several ADR related best practices and knowledge sharing sessions for the foreseeable future. In these times of physical distancing which are expected to be the 'new norm', such initiatives are inevitable and imperative for furthering the AIAC's commitment to providing capacity building and information dissemination platforms to the global ADR community.

Throughout the CMCO Period, we will continue to keep our users and stakeholders updated on case management and related practices through timely announcements which will be published on the AIAC's website and social media pages, as well as being communicated via email to our users.

Thank you for your understanding and consideration in these challenging times.

Yours faithfully,

**AIAC's Management Team**

**ASIAN INTERNATIONAL ARBITRATION CENTRE**
(Established under the auspices of the Asian-African Legal Consultative Organisation)
Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia
T +603 2271 1000 F +603 2271 1010 E enquiry@aiac.world

ASIAN INTERNATIONAL ARBITRATION CENTRE

## ANNOUNCEMENT

**18TH JUNE 2020**

# COVID-19 ROOM BOOKING CONDITIONS AT THE AIAC EFFECTIVE 18TH JUNE 2020

In furtherance to the implementation by the Government of Malaysia of the Recovery Movement Control Order ("RMCO") phase between 10th June 2020 and 31st August 2020, the AIAC is pleased to announce the gradual reopening of its hearing and meeting room facilities to full capacity based on the following stages:

**18th – 30th June 2020** - The following eleven (11) hearing and meeting room facilities and seven (7) breakout rooms will be made available for bookings:

- Extra-Large Hearing Room (15 – 30 pax) – two (2) rooms
- Large Hearing Room (10 – 12 pax) – three (3) rooms
- Medium Hearing Room (8 pax or less) – six (6) rooms
- Breakout Rooms (4 pax or less) – seven (7) rooms

**From 1st July 2020** - All twenty-three (23) hearing and meeting room facilities and fourteen (14) breakout rooms will be made available for bookings:

- Extra-Large Hearing Room (15 – 30 pax) – two (2) rooms
- Large Hearing Room (10 – 12 pax) – three (3) rooms
- Medium Hearing Room (8 pax or less) – twelve (12) rooms
- Small Hearing Room (5 pax or less) – six (6) rooms
- Breakout Rooms (3 pax or less) – fourteen (14) rooms

The AIAC has determined the maximum capacity of persons permitted for each room type as indicated above to ensure effective implementation of physical distancing measures, in line with the RMCO guidelines. As a means to assist and support parties in observing them, a **20%** discount will be automatically applied for all bookings and reservations made in respect of the above hearing and meeting room facilities, until further notice is issued by the AIAC Management.

All bookings for hearing and meeting room facilities at the AIAC shall be strictly subject to the following conditions:

1. At the time of submitting a Room Booking Form, a declaration shall be provided to the AIAC. To avoid over-crowding at the AIAC's premises, the parties and the tribunal are expected to exercise due care and diligence when pre-determining the number of individuals required for the attendance and presence of persons in and/or during a physical hearing or meeting;

2. All visitors to the AIAC's premises must adhere to the health and safety precautions outlined in the AIAC's Health and Safety Bulletin appended below. In addition to these measures, the AIAC will also be disinfecting any allocated hearing and/or meeting room prior to daily usage. Individuals attending a physical hearing or meeting at the AIAC are also required to adhere to the demarcated physical distancing measures whilst within the allocated hearing and/or meeting room; and

3. Any failure to adhere to the conditions outlined above may result in individuals being requested and/or escorted to leave the AIAC's premises.

In line with the RMCO guidelines, please note that the AIAC will consider accepting reservations for external events, conferences, workshops, etc. However, this will only be considered if the AIAC's strict standard operating procedures are agreed and adhered to by the organisers. Further, the AIAC is able to offer its virtual facilities in hosting events such as conducting online conferences, webinars, targeted virtual trainings and workshops as well as other capacity building activities. To explore these opportunities and more, please contact the AIAC's Business Development Team at business.development@aiac.world.

For further information on the virtual hearing solutions available at the AIAC and the discounted rates for reservations and room bookings in Bangunan Sulaiman, as well as to request a copy of the AIAC's Room Booking Form which incorporates the Declaration, please contact reservations.team@aiac.world.

Thank you for your cooperation and understanding.

Yours faithfully,

**The AIAC's Management Team**

ASIAN INTERNATIONAL ARBITRATION CENTRE
(Established under the auspices of the Asian-African Legal Consultative Organisation)
Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia
T +603 2271 1000 F +603 2271 1010 E enquiry@aiac.world

ASIAN INTERNATIONAL ARBITRATION CENTRE

# AIAC HEALTH & SAFETY BULLETIN

*as at 18th June 2020*

1. ***Single entry point and body temperature screening***

   Until further notice, a single-entry point into the AIAC's premises in Bangunan Sulaiman has been strictly enforced. All visitors to the AIAC will only be permitted entry to the premises through the Bangunan Sulaiman Ground Floor Lobby and will be required to undergo compulsory body temperature scanning that will be administered by AIAC security personnel using an infrared thermometer.

   Individuals recording a temperature of more than 37.5°C will not be permitted entry and will be requested to leave the AIAC's premises to seek immediate medical attention.

   The above procedure will be equally applicable to all AIAC staff, tenants and vendors.

2. ***Collection and recording of personal information viz, Health Declaration Record***

   In addition to undergoing body temperature scanning, all visitors, staff, vendors and tenants of the AIAC will also be required to complete a Health Declaration Record containing personal particulars, purpose of visit and floor accessed in Bangunan Sulaiman as well as a disclosure on travel history and medical symptoms, if any.

   Save where required to be disclosed to the Ministry of Health where a contact tracing procedure is ordered, all information collected in the Health Declaration Record will be subject to all prevailing legislative regulations for data protection and will be kept confidential.

3. ***Depositing and delivery of postage, courier and parcels***

   A designated counter table has been reserved at the Reception / Business Centre located at the Ground Floor of Bangunan Sulaiman for drop-off and receipt of all postage and parcel deliveries and dispatch. As expected of all visitors, personnel involved in postage, delivery and dispatch services will also be required to undergo the requisite compulsory body temperature scanning upon entry to the Bangunan Sulaiman premises. All postage and parcels dropped off and received at the designated counter table will be sanitised with a spray disinfectant and will only be unsealed after 30 minutes.

4. ***Hand sanitisers and use of facial masks***

   All visitors, tenants, vendors and staff of the AIAC are encouraged to wear face masks throughout the day, where practicable, whilst in Bangunan Sulaiman.

   Sanitisers have been placed on all floors and at various locations within the AIAC. All visitors are encouraged to sanitise their hands upon entry following their body temperature scanning at the Ground Floor Lobby. Sanitisers are also provided for use by visitors at the Reception / Business Centre.

5. ***Physical distancing measures***

   Physical distancing signages have been erected at the entry point of the Ground Floor Lobby, Reception / Business Centre and lift areas. A maximum of two (2) persons will be permitted entry in each lift at any one time, with physical distancing to be observed within the space.

   Waiting visitors will be seated at designated chairs, separated by a distance of one (1) meter, in accordance with physical distancing practices.

6. ***Cleaning, sanitisation and disinfecting procedures***

   The AIAC's cleaning staff has increased cleaning and sanitisation practices in all areas within the AIAC's premises. These practices will be carried out periodically throughout the day at all common areas in the building including lobby and reception doors, door handles, door knobs, turnstile, reception counter, lift buttons, railings and other frequently touched surfaces. Disinfecting procedures will also be conducted daily, after working hours, by AIAC's cleaning staff.

   The AIAC's external contracted cleaning staff and security personnel will undergo their own body temperature screening in the morning, daily, prior to the commencement of their working day, and are required to use a face mask and hand gloves at all times.

7. ***Café in Bangunan Sulaiman and food delivery services***

   Until further notice, the Café will not be serving any visitors in Bangunan Sulaiman.

   Food delivery services will only be permitted entry to the entrance of the Ground Floor Lobby and will be required to wait there. Individuals placing their orders will be required to pay for and collect their respective orders at the entrance accordingly.

**ASIAN INTERNATIONAL ARBITRATION CENTRE**
(Established under the auspices of the Asian-African Legal Consultative Organisation)
Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia
T +603 2271 1000 F +603 2271 1010 E enquiry@aiac.world

KEY INSIGHT

# TEC VIRTUAL ROUNDTABLE UPDATE

On 11th June 2020, the AIAC hosted a private virtual roundtable to start brainstorming the purpose and goals of the Technology Expert Committee ("TEC"). During this virtual roundtable, the AIAC explained that following its success with its Standard Form of Building Contracts, it decided to explore a similar initiative within the technology ("tech") sector. The AIAC explained that the TEC is aimed at not only developing standard form contracts within the tech industry but also engaging in capacity building events to better educate the industry players on alternative dispute resolution ("ADR"). Accordingly, it was decided during the roundtable that the first two products of the TEC would be: (a) to build a standard form contract, and (b) to produce a list of commonly used tech terms.

During the open discussion, a group of both lawyers and industry players discussed the following: whether there was a need within the industry for a standard form contract; how the construction industry could be used as a model; what are the various types of agreements within the tech sector that could benefit from a standard form contract; what the target market would be; how to obtain the industry's perspective on whether a standard form contract would be useful and utilised; and what the various aspects of the standard form contract would be. In addition, the attendees discussed whether additional accompanying resources would be helpful to supplement the standard form contract. It was decided that the first two steps in proceeding with this initiative would be to send out a survey in order to collate feedback from industry players who would generally use the contract on a day-to-day basis and analysing the results to determine the type of contract for the initial standard form.

Thereafter, the AIAC consulted those who attended the virtual roundtable and created a survey for industry players to gain their perspective on the creation of a standard form contract. The survey was issued on 14th August 2020 and will close on 14th September 2020. For those who wish to contribute, please use the following link to complete the survey: https://forms.office.com/Pages/ResponsePage.aspx?id=zi0S-DU7A0uosl6YN5uTePnATonp6VpKgLxEk5SPlltUNTNBRE9BRDQyRjVXUVdWWEQ4OFA5MkU1Si4u

Additionally, the AIAC, in conjunction with industry players, is in the midst of drafting a list of commonly used tech terms to be published and circulated in the coming months.

Should you wish to be kept up-to-date with the developments of the TEC, or wish to become a member, please reach out to tec@aiac.world and follow the AIAC's LinkedIn page.

TEC
TECH EXPERT COMMITTEE

# PRELIMINARY CASE MANAGEMENT STATISTICS

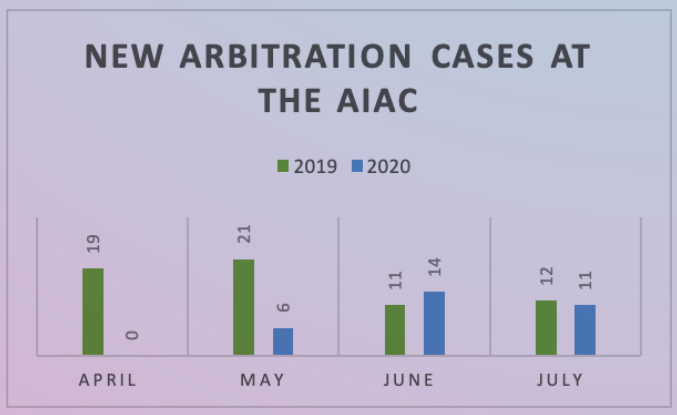
A significant component of the work undertaken by the AIAC is the administration of a range of alternative dispute resolution ("ADR") cases. Specifically, the AIAC administers domestic and international arbitration, adjudication, mediation, and domain name dispute resolution matters.

As part of this Newsletter, we present our preliminary ADR statistics for 1st April 2020 to 31st July 2020. The information presented here is the raw data only.

In light of the Malaysian Government's Movement Control Order, it should be noted that no new physical cases were accepted by the AIAC between 18th March 2020 and 3rd May 2020 (save for cases sent via email). The figures below should be read against this background.

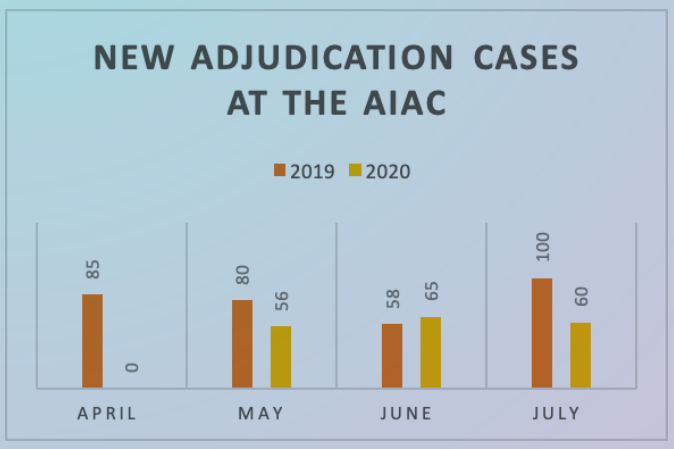
## Arbitration

Between April and July 2020, the AIAC received twenty-five (25) new domestic arbitration and six (6) new international arbitration matters.




## Adjudication

Between April and July 2020, the AIAC received one hundred and eighty-one (181) new adjudication matters.




## Mediation & Domain Name Dispute Resolution

Between April and July 2020, the AIAC received one (1) new mediation matter and no new domain name dispute resolution matters.

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 late-2020.

# 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. Due to the movement restrictions associated with the COVID-19 Pandemic, although physical talks were unable to be convened at the Bangunan Sulaiman, or elsewhere, the AIAC's Legal Services Team participated in the following external webinars and/or training sessions between April 2020 and July 2020:

Speaker, "*An Interview with Chelsea Pollard (International Case Counsel of AIAC)*", L2 Construction Series, Organised by Harold & Lam Partnership and MAC Consultant (4th April 2020)

Panellist, "*Advocacy 101: Arbitration*", NAMCO Outreach Series, Organised by the Novice Arbitration Mooting Competition (19th April 2020)

Co-Examiner, "*Interview with Toby Landau QC*", Interview Series: Know the Masters of Law, Organised by Young Arbitration Practitioners Group (India) and Indian International & Domestic Arbitration Centre (15th May 2020)

Panellist, "*Resolving Construction Disputes in the Time of COVID-19*", YSCL Classroom Series, Organised by the Young Society of Construction Law Malaysia and the AIAC (16th May 2020)

Panellist, "*CIPAA Simplified: A Practical Guide to Construction Adjudication*", YSCL Classroom Series, Organised by the Young Society of Construction Law Malaysia in collaboration with the AIAC (30th May 2020)

Panellist, "*Pursuing a Career in International Law – Episode 3: Arbitration Institution*", Organised by the Indonesian Society of International Law (10th June 2020)

Moderator, "*COVID-19 Webinar: The Institutions Stroke Back*", The Malaysian Institute of Arbitrators (12th June 2020)

Speakers, "*Introduction to ALSA International Mediation Competition 2020*", Organised by the ALSA International Mediation Competition (19th June 2020)

Presenters, "*Overview of the AIAC*", Online Judicial Training, Organised by the AIAC and the US Department of Justice (22nd June 2020) (Private Webinar)

Presenters, "*Overview of Statutory Adjudication, Arbitration, Mediation and Domain Name Dispute Resolution*", Online Judicial Training, Organised by the AIAC and the US Department of Justice (23rd June 2020) (Private Webinar)

Guest Lecturer, "*Careers in Arbitration*", Organised by Universiti Teknologi MARA (30th June 2020)

Guest Speaker, "*Part I: Pre-Dispute Management*", Inception to Enforcement: Practical Issues Webinar Series, Organised by Skrine and Allen & Overy (3rd July 2020)

Guest Speaker, "*An Introduction to Arbitration*", Organised by the United Kingdom and Eire Malaysian Law Students' Union (KPUM) (4th July 2020)

Panellist, "*Part II: Practical Aspects of Managing Disputes*", Inception to Enforcement: Practical Issues Webinar Series, Organised by Skrine and Allen & Overy (17th July 2020)

Moderator, "*ADR Webinar*", Organised by the AIAC and the Malaysian-German Chamber of Commerce and Industry (21st July 2020) (Private Webinar)

Panellist and Moderator, "*Chasing Efficacy: The Capability or Chaos of Alternative Dispute Resolution*", Organised by the AIAC and Malaysian Corporate Counsel Association (24th July 2020)

Speaker, "*Working Abroad 101*", Legal Training and Workshop Online, Organised by the Asian Law Students' Association (29th July 2020)

**Supported Events**

The AIAC also supported the following webinars and/or events between April 2020 and July 2020:

- "*Funding Infrastructure Disputes: Using Litigation Finance as a Strategic Tool*", Organised by the Society of Construction Law India Young Leaders Group (28th May 2020)
- "*The Interaction between Climate Change Obligations and International Arbitration*", Organised by the DAA Investment Arbitration Committee (28th May 2020)
- "*Arbitration in Practice: A Close Look at the IBA Guidelines for Drafting International Arbitration Clauses*", Organised by the IBA Asia Pacific Arbitration Group (Four-Part Series) (5th June 2020)
- "*COVID-19 Webinar: The Institutions Strike Back*," Organised by The Malaysian Institute of Arbitrators (12th June 2020)
- "*THAC International ADR Webinar Series 2020*", Organised by the Thailand Arbitration Centre (24th July 2020 to 30th September 2020)

# 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 as well as domestic and international arbitration for your reading pleasure. Enjoy!

## INVESTMENT ARBITRATION

***Eiser Infrastructure Limited and Energia Solar Luxemburg S.À.R.L. v Kingdom of Spain***
(ICSID Case No. ARB/13/36)

For the first time in ICSID's history, on 11th June 2020, an *Ad Hoc* Committee decided to annul an arbitration award in its entirety on the grounds of the improper constitution of the arbitral tribunal and serious departure from a fundamental rule of procedure.

In the above case, two Claimants (Eiser Infrastructure Limited & Solar Energy Luxembourg S.à.r.l.) initiated an ICSID arbitration based on Energy Charter Treaty ("ECT"), concerning regulatory changes by Spain in the national renewable energy scheme. On 4th May 2017, the Arbitral Tribunal awarded the Claimants compensation amounting to EUR 128 million and held that the 2013 reforms adopted a new remuneration system that deprived the Claimants of their investments. Accordingly, Spain violated Article 10(1) of ECT concerning the standard of fair and equitable treatment ("FET").

The *Ad Hoc* Committee reviewing the annulment application considered the impropriety of an undisclosed relationship between the arbitrator appointed by Claimants, Dr. Stanimir Alexandrov, and the Claimants' experts, the Brattle Group.

The Ad Hoc Committee held that "*…these facts demonstrated enough past and present professional connections and interaction between Dr. Alexandrov, as counsel and as member of the law firm Sidley Austin, on the one hand, and the Brattle Group and Mr. Lapuerta, on the other, to require that this relationship be disclosed to the Parties and to the other arbitrators. These past and present connections and interactions should have alerted Dr. Alexandrov to the possibility that his independence and impartiality may be questioned, by one of the Parties to the case before him. As the House of Lords observed in the Pinochet case: 'impartiality may be compromised not only through a specific act but also where the appearance of impartiality has not been strongly guaranteed'*" (at [225]). Further, the Committee held "*…in this case, the duty to disclose was warranted due to the respective roles of a damages expert and counsel in an arbitration. It was warranted not only because of the existence of such a relationship but also by the extent of the past and present interactions, at issue. These taken together triggered Dr. Alexandrov's obligation to disclose. The Committee is, therefore, of the view that Dr. Alexandrov should have disclosed his relationship with Mr. Lapuerta.*" (at [228]).

Considering Spain's submission regarding the annulment of the award pursuant to Article 52(1)(d) of the ICSID Convention, the Committee also concluded: "*that there was a serious departure from a fundamental rule of procedure*" (at [230]). The Committee observed that "*independence and impartiality of an arbitrator is a fundamental rule of procedure. This means that the arbitrator has a duty not only to be impartial and independent but also to be perceived as such by an independent and objective third party observer. This duty includes the duty to disclose any circumstance that might cause his reliability for independent judgment to be reasonably questioned by a party…. There can be no right to a fair trial or a right of fair defense without an independent and impartial tribunal*" (at [239]). The Committee also opined that "*Dr. Alexandrov's absence of disclosure… affected Spain's right of defense and fair trial, as well. This failure cannot be regarded as a mere inconsequential error or omission or something insignificant having no bearing on the outcome of the proceedings before the Tribunal* (at [241])" and concluded, "*that there has also been a departure from a fundamental rule of procedure*" (at [242]).

On the above note, reviewing the award and conduct of the proceedings, the Committee finally concluded "*that this undisclosed relationship could have had a material effect on the Award. The non-disclosure was, therefore, serious and warrants annulment both under clauses (a) and (d) of paragraph (1) of Article 52*" (at [253]).

Recently on 31st July 2020, the Claimants filed an application with ICSID "*…requesting the ad hoc committee to issue a supplementary decision determining certain questions it omitted to decide in its Decision on the Kingdom of Spain's ("Spain") Application for Annulment dated 11th June 2020.*" (at [1], Application pursuant to Article 49(2) of the ICSID Convention dated 26th July 2020). This application is yet to be determined.

***National Agricultural Co-operative Marketing Federation of India (NAFED) v. Alimenta S.A.***
Civil Appeal No. 667 of 2012, Judgement dated 22nd April 2020

Alimenta initiated arbitration proceedings before FOSFA, London, and the Tribunal rendered an award in 1989, directing NAFED to pay damages of USD4,681,000.00 along with interest. This award was upheld by the FOSFA Board of Appeal in 1990. Subsequently, in 1993, Alimenta filed a petition to enforce the award before the High Court of Delhi. NAFED raised consistent objections to the enforcement petition, and made subsequent appeals from the Single Judge of the High Court of Delhi to an Appeal before the division bench (two judges) of the High Court of Delhi, to the present appeal before the Supreme Court of India.

On 22nd April 2020, the Supreme Court of India allowed the appeal by NAFED and set-aside the impugned judgement and order by the High Court of Delhi. It accordingly held that the Award was unenforceable. This outcome is rather interesting because the decision raises questions regarding the power of the court to review the merits of a foreign award at the stage of enforcement, and determining the scope of the public policy exception to the enforcement of foreign awards in India.

The Supreme Court of India reviewed the award on its merits and held that NAFED could not carry out its contractual obligations due to lack of the Government's permission, accordingly, both parties were aware that the contract would be cancelled in such an exigency (at [57]). The Supreme Court, while reviewing public policy under Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961, held that the enforcement of the Award would contravene the fundamental policy of Indian law and basic concepts of justice, as the award relates to the outstanding quantity of Indian HPS groundnut for exportation, for which permission of Government of India was necessary (at [69]).

Lastly, the Supreme Court noted "*the award is ex facie illegal, and in contravention of fundamental law, no export without permission of the Government was permissible and without the consent of the Government quota could not have been forwarded to next season. The export without permission would have violated the law, thus, enforcement of such award would be violative of the public policy of India*" (at [80]).

***Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang [2020] FCA 767***
Federal Court of Australia, Judgement dated 14th May 2020

The Applicant, Tianjin Jishengtai Investment Consulting Partnership Enterprise, applied to the Federal Court of Australia ("FCA") to enforce a CIETAC Award dated 3rd September 2018, made in the People's Republic of China, against the Respondent, Huazhao Huang. The Applicant applied before the FCA pursuant to section 8 of the International Arbitration Act 1974 (Cth) ("IAA"), which provides for the recognition of foreign arbitral awards in Australia, including awards made under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The Respondent argued against the award stating two grounds, namely, (1) the Applicant had not adequately followed the provisions of sections 9(1)(a) and (b) of the IAA, which requires a duly certified copy of the CIETAC Award and duly certified copies of the original arbitration agreements to be provided; (2) and the form of the orders sought by the Applicant did not reflect the form of the CIETAC Award (at [5] – [7]). Further, there were two other disagreements between the Applicant and the Respondent: first, whether the CIETAC Award should be enforced by the FCA in Australian dollars or the currency of the CIETAC Award; and second, whether post-award interest should be awarded by the court in circumstances where the CIETAC Award did not provide for post-award interest.

The FCA decided to enforce the CIETAC Award in Australia (at [19] & [29]). The FCA on the first issue held that the Applicant had provided properly certified copies of the CIETAC Award and the original arbitration agreements in compliance with sections 9(1)(a) and (b) of the IAA (at [18]). The FCA on the second issue found in favour of the Respondent that the form of the orders sought in the application did not reflect the form of the CIETAC Award. Accordingly, the parties were directed by the FCA to confer in order to determine an appropriate form of order in the form of a declaration as to the enforceability of the CIETAC Award (at [21] & [29]).

In addition, concerning the disagreements between the Applicant and the Respondent, the FCA held that the CIETAC Award should be enforced in Australian dollars "*…where the judgment is sought in an Australian court and the award is sought to be enforced in Australia, I consider that … that the award should be converted…*" (at [23]). Further, the FCA declined to award post-award interest as the CIETAC Award did not provide for post-award interest and determined that the FCA judgement must reflect the terms of the CIETAC Award (at [25]).

***Shell Energy Europe Limited v Meta Energia SpA [2020] EWHC 1799 (Comm)***
Judgement dated 10th July 2020

The English High Court refused to set aside an arbitral award where the Applicant had challenged the award on the ground that the Applicant was not able to participate in the merits hearing in the arbitration due to difficulty in securing an advocate.

The Applicant, in this case, Meta Energia SpA ("Meta"), had participated fully in an underlying LCIA arbitration until the last stage. Less than ten days ahead of the planned two-day final merits hearing, Meta dismissed its entire legal team, saying this was because it was unsatisfied with the way the legal team had pursued or presented the defence. There was an adjournment of the final hearing. Despite the appointment of new solicitors to Meta, who attended the final merits hearing, the new solicitors did not participate in the final hearing, save for making a brief submission that Meta was unable to present its case.

The arbitral tribunal rendered an award in December 2019 where it held in favour of the Claimant, Shell Energy Europe Limited ("Shell Energy"). Subsequently, Shell Energy sought to enforce the award in Italy under the New York Convention, and also in the UK after it obtained the High Court's leave pursuant to Section 6 of the Arbitration Act 1996 (the "Act"). Meta subsequently applied to the Court to set aside the enforcement order.

In conclusion, the High Court dismissed the above and confirmed the May 2020 Enforcement Order on the basis of the following observations:

- *There was no clarity as to how the applicant's defence in the arbitration could have been improved or set out differently by any new legal team.*
- *The Respondent could have been appropriately represented at the merits hearing by suitable junior counsel.*
- *No challenge to the award had been made under Section 68 of the Act, which would be the "normal means to pursue a complaint of lack of due process or other procedural unfairness".*
- *There was no arguable basis for any Section 68 challenge. The arbitrators had been "scrupulously even-handed" and the process "unimpeachably fair".*
- *Finally, the Respondent could have presented and fully developed its case, but simply chose not to do so.*

***Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)***
CA Paris, 23rd June 2020, n°17/22943, Judgement dated 23rd June 2020

The case concerned a Franchise Development Agreement ("FDA") entered into by Kabab-Ji SAL (Lebanon) ("KJS") and Al Homaizi Foodstuff Company ("AHFC"). Following a corporate reorganisation, AHFC became a subsidiary of Kout Food Group (Kuwait) ("KFG"). A dispute arose under the FDA, leading KJS to commence arbitration proceedings against KFG (and not AHFC).

The jurisdictional issue in this matter concerned whether KFG had become an additional party to the FDA, and therefore, to the arbitration agreement. Accordingly, two important determinations required clarification: firstly, which law governed the question of whether KFG had become a party to the arbitration agreement; and secondly, whether, under the applicable law, KFG had become a party to the arbitration agreement.

The arbitration clause specified that the arbitration would be seated in Paris, and the governing law clause stipulated that the FDA would be governed and construed in accordance with English law. The contract contained No Oral Modification ("NOM") clauses. The Arbitral Tribunal unanimously determined that whether KFG was bound by the arbitration agreement was a matter of French law, whilst English law governed the transfer of substantive rights and obligations to KFG. By majority decision, a novation was to be inferred as a result of the conduct of the parties. Further, the Arbitral Tribunal determined that the arbitration agreement was to be extended to include, in particular, KFG, and on the merits, KFG was in breach of the FDA.

The Respondent filed an application before the Paris Court of Appeal to set aside the Award under Article 1520 of the French Code of Civil Procedure, stating the Arbitral Tribunal wrongly upheld its jurisdictions over a Third Party (i.e., KFG) breaching the principle of due process. Simultaneously, the Appellant applied for the enforcement of the award against the Respondent in England, where after various appeals, the English Court of Appeal held that 'KFG' was not a party to the arbitration clause. On 23rd June 2020, the Paris Court of Appeal held that it was not bound by the decision of the English Court and also rejected the argument of the Respondent that English law applied to the arbitration clause.

In conclusion, the Paris Court of Appeal determined that French law was the law which determines the law applicable to the arbitration agreement. It further observed under French law, there is a substantive rule of international arbitration law that the arbitration clause is legally independent from the main contract in which it is contained, and that the existence and effectiveness of the clauses are assessed pursuant to mandatory rules of French law and international public policy.

Further, the Paris Court of Appeal, following well-established case law, agreed with the Arbitral Tribunal that "*where a party to the arbitration is a non-signatory of the arbitration clause, jurisprudence from the Cour de cassation and the Paris Court of Appeal is therefore that the [non-signatory] party should be deemed to have agreed to the [arbitration] clause if the arbitral tribunal finds that the [non-signatory] party intended to participate in the performance of the agreement*". Accordingly, it held that that KFG had actively participated in the performance of the FDA and, therefore, held that it was bound by the arbitration clause. In a nutshell, the Paris Court of Appeal upheld the Arbitral Award that was denied enforcement in the English Courts.

It is interesting to observe that now, the Appellant is seeking leave to appeal against the Court of Appeal's decision before the English Supreme Court and the Respondent has appealed the Paris Court of Appeal decision to the French Supreme Court.

***Fimbank PLC v KCH Shipping Co Ltd [2020] EWHC 1765 (Comm)***
Judgement dated 3rd July 2020

The Applicant, Fimbank PLC, had made an application for an extension of time under Section 12(3)(a) or Section 12(3)(b) of the Arbitration Act 1996 (the "Act"), for the Applicant to pursue a claim in arbitration against the Respondent, KCH Shipping Co Ltd. In this matter, the Applicant had sought to bring a claim for damages against the carrier and Respondent, KCH Shipping Co Ltd, due to cargo discharged without production of the relevant bills of lading (the "Bills").

Prior to these proceedings, the Applicant's Maltese Counsel had mistakenly identified the registered owners ("MW") of the vessel ("The Giant Ace") as the carrier and had filed the Applicant's claim for misdelivery. Subsequently, the Applicant made a request for an extension of time until July 2019 to bring its claim against MW. This request was communicated to the members of the Charter Chain which included "Classic", the entity which had time-chartered The Giant Ace from KCH. Classic's Counsel eventually became aware that the carrier was actually the Respondent. Once approval for the extension of time had been agreed by the MW, Respondent, and other members of the Charter Chain, Classic's Counsel informed the Applicant's counsel that the owners of Giant Ace had granted an extension of time to commence proceedings for claims arising under the Bills. The Applicant''s Counsel interpreted this correspondence as MW having granted an extension of time.

In May 2019, the Applicant's Counsel realised the mistake in the identification of the carrier. However, based on their interpretation of Classic's correspondence on the grant of the extension of time described above, the Applicant's Counsel considered that the claims against the Respondent were time-barred. Further, the Applicant continued pursuing the claim against MW on the basis that it was not its responsibility to alert any party to possible defences to its claim. Thereafter, on 9th July 2019, MW informed the Applicant that its claim was directed to the wrong party.

On 5th November 2019, the Applicant applied to the English High Court for an extension of time to commence arbitral proceedings against the KCH on the following grounds, namely:

i. The circumstances were outside of the reasonable contemplation of the parties when agreeing to the contractual time bar and it would be unjust not to extend the time under Section 12(3)(a) of the Act, or
ii. That KCH's conduct was such that it would cause injustice to the Applicant for KCH to be able to rely on the time bar under Section 12(3)(b) of the Act.

The High Court rejected the Applicant's application and refused to grant an order extending time as the Applicant failed to satisfy the requirements of Section 12 of the Act. It observed that the requirements were extremely difficult and extensions were only being granted in circumstances that are "entirely out of the ordinary". The Court considered that the circumstances in this instance were attributable to the Applicant's original mistake in the identity of the carrier, which was further compounded by the correspondence with the other parties, whom innocently reinforced that mistake. The Court also held that since Classic's Counsel was not acting for the Respondent, the only action which could properly be attributed to the Respondent was its communication to the Applicant's Counsel consenting to the extension of time. In hindsight, if the correspondence from Classic's Counsel were drafted differently, the Applicant would have realised its error sooner. Nevertheless, when considering the passive approach of the Applicant's Counsel upon realising the mistake, the court held that a considerable portion of the causative burden lies with the Applicant's Counsel. Hence, it was not unjust for the Respondent to hold the Applicant to the time bar in question.

The Court further observed that even in circumstances where the Applicant did satisfy the jurisdictional requirements of Section 12 of the Act, the Court nonetheless has the discretion to grant an extension of time. The Court considered that, in this instance, it would probably not have exercised this discretion to grant an extension, since there was a long period of time between the expiry of the time bar / any agreed extension and the application to the Court for an extension under Section 12 of the Act.

## DOMESTIC ARBITRATION

***Sabanilam Enterprise Sdn Bhd v Masenang Sdn Bhd [2020] 3 MLJ 342***

The Appellant, 'Sabanilam Enterprise Sdn Bhd', had appealed against the Order of the High Court which allowed the application of the Respondent to strike out the Appellant's 'originating summons (the "OS") pursuant to 37(1)(a)(v) and/or 37(2)(b) of the Arbitration Act 2005 (the "AA 2005") to vary and/or set aside in whole or in part the arbitration award dated 12th October 2017 made in favour of the Respondent, for lack of jurisdiction. The Respondent made an application to the High Court, under Order 18 Rule 19(1)(a) of the Rules of Court 2012, seeking a declaration that the Kuala Lumpur High Court is the supervisory court in respect of the arbitration and that the Kota Kinabalu High Court has no jurisdiction as the seat was in Kuala Lumpur and the cause of action arose in Kuala Lumpur.

The Court of Appeal allowed the appeal and set aside the Order of the High Court, finding that the Appellant's cause of action related to the arbitration award. Accordingly, the locality of the issuance of the award in Kuala Lumpur was of no consequence. The Court of Appeal referring to the four prescribed conditions pursuant to Section 23(1) of the Courts of Judicature Act 1964, held that the High Court at Kota Kinabalu was competent to hear any matters related to the award (at [24]).

The Court of Appeal noted that "*the learned judge took the wrong approach in arriving at his conclusion in deciding to strike out the originating summons for lack of jurisdiction. The learned High Court judge had determined the juridical seat without taking into consideration that the determination of juridical seat is irrelevant in this case; it being a domestic arbitration the curial law is the AA 2005 applicable throughout Malaysia, peninsular Malaysia and the states of Sabah and Sarawak*" (at [34]). Accordingly, it held that as Malaysia has a single curial law, both the High Court in Malaya and the High Court in Sabah and Sarawak are supervisory courts under sections 2 and 3 of the AA 2005. In conclusion, "*the Kota Kinabalu High Court is certainly seized with jurisdiction to consider and decide the originating summons to challenge the arbitration award*" (at [37]).

***Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd (Civil Appeal No. B-03(IM)(NCVC)-102-12/2017)*** (Decision dated 17th February 2020)

The Appellant 'Tindak Murni Sdn Bhd' (the Employer) and defendant in the civil suit entered into a Building Construction Contract with the Respondent 'Juang Setia Sdn Bhd' (the Contractor) and plaintiff in the civil suit (collectively the "Parties"). The dispute related to a standard form PAM Contract. Disputes arose between the Parties resulting in the Contractor initiating the civil suit. The suit was initiated notwithstanding the clear and unambiguous provision requiring parties to refer any dispute or difference arising between them in relation to any matter arising in connection with the contract, to arbitration (at [7]-[8]). Subsequently, the Respondent obtained a judgement in default against the Appellant. The chronology of the proceedings and appeals are below:

- The Appellant filed an application before the Registrar of the High Court to set aside the judgement in default due to valid disputes against the Contractor and the existence of the arbitration clause. The Registrar decided to set aside the judgement in default.
- The Respondent appealed against the Registrar's decision before the Judge in Chambers. The High Court Judge dismissed the Respondent's appeal and allowed the Appellant's application for a stay pending arbitration.
- The High Court Judge observed that there was defence on the merits as there were issues or disputes of fact that required resolution at trial, and there was a valid arbitration clause that the parties had agreed to be bound by,
- The Respondent then filed two appeals before the Court of Appeal against the decision of the High Court. The Court of Appeal allowed both the Respondent's appeals, reversed the decision of the High Court to set aside the judgement in default, and refused to stay the court proceedings pending arbitration. Subsequently, the Appellant appealed before the Federal Court of Malaysia (Appellate Jurisdiction) against the order of the Court of Appeal (at [17]-[24]).

On the question of the sustainability of the Judgement in Default, the Federal Court of Malaysia held where there is a valid arbitration clause, and a party had raised disputes to be decided pursuant to that arbitration clause, the Judgement in Default cannot be sustained. With respect to whether, in hearing an application to set aside a Judgement in Default, and where there is a valid arbitration clause, the court is required to consider the "merits" or the "existence" of the disputes raised by the defendant, the Federal Court responded in the negative.

The Federal Court of Malaysia, reinstating the order of the High Court and setting aside the Order of the Court of Appeal held that "*the Court of Appeal had wrongly interfered in the decision of the High Court. The High Court judge had not erred in law or on the facts in upholding the setting aside of the judgment in default and in allowing the stay of court proceedings pending arbitration*" (at [74]).

***Hardie Development Sdn Bhd v David Shen I-Tan [practicing [sic] in the name and style of Arkitek Konsult Sabah]* (Originating Summons No: BKI-24NCC(ARB)-3/11-2019)**

The Plaintiff 'Hardie Development Sdn Bhd' entered into a joint venture agreement with Supernesa Sdn Bhd to develop a piece of land in Kota Kinabalu into a residential and commercial development for the State Government of Sabah. For the above project, the Plaintiff appointed the Defendant 'David Shen I-Tan' as the architect to provide supplementary services regarding the project.

In a nutshell, disputes arose between the Plaintiff and the Defendant due to disagreements regarding the Defendant's invoices, subsequent agreement on payment by the Plaintiff via monthly instalments, and the Plaintiff's request for the Defendant to issue a Letter of Release for the Plaintiff's own architect to take over the project pending payment by the Plaintiff. Both Parties agreed to refer the dispute to a Sole Arbitrator appointed under the Malaysian Arbitration Act.

The Arbitrator issued a Partial Award No. 1 finding that the Plaintiff wrongfully terminated the service contract of the Defendant. Subsequently, the Arbitrator issued Partial Award No. 2 upon consent and submissions of the Parties that the Defendant's service contract had not been rendered void for illegality, but was wrongfully terminated by the Plaintiff. The Plaintiff has applied to High Court of Sabah and Sarawak at Kota Kinabalu under Section 37(1)(b)(ii) and Section 42 of the Arbitration Act 2005, applying to set aside the Partial Award No. 2 on the grounds that it is against the fundamental principles of law.

On 21st May 2020, the Judicial Commissioner at High Court of Sabah and Sarawak at Kota Kinabalu dismissed the Plaintiff's application on the grounds that Defendant's charging of professional fees lower than the minimum fees as prescribed by and in breach of the Architects (Scale of Minimum Fees) Rules 1986 does note render an architect's service contract void or unenforceable. Accordingly, the Plaintiff failed to establish that the Arbitrator's decision was erroneous, or would "*shock the conscience … clearly injurious to the public good*", or contravene the "*fundamental notions and principles of justice*" (at [106]). The Judicial Commissioner also did not consider the Plaintiff's application made under Section 42 of the Arbitration Act 2005 a the same was repealed by Arbitration (Amendment) No. 2 Act 2018 with effect on 8th May 2018.

***Siemens Industry Software Gmbh & Co Kg (Germany) (formerly known as Innotec Gmbh) v Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) (Malaysia) & Ors* [2020] MLJU 363**

The Appellant 'Siemens Industry Software Gmbh & Co Kg (Germany)' and the Respondents 'Jacob and Toralf Consulting Sdn Bhd, Mr. Jacob George, Mr. Thomas George, PEC Konsult Sdn Bhd and Mr. Toralf Mueller' had entered into a settlement agreement where all the above parties had agreed to submit any disputes in relation to the settlement agreement to arbitration. Subsequently, the Respondents instituted litigation proceedings before the High Court of Malaya at Kuala Lumpur notwithstanding the provisions of the agreement to arbitrate.

The Appellant obtained an order from the Court of Appeal of Malaysia dated 26th April 2011, subsequently upheld by the Federal Court of Malaysia, which stayed the court proceedings pending reference to arbitration. Subsequently, the Appellant commenced arbitration proceedings, and the Arbitral Tribunal delivered its Award on 8th May 2015.

The Arbitral Tribunal held in favour of the Respondents. The dispositive portion of the Arbitral Award states the following (at [189]-[192], ICC Award dated 8th May 2015):

a. *"the Arbitral Tribunal concludes and holds that Siemens claim be dismissed in its entirety;*
b. *the Arbitral Tribunal awards to the Respondents their costs of this arbitration, to be taxed pursuant to Section 21 of the Singapore International Arbitration Act, if not agreed;*
c. *the Arbitral Tribunal also orders that the fees and expenses of the ICC and the Arbitral Tribunal be borne by Siemens; and*
d. *all other claims and reliefs sought are hereby rejected."*

Subsequently, the Respondents (excluding Mr. Toralf Mueller) filed an application before the High Court of Malaya to register and enforce Part A to P of the Arbitral Award (which includes inter alia the issues to be tried, the witnesses testimonies, the submission of the parties, the findings, reasoning and analysis of the arbitral tribunal) in addition to the dispositive portion of the Arbitral Award contained in Part P (at [189]-[192]). The High Court of Malaya only allowed the dispositive portion set out in Part P of the Arbitral Award to be registered and enforced as a judgment of the High Court of Malaya *[Jacob and Toralf Consulting Sdn Bhd & Ors v Siemens Industry Software GmbH & Co KG (Germany) [2018] 1 LNS 460]*.

The Respondents (excluding Mr. Toralf Mueller) appealed at the Court of Appeal against the decision of the High Court of Malaya. Subsequently, Mr. Toralf Mueller filed an application to intervene and was granted leave in the proceedings before the Court of Appeal. The Court of Appeal on 7th June 2018, held in favour of the Respondents allowing the appeal and set aside the initial order of the High Court of Malaya. The Court of Appeal ordered the entire Arbitral Award be registered as a judgment pursuant to Section 38 of the Arbitration Act 2005. It observed as follows:

*"[38] In our view, there is nothing in s. 38 of the AA 2005 or anywhere else in the same Act which allows for only part of the award to be registered except for s. 39(3) which allows for part of the award to be recognised and enforced where a decision is made on matters not submitted to arbitration. This applies where the decision is separable. This lends support to the proposition that if indeed it was the intention of the Legislature to allow for registration of only the dispositive part, it would have been clearly stated in terms similar to how it was provided in s. 39(3) for separable decisions." [para 38, Jacob and Toralf Consulting Sdn Bhd & Ors v Siemens Industry Software Gmbh & Co KG (Germany); Toralf Mueller (Intervener) [2019] 10 CLJ 281.]*

Accordingly, the Appellant sought leave to appeal before the Federal Court of Malaysia regarding a single question of law against the Court of Appeal Decision:

> *"Whether for the purposes of an application made under Section 38 of the Arbitration Act 2005 and Order 69 Rule 8 of the Rules of the Federal Court 2012, the recognition and enforcement of an arbitration award by way of entry as a judgment of the High Court of Malaya ought to relate only to the disposition of the said award and not the entire award containing the reasoning, evidentiary and factual findings of the arbitral tribunal?"*

In a nutshell, on 27th March 2020, the Federal Court of Malaysia (5 Judge bench) allowed the Appellant's appeal and reversed the decision of the Court of Appeal and reinstated the order by the High Court of Malaya that only the dispositive portion of the Arbitral Award ought to be given due recognition and deemed enforceable (at [53]-[55]).

The Federal Court of Malaysia amongst other grounds of judgement observed as follows:

> *"[34] The award of the arbitral tribunal embodies the totality of the case before it which includes inter-alia, the relief sought, the issues to be tired, witness statements, submissions, summary of findings, costs and disposition. By analogy, this is similar to the grounds of judgment delivered by the courts, which are distinct and separate from the judgment or order itself. The dispositive award is the judgment whereas the entire award is the grounds of judgment. It defies logic that the whole award containing the findings and analysis of the arbitral tribunal of the evidence, which is akin to the grounds of judgment be considered as forming the terms of judgment to be registered as a judgment of the High Court. An analogy may also be drawn between the approach taken by the courts in dealing with an application under REJA and the approach that the courts ought to take in an application under Section 38 of the Arbitration Act 2005. Both REJA and Section 38 provide an avenue for the successful party to register the judgment in Malaysia as a judgment of the High Court" (at [34]).*

## ADJUDICATION

***IRDK Ventures Sdn Bhd v. Econpile (M) Sdn Bhd (Civil Appeal No. W - 02 (C)(A) - 645 - 04 / 2016)*** (Decision dated 9th July 2020)

Summary:

The issue before the Court of Appeal was an application by the developer of a project 'IRDK Ventures Sdn Bhd', the Appellant, against the decision of the Kuala Lumpur High Court which held in favour of the Contractor 'Econpile (M) Sdn Bhd', the Respondent, and allowed the Respondent's Enforcement Application of an Adjudicator's decision dated 30th October 2015, while dismissing the Appellant's Setting Aside Application.

As a brief background, the Adjudicator's decision was due on 15th October 2015, which was subsequently extended to 30th October 2015 by agreement of both parties under Section 12(2)(c) of the Construction Industry Payment and Adjudication Act 2012 (the "CIPAA"). The Adjudicator's decision was delivered to the parties on 3rd November 2015, after confirmation from the AIAC regarding a balance payment of RM258.32 (being the GST to be deposited with AIAC). The Appellant's solicitors had sent a scanned copy of the cheque on 29th October 2015, which was physically delivered to the AIAC on 30th October 2015 (5:20 pm, Friday), and reached the AIAC's Case Counsel on 2nd November 2015 (at [11]-[17]).

*"23.1 Whether an adjudication decision delivered within time but released to the parties only after the payment of the GST for KLRCA's fees is void and/or whether there is a delay in making and serving the Adjudication decision to the Parties; and*

*23.2 Whether the Adjudicator has the jurisdiction to decide on the payment claims when the contract has been terminated and/or whether the Respondent was entitled to commence an adjudication proceeding under CIPAA after the contract had been terminated" (at [23]).*

The Court of Appeal on 9th July 2020 dismissed the appeals with cost (at [57]). First, the Court of Appeal referring to sections 12(2) and 19 of CIPAA, and Regulations 7,9, and 12 under Schedule II of the AIAC's Standard Terms of Appointment held that "*...having perused the abovementioned provisions and after careful perusal of the chronology of facts, we were of the view that the act of withholding the delivery of the decision by the Adjudicator was with a legitimate basis. It was clear to us there was still an outstanding fees [sic] and payment in the form of GST that was still pending to be paid to the KLRCA*" (at [41]). It further observed that "*the cheque was sent on a late Friday afternoon and as such, it only natural that it will only be processed on the next working day* (at [43]).

Most importantly, the Court of Appeal held that "*It is our unanimous view that the Adjudication's decision was delivered within time and the same was released to the parties soon after confirmation that the GST payment to the KLRCA had been duly paid pursuant to the KLRCA Standard Terms of Appointment of the Adjudicator as provided under Schedule II of the KLRCA Adjudication Rules and Procedure, to which the parties had agreed to adhere to. Thus, it is our decision that the Adjudicator's decision was valid*" (at [48]).

Second, the Court of Appeal referring to Sections 2 and 3 of CIPAA, Clause 25.4(d) of the PAM 2006, and Section 17A of the Interpretation Acts 1948 and 1967, held that the Respondent had a statutory right to refer to adjudication for recovery of payment in the construction industry. A remedy under the CIPAA is only intended as an interim measure, and the aggrieved party may still find recourse in an arbitration proceeding and/or in Court (at [52]-[55]). Accordingly, it held that "*we were of the unanimous view that none of the requirements under section 15 of CIPAA has [sic] been established by the Appellant to convince this Court to set aside the Adjudicator's decision. We were also mindful that an adjudication decision should only be set aside in a rare and extreme circumstances in order to give effect to the provisional resolution of payment disputes in construction contracts*" (at [56]).

# SAVE THE DATE !

| | |
|---|---|
| 1st Sept 2020 | **ADR Online: An AIAC Webinar Series - AIAC September Sports Month 2020** - Building Your Career as a Sports Arbitrator |
| 4th Sept 2020 | **AIAC's September Sports Month Workshop Series** - Introduction to Sports Dispute Resolution |
| 8th Sept 2020 | **ADR Online: An AIAC Webinar Series - AIAC September Sports Month 2020** - Employment and Contractual Issues in Sports: Recent Developments Post-COVID 19 |
| 10th Sept 2020 | **ADR Online : AIAC Webinar Series** - Steering Clarity on C.A.R. |
| 11th Sept 2020 | **AIAC's September Sports Month Workshop Series** - Understanding Esports: Legal Rights and Implications |
| 15th Sept 2020 | **ADR Online: An AIAC Webinar Series - AIAC September Sports Month 2020** - The Challenges in Regulating Sports: From Gender Equality to Anti-Doping Requirements |
| 17th Sept 2020 | **ADR Online: An AIAC Webinar Series - Malaysia Day Special**: The Birth of a Nation - ADR in East and West Malaysia |
| 18th Sept 2020 | **AIAC's September Sports Month Workshop Series** - Negotiating Sports Contracts and Agreements: What to Expect |
| 19th - 23rd Sept 2020 | AIAC Certificate in Adjudication |
| 22nd Sept 2020 | **ADR Online: An AIAC Webinar Series - AIAC September Sports Month 2020** - International Sports Arbitration and Athletes' Rights – Maintaining a Level Playing Field |
| 24th Sept 2020 | **ADR Online : AIAC Webinar Series** - Enforcement Issues and the New York Convention: To March with the Status Quo or to Petition for Change? |
| 29th Sept 2020 | **ADR Online: An AIAC Webinar Series - AIAC September Sports Month 2020** - Sports Mediation: An Underused Tool in Resolving Sporting Disputes |
| 1st Oct 2020: | **ADR Online : AIAC Webinar Series** - State of Affairs: Corruption Allegations in Arbitration |
| 21st Oct 2020 | **ADR Online : AIAC Webinar Series** - The Modern-day Changes & Challenges to the Construction Industry |
| 5th Nov 2020 | **ADR Online : AIAC Webinar Series** - À la mode: Latest Dispute Resolution Trends in the Fashion Industry |
| 19th Nov 2020 | **ADR Online : AIAC Webinar Series** - Creating a Sphinx: The Perfect ADR Mechanism |
| 3rd Dec 2020 | **ADR Online : AIAC Webinar Series** - Promoting the Use of Mediation in Investor-State Dispute Settlement |

## 2020

### JANUARY

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

### FEBRUARY

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

### MARCH

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

### APRIL

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

### MAY

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

### JUNE

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

### JULY

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

### AUGUST

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

### SEPTEMBER

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

### OCTOBER

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

### NOVEMBER

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

### DECEMBER

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

ASIAN INTERNATIONAL ARBITRATION CENTRE

**ASIAN INTERNATIONAL ARBITRATION CENTRE**

BANGUNAN SULAIMAN,

JALAN SULTAN HISHAMUDDIN,

50000 KUALA LUMPUR

**T** +603 2271 1000

**F** +603 2271 1010

**E** enquiry@aiac.world

**www.aiac.world**

Outdoor cafeteria, AIAC