ASIAN INTERNATIONAL ARBITRATION CENTRE
NEWSLETTER #03
DECEMBER 2020

VIRTUAL REALITY

Unlocking Potentials for ADR

AIAC ADJUDICATORS CONTINUING COMPETENCY DEVELOPMENT (CCD) WORKSHOP SERIES

ADJUDICATION CASE LAW UPDATE

Apart from the provisions contained in the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"), the statutory framework of adjudication in Malaysia is marked significantly by the precedents and judicial pronouncements of the Courts in Malaysia. There is an increasing need for all players in the CIPAA industry to have a proper understanding and appreciation of how case law affects the interpretation and application of the CIPAA provisions to adjudication proceedings. In this respect, the AIAC is pleased to unveil the first of its CCD Workshop Series for the year 2021.

The **Adjudication Case Law Update** will be open to legally trained and non-legally trained individuals who regularly appear and participate in CIPAA proceedings. This workshop forms part of the AIAC's larger initiative to maintain and enhance competency standards amongst adjudicators. The format is designed as an interactive session, with exercises and assignments to be conducted throughout the discussion on adjudication case law updates. To ensure optimum results in the delivery of the workshop and trainer-participant ratio, only limited seats will be available.

Registration Fee: **RM 40**

CCD Scheme: **1 Point**

SPEAKERS

Kevin Prakash
(Kevin Prakash, Advocates & Solicitors)

Daniel Tan
(Tan Chun Hao, Advocates & Solicitors)

DATE: Saturday, 30th January 2021

TIME: 9.00 a.m. - 1.00 p.m.

VENUE: AIAC, Bangunan Sulaiman

AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE

For more information, please contact events@aiac.world or +603 2271 1000

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

ASIAN INTERNATIONAL ARBITRATION CENTRE

FROM THE ED

Welcome to the December 2020 edition of the Asian International Arbitration Centre's ("AIAC") Newsletter! Recent times have certainly brought about winds of change whether they be concerted efforts to develop a successful COVID-19 vaccine or changes to the global political landscape.

Closer to home, it is our pleasure to announce that the Honourable Tan Sri Datuk Suriyadi bin Halim Omar was appointed by the Government of Malaysia, in consultation with the Asian-African Legal Consultative Organization (AALCO), as the Director of the AIAC for the 2020-2022 term, with effect from 1st December 2020. The appointment ends the vacancy of the AIAC's directorship following the untimely demise of the late Vinayak P. Pradhan in March 2020.

On behalf of the AIAC Team, we would like to welcome Tan Sri to the AIAC. We are hopeful that Tan Sri's leadership will drive our efforts to enhance Malaysia as a preferred seat of arbitration, and continue delivering the AIAC as a global alternative dispute resolution ("ADR") hub.

On that note, we would also like to thank the local and global ADR community for their patience and understanding throughout the absence of a Director at the AIAC. The AIAC Team has been working diligently throughout December 2020 to ensure all pending case management tasks and projects are actioned and/or resolved expeditiously. We will strive throughout 2021 to continue providing efficient and innovative case management products and services to strengthen and reinforce public confidence in the AIAC's offerings.

Despite these setbacks, between August and November 2020, the AIAC continued powering ahead with its innovative capacity building and knowledge sharing initiatives to promote ADR both locally and globally.

August 2020 saw the AIAC launch and/or partake in two new initiatives – the AIAC Young Practitioners Group's (YPG) webinar series titled "Careers 2.0: Find Your Niche", and the "DREx Talk – Kuala Lumpur 2020". The former 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. The latter was the first of its kind in South East Asia. It featured Dr. Michael Hwang S.C. (Barrister & Arbitrator at Michael Hwang Chambers LLC) delivering a lecture on the setting aside of awards under Article 34 of the UNCITRAL Model Law, with a comparative overview across eight jurisdictions. Both these initiatives received highly positive feedback from the participants, and we anticipate continuing the momentum in 2021.

September 2020 heralded the arrival of the 3rd edition of the AIAC's September Sports Month. Following the outbreak of the COVID-19 pandemic and its halting of international travel, the AIAC replaced its annual International Sports Law Conference with a special September Sports Month Webinar Series, held every Tuesday of the month, on its ADR Online platform. Featuring interesting topics, namely "Building Your Career as a Sports Arbitrator", "Employment and Contractual Issues in Sports: Recent Developments Post COVID-19", "The Challenges in Regulating Sports: From Gender Equality to Anti-Doping Requirements", "International Sports Arbitration and Athletes' Rights – Maintaining a Level Playing Field", and "Sports Mediation: An Underused Tool in Resolving Sporting Disputes", the AIAC attributes the success of this webinar series to our outstanding speakers.

Aiming also to provide an affordable and accessible platform for sports law education in Malaysia, the AIAC kept the ball rolling with its second edition of the Sports Month Workshop Series, with three sessions titled "Introduction to Sports Dispute Resolution", "Understanding Esports: Legal Rights and Implications", and finally to conclude, "Negotiating Sports Contracts and Agreements: What to Expect". For the brief yet advantageous period of time when movement restrictions were relaxed, the AIAC ended its September Sports Month 2020 on a high note with a Sports Month Networking Session which was hosted on 25th September 2020 at the AIAC's Bangunan Sulaiman. Fun activities including a sports pub quiz and a sports movies-themed charade were organised, amidst strict social distancing measures. The event was a timely

DITORS' DESK

catch-up amongst local sports law enthusiasts to discuss the development of sports dispute resolution in Malaysia.

In terms of the AIAC's investment in capacity building efforts, in October 2020, the AIAC had the opportunity to partner with the Asian Law Students' Association, Malaysian Chapter in organising its inaugural ALSA International Mediation Competition 2020. This competition featured problems drafted by the AIAC's Legal Services Team with reference to the AIAC Mediation Rules 2018. The problems presented real-life scenarios to law students who were being tested on their abilities to extract information, negotiate and compromise. We applaud these students for their efforts in embedding their feet in the world of ADR!

November 2020 also marked the launch of the AIAC's latest initiative aptly titled, "Around the World in 30 Days". Focussed on promoting diversity in arbitration, this initiative featured short interviews by 30 arbitration practitioners from 30 different jurisdictions who shared their views on what makes their respective jurisdictions effective seats for arbitration, as well as tips and other insightful information on succeeding and developing a career in international arbitration. All the interviews are accessible on the AIAC's social media platforms – namely the AIAC's LinkedIn, Facebook, and Instagram pages.

No newsletter would be complete without industry contributions. An interesting feature of this edition of the Newsletter is the publication of Part II of the AIAC's survey of the practice of arbitration in emerging arbitration jurisdictions. Additionally, one of the most significant developments in 2020 was the legal industry's adoption of using virtual hearings and online dispute resolution (ODR) platforms. Accordingly, we interviewed various providers and experts on what 2020 has brought the ADR community in the virtual world. On that note, the AIAC also wishes to thank all of the special contributors in this edition of the Newsletter – Aisha Abdallah, Ana María Arrarte, Angela Cámara Chumbes, Dr. Hassan Arab, Jagpreet Sandhu, Joe Al-Khayat, Kimberley Stewart, Nathan Eastwood, and Nodir Yuldashev – for sharing their industry insights and practical knowledge with our audience.

As 2020 comes to a close, we look forward to the exciting opportunities and possibilities 2021 will bring. Just as we toured the globe with Around the World in 30 Days, this year we have seen that despite the lack of travel, the ADR community has become more connected than ever virtually. We plan on continuing our efforts to provide virtual content and connecting with our network, hopefully virtually, in the coming months. Not only have virtual hearings and ODR taken the legal industry by storm, but this pandemic has caused us to be more introspective. In line with this, the AIAC, under the leadership of our new Director, will visualise the next decade for the AIAC and determine the best way in which we can serve the ADR community as a whole building on our strong foundation.

Till the next issue, happy reading!

- AIAC Newsletter Team

THE AIAC WELCOMES ITS NEW DIRECTOR AND DEPUTY DIRECTOR

On 1st December 2020, Tan Sri Datuk Suriyadi bin Halim Omar, the new Director of the AIAC, took office. Tan Sri's experience includes serving as a judge in the Federal Court (Malaysia's apex court) and the Attorney-General's Chambers. Tan Sri graduated from the University of Warwick, United Kingdom with an LLB (Hons) and is a Barrister-at-Law from Lincoln's Inn, London. During his time in the judiciary, Tan Sri sat in a number of cases regarding issues related to arbitration, adjudication, as well as the construction industry as a whole. Such issues related to "limitation periods in arbitration, the incorporation of arbitration clauses by reference, the interpretation of co-existing and conflicting jurisdiction and arbitration clauses, the interplay between statutory winding-up proceedings and arbitration, stay of court proceedings commenced in breach of an arbitration agreement, the challenge of awards premised on the minority opinions in the arbitration, and the limitation period for enforcing awards as a judgment of the court".

Following Tan Sri's appointment, on 14th December 2020, Datuk Dr. Prasad Sandosham Abraham, the new Deputy Director of the AIAC, took office. Datuk graduated from the University of Nottingham with an LLB (Hons) and is a Barrister-at-Law from Middle Temple's Inn, London and was later called to the Malaysian Bar. Prior to joining the judiciary, Datuk practised with several firms and later started his own practice focusing on commercial and civil litigation. In 2009, Datuk was appointed as a Judicial Commissioner and later elevated to the High Court in 2011, followed by the Court of Appeal in 2014 and Federal Court in 2017. In addition to his time in practice and on the bench, Datuk was a part-time lecturer at the School of Law University Technology of MARA (UiTM) teaching Civil Procedure as well took part in the conduct of the Certificate of Legal Practice (CLP) examinations. He was also a Special Professor to the Department of Law at the University of Nottingham and was conferred an Honorary Decree of Doctor of Laws Honoris Causes in recognition for his efforts at the University. Upon his retirement from the judiciary, Datuk acted as an independent arbitrator in both administered and ad hoc matters.

The AIAC welcomes both Tan Sri and Datuk to the Centre and we are confident that the Centre will reach new heights under their esteemed leadership. A detailed interview with the Director of the AIAC and the Deputy Director of the AIAC will be featured in the next edition of the AIAC Newsletter.

AIAC SEPTEMBER

SPORTS MONTH

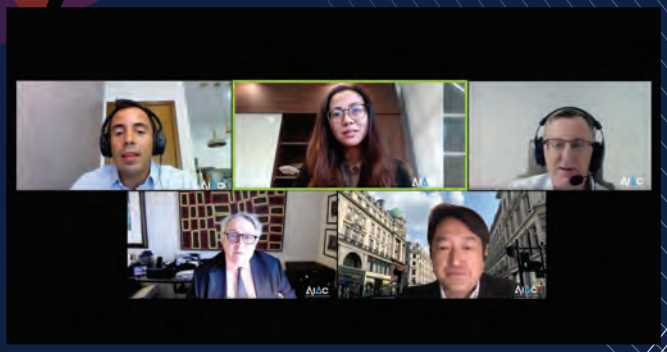
As part of our efforts to increase public awareness of sporting disputes, and to promote the development of sports law in Asia and beyond, the AIAC dedicated the entire month of September to events focused on sports law and sports dispute resolution. Aptly titled "September Sports Month", below are the highlights of the events which took place in September 2020.

ADR ONLINE: SEPTEMBER SPORTS MONTH WEBINAR SERIES

Following the outbreak of the COVID-19 pandemic, and its halting of international travel, the AIAC replaced its annual International Sports Law Conference with a special September Sports Month Webinar Series (the "Webinar Series"). As part of the series, each Tuesday, the audience was enlightened by through-provoking panel discussions on key topics in sports dispute resolution.

Building Your Career as a Sports Arbitrator

The first of the 5-episode Webinar Series, held on 1st September 2020, was titled "Building Your Career as a Sports Arbitrator". The panel featured prominent sports arbitrators - Clifford J. Hendel of Hendel IDR, Takuya Yamazaki of Field-R Law Offices, and Paul J Hayes QC of 39 Essex Chambers, who each shared their experience on how they began their careers in sports arbitration, as well as their first accounts as sports arbitrators, with Thomas Delaye-Fortin, Head of Legal and Governance, Badminton World Federation, expertly moderating the session. The panellists then addressed some of the differences between sports and commercial arbitration, before sharing some practical advice to upcoming and budding sports law practitioners. Valuable words of wisdom for budding sports arbitrators echoed by the panel included having to build one's trustworthiness and brand within the industry by developing the relevant expertise, as well as displaying professionalism, passion, and dedication in this field of law.

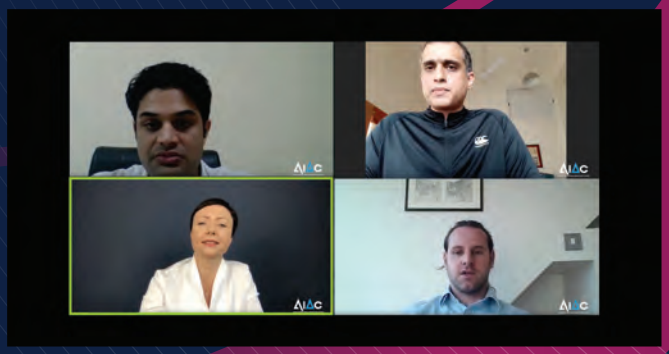


Employment and Contractual Issues in Sports: Recent Developments Post COVID-19

The second episode, titled "Employment and Contractual Issues in Sports: Recent Developments Post COVID-19" was held on 8th September 2020. The session was moderated by Henry Goldschmidt of Morgan Sports Law and featured industry experts, namely Nick De Marco QC of Blackstone Chambers, David Menz of Martens Lawyers, and Aahna Mehrotra of TMT Law Practice. The panel highlighted some of the critical employment and contractual issues faced by the sports industry in the UK, Europe, and India following the outbreak of the COVID-19 pandemic. This included unpaid wages, the invocation of force majeure clauses as well as the reorganisation of major sports competitions. The panel also touched upon the financial consequences of the COVID-19 pandemic and concurred that although there are signs of recovery, the huge disruption to the sports industry is far from over. As with all sport regulatory bodies and federations alike, the panel emphasised that it is also essential for sports lawyers to adapt, evolve, and be innovative in formulating solutions for their clients in these unprecedented times.

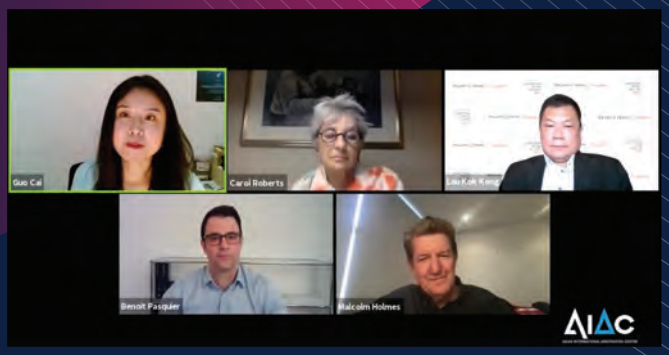
The Challenges in Regulating Sports: From Gender Equality to Anti-Doping Requirements

The momentum of the Webinar Series continued with its third episode titled "The Challenges in Regulating Sports: From Gender Equality to Anti-Doping Requirements" taking place on 15th September 2020. Moderated by Shivam Singh of Chamber 20A and featuring Nandan Kamath of LawNK, Melanie Schärer of MS International Law, and Chris Lavey of Bird & Bird, the panel spotlighted the various challenges that governing bodies face in ensuring equality and uniformity in sports regulations. From a critical analysis of the *Dutee Chand and Caster Semenya* cases to the issues plaguing women's football, as well as questions of self-determination and the right to livelihood, the panel delved deep into the legitimacy and human rights implications involved, as well as what could be done to address them. Concurring that thoughtful and considered approaches need to be taken to address the imbalances, the panel also stressed the importance of having equal representation at the decision-making table, as well as ensuring ethical boundaries are not crossed at the expense of athletes and all stakeholders involved.



International Sports Arbitration and Athletes' Rights – Maintaining a Level Playing Field

The fourth episode, titled "International Sports Arbitration and Athletes' Rights – Maintaining a Level Playing Field," was held on 22nd September 2020 and featured an experienced and diverse international panel of speakers, namely Malcolm Holmes QC of Eleven Wentworth, Benoît Pasquier of BP Sports Law, Lau Kok Keng of Rajah & Tann Singapore LLP, and Carol Roberts of Carol Roberts Law Corporation. Moderated by Guo Cai of Jin Mao Law Firm, the panel discussed the prevailing issues in international sports arbitration ranging from the cultural, gender and language biases in hearings, the issue of diversity in the Court of Arbitration for Sport's ("CAS") closed list of arbitrators, as well as the general lack of access to legal representation. Suggested improvements to the current framework include the need for establishing domestic sports arbitration tribunals and expanding the pool of sports law experts and arbitrators from less developed jurisdictions. The panel also called upon young practitioners to continue pushing for improvements to the current framework as their career progresses.



Sports Mediation: An Underused Tool in Resolving Sporting Disputes

The fifth and final episode of the Sports Month Webinar Series took place on 29th September 2020 with the title "Sports Mediation: An Underused Tool in Resolving Sporting Disputes". The panel consisted of seasoned sports lawyers and CAS Mediators, Jeffrey Benz of Jams & 4 New Square, Konstantina Morou of Konstantina Morou Law Office, Abdul Salim Ahmed Ibrahim of United Legal Alliance LLP and John Shea of Lewis Silkin LLP, with the AIAC's Diana Rahman moderating. The panel considered the different sporting disputes that may be referred to the CAS, focusing on the distinguishing factors and issues in sports mediation, and provided an overview of how to promote and encourage the wider use of mediation in the sports industry. Following the sharing of perspectives and experiences, the panel concluded that transactional lawyers were in the best position, and thus, bore a greater responsibility to promote mediation – by including mediation clauses in sports contracts at the federation and association levels, as well as having mediation be part of internal dispute resolution processes.

Workshop on Introduction to Sports Dispute Resolution

Aiming to provide an affordable and accessible platform for sports law education in Malaysia, the AIAC kept the ball rolling with its second edition of the Sports Month Workshop Series, with its first session held on 4th September 2020, titled "Introduction to Sports Dispute Resolution". Conducted in partnership with the Sports Law Association of Malaysia ("SLAM") and supported by the Olympic Council of Malaysia, The Asian Football Confederation and the AIAC Young Practitioners' Group, the workshop brought together industry experts, namely, Richard Wee of Richard Wee Chambers, Nik Erman Nik Roseli of Amir Khusyairi & Associates, Sri Sarguna Raj of Christopher & Lee Ong, and Liu Jiahe from The Asian Football Confederation. The panel began by examining the governing structures and legal principles applied in sports law, followed by the dispute resolution procedures in sports, and the structure of the CAS. The session rounded off with a sharing by the Asian Football Confederation on its approach to resolving disputes at the continental confederation level.

Workshop on Understanding Esports: Legal Rights and Implications

Focusing on the rapidly growing esports market, the second session of the Workshop Series was held on 11th September 2020 and featured a young panel of esports lawyers, including Bryan Boo of Bryan & Co, Joseph Cheah of Paul Cheah Associates and Marlysa Razak of Richard Wee Chambers. Titled "Understanding Esports: Legal Rights and Implications", the panel kicked off with an overview of esports, followed by an analysis of the legal issues arising from contracts, sponsorships, intellectual property, cross-border governance and dispute resolution. A key takeaway from this workshop was the importance of having a thorough understanding of the esports industry given its synergy with constantly evolving technology, as well as its differing nature from conventional sports.

Workshop on Negotiating Sports Contracts and Agreements: What to Expect

On 18th September 2020, the AIAC concluded the final fixture of its Workshop Series for the year, titled "Negotiating Sports Contracts and Agreements: What to Expect". This session brought together experienced individuals from the sports industry, namely Brian Song of Song & Partners, Susanah Ng of Susanah Ng & Associates, and Stanley Bernard of the Malaysian Football League. Kicking off with an engaging and interactive introduction to sports contracts, the panel then moved into the essentials of negotiating sports contracts, including key provisions and considerations. The participants also benefitted from a unique perspective with some personal sharing from Stanley Bernard himself, who was once a professional athlete.

AIAC-SLAM SPORTS MONTH NETWORKING SESSION

The AIAC's September Sports Month 2020 ended on a high note with a Sports Month Networking Session which was hosted on 25th September 2020 at the AIAC's Bangunan Sulaiman. Attendees included members of SLAM, speakers in the AIAC September Sports Month Workshops as well as Workshop attendees throughout the month. Fun activities including a sports pub quiz and a sports movies-themed charade were organised, amidst strict social distancing measures. The event was a timely catch-up amongst local sports law enthusiasts to discuss the development of sports dispute resolution in Malaysia.

ADR Online:
An AIAC Webinar Series

OVERVIEW OF THE MERDEKA SPECIAL WEBINAR SERIES

The ties between Indonesia and Malaysia cannot be understated. Not only do the two countries share the same cultural and linguistic roots, but they also have close socio-economic cooperation, particularly in their roles as Member States of the Association of Southeast Asian Nations ("ASEAN"). Chiefly, it is worth noting that both countries celebrate their Independence Days at the end of August, with Indonesia's Independence Day on 17th August and Malaysia's Independence Day on 31st August.

In line with the AIAC's vision to further expand its footprint as a premier alternative dispute resolution hub in Asia, the AIAC, in collaboration with the Indonesian Arbitrators Institute (the "IArbI"), held its first Merdeka Special Webinar Series, as part of AIAC's ADR Online: An AIAC Webinar Series, to celebrate the Independence Days of Indonesia and Malaysia. Befitting the theme of this occasion, the following webinars took place on 24th August 2020, 25th August 2020, and 27th August 2020. . We would like to take this opportunity to thank the supporting organisation of the Merdeka Special Webinar Series, namely Justitia Training Center, CIArb Indonesia Chapter, CIArb Malaysia Branch and Malaysia Institute of Arbitrators (MIArb)

The Indonesian Features on 24th August 2020 to 25th August 2020

Alternative Dispute Resolution for Construction Dispute in Indonesia: Growth, Challenges, and Opportunities

The three panellists for this session – Dr. Ir. H. Ahmad Rizal of IArbI, Mr. Raymond Lee of the Indonesian Mediation Center, and Mr. Albertus Aldio Primadi of the AIAC – spoke on the current state of and developments in the construction industries in Indonesia and Malaysia vis-à-vis the alternative dispute resolution mechanisms that are available in both countries. The session was seamlessly moderated by Ms. Melati Siregar of UMBRA – Strategic Legal Solutions, Indonesia.

Mr. Lee kickstarted the session by providing an overview on the use of mediation in Indonesia for construction disputes. He elucidated the correlation between Indonesian culture which makes preference to more amicable and "friendlier" dispute resolution mechanisms such as mediation, despite the popular use and demands of litigation. Additionally, Mr. Lee also explained the benefits and the existing avenues of mediation for disputing parties in Indonesia.

Dr. Rizal then presented an overview on the exponential growth of the construction industry in Indonesia and why tailored dispute resolution mechanisms are very much necessary to facilitate the present and future construction disputes which do not show signs of stopping. He also touched upon the framework of arbitration in Indonesia and the clear interest from the stakeholders to explore the use of adjudication for construction disputes, akin to that of Malaysia under the *Construction Industry Payment and Adjudication Act 2012* (the "CIPAA").

Mr. Primadi skillfully tied up the presentations by his fellow panellists by first introducing arbitration, mediation, and adjudication from global perspectives, and how each of these mechanisms is suitable for construction and non-construction disputes. Specifically, he presented how adjudication within the CIPAA framework operates in Malaysia, and how both administered proceedings under AIAC Arbitration and Mediation Rules, as well as the Malaysian Arbitration Act 2005 (the "Act"), are conducted and monitored by the AIAC as an administrative authority.

Ms. Siregar finally concluded the webinar by emphasising the importance of having clearly defined contracts which set out the appropriate dispute resolution mechanism to begin with. Not only does it serve as an effective dispute avoidance tool, it also assists the parties when disputes become unavoidable during and after the performance of the contracts.

The Garuda and The Tiger: The Indonesian Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution and the Malaysian Arbitration Act 2005

Unlike the previous session which was very much tailored to discuss construction disputes and different alternative dispute resolution mechanisms, the second day of the Merdeka Special Webinar Series was designed to explore the current arbitration practice and laws in Indonesia and Malaysia.

Ms. Karen Mills of KarimSyah Law Firm, Indonesia, Prof. Dr. Huala Adolf of the Indonesian National Board of Arbitration (the "BANI"), and Mr. Rajendra Navaratnam of Azman Davidson & Co., participated as the panellists of this session. Dr. Anangga W. Roosdiono of Roosdiono & Partners and BANI served as the Moderator.

Prof. Dr. Huala Adolf had the daunting task of comprehensively introducing the Indonesian Law No.30 of 1999 on Arbitration and Alternative Dispute Resolution (the "Law No. 30") to the audience. Ms. Mills then shared her views as to whether Law No. 30 needs to be amended to make Indonesia a more efficient and attractive arbitral seat, given that it is now more than 20 years old. Ms. Mills particularly pinpointed the enforcement procedure of foreign arbitral awards before Indonesian courts and how she thought such may be improved.

Last but not least, Mr. Navaratnam navigated the workings of the Act, before and after the 2018 Amendments entered into force. Mr. Navaratnam highlighted the success of the Act to date and the important role that the Malaysian judiciary plays in supporting the progress of arbitration in Malaysia and making the country, not only an UNCITRAL Model Law country, but also a safe and efficient arbitral seat on par with other popular arbitral seats.

The Malaysian Feature on 27th August 2020

One to Remember: Malaysia's Journey in Alternative Dispute Resolution.

The last day of the Merdeka Special Webinar Series was dedicated as a remembrance to how Malaysia successfully created the legal framework for arbitration.

Ms. Michelle Sunita Kummar of the AIAC gracefully moderated this webinar while Yang Arif Dato' Mary Lim Thiam Suan, a Judge of Federal Court of Malaysia, Mr. Kamraj Nayagam of Mah-Kamariyah & Philip Koh, Dato' Nitin Nadkarni of Lee Hishamuddin Allen & Gledhill, and Ms. Nereen Kaur Veriah of Christopher Lee & Ong, participated as panellists.

Mr. Nayagam began by summarising what – to the best of his research and recollection - was the very first arbitration case in Malaysia, which went back to 19th century and appeared to be recorded in Straits Settlement Excise Ordinance 4 of 1870!

YA Arif Dato' Mary Lim continued to build the momentum by sharing her experience and journey from the moment she started her legal career to the days where she served in the Attorney General's Chambers, during which she was engaged in not only domestic and international arbitrations, but also with the very first investment arbitration involving Malaysia as the Respondent – a landmark case which ushered in this niche area of arbitration into Malaysia. She also shared her perspective on arbitration practice as a member of the Judiciary and what she had in mind to further strengthen Malaysia's reputation as an arbitration friendly jurisdiction.

Dato' Nadkarni and Ms. Veriah echoed Mr. Nayagam and Yang Arif comments. Both of them went on to share their opinions and experiences as arbitration practitioners who are from different generations.

Finally, all panellists imparted their views on the features that have been and should be included in the 2018 Amendments to the Act and future Amendments to the same.

ADR Online:
An AIAC Webinar Series

MALAYSIA DAY SPECIAL:

The Birth of A Nation - ADR in the East and the West of Malaysia

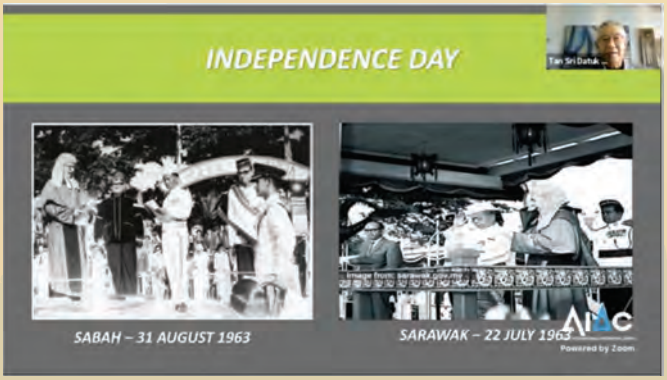
Malaysia's rich and diverse culture and history is made even more resplendent with the beauty that is Borneo! With Peninsula Malaysia having just concluded its Merdeka celebrations in August, Malaysians always look forward to the excitingly diverse celebration that is, Malaysia Day.

To commemorate the celebration of Malaysia Day, which took place on 16th September 2020, the AIAC hosted its Malaysia Day Special Webinar titled, *"ADR Online - An AIAC Webinar Special Series: The Birth of a Nation: ADR in East and West Malaysia"* on 17th September 2020.

The Malaysia Day Special Webinar involved notable panellists from East Malaysia, namely Tan Sri Datuk Seri Panglima David Wong Dak Wah, retired Chief Judge of Sabah & Sarawak, Grace Chaw Hei Hei from Grace Chaw & Co, Ho King Hong from Ho Chong Yong, and Clinton Tan Kian Seng from Idris, Alvin Chong & Partners. Abang Mohd Iwawan, of Rosli Dahlan Saravana Partnership, served as the Moderator.

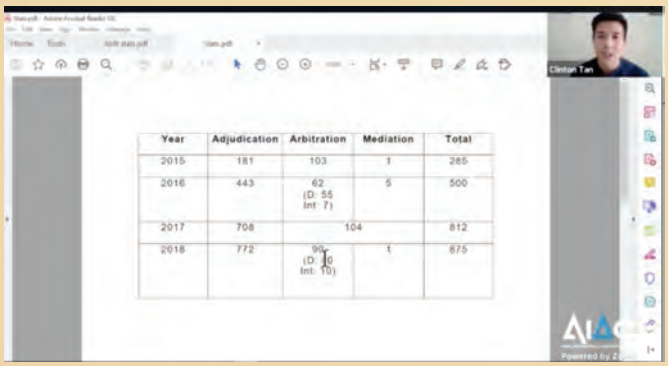
The formation of Malaysia on 16th September 1963 witnessed amendments to the Federal Constitution to include special provisions that are only applicable to the states of Sabah and Sarawak. Certain federal Acts of Parliament have a differing application in these States when compared to Peninsular Malaysia, thereby creating two separate local jurisdictions of the High Court – one for Peninsular Malaysia and another for East Malaysia. In view of these differences in jurisdiction, arbitration has become a very attractive form of alternative dispute resolution (ADR), if not, the preferred method of dispute resolution for cross-border transactions in Malaysia, especially for construction disputes. Where domestic construction disputes are concerned, the *Construction Industry Payment and Adjudication Act 2012* (the "CIPAA") is seen as being the primary mechanism of redress.

During this Malaysia Day Special Webinar, Tan Sri Datuk Seri Panglima David Wong Dak Wah provided a brief outline of how Malaysia was born. Tan Sri listed down some distinguishing features between the two local jurisdictions in Malaysia to assist the audience with understanding why Sabah and Sarawak have special rights distinguishable from the rest of Malaysia. After 56 years of independence, he took us down memory lane, back to May 1961 where the first Prime Minister of Malaysia proposed the idea of forming Malaysia into what it is today. Tan Sri also discussed the significance of the Malaysia Agreement 1963, as well as an providing an overview of the ADR scene in Malaysia.



Following Tan Sri's presentation, Mr. Ho then shared his insights on statutory adjudication. The CIPAA is a speedy and cost-effective dispute resolution mechanism for the recovery of payments for the construction industry. There are no differences between the East and West Malaysian States in the application of the CIPAA as the procedures applicable are the same in both jurisdictions. As an adjudicator himself, Mr. Ho also highlighted the advantages and disadvantages of the adjudication mechanism under the CIPAA and how it has helped parties with the recovery of payments.

On the topic of arbitration, Mr. Tan then provided a snapshot of how ADR is growing rapidly in Malaysia. He shared his views on when it is appropriate to use arbitration and when it is not. In brief, there are two main factors to consider when choosing arbitration: time and cost. Arbitration can be costly at times, and courts may offer a speedier and more cost-effective solution. As an arbitration practitioner, it is important to advise clients on both the benefits and the disadvantages of arbitration as a dispute resolution method so they are able to make an informed decision on how best to proceed. Arbitration is particularly suitable where the subject matter of the dispute requires a technical skill (e.g. a firm grasp of engineering principles). One of the great benefits of arbitration is that parties get to choose their own arbitrator based on characteristics such as the level of expertise and the fields of experience.



Finally, Ms. Chaw also shared her thoughts on the effectiveness and practically of ADR.

The panellists also shared their views on mediation, particularly in the context of the Singapore Mediation Convention. Interestingly, the panel considered that judges should be discouraged from conducting mediations, although policy decisions should be made to mandatorily require certain disputes to be referred to mediation prior to bringing the dispute to court.

Also topical was the discussion on the rights of audience of foreign lawyers in Sabah and Sarawak-seated arbitrations. Our panellists shared the view that the legal industry in Sabah and Sarawak should be opened up to the whole of Malaysia, as the increase in competition will propel everyone to move forward. Certainly, it is possible that there will be an opening of floodgates; however, by adopting a protectionist approach, the states of Sabah and Sarawak are essentially limiting the number of contracts and other commercial opportunities that could be brought in.

In conclusion, it is undeniable that there is a gap between Peninsular and East Malaysia in legal practice. However, the concerted efforts of institutions and government bodies should assist in bridging the gap between East and West Malaysia to strengthen ADR practice and develop the overall arbitration scene.

THE VIRTUALISATION OF DISPUTE RESOLUTION: IN CONVERSATION WITH ODR PROVIDERS

Taking into consideration the vast improvements made by virtual hearing providers and online dispute resolution ("ODR") in 2020, the AIAC interviewed two different stakeholders involved in providing services for the virtualisation of alternative dispute resolution proceedings. Our interviewees – Kimberley Stewart[1] of Arbitration Place Virtual ("APV") and Joe Al- Khayat[2] of Resolve Disputes Online ("RDO") – shared stories from funny moments experienced during virtual hearings to the projection of what the future of moving arbitration, and other ADR mechanisms, online holds. Who knows maybe one day we will all sit in the comfort of our homes and join virtual hearings through augmented reality! The excerpts from their interview are below.

Kimberley Stewart

Joe Al-Khayat

1. *What has been your most humorous experience with virtual hearings or ODR platforms?*

APV: Pets and virtual hearings seem to be the perfect storm. While seeing a furry friend appear on screen can sometimes brighten your day, sometimes their behind the scenes actions can cause quite a bit of havoc. We had one arbitration in which an expert witness was delivering their evidence to the panel. During this time, their dog walker returned with their English Springer Spaniel. The dog was clearly excited to see its owner—so much so that it ran straight through the room onto the witness' lap, tearing down the laptop and sending papers flying everywhere. We were left with the sight of the floor, papers scattered alongside it, and the panicked sounds of "Dog!!!! Get the dog!!!" The panel was very understanding and laughed it off, but needless to say, it was my most humorous and memorable experience with virtual hearings to date.

RDO: Our Government and Private Sector Partners do not name names. However, in the US, we were made aware of lawyers in Florida who apparently did virtual hearings shirtless while another did it in bed still under the covers!

We have also heard stories of inappropriate 'chit-chat' in waiting rooms getting picked up by court clerks and judicial officers. I am sure there are many more! As users become more savvy, we are likely to see a reduction in such indiscretions!

2. *In response to the COVID-19 pandemic, the necessity for virtual hearings and ODR platforms grew exponentially overnight. What do you think has been the most impressive development as a result of this?*

APV: There are several things I have found impressive about the world's seemingly immediate response to virtual hearings and ODR platforms. Firstly, the rapid response to accelerate and innovate our legal systems and alternative dispute resolution systems into the 21st century. Our systems have seemed to advance by years in just mere months. The number of individuals and industries that have come together to ensure that hearings can continue while much of the rest of our lives are on pause has been a remarkable feat. Secondly, the openness and innovative spirit much of the community has shown towards adopting these new systems and changing our traditional models. The collaboration with other services, such as CaseLines to name one example, has ensured that this is not just a band-aid solution but a clear and innovative alternative to in-person hearings. Finally, this development has increased much needed access to justice on many levels, especially for those in remote areas who are unable to travel to the nearest courthouse, and those currently being held in correctional institutions.

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[1] Kimberley Stewart is a respected Canadian entrepreneur who built two highly successful legal services businesses before founding Arbitration Place. Ms. Stewart has demonstrated strength in identifying service gaps in the established model and developing business solutions to address them. She took on the Arbitration Place project because she felt that despite having so many excellent arbitrators who are recognised and employed around the world, Canada lacked a top-level arbitration facility – one based on providing 360-degree service. So, she set out to design a combination of sleek office space, state-of-the art technology and superb concierge-level support that would become an international and Canadian arbitration destination.

Ms. Stewart's hallmark is attention to detail, and she leads by example. She is committed to providing exceptional customer service. She expects her team to maintain the highest standards and constantly look for ways to innovate. From the high calibre of resident and member arbitrators to having on-site court reporters, a secretary/clerk to the tribunal, and an in-house chef, every aspect of Arbitration Place has been well-thought out and meticulously executed with the users in mind.

[2] Joe Al-Khayat is the Co-Founder of Resolve Disputes Online (**RDO**). Prior to becoming a technology entrepreneur, Mr. Al-Khayat practised as a barrister, mediator and solicitor across multiple jurisdictions including the UK, Australia and Singapore. Mr. Al-Khayat has experienced dispute resolution from the perspective of the independent Bar, within law firms and in-house within Government. Mr. Al-Khayat began mediating disputes online back in 2009 and potential of modern technology within dispute resolution was made clear. RDO's technology is supplied to Governments, ADR Centres, Mediators and Arbitrators, and has been operating around the world since 2016.

RDO's leadership team is as a collection of international lawyers and leading technologists from around the world which includes the Chairman of the UN Justice Taskforce, former Thomson Reuters executives and international law firm partners. RDO's team is bound by its mission to make justice effortless and accessible for citizens around the world. RDO is making great progress having been recognised by the UN's latest report on Access to Justice.

Most impressive is that once *Arbitration Place Virtual* and others began generating awareness, providing demonstrations of virtual, and creating momentum, disputing parties and their counsel, arbitrators and mediators, experts, and others who are part of the dispute resolution process started to see that dispute resolution processes could continue – and earning income could continue – despite the global pandemic. And remember, that was March 2020 in North America and Europe. At that time, many people thought there would be a return to 'normal' within a few months.

RDO: Indeed, it was necessary to keep the wheels of justice moving. The most impressive development is the fact that the profession has demonstrated the ability to move quickly. Necessity is the mother of invention. It has shown us that the law certainly has the potential to evolve and become more tech savvy and user centric.

3. *There is a plethora of video conferencing platforms that are currently being used for hearings. In your opinion, is it better to use an ODR provider rather than having an arbitrator or mediator serve as the host him/herself? Why?*

APV: Is using an independent professional provider preferable? Absolutely. Arbitrators and mediators, and counsel, should focus on doing their jobs, and not be pivoting between those roles and dealing with the technology.

Also, an independent professional virtual provider such as *Arbitration Place Virtual* has a depth and breadth of experience with virtual proceedings – the technology and the needs of the participants – that no neutral or counsel will ever have. We have done over 500 proceedings and have some 30 virtual case managers around the world. No arbitrator or mediator, and no law firm technology specialist, will have that level of experience.

In my opinion, it is not only better, but also more efficient, to use an ODR provider rather than having an arbitrator or mediator serve as the host themselves. There are so many issues or concerns that can arise during a virtual hearing, ranging from as large as technical issues to as small as viewing preference requests, and arbitrators have more important matters requiring their attention. Especially when multiple parties are involved, these issues can slow down the actual hearing process. When using an ODR provider, that individual can provide solutions to problems in the background, without pausing the hearing in most instances, which leaves the mediator or arbitrator free to focus their entire attention on the submissions being delivered. It also allows for a less stressful process, as there is someone solely dedicated to providing these support services.

RDO: There are pros and cons to both. RDO's clients who are mediators and arbitrators have reported productive hearings by taking advantage of the additional feature set such as asynchronous communications, file repositories and an ability to view the overall case activity in one secure specialist platform. That said, some video conferencing platforms can be great entry level tools.

4. *What makes your services stand out compared to the other providers we find in the market?*

APV: *Arbitration Place Virtual* figured out early on that it is not only about the technology but about the service. We know the needs of arbitrators and mediators, and counsel, and we know the challenges they face doing their jobs virtually.

What makes our services stand out is our all-encompassing approach. At *Arbitration Place Virtual* (APV), no request is too large, and no detail is too small – providing exceptional customer service is something we value tremendously. We handle hearings from start to finish and can even provide technical rehearsals to ensure parties are comfortable with the eHearing process. Our secure eHearing services include everything expected from traditional on-site proceedings, including live document display and sharing for all participants, break out rooms for private deliberations, translation services in any language, equipment deployment to those who might not have the appropriate set-up for a virtual hearing, as well as technology consulting services. We also have our sister company, an industry-leading court reporting company, A.S.A.P. Reporting Services, to provide real-time transcription. We provide full technical support through our Virtual Case Managers who are equally knowledgeable of the technologies employed and the legalities of virtual proceedings.

We can also provide global time-zone neutral coverage through our International Arbitration Centre Alliance in London and Singapore.

Lastly, (but certainly not least!) APV includes access to our roster of world-class arbitrators and in-house counsel to act as arbitral secretaries if required. In essence, every service you could possibly need to conduct your hearing is provided by APV – making it a one-stop-shop, thereby providing only one point of contact to deal with from beginning to end.

RDO: RDO has been around for a while, whereas a number of new providers have seen the opportunity since COVID-19 and are less experienced. We are also global, and that helps because we have seen what best practice looks like in a multitude of jurisdictions and across a number of resolution types, including mediation and arbitration.

5. *What has been a significant difficulty with moving hearings online? How did you overcome it, and what advice would you provide to those trying to overcome these challenges?*

APV: A significant difficulty was getting participants in the dispute resolution to dip their toes in the water – to take a demo; to see how it works; to talk about their concerns; to accept that while there are differences from physically in-person proceedings, there are advantages. Those who were flexible, who came to appreciate the advantages, and who began to innovate in how they would present or hear cases, led others into 'the new normal', deserve a lot of credit.

Another significant difficulty with moving hearings online was learning how to ensure that the client experience and our service standards did not lessen with the implementation of virtual hearings. With virtual hearings, you cannot provide the treats and catered lunches, the restaurant and shop recommendations, or other benefits to travel and in-person hearings. Since client experience is my most important priority – I did not want our clients or arbitrators to feel like they were receiving a second-rate service by moving their hearings to a virtual world. To overcome these concerns, I ensured that we chose an eHearing platform that could provide all the services expected from an in-person hearing. I have

ensured that our Virtual Case Managers are knowledgeable not only in our technologies, but also in the law, so they are able to provide end-to-end, seamless services to our clients. While our clients may not be receiving the travel and catering perks, they can rest assured that they will still be receiving knowledgeable help, state of the art technologies, and concierge-level support. My advice to those trying to overcome these challenges: keep persevering and growing. Take all compliments and critiques that may come your way to heart to learn from them and improve. Do your research into the types of services currently being offered and try to innovate and create something that goes above and beyond the typical services. My most important advice, however, is to never be defeated. This is a new world for many of us, and you will quickly find out what does and does not work for your business model – but you cannot let one setback stop you from improving.

RDO: The most challenging issue is ensuring parties know how to use technology. We have a support team who can help, and we also provide easy to follow tutorials for parties.

6. ***In arbitrations, the greatest concern with virtual hearings seems to be the possibility of witness coaching as well as the disconnect created by not being able to read the body language of witnesses. How can we deal with this obstacle and enhance the reliability and authenticity of witness examinations in virtual hearings?***

APV: Witness coaching became a topic that people liked to talk about on webinars and write about in articles. The reality is that it is a minor or non-existent risk in most proceedings. If there is a concern, there are various means of almost, if not totally, eliminating the risk through a combination of technology and procedural solutions.

Although due process concerns and the integrity of oral evidence is a factor to consider, I believe it is a manageable one. An easy solution to tackling the issue of both body language of a witness and witness coaching is to ensure that the witness is sitting far enough away from the camera to see the entire top portion of their body – or the same amount you would see if a witness was in a witness box in a traditional court hearing.

Additionally, the tribunal can ask the witness at any time to provide a 360-degree view of the room in order to confirm that no unauthorised persons are present or can ask the witness to display any documents they are referring to in order to ensure there is no annotation or notes on those documents. A secondary camera can be placed behind the witness as well to ensure they are alone in the room and that no other devices are being used to communicate with counsel. The tribunal or reporter should also ask the witness to affirm that he or she is not receiving any communications or assistance during the testimony. A feature that can help ensure this is to disable private chat functions on the virtual platform and utilize security features of those platforms such as waiting rooms and secure breakout rooms. While no system, whether virtual or in-person, is perfect – I believe these practical suggestions can mitigate these concerns.

RDO: There is a risk that live evidence via webcam is either not as 'rich' as a medium of communication and/or there is a risk of evidence being compromised. Practical steps that we have advised historically include: having a clear view of a witness' face and shoulders and reminding representatives that any form of communication is prohibited. There are tech innovations which providers like RDO are developing, and those should assist on these points.

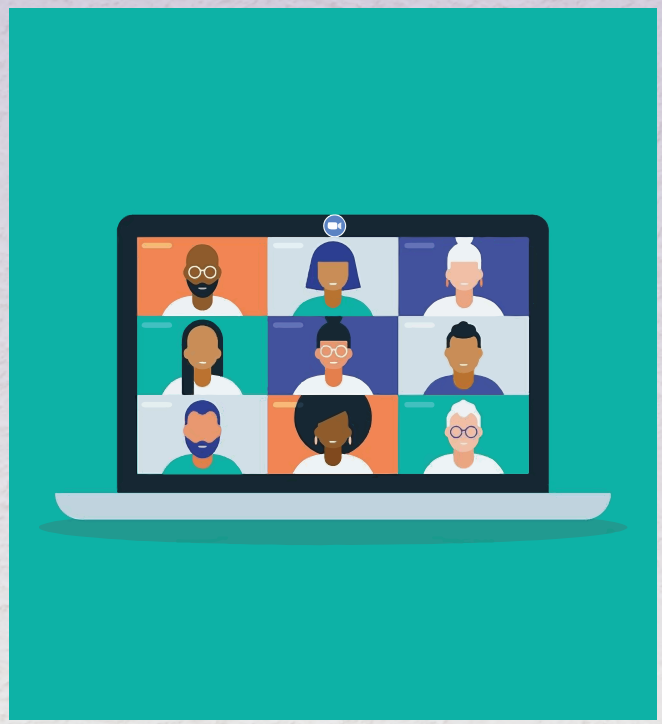
7. ***What future developments do you think we will see in the next few years for virtual hearings and ODR platforms?***

APV: The virtual platforms were overwhelmed with their growth in business starting when the pandemic hit. *Arbitration Place Virtual* was dealing at the senior levels with the platform providers and found that they just didn't have the time or capacity to customize and adapt their platforms to the needs of a particular industry – the dispute resolution industry included. As they have expanded and as all of us settled into more of a pattern, they will adapt to make the technology fit better with what goes on in arbitration and mediation.

I think we will see more individuals, firms, and courts choosing to operate via virtual hearings and hybrid hearings – a combination of in-person and virtual participation in a post-pandemic world.

Also, the hardware will get better, and the use of higher-end hardware solutions will become more prevalent. Since the pandemic hit, dispute resolution practitioners have figured out the use of three screens, cameras, sound, lighting, background, document display and so much more. Will we see 3-D soon? Watch this space!

RDO: I think we will see a combination of software and hardware where methods of detection of movement and other physical or online activity will be far more advanced. There will also be an increased use of what RDO describes as hybrid dispute resolution where tools like RDO are used in conjunction with face to face processes.

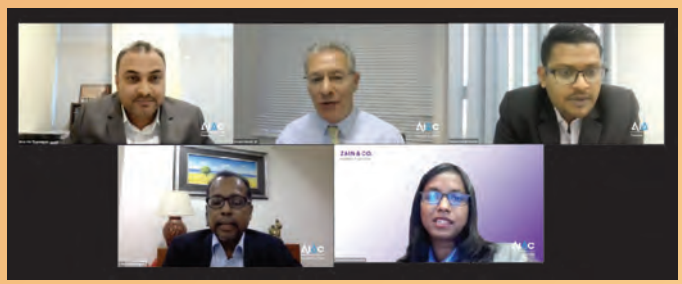


ADR Online:
An AIAC Webinar Series

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.

This section will provide a summary of the webinars hosted under this banner between 1st August 2020 and 30th November 2020 (save for the September Sports Month Webinar Series and the Merdeka Special Series which are covered separately in this Newsletter).

Steering Clarity on C.A.R. (10th September 2020)



This webinar delved deep into the use of insurance as a mechanism by Developers, Employers, and Contractors, to protect their capital investments against damage or destruction to the ongoing works or raw materials at a worksite, whilst understanding the day-to-day risks that Subcontractors, Engineers, Architects, Quantity Surveyors, Project Managers, and even Financial Institutions undertake by their involvement in a construction project.

This webinar explored potential third-party liability claims that may be involved, when Contractor's All Risk ("C.A.R.") insurance policies may have different risk exposures for various parties. With the skilful moderation of Vatsala Ratnasabapathy (Zain & Co.), the expert panellists, Nadesh Ganabaskaran (Malek, Gan & Partners), Ir. Pooba Mahalingam (Talent Asia Training Consulting), Balan Nair Thamodaran (Thomas Philip, Advocates & Solicitors), and Gordon Nardell QC (Twenty Essex) provided an overview of what C.A.R. insurance policies are, the different policies in the market, and the difference in coverage, as well as the impact of and need for such policies.

The speakers also unwrapped the nitty-gritty of the validity of specific clauses and legal challenges against them, issues arising from conditions precedent and the exclusions of liability, as well as the pros and cons of standard form contracts. A key takeaway for participants was the need to be attentive to the wording in C.A.R. policies, and to understand the importance of case law in interpreting such policies.

Enforcement Issues and the New York Convention: To March with the Status Quo or to Petition for Change? (24th September 2020)

To mark the 62nd anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, otherwise known as the New York Convention, a panel comprising Shanti Mogan (Shearn Delamore & Co.), Prof. Dr. Mohamed S. Abdel Wahab (Zulficar & Partners), Meriam Nazih Al-Rashid (Eversheds Sutherland), and Mauricio Gomm Santos (GST LLP) with Nivvy Venkatraman (AIAC) moderating the session, examined whether there exists a need for amendments to be made to the New York Convention.

The New York Convention has predominantly enjoyed a positive reception from practitioners around the globe. Although there has been room for improvement, making amendments to the Convention has been seen as being impractical from an international standpoint. During the session, the panellists addressed criticisms that the New York Convention is outdated and provided their views and opinions on potential amendments that could address the inconsistencies that have arisen from court decisions in certain jurisdictions, refusing the recognition and enforcement of arbitral awards. The panellists also spoke about technological advancements in arbitrations, especially in the context of the COVID-19 pandemic.

In discussing the impacts of virtual hearings as a ground for setting aside arbitral awards, the panellists touched upon issues relating to whether the right to a physical hearing exists in international arbitration. The panellists agreed that the virtual conduct of arbitral hearings would not constitute a violation of due process automatically, but rather only when it is shown that the virtual element led to the due process violation.

State of Affairs: Corruption Allegations in Arbitration (1st October 2020)

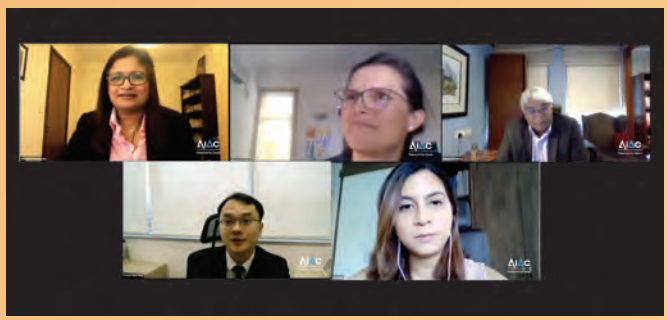
This webinar deliberated on the issue of corruption allegations in international arbitration. The panel comprised Pierre-Olivier Savoie (Savoie Laporte), Ndanga Kamau (Ndanga Kamau Law) and Julie Raneda (Schellenberg Wittmer), with Abinash Barik (AIAC) moderating the session.

Ms. Raneda commenced the webinar by referring to the 2019 Toolkit for Arbitrators used by arbitrators to identify and deal with corruption allegations in international arbitration. Factors considered include determining whether there is a duty to investigate, the tribunal's source of power to investigate, as well as the techniques adopted by tribunals in such cases.

Ms. Kamau briefly outlined the instances where the defence of corruption is raised in arbitration before addressing the burden of proof and the standard of proof used in such proceedings. Mr. Savoie explored the interaction between domestic criminal proceedings and arbitration proceedings with respect to corruption. References were also made to notable investor-state arbitration cases involving corruption allegations.

As a closing remark, the panel emphasised the importance of having a strong tribunal and being vigilant in tackling the issue of corruption in order to ensure that international arbitration stays functional as a dispute resolution mechanism.

The Modern Day Changes and Challenges to the Construction Industry (21st October 2020)



In addressing the current challenges faced by the construction industry, the AIAC and the HKA jointly organised a webinar titled, "The Modern-Day Changes & Challenges to the Construction Industry." Moderated by Tharshini Sivadass (AIAC), this webinar featured industry experts, namely, Shamila Neelakandan (HKA), Pirodja Lawyer (HKA), Belden Premaraj (Belden), and Choon Hon Leng (Raja, Darryl & Loh).

This webinar was a two-part interactive poll centric webinar, beginning with panel discussions and ending with a rapid-fire debate. The webinar was set up to allow the attendees to participate with the speakers during the live session, voting on answers and participating in an engaging Q&A in each segment. The panellists explored a broad range of topics in relation to the construction industry, including the primary causes for disputes arising in projects, and an overview of the building, construction and engineering processes. The topics covered included the advantages and disadvantages of the Building Information Management ("BIM") system in contracts, as well as the latest developments on BIM.

The session also explored issues on the trade-off between certainty and flexibility in construction contracts, the importance of using simple and clear language when drafting, as well as the pitfalls of cherry-picking clauses in standard form contracts. The panellists then concluded with a discussion on the Malaysian COVID-19 bill and its effect on construction projects. The rapid-fire debate saw the participants debating the pros and cons of various dispute resolution avoidance and/or dispute resolution methods.

À La Mode: Latest Dispute Resolution Trends in the Fashion Industry (5th November 2020)

This webinar shed light on the fashion industry's competitive advantages as well as its growing allure towards arbitration as a preferred method for resolving disputes. This webinar was styled as a back and forth discussion between Daniela Della Rosa (Curtis, Mallet-Prevost, Colt & Mosle LLP) and Irene Mira (AIAC).

Ms. Della Rosa commenced the discussion with a presentation on the attractiveness of arbitration as an alternative to courts in the fashion industry, namely the advantages of confidentiality, expertise, personalisation, forum neutrality, efficiency, the finality of the decision, the enforceability of awards, and the availability of interim measures. Ms. Della Rosa also shared a few case studies where arbitration had been used to resolve fashion business disputes arising out of distribution agreements and supply agreements.

Ms. Della Rosa also explored the legal impact of the COVID-19 pandemic on manufacturers, fashion brands, department stores, and retailers. She also looked at the latest ADR trends in the fashion industry, and then proceeded to share her views on sustainability and Corporate Social Responsibility ("CSR"), focusing on the initiatives put in place by fashion businesses in the production of ready-to-wear fashion.

Creating a Sphinx: The Perfect ADR Mechanism (19th November 2020)

In this webinar, the speakers provided an overview of the various elements of ADR mechanisms. Moderated by Chelsea Pollard (AIAC), this session featured a diverse and expert panel of speakers, namely Dr. Robert Gaitskell QC (Keating Chambers), Mercy A. Okiro, MCIArb (Independent Arbitrator), Steve Tennant FRICS, FCInstCES, MAIB (Plus Three Consultants (HK) Ltd), and Janice Tay, FCIArb (Wong & Partners).

During this session, the speakers discussed various mechanisms available to parties for resolving disputes, in the attempt to find the perfect system. In so discussing, the speakers highlighted the role of a dispute manager or dispute resolution board which, if appointed in a contract, disputes can be referred to during the duration of the contract. They also examined the use of expert determination and mediation in assisting the disputing parties to reach a binding decision or amicable settlement.

In discussing the application for security costs, the speakers highlighted that its scope generally depends on the statutory position in each jurisdiction. Additionally, the speakers explored the pros and cons of statutory adjudication, as well as the potential benefits and pitfalls of hybrid and waterfall clauses in the dispute resolution process.

In conclusion, the speakers determined there was no single "perfect" method, but rather that parties and practitioners alike should be well versed in the various available mechanisms as well as ensure they are equipped in knowing the skills and tools required for each mechanism. To visualise this idea, the speakers determined that those involved in disputes should have an Hermès bag with all the relevant material needed to determine which is the best method for each particular dispute at hand.

ADJUDICATION AND INSOLVENCY – A CASE MANAGEMENT PERSPECTIVE

One of the side effects of the COVID-19 pandemic globally has been a steady increase in the number of businesses experiencing solvency issues. In some unfortunate instances, businesses have been placed into liquidation, or a secured creditor may have exercised its right to appoint a receiver under a security agreement. Such solvency concerns are neither limited by territorial boundaries nor the industries which may be impacted.

Indeed, one of the fundamental purposes of the Construction Industry Payment and Adjudication Act 2012 (the "CIPAA"), was to address concerns of non-payment prevalent in the construction industry, and which ultimately resulted in the liquidation of certain contractor businesses.

In recent times, the AIAC has witnessed a handful of adjudication proceedings containing elements of insolvency. The purpose of this insight is to highlight the AIAC's case management approach to the issues we have encountered to date.

Prior to the registration of an adjudication proceeding, if the AIAC becomes aware that a party (usually the Respondent) has been placed into liquidation, the AIAC will not register the adjudication proceedings unless either the appointed liquidator(s) has informed the AIAC, in writing, that it intends to step into the shoes of the liquidated party and partake in the adjudication proceedings.

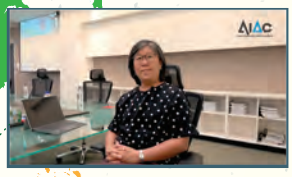
If a party is placed into liquidation during the course of an adjudication proceeding, it is up to the adjudicator to determine whether they intend to (1) withdraw from the proceedings; (2) exercise their rights (where there is a non-compliance) under Section 26 of the CIPAA to set aside the proceedings either in whole or in part; or (3) continue with the proceeding if either the appointed liquidator(s) informs the adjudicator in writing that it intends to step into the shoes of the liquidated party and partake in the proceeding, or a party (usually the Claimant) obtains leave of court. Additionally, where either party is in liquidation, then the Claimant (or the appointed liquidator in the Claimant's shoes) may also choose to withdraw the adjudication claim pursuant to Section 17(1) of the CIPAA.

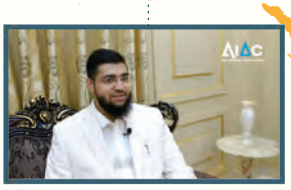
If the liquidator decides to take the liquidated party's position in the adjudication proceeding, then there should be minimal, if any, interference in the continuation of the adjudication proceeding (save for perhaps, the payment of the advance security deposit for the liquidated party if this remains outstanding at the time of the liquidator's appointment). To that extent, there is also nothing stopping a Claimant in liquidation, where so acted upon by the appointed liquidator, to commence adjudication proceedings, should it wish to do so.

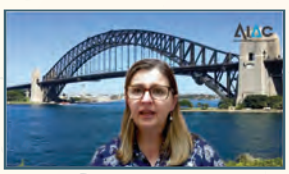
Suppose a party is placed into liquidation after the delivery of the adjudication decision. In that case, the party who intends to enforce the adjudication decision as a judgment debt should obtain legal advice on whether the same will be possible, and also whether the enforcing party might be able to claim the judgment debt in the liquidation as an unsecured creditor.

If you have any queries relating to the AIAC's adjudication case management practices and procedures, please send your enquiry to adjudication@aiac.world.

AROUND THE WORLD IN 30 DAYS







During November, the AIAC embarked on a tour of the world through its virtual aeroplane, where 30 arbitration practitioners, from 30 different countries, gave us a glimpse of their country whilst speaking about arbitration and their experiences. During the travels, we started in Afghanistan and ended in Malaysia, the home of the AIAC. Our "pilots" not only showed us the beauties of their countries, but they also provided the "passengers" with golden nuggets on what keeps them in arbitration, how they overcame their greatest challenges, the best advice they had received in their careers, tips for someone wanting to pursue a career in arbitration, and what they saw for the future of arbitration. Additionally, they explained why their respective countries were effective seats for arbitration as well as sharing their thoughts on their favourite AIAC initiative.

The purpose of this initiative was to highlight various arbitrators and practitioners as well as arbitral seats around the world, in an effort to promote and enhance diversity in arbitration. Understanding and embracing diversity in arbitration is essential not only to legitimise and improve the quality of the arbitration process, but it also assists in identifying new talent in the market and finding opportunities to make international arbitration more accessible to the commercial world.

In this endeavour, we toured Afghanistan, Argentina, Australia, Bangladesh, Brazil, Canada, Chile, China, Egypt, France, India, Indonesia, Japan, Mauritius, Mexico, Morocco, the Netherlands, New Zealand, Nigeria, Pakistan, Qatar, Russia, Singapore, South Africa, South Korea, Switzerland, United Arab Emirates, United Kingdom, United States of America, and Malaysia.

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AN OVERVIEW OF EMERGING ARBITRATION JURISDICTIONS: PART II

In the August edition of the AIAC Newsletter, we featured a survey of four emerging arbitration jurisdictions in the Asia Pacific, namely Malaysia, the Philippines, Thailand, and Vietnam. The purpose of surveying such jurisdictions is to understand global developments in arbitration and the efforts made by lesser-known jurisdictions to reposition themselves as emerging centres ready to have a piece of the proverbial "arbitration pie". In this second and final instalment of the survey, we have showcased four emerging jurisdictions in other corners of the globe – Kenya (by Aisha Abdallah[1]) ("AA"), Peru (by Ana María Arrarte[2] & Angela Cámara Chumbes[3]) ("AMAC"), United Arab Emirates (by Dr. Hassan Arab[4]) ("HA"), and Uzbekistan (by Nodir Yuldashev[5]) ("NY").

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

AA: In Kenya, arbitration is governed by the Constitution of Kenya, 2010 (the "Constitution"), the Arbitration Act 1995 (the "Arbitration Act"), and the Arbitration Rules of 1997 (the "Rules"), which were amended in 2009. The Arbitration Act adopts the United Nations Commission on International Trade Law Model Law ("UNCITRAL Model Law") and applies to both domestic and international arbitrations.

Also noteworthy are the Nairobi Centre for International Arbitration Act, 2013 ("NCIA Act") and the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 (as amended) (the "NCIA Rules"). The NCIA Act brought into operation the Nairobi Centre for International Arbitration ("NCIA"), which is a state-sponsored international arbitration centre with various objectives, including the training and accreditation of arbitrators and the facilitation and administration of arbitrations.


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[4] Dr. Hassan Arab is a leading dispute resolution expert in the United Arab Emirates (UAE) and wider Middle East will full rights of audience before all UAE courts. He regularly sits as an arbitrator and has extensive experience in providing expert opinions on the UAE laws before arbitral tribunals and foreign courts. He has spent his career building one of the strongest litigation teams in the Middle East which Legal 500 has recognised as "having a great reputation for local court work with a number of really good practitioners". Chambers Global has recognised him as a Eminent Practitioner in Dispute Resolution in UAE. Dr. Arab is the Chair of International Chamber of Commerce (ICC) – UAE Commission on Arbitration & ADR and the member of the Dubai International Arbitration Centre (DIAC) Board of Trustees. In addition, he is a Member of the DIFC Court User's Committee, Member of the future Arbitration Court of the Casablanca International Mediation & Arbitration Centre (CIMAC) and Board Advisor of Delos Dispute Resolution.

[5] Nodir Yuldashev is a Partner at GRATA International, a leading law firm in Uzbekistan. Before joining GRATA, he worked at the Uzbekistan Chamber of Commerce and Industry and at the Insolvency Committee. During his twelve years at GRATA, Mr. Yuldashev has advised clients on a wide array of Uzbekistan investment, construction and general commercial and business law matters. He is an active arbitrator at the Arbitration Court under the Chamber of Commerce and Industry of Uzbekistan. Mr. Yuldashev has significant experience in representing clients before international commercial arbitration centres, including in European, Middle Eastern and South-East Asian arbitration tribunals, in cases arising from construction, investment, financing projects as well as hiring top football players by local sports clubs.

In addition, since Kenya acceded to the provisions of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (the "New York Convention") and the International Convention on the Settlement of Investment Disputes ("ICSID"), these will also apply. ICSID was domesticated through the Investment Disputes Convention Act in 1966.

Pursuant to Article 2(5) and 2(6) of the Constitution, the general rules of international law and treaties or conventions ratified by Kenya now automatically form part of the laws of Kenya. This means that Kenyan courts may readily refer to the provisions of international conventions and treaties on arbitration without there being an act of parliament domesticating the same.

AMAC: In Peru, commercial arbitrations, domestic and international, are ruled by Legislative Decree No. 1071- the Peruvian Arbitration Law (hereinafter, "PAL"), based on the UNCITRAL Model Law.

In our country, both domestic and international arbitrations are ruled by the same rules, except where there are very specific exceptions. By this, we mean that the arbitral system is "monistic" and reflects internationally accepted standards.

HA: The UAE Arbitration Law (Federal Law No. 6 of 2018) will apply to arbitral proceedings conducted in the UAE as well as to international commercial arbitration procedures conducted outside the UAE where the parties have agreed that the UAE Arbitration Law will apply. Arbitrations seated in the free zones, Dubai International Financial Centre ("DIFC") and Abu Dhabi Global Market ("ADGM") have their own offshore arbitration laws. The DIFC Arbitration Law (Arbitration Law No. 1 of 2008 as amended by DIFC Law No. 6 of 2013) is applicable to arbitration proceedings seated in the DIFC, and the Arbitration Regulations of 2015 governs arbitration proceedings that are subject to the jurisdiction of the ADGM.

The UAE Arbitration Law is largely modelled on the UNCITRAL Model Law on International Commercial Arbitration and is aligned with the international standards and best practices.

NY: Arbitration is becoming more and more popular in Uzbekistan as an alternative to litigation. With the adoption of the Arbitration Law in 2006, the number of arbitration tribunals established in Uzbekistan reached 247 in 2020. One of the most active is a network of arbitration courts under the Chamber of Commerce and Industry of Uzbekistan ("CCI"). CCI confirms that 10,623 cases were heard by all CCI arbitration courts across Uzbekistan in 2019. Arbitration in Uzbekistan is currently regulated by a special Law on Arbitration which is based on the UNCITRAL Model Law. However, the legislation is limited to domestic arbitration and allows local arbitration courts to accept and hear cases under Uzbekistan law only. Generally speaking, all other major provisions are compliant with the UNCITRAL Model Law.

At the moment the Senate of Uzbekistan is reviewing the draft Law on International Commercial Arbitration which has also been prepared based on the UNCITRAL Model Law. It is expected this Law shall be enacted in the first quarter of 2021 and shall allow international commercial arbitration based on domestic and any foreign law to be practiced in Uzbekistan.

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)?

AA: In our practice, we have experienced more institutional than ad hoc arbitrations. Some parties choose to have their arbitrations administered in accordance with the Rules of the Chartered Institute of Arbitrators, Kenya Branch ("CIArb Kenya"), and increasingly, due to government policy, some will choose to apply the NCIA Rules.

In our view, the services offered by the NCIA and CIArb Kenya have proven to be quite effective in domestic arbitration. We have seen cases where the parties have requested the Chairman of CIArb Kenya to appoint an arbitrator from its diverse panel of accredited arbitrators. The hearing facilities offered by the NCIA, which are conveniently located within the central business division of Nairobi, have proven to be quite useful, particularly in international arbitrations where the seat is outside of Kenya, but the parties opt for Nairobi as the hearing venue.

AMAC: Although the PAL authorises the parties to agree to subject themselves to ad hoc arbitration, institutional arbitrations are the most common processes.

The only exception to the parties' power to agree upon an ad hoc arbitration appears in arbitrations where the State is a party. According to the last amendment to the PAL, all arbitrations resolving controversies in the relationships engaged with the State will be institutional (Article 7 of Urgency Decree No. 020-2020).

The main arbitration institutions are the Lima Chamber of Commerce-LCC, the American Chamber of Commerce-AMCHAM, and the Arbitration Center at the Universidad Católica del Perú -PUCP. To date, the most efficient in terms of speeding-up the process is the LCC.

HA: Institutional arbitrations are more commonly preferred by the parties in domestic arbitral disputes in the region. The most preferred arbitral institutions for UAE parties are the Dubai International Arbitration Centre ("DIAC"), International Court of Arbitration of the International Chamber of Commerce ("ICC"), DIFC-LCIA Centre, Abu Dhabi Conciliation and Arbitration Centre ("ADCCAC"), and the Sharjah International Commercial Arbitration Centre (Tahkeem).

The services offered by the arbitral institutions in the UAE are efficient, committed to serving the parties requirements, and offer impartial administration of dispute resolution services.

NY: Institutional arbitration is a more favourable option in Uzbekistan.

The most experienced and reputable venue for arbitration in Uzbekistan is the Arbitration Court and International Arbitration Court under the central apparatus of the CCI. The CCI has a regional branch in each of the fourteen administrative regions, and a separate Arbitration Court has been established under each branch to make arbitration closer and more feasible to businesses in the region. No decision of an International Arbitration Court under CCI has been annulled so far, and the level of annulment of the Arbitration Court under the CCI across all regions of Uzbekistan is close to zero. In accordance with the statistics shared by the participants of arbitration disputes, more than 95% of awards made by the Arbitration Court under the CCI have been enforced fully. The speed of hearings usually constitutes from two months up to six months, depending on the case details.

Speedy hearings, a credible board of arbitrators, and the level of enforceability make arbitration a more popular dispute resolution tool in Uzbekistan from year to year.

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?*

AA: An individual looking to become a practising arbitrator in domestic arbitrations should undergo training on the law and procedure of arbitration in Kenya and accreditation provided by the NCIA or CIArb.

With respect to CIArb Kenya, a multi-tiered training programme is offered with various qualifications being obtained at each stage. In this regard, an individual will first qualify as an associate following the successful completion of introductory classes and exams, then transition to a member and then qualify as a fellow following a peer review by senior arbitrators. An individual who has qualified as a fellow will be entitled to appointment as an arbitrator in accordance with the rules of CIArb Kenya.

With respect to the NCIA, a person seeking to become accredited by the NCIA must complete the NCIA's training programme. Unlike the CIArb Kenya, there is no multi-tiered training. Once the training is complete, and the person is accredited, they may be appointed as an arbitrator by the NCIA in a domestic, international, or emergency arbitration. The NCIA also continuously enrols already qualified arbitrators for listing on its Arbitrators Panel. To be enrolled, an arbitrator has to complete an Arbitrators Panel Status Application Form and submit supporting documents including a signed Declaration and Undertaking Form and pay the application fee.

Accredited foreign practitioners can also be appointed as arbitrators in Kenya and act as party representatives in domestic and/or international cases. With respect to party representation, the CIArb Rules provide that a party has the right to choose any person to represent it in arbitration proceedings.

AMAC: As set forth in the PAL, in order to be an arbitrator, it is required that the natural person is fully apt to exercise all his/her civil rights, has no incompatibilities to act as arbitrator and that was not convicted for any intentional crime(s). The PAL is clear when stating (in Articles 20 and 22(2)) that unless otherwise agreed by the parties, nationality will not be an obstacle for an arbitrator to act as such.

Also, each arbitration center determines its own requirements to include names to their lists of arbitrators, such as specific knowledge in certain matters, as well as ethical and professional capacity.

In connection to parties' representation, the PAL does not require that this is performed by a lawyer, meaning any authorised person able to do it. Similarly, with respect to the appointment of arbitrators, Article 37(4) states that there are no restrictions on the participation of foreign lawyers.

HA: Parties are free to agree on the requirements of the arbitrator, including qualifications and the procedure for appointment. Pursuant to Article 10 of the UAE Arbitration Law, the arbitrator must be a natural person, not be a minor, not be legally incapacitated or without civil rights by reason of bankruptcy, and must not have previous convictions involving crimes related to felony, misdemeanour or breach of trust. The arbitrator must not be on the board of trustees or the administrative body of the arbitral institution responsible for administering the arbitration. An individual approached in connection with his/her possible appointment as an arbitrator shall disclose in writing anything likely to give rise to doubts as to his impartiality or independence.

There is no restriction for foreign practitioners to serve as arbitrators or parties' representatives in the UAE.

NY: Only citizens of Uzbekistan are allowed to be appointed as arbitrators in Uzbekistan Arbitration Courts. However, this restriction shall not apply in respect of International Arbitration Courts once the Law on International Commercial Arbitration is enacted in 2021.

Arbitration boards should be formed from only the list of arbitrators registered with a particular arbitral institution. Registration is made through the Ministry of Justice of Uzbekistan.

The parties to a dispute are free to choose their arbitrator. Arbitrators acting solely must have a higher legal education. When a case is heard by several arbitrators, i.e. by an arbitration board, the arbitrator acting as a chairperson must have a higher legal education.

The following persons cannot act as arbitrators in domestic arbitration courts in Uzbekistan: persons under the age of twenty-five; persons who cannot ensure unbiased resolution of a dispute, who are directly or indirectly interested in the resolution of a dispute; persons who have been announced by courts as having no or limited legal capacity; persons having an outstanding criminal conviction or non-served decision of criminal court; persons forbidden by court or by law to act as arbitrator, judge, advocate, investigator, prosecutor or other categories of law enforcement agent; or a person who is due to his position as determined by law cannot act as arbitrator.

It is expected that similar restrictions may apply in respect of arbitrators in international arbitration courts once the special Law is enacted in 2021.

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

AA: Yes. Under Section 35(2)(b) of the Arbitration Act, the High Court may set aside an arbitral award if, amongst other things, the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Kenya. Similarly, Section 37(1)(b) provides that the High Court may refuse to recognise or enforce an award if the High Court finds that it is not capable of settlement by arbitration under the laws of Kenya.

However, the Arbitration Act does not specifically identify the disputes that are not capable of settlement by arbitration or which are non-arbitrable. According to the High Court of Kenya and the Court of Appeal, the issue of arbitrability is a matter of public policy to be determined by the local courts from time to time. [6]In this regard, there is still growing jurisprudence in this area.

In the case known as *Kenya Anti-Corruption Commission & another v Nedermar Technology BV. Limited [2017] eKLR*, the Court of Appeal held that non-arbitrable disputes will "*..include matters of a criminal nature, public interest disputes or matters that clearly go against public policy*." Further, in the case *Gerick Kenya Limited v Honda Motorcycle Kenya Limited [2019] eKLR*, the High Court stated that a dispute relating to fraud will not be non-arbitrable where the allegation of fraud relates to a right, *in rem* and where the matter of fraud relates to a dispute *in personam* but involves a serious or complex question of fraud. The High Court held that in such instances, the party who seeks to oust the jurisdiction of the arbitral tribunal must demonstrate that the nature of the fraud and circumstances of the dispute make it non-arbitrable.

It is worth noting that according to the Court of Appeal in *TSJ v SHSR [2019] eKLR*, disputes of a personal nature, including disputes relating to divorce, child maintenance and custody matters may be resolved by arbitration.

It is also arguable that claims which are brought outside of the statutory limitation periods provided in the Limitations Act of Kenya, Chapter 22, Laws of Kenya (the **Limitations Act**) will not be capable of settlement by arbitration. In some cases, parties have requested the High Court to set aside arbitral awards which relate to claims that are time-barred.

AMAC: The PAL does not indicate non-arbitrable matters. What it states in Article 2 is that "*[a]s set by Law, controversies on matters of free disposal may be subject to arbitrations, as well as those that the Law or International Agreements authorize*".

Essentially, the "free disposal" criterion shall continue to be an initial parameter to determine arbitrability. However, specific laws may also determine matters that may be subject to arbitration. For example, unlike what occurs in most countries, in Peru, all controversies arising from contracts with the State are arbitrable matters, even more, in these cases, arbitration is mandatory.

We can conclude, however, as a general rule, that disputes in connection to family law, criminal law, most intellectual property and market matters, for example, are non-arbitrable.

HA: Certain disputes are considered as non-arbitrable under the UAE law. Disputes related to issues of personal status, criminal, bankruptcy, labour disputes, commercial agency disputes, and other issues relating to public policy are non-arbitrable. The Court of Cassation ruled that matters pertaining to the registration of property on the property register in the UAE are provisions relating to the monetary system of the State and are considered as matters of public policy.[7]

NY: As a general rule, all commercial and civil cases arising from business and contract law are arbitrable in Uzbekistan.

The Law on Arbitration establishes that the following categories of disputes arising from the following relations cannot be arbitrated: administrative relations (disputes with public authorities); family relations; employment relations; where litigation is a statutory obligation (e.g. insolvency cases, criminal and administrative liability cases, certain intellectual property cases and others).

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?*

AA: The procedure will depend on the rules applicable to the parties' dispute as chosen by the parties in their agreement. Generally, this will be from the moment the arbitral institution receives a party's request for arbitration, which is filed in accordance with the rules of that institution.

The provisions in the Limitation Act should be taken into account by the parties, particularly as a breach of the same may result in the award being set-aside or not recognised under the Arbitration Act. It is worth noting that under the Limitations Act, an action based on a contract should be brought within six years from the alleged breach complained. With respect to tort, the limitation period is three years. Further, under the Limitations Act, an action to enforce an award should be made within six years from the date the cause of action arose.

AMAC: The commencement of arbitration, as set forth in the PAL, starts with the submission of a request for arbitration to the other party and unless the parties have agreed otherwise, there is no period of limitation for the commencement of the arbitral procedure. It is worth mentioning that the PAL has granted the Lima Chamber of Commerce a subsidiary role in the conformation of the arbitral tribunal when the parties fail to appoint them, or in the event of objections to the appointed arbitrators, so the lack of formation of a tribunal does not imply the impossibility of an arbitral process.

To date, an arguable normative regulation is in force (Article 8 of Urgency Decree No. 20-2020). It states that in arbitrations where the State is a party to the dispute, inactivity of four months will imply the dismissal of the arbitration proceedings due to abandonment. This means that the Parties will not be able to recommence an arbitration relating to the same controversy within the term of one year from the date of dismissal.

HA: Commencement of the arbitration is subject to the rules of the relevant arbitral institution selected by the parties to govern the arbitration process. The parties are free to agree on the rules governing the arbitral proceedings.

Pursuant to Article 27 of the UAE Arbitration Law, arbitration proceedings are commenced by filing a notice of the request for arbitration. Unless otherwise agreed by the parties, the arbitral proceedings commence on the day following the date when the composition of the arbitral tribunal is completed.

As to period of limitation, the most important limitation periods in the UAE for arbitration purposes are the 15-year general limitation period and 10-year limitation period applicable to commercial transactions as defined by the UAE Commercial Transactions Law.

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[6] See *Midland Finance & Securities Globetel Inc v Attorney General & another* [2008] eKLR; *Nedermar Technology BV Ltd v Kenya Anti-Corruption Commission & another* [2006] eKLR; and *Kenya Anti-Corruption Commission & another v Nedermar Technology BV. Limited* [2017] eKLR.

[7] Abu Dhabi Court of Cassation Commercial Appeal No 55 of 2014, Dubai Court of Cassation Case No: 320/2013.

NY: The Law on Arbitration does not impose any mandatory procedural steps to commence arbitration proceedings in Uzbekistan.

The following steps are implied by law: (1) arbitration court and arbitrators are duly registered; (2) arbitration agreement is duly executed in written or electronic version; (3) written filing is made by the claimant with the submission of all relevant supporting documentation; (4) arbitrators are chosen by the parties or as per the procedure; (5) all parties are duly notified of hearing day and venue; (6) arbitration hearing is held with the participation of all parties. The court may appoint several arbitration hearing days by means of postponing the hearing to another day; and (7) arbitral award is made and sent to both parties in writing.

The limitation period established under Article 150 of the Civil Code of Uzbekistan for making judicial claims is equal to three calendar years from the moment a creditor has become aware, or ought to had become aware, of a breach. Arbitration Courts cannot refuse accepting cases where the limitation period has expired; however, they shall refuse the claim on the grounds of expiry of the limitation period if the debtor calls for the rule of expiry of the limitation period to apply. This principle is established under Article 153 of the Civil Code.

6. *What is the approach of the local courts in your jurisdiction towards international arbitration proceedings? Do the courts intervene to assist arbitration proceedings? If so, to what extent?*

AA: The local courts have a duty to support arbitration, including international arbitration, under Article 159(2)(d) of the Constitution. To this extent, there are limited circumstances within which the local courts will interfere with arbitration proceedings, or allow a party to apply for the setting aside of an arbitral award. It is worth noting Section 10 of the Arbitration Act, which states that no court shall intervene in matters governed by the Arbitration Act unless provided in the Arbitration Act. It is also worth noting that where an award deals with a dispute issued outside the scope of the tribunal's terms of reference, the High Court has the discretion to only set aside that part of the award that is outside the tribunal's scope of reference.

Further, where a party applies for an injunction or any other interim order and the matter has already been dealt with by an arbitral tribunal, then the High Court may uphold the tribunal's findings of fact or ruling as conclusive.

In addition, the High Court will, as a matter of course, stay any court proceedings where the matter is subject to arbitration pursuant to an arbitration agreement between the parties, unless the agreement is void, incapable of performance, or if there is no dispute between the parties that is capable of being referred to arbitration.

AMAC: The PAL sets forth judicial assistance for the effectiveness of arbitration, whether domestic or international (*e.g.*, pre-emptive measures, presentation of evidence, challenges, and enforcement of awards). Courts tend to favour arbitration.

On the other hand, when dealing with arbitrations that are not seated in Peru, the procedure for the recognition and enforcement of an award is followed under the parameters set forth in the New York Convention, which Peru has been a party to since 1988. The PAL has determined that the interpretation made by Courts shall be the one that favours arbitration.

HA: The UAE courts have demonstrated greater support for arbitration by upholding the parties' agreement to have their disputes resolved by arbitration. The UAE courts are less inclined to consider arguments by parties to challenge the existence, validity and/or enforceability of an arbitration agreement.

Under Article 18 of the UAE Arbitration Law, UAE courts have a general jurisdiction to consider arbitral measures in accordance with the procedural laws, upon an application by a party. In general, the court's jurisdiction in arbitration proceedings includes the power to examine procedural issues related to the appointment of an arbitrator, jurisdictional challenges, summoning witnesses to appear before the tribunal to give oral testimony or adduce documents or any evidentiary materials, order interim or conservatory measures, and impose sanctions.

NY: Uzbekistan is an unconditional member to the New York Convention, and therefore, all foreign awards made by foreign international arbitral tribunals shall be recognised and enforced in Uzbekistan. Recognition and enforcement are made directly through economic or civil courts, depending on the case details.

Judicial intervention to assist in arbitration proceedings is allowed and practiced under the Law on Arbitration only. In other words, local courts can assist local arbitration courts in making an award and protect the claimant's rights, for example, by issuing mandatory judicial decisions to apply for interim relief. After the Law on International Commercial Arbitration is enacted in 2021, it is expected that local courts would also be able to assist foreign international arbitrations in the arbitration procedure.

Unfortunately, no other international treaties are signed by Uzbekistan binding Uzbekistan courts to assist foreign-seated arbitration proceeding in Uzbekistan.

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?*

AA: Under Section 35 of the Arbitration Act, arbitral awards, both foreign and domestic, can be set aside by the High Court if the party making the application for setting aside satisfies grounds that are reflective of the recognition and enforcement provisions in the New York Convention. The High Court may also set aside an arbitral award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Kenya or if the award conflicts with public policy.

A party desiring to have an arbitral award set aside should ensure that it files its application for setting aside the arbitral award within three months from the date it received the award.

In determining whether or not to set aside an arbitral award, the High Court will consider the principle of party autonomy and the parties' agreement that the award be final and binding. In this regard, the court will only set aside the award where there are legitimate reasons to do so, and the parties have sufficiently proven that the aforementioned grounds exist.

It is also important to note that a party will only be allowed to appeal the High Court's decision on a setting aside application in exceptional circumstances (*i.e.*, where it is shown that the High Court has acted outside the grounds set out in Section 35 and made a manifestly wrong decision). It is also arguable that following the *Nyutu Agrovet Limited v. Airtel Networks Limited* (discussed below), parties can appeal the High Court's decision to set aside an award where constitutional challenges to an arbitral award have been raised.

AMAC: Pursuant to the PAL, the only recourse against an award is the application for setting it aside, which can only rely on any of the following 7 (seven) grounds: (i) the arbitration agreement does not exist or is not valid; (ii) a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was unable to present its case; (iii) the composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the applicable arbitration rules, unless such agreement of rule is contrary to a mandatory provision of the PAL; (iv) the award resolves a matter that was not submitted to the tribunal's decision; (v) in a domestic arbitration, the tribunal settled matters which are manifestly impossible of settlement by arbitration, according to law; (vi) in international arbitration, the subject matter of controversy is not susceptible of settlement under Peruvian law or the award is against international public order; (vii) controversy was settled outside the deadline agreed by the parties, provided in the applicable arbitration rules or established by the tribunal.

Filing a lawsuit to set aside an award does not prevent its enforcement unless the claimant files additionally a stand-by letter of credit for the amount of the award which is being challenged. Otherwise, it is possible to pursue the award's enforcement in parallel.

According to public information of the Commercial Court of Justice of Lima (country's capital), the most common grounds invoked to challenge an award is the aggravation of the right of a due process of law, specifically for lack of motivation or non-adequate motivation. When resolving such cases, the Judiciary takes into account that the PAL prohibits the judges from ruling on the merits of the case. The rate of annulled awards is low.

HA: Article 53(1) of the UAE Arbitration Law sets out the grounds for setting aside the award on onshore UAE. Under Article 53 of the UAE Arbitration Law, the party seeking to set aside the award must establish any of the prescribed circumstances, which themselves are reflective of the recognition and enforcement provisions in the New York Convention.

Additionally, the Court shall, on its own initiative, set aside the arbitral award if it finds:

(a) The subject-matter of the dispute is not capable of settlement by arbitration; and
(b) The arbitral award is in conflict with the public order and morality of the State.

A party can challenge a decision of the court on the enforcement of the award, pursuant to Article 57 by filing a grievance before the Court of Appeal within thirty days of being served with the court's decision to enforce the award.

A party can also present its defence to the court objecting to the recognition and enforcement of the award during the process of enforcement initiated by the award creditor under Article 55(1) of the UAE Arbitration Law.

UAE Courts have demonstrated a positive approach towards the enforcement of the arbitral awards.

NY: The Law on Arbitration does not allow the parties to challenge an arbitral award on its merits. National courts are forbidden by law to hear appeals on the merits of the case. However, challenges based on breach of procedural rules is allowed.

Any challenge of an arbitral award must be made by means of filing a lawsuit with the relevant economic or civil court of Uzbekistan. The procedure for filing is established by the Economic or Civil Procedural Codes and represents a standard judicial process. All national courts are obliged to accept and review this filing. A review of an arbitral award is made only to identify inconsistencies with compliance to the procedural requirements for commencing and holding the arbitration process. National courts do not analyse cases by their merits. If the national court does not identify any breach of procedural requirements, it will make a decision to refuse annulment of an arbitral award.

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?

AA: Yes. Section 17 of the Arbitration Act provides for the doctrine of kompetenz-kompetenz by empowering the arbitral tribunal to rule on its own jurisdiction and any objections in respect of the existence or validity of an arbitration agreement.

A party's plea that the tribunal lacks jurisdiction should be raised before that party submits its statement of defence. Where the issue is that the tribunal has exceeded the scope of its authority, the plea must be raised as soon as the matter alleged to be beyond the scope is raised during the arbitral proceedings. The tribunal may rule on the plea referred to it as a preliminary question, or in an arbitral award on the merits.

AMAC: Yes, the PAL expressly recognises the kompetenz-kompetenz principle in Article 41. Its application is extensively recognised by arbitration practitioners and by the local court. Peruvian Constitutional Tribunal has stated in binding decisions that arbitrators are able to decide about their own competence, and local courts cannot interfere in arbitration processes, without prejudice of posterior control through applications to set aside awards which can only rely on the abovementioned specific grounds.

HA: The principle of competence-competence is contained in Article 19(1) of the UAE Arbitration Law. UAE courts recognise that the arbitral tribunal shall have the authority to hear any disputes, including any questions on the jurisdiction of the tribunal. This shall not preclude the court from determining the jurisdiction of the tribunal, subsequently upon the application of one of the parties.

Article 19(2) of the UAE Arbitration Law provides that if the arbitral tribunal rules as a preliminary question that it has jurisdiction, a party may within 15 days after receiving the notice of that ruling request the court to decide on the matter. The court shall then decide the request within 30 days of receiving the petition, and such decision shall not be subject to any further appeals or challenges.

NY: Article 24 of the Law on Arbitration incorporates the competence-competence principle into domestic legislation. If any of the parties to a dispute challenges the competence of an arbitral tribunal, then the arbitral tribunal should accept the filing and review and analyse this matter. Upon reviewing the filing, the arbitral tribunal makes a decision on its competence by means of issuing a resolution. If the arbitral tribunal makes a decision on the absence of competence, then the case cannot be heard on its merits by the arbitral 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?

AA: Yes, the High Court of Kenya has the power to award interim relief pending the determination of the arbitration proceedings. The types of relief will generally include status quo orders, injunctions to halt an action that would cause irreparable loss or prejudice the arbitration process, and orders to preserve assets or evidence. Further, under the Arbitration Act, an arbitral tribunal may, on the application of a party, order any party to take such interim measure of protection as the tribunal may consider necessary (without an order requiring the provision of appropriate security in connection with the measure). It is worth noting that the High Court may assist a tribunal in the exercise of its powers to issue interim measures. This includes having the power to make any order which the tribunal is empowered to make. The tribunal's powers to issue interim awards may also be provided for in the rules of arbitration chosen by the parties. For example, the CIArb Kenya rules specifically state that the tribunal appointed under its rules has the jurisdiction to make one or more interim awards, including injunctive relief and measures for conservation of property.

AMAC: According to Article 47 of the PAL, a party seeking interim relief has the following options:

- Prior to the constitution of the arbitral tribunal, petitions for interim relief may be referred to local courts. Local courts resolve such petitions under Civil Procedural Law provisions, which allows parties to obtain any kind of appropriate measures. Relief is awarded on an ex parte basis.

  The other alternative, if permitted by institutional arbitration rules, is to initiate an emergency arbitrator proceeding. This is provided for in the rules of the two main Peruvian arbitration centers for arbitration clauses agreed after 2017.

  In any case, the file shall be sent to the arbitral tribunal once it is constituted. The tribunal is empowered to modify, substitute, or revoke the measure.

- Once the arbitral tribunal is constituted, the following interim reliefs can be obtained from it: (i) maintain or restore the status quo until the resolution of the controversy; (ii) measures to prevent actual or imminent prejudice to the arbitral process, or refrain from taking certain actions that are likely to cause such harm or prejudice to the arbitration process; (iii) provide means to preserve assets necessary to enforce the future award; and (iv) preserve evidence that shall be relevant and pertinent for the resolution of the controversy. Measures are not awarded on an *ex parte* basis unless justified by the petition filed by the party.

  Arbitrators are able to enforce their own measures, but when needed, they can ask for assistance from the local courts in order to enforce them.

HA: UAE Arbitration Law explicitly recognises the arbitral tribunal's power to award interim or conservatory measures, at the request of a party or of its own motion, taking into account the nature of the dispute. Under Article 21 of the UAE Arbitration Law, the arbitral tribunal can award reliefs that are reflective of Article 17(2) of the UNCITRAL Model Law. There is also an additional relief that allows an arbitral tribunal to order a party to take necessary measures to preserve goods which constitute part of the dispute, such as an order to deposit goods with a third party or to sell goods which are susceptible to damage.

Article 21(4) of the UAE Arbitration Law provides that a party for whom an interim measure has been ordered may, after obtaining written permission from the arbitral tribunal, request the court to order the enforcement of the order of the arbitral tribunal within fifteen days of receipt of the request.

The UAE Courts may order interim or conservatory measures under Article 18(2) of the UAE Arbitration Law as may be necessary to be taken in respect of existing or potential arbitral proceedings, whether before the commencement of the arbitral proceedings or during its course.

NY: Arbitral tribunals in Uzbekistan are not allowed to award preliminary or interim relief. However, Article 32 of the Law on Arbitration entitles a party to an arbitration proceeding to apply to a relevant national court for interim relief. Interim relief can be applied for if the party believes non-application of the interim relief shall lead to the inability or restricted ability to enforce the arbitral award. An application for interim relief must be reviewed and decided upon by national courts within one working day after the application has been filed.

All applications related to the issuance of an award for preliminary or interim relief are filed to and reviewed by national courts only. National courts can issue decisions to grant the following types of interim reliefs in respect of only disputes heard in domestic arbitration proceedings:

1) arresting property and money owned by the defendant;
2) forbidding the defendant from taking certain actions;
3) forbidding third persons from taking certain actions in respect of the disputed object;
4) suspension of executing writs of execution or execution of decisions which can be made on a direct basis;
5) suspension of sale of property;
6) binding the defendant to take certain actions in respect of disputed property (security or other); and
7) transferring a disputed property to a third person.

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?

AA: Kenya ratified the New York Convention in 1989 with a reciprocity reservation. This means that foreign awards recognised and enforced under the New York Convention must have been awarded in a signatory state. According to Section 35 of the Arbitration Act, the High Court can refuse to recognise and enforce the award on grounds similar to the grounds for setting aside an award as listed Article V of the New York Convention. Under the Limitations Act, an action to enforce an award should be made within six years from the date the cause of action arose.

AMAC: Peru has been a party to New York Convention since 1988. The New York Convention's application is expressly recognised in the PAL. The PAL also recognises the more-favourable-right application for the recognition and enforcement of an award. The more-favourable provision could be regulated in a treaty or in the PAL.

The grounds for refusing enforcement of an arbitral award under the PAL are regulated in Article 75, which resemble the grounds contained in the New York Convention. Further, the court may refuse to recognise *ex officio* in any of the following circumstances: (i) according to Peruvian Law, the subject matter of controversy was not susceptible of settlement under arbitration; (ii) the award is contrary to international public order.

There is no regulated limitation period to enforce a foreign award. However, pursuant to the Peruvian legal system, the statute of limitations period to claim rights shall be observed.

HA: Article 53 of the UAE Arbitration Law sets forth the grounds for challenging an arbitral award in onshore UAE. These grounds are largely modelled on the grounds set forth in Article V of the New York Convention which sets out the grounds for refusal of the recognition and enforcement of foreign arbitral award. Pursuant to Article 53 of the Arbitration Law, a party seeking to set aside an award must establish one or more of the eight procedural grounds, but Article V of the New York Convention mainly provides for five procedural grounds. Article 53 of the UAE Arbitration Law contains two additional grounds for challenging an award that are not found in Article V of the New York Convention.

Article 53.1(e) of the UAE Arbitration law states that the arbitral award can be challenged if a party establishes that the arbitral award excluded the application of the parties' choice of law for the dispute.

Article 53.1(g) of the UAE Arbitration Law provides that an award can be challenged if a party establishes that the award was not issued within the specified timeframe.

The general limitation period for the enforcement of judgments in the UAE is 15 years.

NY: Uzbekistan is a member of the New York Convention, and it has not made any reservations or exclusions to the text of the Convention. The grounds for refusal to recognise and enforce a foreign arbitral award in Uzbekistan introduced into domestic legislation do not differ from the same approved by the New York Convention.

Enforcement of foreign arbitration awards is made by the State Economic Courts of Uzbekistan (B2B cases). In accordance with Article IV of the New York Convention and Article 251 of Economic Procedural Code of Uzbekistan, to obtain the recognition and enforcement of a foreign arbitration award, it would be necessary to submit the following documents to Tashkent City Economic Court:

- application for recognition;
- duly authenticated original award or its duly certified copy;
- original arbitration agreement or its duly certified copy;
- formal confirmation of the award coming into force if the award is silent about it;
- documents on any previous execution of the award (if any);
- documents confirming due notification of the parties;
- powers of attorney for representatives;
- evidence of sending the application for recognition to all parties;
- evidence of payment of state fee; and
- notary translation of all documents which are not in the Uzbek language.

Application for recognition and enforcement of a foreign arbitration award in Uzbekistan must be filed with a relevant State Court no later than within three calendar years from the date a foreign arbitration award has come into force.

Once the enforcement decision is made by the relevant Economic Court, actual enforcement actions will be carried out by law enforcement officers of the Bureau for Mandatory Enforcement under the General Prosecutor's office. As a general rule, the law enforcement officers initiate the enforcement procedure within three calendar days after receiving the court order on the recognition and enforcement of foreign arbitration award. The actual length of enforcement shall depend on various factors related to the existence of assets and financial funds of a debtor enterprise, location of these assets and funds, existence of any restrictions to use these assets (for example, pledge, arrest, etc.), and other factors.

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?

AA: One current controversy is whether or not the High Court's decision to set aside or uphold an arbitral award and issued under section 35 of the Arbitration Act is subject to appeal to the Court of Appeal. Another is the interplay between access to justice under the Constitution and the limited right of Court intervention in setting aside arbitral awards.

As stated above, a party may make an application under Section 35 that the High Court set aside an arbitral award. Prior to the Supreme Court's decision of December 2019 in the case *Nyutu Agrovet Limited v. Airtel Networks Limited (Nyutu v. Airtel)*[8], whether or not a party could appeal the High Court's decision issued under Section 35 was a debatable issue. Some courts held that there was no express right under Section 35 to appeal a decision by the court, and therefore, the High Court's decision on the setting aside application was final. Other courts held that, although the right to appeal to the Court of Appeal had not been expressly provided for in Section 35, the courts retained their jurisdiction to grant leave to appeal.

According to the Supreme Court, although Section 35 does not expressly provide for the right of appeal, there are some exceptional cases where there will be legitimate reasons to appeal the High Court's decision. This will be where the High Court, in making its decision, has acted outside the grounds set out in Section 35 and made a manifestly wrong decision. The Supreme Court did not elaborate all the circumstances which would necessitate an appeal leaving this to be developed in jurisprudence.

Allowing a party to appeal the decision of the Court of Appeal will ensure that substantive justice is served and that grave errors by the High Court are reviewed by the Court of Appeal, particularly where a party has attacked an award on constitutional grounds. However, the appeal process will impact the speed with which commercial parties will resolve their disputes through arbitration, and eventually enforce their arbitral awards.

[8] *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR.

Kenya is pro-arbitration and has put in place a number of policies to remove disputes from the Court system that is suffering from a backlog of cases. This is evident from the legal and institutional mechanisms set in place to promote arbitration. This includes: (i) the constitutional recognition of alternative dispute resolution (**ADR**) in Article 159(2)(d) of the Constitution, which requires courts and tribunals to promote ADR including arbitration; (ii) the Arbitration Act where the provisions summarised above prevent interference by the courts in arbitration proceedings unless the limited circumstances prescribed in the Arbitration Act apply; and (iii) the ratification of the New York Convention. Further, there are also various legislative initiatives which seek to further promote the development of ADR including the development of a legal regime for mediation in the Civil Procedure Act, 2010, the introduction of the Court-Annexed mediation programme, and the establishment of robust arbitration centres through the NCIA and the CIArb Kenya. There are also various conferences that have been held in Kenya, which have sensitised professionals on arbitration and provided a platform for discussions on double cross-border partnerships with regional arbitration hubs and international institutions.

AMAC: Arbitration is extensively used in Peru, which is a pro-arbitration jurisdiction. Among other reasons, this is due to the following: (i) the PAL was designed following the UNCITRAL Model Law; (ii) foreign arbitrators can act without the need of being lawyers or being admitted to a lawyers' professional bar, which promotes the participation of foreign professionals and fosters best international arbitration practices; (iii) the main arbitration centers are adapting their institutional rules to best international arbitration practices (*e.g.*, implementation of emergency arbitration, procedural calendars, etc.); and (iv) according to Public Procurement Law, disputes arising out of contracts entered with the State shall be settled by arbitration.

Notwithstanding the aforementioned, arbitration faces problems specially in the case of arbitrations which involve the Peruvian State. An Urgent Decree issued in 2020 amended the PAL introducing worrisome provisions for those cases. For instance, every petition for provisional measures against the State must be accompanied by a stand-by letter of credit for an amount not less than that of the contract's performance bond. This requirement does not apply for interim relief sought by State entities.

Peruvian practitioners have reacted unanimously against this amendment. Some arbitrators are setting aside its application through constitutional control of law. Its repercussion in a country where arbitration is relevant has led to a draft law repealing it. Thus, it is likely that the Decree will soon no longer exist.

HA: Arbitration is increasingly becoming the favourable method of ADR for solving both international and domestic disputes after the enactment of the UAE Arbitration Law which provides a more secure framework for the conduct of the arbitration proceedings. An examination of recent trends in relation to the case law reveals a promising environment for international arbitration in the UAE and makes the UAE clearly a pro-arbitration jurisdiction.

NY: The main trend of arbitration in Uzbekistan in 2018-2019 was the move towards international commercial arbitration. The current Law on Arbitration allows to accept and hear arbitration cases only under Uzbekistan law, and therefore, a special law on international commercial arbitration has been drafted and is being reviewed by the parliament. Following this trend, an International Commercial Arbitration Court ("ICAC") has been established under CCI, which currently accepts cases under Uzbekistan law. CCI reports than nearly 68 cases have been already heard in 2020 by such ICACs.

Observations of arbitration trends by practitioners suggest that construction, infrastructure, banking, and trading sectors have been very active in making use of international arbitration in recent years. Based on active reforms and the development of projects, it is also possible to identify that the energy, automobile and telecommunications industries will grow in terms of involvement in international arbitration.

The spread of the COVID-19 pandemic has indeed negatively impacted the number of arbitration filings. The vast majority of Arbitration Courts have ceased activities in 2020 with only a few remaining active and accepting cases, either without invitation of the parties to arbitration hearings or convening the hearings through online platforms. Despite the significant slowdown during the pandemic, Arbitration Courts under CCI have already accepted and reviewed nearly 3,400 cases in 2020. The filing rate in summer-autumn 2020 seems to have stabilised and has marked a trend of increasing case filings.

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

AA: Our jurisdiction is open to accredited and licensed foreign dispute resolution professionals. There is no bar to having a foreign-qualified lawyer as your counsel in an arbitration matter. However, with respect to the handling of any post-award related matters, including challenges to an award at the High Court of Kenya, the party's legal representative must be an advocate of the High Court of Kenya with a current and valid practising certificate.

AMAC: There is no legal regulation preventing the participation of foreign young dispute resolution professionals. On the contrary, legislation is open to foreign professionals. It is true that traditionally senior lawyers have been involved in practice, but we are going through changes in the last few years have witnessed the increasing participation of young professionals, both Peruvian and foreigners. Among other reasons, this is due to the following: (i) Peru is an important spot for academic arbitration events with the participation of foreigners practitioners. In such academic events, young professionals are also invited to participate as moderators and/or speakers; (ii) young arbitration practitioners organisations are proliferating (e.g. Peruvian Young Arbitrators). They actively participate in events and work along with similar organisations in the region; and (iii) regional arbitration moot competitions also give young professionals the opportunity to participate as coaches and/or arbitrators.

These spaces are important for young arbitration practitioners to become better known in the field and fosters their participation in arbitration practice.

HA: The UAE jurisdiction is open to foreign young dispute resolution professionals. There are several dispute resolution organisations which provide professional networking for young professionals interested in the field of arbitration, conciliation and mediation. Some examples include the Young Arbitrators Forum (YAF) International Chamber of Commerce and DIAC 40 – Young Practitioners Group.

NY: Uzbekistan is quite a liberal and open country for all modern and conservative initiatives, including young dispute resolution professionals. The Law on Arbitration itself allows lawyers as young as 25 years old to act as arbitrators, including as sole arbitrators in any domestic commercial disputes. Moreover, in the mid- 2010s, the CCI held a joint Young Arbitrators Forum together with the International Chamber of Commerce in Tashkent City, to provide a plat for young arbitration professionals.

AIAC Pro Bono Mediation Initiative

As the current pandemic continues to upend nearly every sector of the society, issues stemming from across various industries are starting to proliferate. Vulnerable individuals who are lacking the necessary financial means and resources to resolve their disputes are presented with a further challenge that we face collectively as a community.

The AIAC is cognizant that this crisis has highlighted the necessity of resolving disputes effectively and efficiently. As such, the AIAC is pleased to announce the launch of its Pro Bono Mediation Initiative. The AIAC Pro Bono Mediation Initiative is aimed at providing easy and affordable access to mediation, through the AIAC's mediation services on a pro-bono basis whilst simultaneously increasing public awareness on the benefits of mediation.

The AIAC Pro Bono Mediation Initiative is accepting registration of cases starting from 1st January 2021.

The AIAC is also delighted to extend its call to interested mediators from all over the world to be a part of our journey in helping the community through the AIAC Pro Bono Mediation Initiative.

Should you be interested to apply or if you need more information, please visit our website at aiac.world. All applications will be carried out online.

Under the AIAC Pro Bono Mediation Initiative, those who satisfy the applicable criteria stand to benefit from the following non-exhaustive advantages:

- Mediated by AIAC Empanelled Mediators
- Full waiver of AIAC Administrative Fee
- Conduct of mediation session in physical and/or virtual setting
- Full or partial waiver of the Mediator's Fee
- Discounted rate on facilities booking at AIAC
- Full administrative support by the AIAC Case Counsel

If you have any questions, please contact probono.mediation@aiac.world or +603 2271 1000

DREx TALK– KUALA LUMPUR 2020

THE THREE-MONTH TIME LIMIT IN ARTICLE 34(3) OF THE MODEL LAW – A COMPARATIVE STUDY ACROSS MODEL LAW JURISDICTIONS

The AIAC, together with DREx Talks, hosted the DREx Talk – Kuala Lumpur 2020 ("DREx Talk") on Friday, 21st August 2020 via the AIAC's YouTube platform. This occasion marked the very first time a DREx Talk has been hosted in Southeast Asia.

We were honoured to have Dr. Michael Hwang S.C. (Barrister & Arbitrator at Michael Hwang Chambers LLC) as the DREx Speaker, and Christopher Leong (Managing Partner, Chooi & Company + Cheang & Ariff) as the DREx Introducer.

Dr. Hwang delivered a lecture on "*Can an arbitral award be set aside under Article 34 of the Model Law if the application is not made within the 3-month period permitted by Article 34(3)? Different approaches from the common law Model Law jurisdictions*". His lecture reviewed legal developments across eight jurisdictions covering 7 Model Law jurisdictions and 1 Quasi-Model Law jurisdiction, namely, Australia, New Zealand, Ireland, Canada, India, Hong Kong, Singapore, and Malaysia.

Michelle Sunita Kummar, Deputy Head of Legal of AIAC and a DREx Fellow Member, was the Master of Ceremonies. Ms. Kummar delivered the DREx Talk's Welcoming and Closing Remarks.

Ms. Kummar highlighted that upon entering this new decade, one thing which has proved inevitable, for business and legal communities across the world, is showcasing the capacity to cope with the unprecedented challenges that have and will come our way. She discussed the importance of digitisation in this context and encouraged the business and legal communities to continue working together to innovate and adapt to overcome any obstacles whilst meeting and exceeding client and stakeholder demands.

Mr. Leong, as the DREx Introducer, shared insights on the UNCITRAL Model Law's effect on and application in the Malaysian legal system, with a specific reference to Section 37(4) of the Malaysian Arbitration Act 2005 (the Malaysian equivalent to Article 34(3) of the Model Law). During his address, Mr. Leong highlighted that international commercial and investment treaty arbitrations are now part and parcel of the global commercial and legal framework. The overriding objective of such mechanisms is to ensure that commercial activities are conducted in a predictable legal framework. Dr. Leong elaborated the history of the development of the Malaysian Arbitration Act 2005 and the 2018 Amendments that controversially repealed Sections 42 and 43 of the Malaysian Arbitration Act 2005 which concerned the right to appeal arbitral awards on questions of law. Lastly, Dr. Leong discussed the principle of the finality of an award as one of the fundamental tenets of arbitral proceedings and touched upon Section 37 of the Malaysian Arbitration Act 2005.

Dr. Hwang, as DREx Speaker, provided a multi-jurisdictional overview on the setting-aside of awards under Article 34(3) of the Model Law. He began his remarks by reiterating that the UNCITRAL Model Law has always been a beacon of international legal convergence and is particularly prevalent in the Asia Pacific region. He then proceeded with interpreting Article 2A and Article 34(3) of the UNCITRAL Model Law and explained the essence of the three-month window to make an application to set aside an arbitral award, with case studies from Singapore, Malaysia, and Hong Kong on this matter. Dr. Hwang specifically remarked "*As far as I know, no one has written about the conflicting approaches taken in these 3*

cases. After my lecture in 2018, I said that I wanted to write an article on this issue, but also that I would not be writing it until some court gave a comprehensive review of the 3 cases and the irreconcilable elements within them. And that opportunity has finally come [referring to DREx Talk]". Dr. Hwang proceeded to discuss a 2019 Singapore International Commercial Court decision which settled the controversies regarding the true interpretation of Article 34(3). Dr. Hwang proceeded to elaborate on other decisions on Art 34(3) from other common law and UNCITRAL Model Law countries. Dr. Hwang further remarked "*…it turns out that other common law countries have (to a greater or lesser degree) also come to the same conclusion as Singapore, so I think it is a good idea to share all these authorities which, to my knowledge, have not been assembled together in one place. I will now give you a quick bird's eye view of the available jurisprudence*". Accordingly, Dr. Hwang proceeded to discuss the Indian case studies along with a discussion on the Indian Arbitration Act. Subsequently, he proceeded to discuss case studies from New Zealand, Ireland and Canada. He also elaborated on the policy considerations under Article 34(3) referring to decisions from New Zealand and Australia.

During his concluding remarks, Dr. Hwang stated "*…While harmonisation is a goal of the Model Law, and undoubtedly a worthy one, it remains in the hands of the courts to interpret Model Law provisions with an eye to maintaining cross-border interpretative consistency… As things currently stand, arbitration parties would be well-advised to take note that, at least for arbitrations seated in* [omitted],[1] *prospective claimants will not be allowed to bring a setting-aside application after three months have elapsed since the rendering of the arbitral award, regardless of how deserving their particular circumstances may be*". (*). The DREx Talk concluded with a question & answer session between Mr. Leong and Dr. Hwang.

The 3rd DREx Talk reinforced the high standards of the series which began with Prof. Douglas Jones in 2018, Prof. Emmanuel Gaillard in 2019 and now Dr. Michael Hwang in 2020. We eagerly await the 4th instalment of the DREx Talk series which we are confident will feature another stellar figure from the international arbitration community.

We would like to take this opportunity to acknowledge the supporting organisations of the DREx Talk namely, AIAC Young Practitioners' Group (AIAC YPG), Malaysian Institute of Arbitrators (MIArb), Australian Centre for International Commercial Arbitration (ACICA), Thailand Arbitration Center (THAC), Arbitration Ireland, ADR Institute of Canada (ADRIC), Indian Arbitration Forum (IAF), Asia Pacific Regional Arbitration Group (APRAG), Global Arbitration Review (GAR), and Inter-Pacific Bar Association (IPBA).

We also sincerely acknowledge the support extended by the DREx Talks Knowledge Partners namely, Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC), Hong Kong International Arbitration Centre (HKIAC), Singapore Chamber of Maritime Arbitration (SCMA), Vienna International Arbitral Centre (VIAC), MARC (the Alternative Dispute Resolution arm of the Mauritius Chamber of Commerce and Industry (MCCI)), London Maritime Arbitrators Association (LMAA), International Chamber of Commerce (ICC), and Scottish Arbitration Centre.

"The Talk was really well-received across the judicial circles, practitioners and academia alike. What made it even more special was the fact that it was a new endeavour for all of us involved since it was the first-ever completely online DREx Talk.

We have received fantastic feedback on not just the quality of the Talk but especially about the organizational part. Despite it being a difficult time, the conceptualization starting from the brilliantly made 'Trailer' to the high-quality video of the Talk itself - all of it made it one of the most unique and well-received DREx Talks we have had.

Once again, we would like to express our sincerest thanks to … the entire AIAC team for taking out the time and planning and executing such a smooth and highly-organized event."

- DREx Talk Secretariat

[1] To know the jurisdictions, please refer to DREx Talk Kuala Lumpur available on YouTube at https://youtu.be/xxkP8LzWOAw.

2020 INVESTMENT ARBITRATION RECAP: RECENT DEVELOPMENTS

*By Nathan Eastwood[1] & Jagpreet Sandhu[2]**

Nathan Eastwood

Jagpreet Sandhu

The landscape of investment arbitration is everchanging. Users and observers of the Investor-State Dispute Settlement ("ISDS") regime are no doubt familiar with the criticisms levelled against the ISDS regime, which include allegations of a lack of transparency, a lack of consistency, the overriding of State sovereignty, and more.

This past year has seen developments in addressing these criticisms through sensible and measured approaches. UNCITRAL Working Group III's efforts to consider and chart the reform of ISDS remains ongoing with increasing dialogue from stakeholders around the world. More attention is now being paid to the potential use of investor-State mediation, while accepting that provisions for ISDS may not be dispensed with entirely. Some new investment agreements have opted to exclude ISDS provisions for now, but at the same time included mandatory treaty review mechanisms which allow for the potential subsequent incorporation of ISDS provisions in the future.

States at the receiving end of renewable claims have devised '*olive branch*' solutions to encourage settlement dialogue between investors and States. For example, Spain has convinced award debtors to waive their awards in acceptance of remuneration regimes that provide specific incentives. Such measures sensibly allow for domestic regulations to be introduced in a mutually acceptable fashion, as likely will be necessary with the increased further creation and uptake of green energy incentives by States around the world.

Transparency in investment arbitration has also seen a boom through a first-of-its-kind ICSID annulment decision, in which an ad hoc ICSID Committee found a lack of disclosure to give rise to a serious departure from a fundamental rule of procedure.

This article details these developments in further detail and offers a promising view of the investment arbitration landscape for the future, as the regime and its users evolve to adapt with today's criticisms and discourse.

Investment Agreement Trends

The liberalisation of global trade and investments remains ongoing. In apparent recognition of the need to secure trade agreements in uncertain times, there has been a noticeable increase of activity in the pursuit of, entry into, and modification of multilateral and bilateral trade agreements.

The United Kingdom's ("UK") activity in this sphere has been notable. It has signed agreements with approximately 20 countries and trading blocs to 'roll over' existing European Union ("EU") preferential trade agreements on 1 January 2021.[3] Among these, the UK-Japan Comprehensive Economic Partnership Agreement ("UK-Japan CEPA"), entered into on 23 October 2020, is particularly notable.[4]

Political importance notwithstanding, the UK-Japan CEPA represents an important confirmation of both States in the continuing need to provide for the protection of investors and for the overall acceptance of international arbitration as a dispute resolution mechanism. While the UK-Japan CEPA does not contain ISDS provisions, it does provide for international arbitration by an appointed panel of arbitrators (in addition to providing for conciliation and mediation). It is unsurprising that the UK-Japan CEPA does not contain ISDS provisions, as this is typical of its predecessor (which it seeks to embody) – the Japan-EU Economic Partnership Agreement ("Japan-EU EPA").

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[*]The views expressed in this article are the authors' alone and do not necessarily reflect the views of Clifford Chance nor the AIAC. Neither of the authors is qualified to practice law in Malaysia and the views expressed in this article should not be taken as legal advice. Any questions, queries or comments relating to this article can be directed to Nathan.Eastwood@CliffordChance.com and Jagpreet.Sandhu@CliffordChance.com.

[3]Clifford Chance, 'UK Releases Strategic Approach for Securing a Free Trade Agreement with Japan', Thought Leadership, June 2020, p. 2.

[4]See, Ministry of Foreign Affairs of Japan, 'Japan-UK Comprehensive Economic Partnership Agreement', accessible at: <https://www.mofa.go.jp/ecm/ie/page24e_000270.html>.

Interestingly, however, the UK-Japan CEPA does not completely 'shut the door' on the potential amendment and future inclusion of ISDS provisions. Article 8.5, entitled '*Review*', specifically contemplates the possibility and inclusion of ISDS to "*provide for the improvement of the investment environment*":[5]

> *"3. If, after the date of entry into force of this Agreement, a Party signs an international agreement with an investment chapter that contains provisions for investment protection or provides for investor-to-state dispute settlement procedures, the other Party, after the date of entry into force of that agreement, may request that the Parties review this Section and Section B. Such a review shall be conducted with a view to the possible inclusion within this Agreement of such provisions that could provide for the improvement of the investment environment. Unless the Parties otherwise agree, any such review shall be commenced within two years from the date of the request and shall be concluded within a reasonable period of time."*

There is no equivalent counterpart provision in the Japan-EU EPA. This approach is therefore novel and, refreshingly, shows an intention to not outrightly abandon ISDS mechanisms in a period where other States have sought to hastily withdraw themselves from those very same mechanisms following public backlash against ISDS. For example, India has to date served notices of termination to 57 States and prepared its own BIT Model Text to rebalance the protections it intends to afford investors.[6] That said, India's BIT Model Text still provides for ISDS – an option which the UK-Japan EPA does not provide for (yet, if at all).

The above approach is similarly mirrored in the Regional Comprehensive Economic Partnership ("RCEP"), which was signed by 15 States on 15 November 2020. The agreement represents the biggest trade bloc in history and accounts for approximately 30% of global GDP by virtue of presence of key Asia-Pacific States. While it does not allow for ISDS, a similar, albeit less specific, Article 20.8 entitled 'General Review' provides that the Contracting Parties must periodically undertake a general review of the RCEP with a view to "consider ways to further enhance trade and investment amongst the Parties" by taking into account "relevant developments in international fora". There can be little doubt that this reservation likely contemplates in part the potential future inclusion of ISDS provisions – Malaysia's Trade Minister has recently commented that once the agreement is in force, "the member states will re-look into it and see whether or not we are going to have ISDS. But it must be an agreement made by all parties. For now, there is no ISDS."[7]

The UK-Japan CEPA and the RCEP 'reservation' options to incorporate ISDS provisions in the future may in part be informed by the ongoing efforts of UNCITRAL Working Group III, which has been mandated since 2017 with reforming the current ISDS regime. Most recently, discourse in that respect has included the potential utility of mediation in ISDS.[8] Working Group III's efforts remain ongoing and may very well inform the future inclusion of ISDS provisions in trade agreements such as the UK-Japan CEPA and the RCEP. It remains a space to watch.

[5]UK-Japan CEPA 2020, Article 8.5(3).

[6]See, Won Kidane, 'China's and India's Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa' 49(2) Loyola University of Chicago Law Journal 405, 422.

[7]Misha Ketchell, 'Suddenly, the world's biggest trade agreement won't allow corporations to sue governments', The Conversation, 17 September 2019, accessible at: < https://theconversation.com/suddenly-the-worlds-biggest-trade-agreement-wont-allow-corporations-to-sue-governments-123582>.

[8]Alison Ross, 'Investor-state mediation under the spotlight', Global Arbitration Review, 2 December 2020 accessible at: <https://globalarbitrationreview.com/investor-state-mediation-under-the-spotlight>.

Energy Arbitration Developments - Spanish Solar Cases

It is well recognised that Spain has suffered a series of adverse claims arising out of its 2010 modifications to its renewable energy incentives. These claims concern alleged breaches of the Fair and Equitable Treatment ("FET") standard afforded in the Energy Charter Treaty ("ECT"), these claims have been voluminous to the point that they are referenced as the "Spanish renewables saga".[9]

Spain has however enjoyed some reprieve over the last year. It has adopted a creative approach in addressing the claims before it, by rolling out a new "remuneration regime" that offers investor claimants incentives which are only accessible if said investors elect to discontinue any existing claims against Spain that arise out of the "renewables saga".[10]

This incentive program has been well received. For example, investor claimants have even opted to cease enforcing their arbitral awards against Spain. In October 2020, Dutch energy company Masdar opted not to enforce its €64.5 million award (arising out of the "renewables saga") against Spain.[11] Reports indicate a further two award creditors may accept the incentives on offer.[12] Spain's 'olive branch' approach, therefore, may yet prove influential for future States confronted with similar torrents of investment claims that arise out of renewable energy incentive regimes – a reality which may be realised sooner than expected, owing to a globally energised rapid shift to embrace green incentives.

Innovative settlement incentives aside, Spain maintains an active log of claims against it, with some 32 pending claims (of a total 52 cases to date).[13] While it may have incurred a liability of €860 million from the awards rendered against it,[14] it has not, however, accepted the outcomes of those awards without resistance. Spain has sought to annul awards (with an occasion of success, as discussed further in this article) and on other occasions employed various defences to enforcement of awards beyond Europe by pleading sovereign immunity[15] and jurisdictional deficit owing to an alleged incompatibility with the Achmea decision.[16] Award debtors have, however, sought to circumvent Achmea jurisdiction by seeking to enforce their awards outside the EU, and have succeeded in one occasion in Australia.[17]

Spain's activity in the investment arbitration sphere is both innovative and important as it continues to test the strength of claims brought against it and the parameters of any subsequent rendered awards. In certain instances, Spain has even accomplished what no other State (or investor) has managed to do thus far: it has secured the annulment of an ICSID award due to the improper constitution of the tribunal under Article 52(1)(a) of the ICSID Convention.

First-Ever ICSID Annulment of Award for Improper Constitution of Tribunal

On 11 June 2020, an ad hoc ICSID Committee made legal history by annulling the award in Eiser Infrastructure Limited and Energia Solar Luxemburg S.A.R.L. v Kingdom of Spain (ICSID Case No. ARB/13/36) for reasons of an identified conflict of interest that gave rise to the improper constitution of the tribunal. It is worth noting that the annulled award is the very same award that was successfully enforced in Australia only three months earlier.

In arriving at its decision, the Committee utilised the same three-step test employed in EDF v Argentina,[18] namely:

> 1. was the right to raise this ground waived because the party concerned had not raised it promptly?
>
> 2. if not, has the party seeking annulment established facts the existence of which would cause a reasonable person, with knowledge of all the facts, to consider that there were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality? and
>
> 3. if so, could the lack of impartiality or independence on the part of that arbitrator – assuming for this purpose that the doubts were well-founded – have had a material effect on the award?

The facts concerned the relationship between the Claimant's appointed member of the tribunal in the underlying arbitration and the Claimant's designated quantum and regulatory experts in that same arbitration. Namely, the Claimant's appointed arbitrator, Dr. Stanimir Alexandrov, had failed to disclose his long-standing relationship between the Claimant's quantum and regulatory experts, Brattle Group and specifically Mr. Carlos Lapuerta whom was involved as the Claimant's quantum expert.

The referenced relationship spanned across some fifteen years and crucially included a history of appointments of Brattle Group (which specifically included Mr. Lapuerta as a testifying expert in multiple instances) by Dr. Alexandrov during his career as a practising lawyer. Pressingly, it was further brought to the attention of the Committee that during the period of the underlying arbitration, Dr. Alexandrov had been either working with the Brattle Group in several other ongoing arbitrations or had been appointed as an arbitrator by the same party that engaged the Brattle Group as its experts.[19]

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[9]Amelie Noilhac, 'Renewable energy investment cases against Spain and the quest for regulatory consistency', Questions of International Law, accessible at: <http://www.qil-qdi.org/renewable-energy-investment-cases-against-spain-and-the-quest-for-regulatory-consistency/> .

[10]The remuneration regime was passed by Spanish royal decree in November 2019. The full text of the regime (in Spanish only) is accessible at: <https://www.boe.es/eli/es/rdl/2019/11/22/17/dof/spa/pdf>.

[11]Jack Ballantyne, 'Renewables investors to renounce awards against Spain', Global Arbitration Review, 6 October 2020, accessible at: <https://globalarbitrationreview.com/article/1234055/renewables-investors-to-renounce-awards-against-spain>.

[12]Tom Jones, 'Spain solar case moves to quantum phase', Global Arbitration Review, 14 October 2020, accessible at: <https://globalarbitrationreview.com/spain-solar-case-moves-quantum-phase>.

[13]UNCTAD Investment Policy Hub, 'Spain: Cases as Respondent State', accessible at: <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/197/spain>.

[14]Miguel Angel Noceda, 'España recibe la primera renuncia en los laudos de las renovables y se ahorra 80 millones', El Pais, 3 October 2020, accessible (in Spanish only) at: <https://elpais.com/economia/2020-10-02/espana-recibe-la-primera-renuncia-en-los-laudos-de-las-renovables-y-se-ahorra-80-millones.html?ssm=TW_CC>.

[15]Infrastructure Services Luxembourg S.A.R.L v Kingdom of Spain [2019] FCA 1220.

[16]Novenergia II – Energy & Environment (SCA) v the Kingdom of Spain, Civil Action No. 1:18-cv-1148, US District Court for the District of Columbia.

[17]Eiser Infrastructure Ltd v Kingdom of Spain [2020] FCA 157.

[18]EDF International S.A. v Argentine Republic (ICSID Case No. Arb/03/23), Decision on Annulment, 5 February 2016, para. 136.

[19]Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L v Kingdom of Spain (ICSID Case No. Arb/13/36), Decision on the Kingdom of Spain's Application for Annulment, 11 June 2020, paras. 182 to 184.

Spain submitted that it became aware of the facts of the relationship shared by Dr. Alexandrov and the Brattle Group only when it learned of public reports of the relationship in the context of a disqualification proposal filed in an unrelated arbitration involving Pakistan.[20] By Spain's account, such disclosure had never been made.

In consideration of the referenced relationship and the lack of disclosure, the Committee concluded that a serious departure from a fundamental rule of procedure had occurred. In the Committee's view, it would be "manifestly apparent" to an independent third party that Dr. Alexandrov "lacked impartiality".[21] Dr. Alexandrov's failure to disclose his relationship had deprived Spain of the opportunity to challenge him and further "deprived Spain from seeking the benefit and protection of an independent and impartial tribunal".[22]

In an interesting observation, the Committee considered that Dr. Alexandrov's influence on the other Tribunal members – however significant or insignificant it may have been – would expectedly have affected the deliberations of the other Tribunal members to some degree and as such, a lack of unanimity in the underlying award would not impede annulment:[23]

> *"It is in the very nature of deliberations that arbitrators exchange opinions and are persuaded or influenced by the opinions of their colleagues. That makes us conclude it would be unsafe to hold that Dr. Alexandrov's views and analysis could not have had any material bearing on the opinions of his fellow arbitrators. It is not improbable that they had such effect, and therefore, excluding this possibility from consideration would go against the nature of deliberations."*

On the whole, the Eiser annulment decision represents a positive watershed moment in investment arbitration. Parties are now arguably further empowered to seek transparency in disclosures by tribunal members, and tribunals are equally obliged to meet those demands where reasonable. Transparency, as a long-sought feature in investment arbitration, is ever-welcome.

Conclusion

Despite the challenges of 2020 and the criticisms levelled at ISDS, more and more foreign investors are having recourse to the protections provided by these treaties. ICSID has this year alone administered 303 ISDS cases under the ICSID Convention and 21 ISDS cases under UNCITRAL arbitrations, a maintenance in overall caseload from 2019.[24] Despite the criticisms, the ISDS framework has demonstrated its versatility and resilience in addressing these criticisms to ensure ISDS remains an important forum for international dispute resolution in the 21st century.

In conclusion, the increased scrutiny of ISDS has resulted in an observable response by its users and States. Parties have become increasingly sophisticated in their election for, and inclusion of, ISDS in treaties. ISDS Reform is a tasked item and will likely be realised through Working Group III's efforts. States have creatively deployed remuneration regimes to placate investors and to progress with initiatives. With measured responses, ISDS is likely to continue to serve as a cornerstone of international dispute resolution and guardian of investments well into the future.

[20] Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L v Kingdom of Spain (ICSID Case No. Arb/13/36), Decision on the Kingdom of Spain's Application for Annulment, 11 June 2020, para. 183.

[21] Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L v Kingdom of Spain (ICSID Case No. Arb/13/36), Decision on the Kingdom of Spain's Application for Annulment, 11 June 2020, para. 239.

[22] Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L v Kingdom of Spain (ICSID Case No. Arb/13/36), Decision on the Kingdom of Spain's Application for Annulment, 11 June 2020, para. 241.

[23] Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L v Kingdom of Spain (ICSID Case No. Arb/13/36), Decision on the Kingdom of Spain's Application for Annulment, 11 June 2020, para. 246.

[24] In 2019, ICSID administered 306 cases under the ICSID Convention and 17 cases under ISDS UNCITRAL arbitrations.

RECAPPING RECENT HIGHLIGHTS OF THE AIAC YOUNG PRACTITIONERS' GROUP

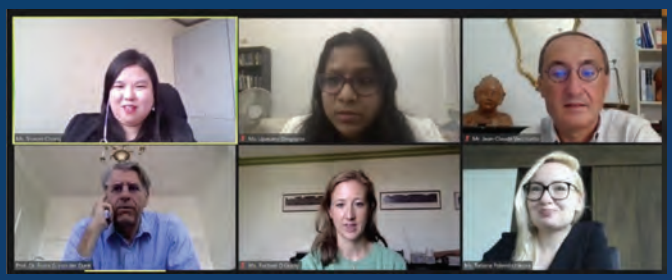
The AIAC Young Practitioners' Group ("AIAC YPG") is an important platform through which students and young practitioners can develop their skills and networks, while sharing key insights, on topical issues in alternative dispute resolution ("ADR"). A pressing question for students and young practitioners alike is trying to find their footing in the legal industry and deciding on the field of law they will predominately focus their careers in. However, the COVID-19 pandemic has altered the way the world functions and, consequently, how people should navigate through the job market to find their first or next opportunity.

To assist in this endeavour, in August 2020, the AIAC YPG launched its unique webinar series *"Careers 2.0: Find Your Niche"*. The initiative is aimed at providing a platform for interested individuals 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.

Additionally, the AIAC also hosted two virtual workshops on arbitration to Indonesian law students to give them a better understanding of the workings of the industry.

A recap of these AIAC YPG initiatives can be found below.

Careers 2.0: Find Your Niche. To Infinity and Beyond: A Career in Air and Space Law (28th August 2020)



On 28th August 2020, the AIAC YPG launched its inaugural "Careers 2.0: Find Your Niche" webinar titled, "To Infinity and Beyond: A Career in Air and Space Law". This session was moderated by Ms. Sharon Chong of Skrine, and featured prominent industry-experts, namely Professor Dr. Frans von der Dunk of Black Holes BV Consultancy, Mr. Jean-Claude Vecchiatto of Bird & Bird Paris, Ms. Rachael O'Grady of Mayer Brown International LLP, and Ms. Upasana Dasgupta of McGill University, who gave an overview of air and space law and its applicable treaties.

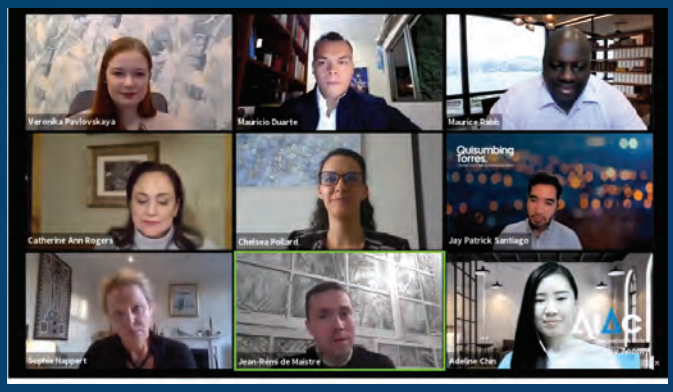
This was then followed by the panellists sharing the humble beginnings of their respective careers to the niche area of air and space law they are now in. Having the passion to learn about the sector, the people, the business, and technological know-how are among the key traits towards achieving a successful career in this industry.

Careers 2.0: Find Your Niche. Contours of a Legal Career in Islamic Finance (25th September 2020)

The AIAC YPG alongside its supporting organisations, held its second webinar on careers in the niche areas of law and ADR. The webinar titled "Contours of a Legal Career in Islamic Finance" was held on 25th September 2020. Opened by Ms. Monica Chong Wan Yee on behalf of the Asia-Pacific Forum for International Arbitration, this session was moderated by Ms. Nereen Kaur Veriah and featured prominent speakers, namely Ms. Farmida Bi of Norton Rose Fulbright LLP, Mr. Arif Jamal of National University of Singapore, Mr. Jalalullail Othman of Shook Lin & Bok Malaysia, and Ms. Azlin Ahmad of Herbert Smith Freehills.

The panellists provided an insight into what is involved if young practitioners wished to undertake a career in Islamic finance. The panellists shared their academic and professional experiences, and discussed how their professional journey took them to the road less travelled in specialising in Islamic banking and finance.

Careers 2.0: Find Your Niche. Game Player ADR: The Interplay of Arbitration and Technology (23rd October 2020)



The third webinar as part of the Careers 2.0 series was titled, "Game Player ADR: The Interplay of Arbitration and Technology".

Moderated by Chelsea Pollard of the AIAC and Veronika Pavlovskaya of Arzinger Law Offices, this session featured a diverse panel of speakers, namely, Jay Patrick Santiago of Quisumbing Torres, Jean-Rémi de Maistre of Jus Mundi, Sophie Nappert (an independent arbitrator), Catherine Rogers of Queen Mary University and Arbitrator Intelligence, Mauricio Duarte of Legal Plus, Adeline Chin YF of LawTech Malaysia, and Maurice L. Rabb, Esq. of Baker McKenzie.

The panellists discussed what type of technology and Artificial Intelligence ("AI") is available in arbitration, how AI can influence and be useful for arbitration, obstacles faced in the industry, who the panellists believe should be the driving force behind the legal technology industry, the professional skillsets needed to take on such roles, challenges faced when moving from counsel work to the legal tech industry, and many more. The panellists also provided practical and encouraging advice to participants, before concluding with an interactive Q&A session.

AIAC YPG Virtual Workshop at Faculty of Law, Universitas Gadjah Mada, Indonesia (27th November 2020)

On 27th November 2020, AIAC YPG Virtual Workshop embarked on its very first Indonesian workshop with the Faculty of Law, Universitas Gadjah Mada (UGM). The Workshop featured Mr. Firmansyah of KarimSyah, Mr. Yasser Mandela of Budidjaja International Lawyers, and Mr. Albertus Aldio Primadi of the AIAC.

Mr. Firmansyah kicked off the Workshop with an overview to the Law No. 30 Year 1999 on arbitration and ADR. Mr. Yasser continued the Workshop by giving his presentation on the conduct of arbitral proceedings. Subsequently, Mr. Aldio took the students on a presentation regarding pathological arbitration clauses. Students then were divided into virtual breakout rooms for a role play scenario under the supervision of the mentors.

The best students in this Workshop stood the chance to be awarded internship opportunities at the AIAC and KarimSyah Law Firm.

AIAC YPG Virtual Workshop at Faculty of Law, Universitas Indonesia, Indonesia (28th November 2020)

On 28th November 2020, the AIAC YPG, in collaboration with ILMS FH UI, conducted its Virtual Workshop on arbitration and ADR for University of Indonesia. The Workshop was steered by Ms. Windri Marieta FCIArb of Harvardy, Marieta & Mauren - Attorneys at Law, Mr. Junianto James Losari of UMBRA - Strategic Legal Solutions, and Ms. Irene Mira of the AIAC.

Ms. Windri introduced the students to Indonesia's arbitral legislative framework and provided an insight into the practical difficulties at the stage of the enforcement of arbitral awards.

Mr. James then delivered an overview on the conduct of arbitral proceedings. He also emphasised the importance of briefing clients beforehand and ensuring that witnesses are well-versed with the arbitration process.

The students were then brought to the fundamentals of arbitration agreement by Ms. Irene. Following that, the students assumed a role play scenario to draft and negotiate an arbitration clause under supervision of mentos.

The best students in this Workshop stood the chance to be awarded internship opportunities at the AIAC and UMBRA Strategic Legal Solutions.

VISION 2021:

AN INSIGHT INTO THE AIAC'S INITIATIVES FOR 2021

Due to the COVID-19 pandemic and the absence of a Director at the AIAC, a number of the initiatives the AIAC had initially envisioned to launch in 2020 were unfortunately postponed. Nevertheless, wherever possible, the AIAC has undertaken the necessary groundwork throughout 2020 to ensure certain initiatives in the pipeline come into fruition in 2021.

One prime example is the revision of the AIAC Arbitration Rules 2018. The AIAC intends to amend the same to ensure the rules reflect the best international practices and procedures. It is anticipated that these rules will be released in mid-2021 to be used as part of the 29th Willem C. Vis International Commercial Arbitration Moot in Vienna, Austria and the 19th Willem C. Vis East International Commercial Arbitration Moot in Hong Kong SAR in 2022.

In light of the demand for arbitral institutions to provide virtual hearing solutions, the AIAC also intends to launch its Virtual Arbitration Protocol and its Virtual Mediation Protocol. These protocols will assist both Parties and Arbitral Tribunals to better manage the effectiveness of any virtual hearings, meetings or conferences that are to be conducted, whilst also enabling the AIAC to provide more effective technical support for such virtual proceedings.

Also, to be launched in 2021 is the AIAC's Pro Bono Mediation Initiative. This initiative aims to ensure mediation services offered by the AIAC are more accessible to both the local and the global alternative dispute resolution community. It is hoped that this initiative will enable those economically impacted by the COVID-19 pandemic to have a viable means by which their disputes can be resolved and their relationship with the other party potentially restored.

On the adjudication front, the AIAC also intends to launch an adjudicator evaluation mechanism which will allow adjudicators, parties and party representatives, and the AIAC to have a better understanding of potential areas of skills development for empaneled adjudicators. The particulars of this initiative will be published in early 2021.

On the young practitioners' front, the AIAC will host its 5th AIAC (Virtual) Pre-Moot to the Willem C. Vis International Commercial Arbitration Moot. In addition, the AIAC YPG also has a number of events lined up for 2021 including the 3rd AIAC-YPG Conference, the YPG Essay Competition, and the YPG Regional Ambassador Programme.

With all these and other exciting initiatives in the pipeline, the AIAC is optimistic that 2021 will mark the beginning of a new era for the AIAC!

ANNOUNCEMENT
November 16, 2020

ASIAN INTERNATIONAL ARBITRATION CENTRE
*(Formerly known as KLRCA)

Appointment of the Director of the Asian International Arbitration Centre (AIAC)

The Asian International Arbitration Centre ("AIAC") is pleased to announce that The Honourable Tan Sri Datuk Suriyadi bin Halim Omar has been appointed as the Director of the AIAC for the 2020 to 2022 term, with effect on 1st December 2020. This decision was confirmed by the Government of Malaysia, following its consultation with the Asian-African Legal Consultative Organization (AALCO), as stated by The Honourable Dato' Takiyuddin Bin Haji Hassan, Minister in the Prime Minister's Department (Parliament and Law) in his press statement dated 16th November 2020 as follows:

MENTERI DI JABATAN PERDANA MENTERI
(PARLIMEN DAN UNDANG-UNDANG)

KENYATAAN MEDIA

PELANTIKAN PENGARAH
PUSAT TIMBANG TARA ANTARABANGSA ASIA
(ASIAN INTERNATIONAL ARBITRATION CENTRE – AIAC)

Jemaah Menteri pada 13 November 2020 telah bersetuju melantik **YBhg. Tan Sri Datuk Suriyadi bin Halim Omar** sebagai **Pengarah Pusat Timbang Tara Antarabangsa Asia** (*Asian International Arbitration Centre – AIAC*) bagi sesi 2020 hingga 2022 yang berkuatkuasa pada **01 Disember 2020.**

Pelantikan YBhg. Tan Sri Datuk Suriyadi sebagai Pengarah *AIAC* ini juga adalah hasil konsultasi pihak Kerajaan dengan *Asian-African Legal Consultative Organization (AALCO)*, selaras dengan AIAC sebagai institusi antarabangsa yang bebas dan bernaung di bawah AALCO.

YBhg. Tan Sri Datuk Suriyadi, 69, merupakan bekas Hakim Mahkamah Persekutuan dan pernah juga berkhidmat di Jabatan Peguam Negara, berkelulusan LLB (Hons) dari Universiti Warwick, United Kingdom dan Barrister-at-Law dari Lincoln's Inn, London.

Dengan pelantikan ini saya mengharapkan YBhg. Tan Sri Datuk Suriyadi dapat meneruskan kecemerlangan beliau dalam merajui AIAC untuk terus menjadi sebuah pusat timbang tara yang unggul di rantau Asia.

DATO' TAKIYUDDIN BIN HAJI HASSAN
Menteri di Jabatan Perdana Menteri
(Parlimen dan Undang-undang)

16 November 2020

An English office translation of the above statement can be found here.

Usual case management practices for all alternative dispute resolution (ADR) matters including arbitrations, adjudications, mediations and domain name disputes will resume effective 1st December 2020. All pending registrations, appointment requests, decisions and/or approvals requiring the Director of the AIAC's consideration will be brought to The Honourable Tan Sri Datuk Suriyadi bin Halim Omar's immediate attention to be actioned upon from 1st December 2020.

If there are any questions, please contact your respective AIAC Case Counsel by email with a copy to arbitration@aiac.world, adjudication@aiac.world, mediation@aiac.world, dndr@aiac.world or aiac@adndrc.org, as applicable.

Yours sincerely,
The AIAC's Management

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

ASIAN INTERNATIONAL ARBITRATION CENTRE

ANNOUNCEMENT
10TH DECEMBER 2020

PAYMENT OF COSTS IN ADJUDICATION PROCEEDINGS UNDER THE CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012

In adjudication proceedings, there are a number of instances where Parties are liable to pay the Adjudicator's fees and expenses as well as the AIAC's Administrative Fee. Unfortunately, there are instances where either or both the Parties are unable to satisfy the payment of the said fees.

In some instances, this may result in the withdrawal of adjudication proceedings pursuant to Section 17(1) of the Construction Industry Payment & Adjudication Act 2012 (the "CIPAA"). Alternatively, the proceedings may continue through to completion with the AIAC not being in receipt of the entirety of deposits at the time the Adjudicator is ready to release the adjudication decision.

It is essential for both Parties and Adjudicators to be aware of their rights and obligations with respect to costs under the CIPAA. Accordingly, the AIAC has taken this opportunity to clarify the issue of costs under the CIPAA.

Rights and Obligations of the Parties

(a) Joint and Several Liability

Pursuant to Section 19(3) of the CIPAA, the Parties are jointly and severally liable to pay the Adjudicator's fees and expenses. This means that in the event one of the Parties fails to pay, the other party may be required to satisfy the non-payment. This joint and several liability extends to the Parties' payment of the AIAC's Administrative Fee (*cf.* Section 19(4) of the CIPAA and Rules 9(2) and 9(4) of the AIAC Adjudication Rules & Procedure).

Failure to pay the Adjudicator's fees and expenses and/or the AIAC's Administrative Fee will result in the adjudicator withholding of the release of the adjudication decision to the Parties (*cf.* Section 19(5) of the CIPAA and Rule 9(5) of the AIAC Adjudication Rules & Procedure).

(b) Withdrawal of Adjudication Claim

Section 17(1) of the CIPAA also enables the Claimant to withdraw an adjudication claim at any time by serving a Notice of withdrawal of adjudication claim proceedings (Form 11) on the Respondent and on the Adjudicator. The Respondent has no right to withdraw an adjudication proceeding.

Where a Claimant excercises its right to withdraw the adjudication proceeding, the Claimant will be solely liable to bear the costs arising out of the withdrawal of the proceedings, unless the adjudicator orders otherwise (*cf.* Section 17(2) of the CIPAA) (the "Withdrawal Costs").

The Withdrawal Costs will comprise of a sum towards the Adjudicator's fees and expenses, as determined by the Director of the AIAC, as well as the AIAC's Administrative Fee. The latter is payable in full despite the proceedings having prematurely ended, being withdrawn, or the dispute settled (*cf.* Schedule III, Paragraphs 1.1(c) and 1.2 of the AIAC Adjudication Rules & Procedure).

However, the AIAC and the Adjudicator will only be able to recover Withdrawal Costs if the Adjudicator has served a Notice of acceptance of the appointment to act as adjudicator (Form 6) on the Parties within 10 working days of the adjudicator's notification of appointment by the Director of the AIAC.

(c) Adjudication Decision is Void

There are some instances where an adjudication decision is declared void due to the Adjudicator not having delivered the adjudication decision to the Parties and the AIAC within the timeframe set out in Section 12(2) of the CIPAA. In such instances, the Parties will still be liable to bear the full sum of the AIAC's Administrative Fee (*cf.* Schedule III, Paragraph 1.2 of the AIAC Adjudication Rules & Procedure). However, any deposits held by the AIAC with respect to the Adjudicator's fees and expenses will be refunded to the Parties.

Rights and Obligations of Adjudicators

(a) Setting Aside Adjudication Proceeding

Where there has been a non-compliance in the adjudication proceedings, including where either or both Parties fail to deposit the requisite deposits with the AIAC as directed by the Adjudicator, the Adjudicator may set aside the adjudication proceedings, wholly or partly, or make any order dealing with the adjudication proceedings as the Adjudicator deems fit (*cf.* Section 26(2) of the CIPAA).

In the event the Adjudicator sets aside the adjudication proceedings wholly, the CIPAA does not make provision for the Adjudicator to be reimbursed for any work done or expenses incurred during the course of the adjudication proceedings.

The AIAC's Administrative Fee, however, remains due and payable in full, since the proceedings would have prematurely ended in such an instance (*cf.* Schedule III, Paragraph 1.2 of the AIAC Adjudication Rules & Procedure).

(b) Withdrawal of Adjudication Proceedings by the Claimant

Where an adjudication claim has been withdrawn by the Claimant, the right and quantum of costs payable towards the Adjudicator's fees and expenses depends on the stage of the adjudication proceedings prior to the Claimant's withdrawal.

In determining the same, Adjudicators are required to consult with the Director of the AIAC on the Withdrawal Costs to be ordered in the proceedings (*cf.* Rule 9(5A) of the AIAC Adjudication Rules & Procedure). In this respect, the Adjudicator should provide the AIAC with their proposed withdrawal costs, supported by a statement of works estimating the number of hours expended on the proceedings (where possible), and proof of expenses incurred.

(c) Withholding Release of the Adjudication Decision

Once the adjudication decision is ready to be delivered to the Parties, if the AIAC is yet to receive the full deposits from the Parties, the Adjudicator can withhold the release of the Adjudication Decision until payment of fees and expenses in full. Where this right is exercised, the Adjudicator is required to communicate the same to the Parties and the AIAC on or before the deadline for the delivery of the adjudication decision by serving the requisite Notice for witholding the release of the decision until payment of fees and expenses in full (Form 14). The Adjudicator must also ensure that the AIAC is in receipt of at least one (1) copy of the adjudication decision on or before the deadline stipulated in Section 12(2) of the CIPAA.

Upon the AIAC notifying the Adjudicator that the outstanding deposits have been collected, the Adjudicator may proceed with releasing the adjudication decision to the Parties.

(d) Debt Recovery

Alternatively, or in conjuction with exercising the power to withhold the release of the adjudication decision, the Adjudicator may seek to recover his or her unpaid fees and expenses from the Parties as a debt due (*cf.* Section 19(3) of the CIPAA). This relief can also be exercised by an Adjudicator where a party is yet to remit the Withdrawal Costs.

(e) Termination of Adjudicator's Appointment by the Parties

In the event the Parties agree to terminate the appointment of an Adjudicator, the Adjudicator is entitled to claim a reasonable fee and expenses, provided that the AIAC's Standard Terms of Appointment have been agreed upon by the Parties and the Adjudicator. The proportion of the Adjudicator's fee to be disbursed will be determined by the Director of the AIAC representing work done and also having regard to the stage of the proceedings.

Adjudicators are to note that any claims for expenses must be accompanied by their respective proofs, including but not limited to receipts, etc.

In conjunction with the above, the AIAC has issued its AIAC CIPAA CIRCULAR 08 which can be found here.

For general inquiries, please write to enquiry@aiac.world.

Yours sincerely,

TAN SRI DATUK SURIYADI BIN HALIM OMAR
DIRECTOR

ASIAN INTERNATIONAL ARBITRATION CENTRE
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ASIAN INTERNATIONAL ARBITRATION CENTRE

ANNOUNCEMENT
10TH DECEMBER 2020

CLARIFICATION ON THE COMPETENCY STANDARD AND CRITERIA OF ADJUDICATORS UNDER THE CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012 AND THE AIAC'S APPOINTING PROCESS

Pursuant to Section 32(a) of the Construction Industry Payment and Adjudication Act 2012 (the "CIPAA"), the Asian International Arbitration Centre ("AIAC") is responsible for setting the competency standard and criteria of an adjudicator. In fulfilling this responsibility, the AIAC is guided by Regulation 4 of the Construction Industry Payment and Adjudication Regulations 2014 (the "Regulations").

Specifically, Regulation 4(a) of the Regulations contains the requirement that an adjudicator shall have *"working experience of at least seven years in the building and construction industry in Malaysia or any other fields recognized by the AIAC"*.

The AIAC has determined that in assessing whether an adjudicator who is presently empanelled, or is seeking to be empanelled, satisfies the condition in Regulation 4(a), consideration will be given to individuals who have acquired experience in the building and construction industry *both within Malaysia and overseas* over at least seven years.

This means that it is no longer a requirement that an adjudicator's building and construction experience must have only been acquired in Malaysia over at least seven years. Rather, adjudicators will now be considered for empanelment and appointment where they possess fewer than seven years' experience in the building and construction industry in Malaysia. However, the adjudicator's cumulative experience in this industry, both within Malaysia and overseas, must total at least seven years.

Furthermore, consideration will also be given to the empanelment and/or appointment of adjudicators who work or specialise in industries other than building and construction, provided that such individuals have acquired practical or theoretical experience related to the building and construction industry to some degree of significance. Adjudicators who fall within this category are not exempt from the requirement to have acquired at least seven years of experience in Malaysia as defined above.

For the avoidance of doubt, the duration and nature of an adjudicator's experience in Malaysia cannot be insignificant. The Director of the AIAC retains the discretion to refrain from the empanelment or appointment of adjudicators who fail to demonstrate sufficient experience within Malaysia.

In light of this clarification, the AIAC is pleased to announce that from 1st December 2020, it will be appointing foreign adjudicators (that is, adjudicators who are based outside of Malaysia) to adjudication proceedings under the CIPAA. Such appointments will be confined to matters where both parties in the proceeding are represented and where there is potential that the service of documents via email will be accepted.

The above clarifications have been published through the AIAC's issuance of its AIAC CIPAA CIRCULAR 07 which can be found here.

Please note that the clarifications to the competency standard and criteria of adjudicators have no impact on the AIAC's appointment procedure of adjudicators under the CIPAA.

Under the current procedure, upon receipt of the "*Request to the Director of the AIAC to appoint an adjudicator*" (Form 5) (the "Request"), the AIAC will identify at least three (3) potential candidates to be appointed as the adjudicator. In the absence of any circumstances preventing the AIAC from acting on the Request (e.g. incompleteness of documents, non-payment of the appointment fee, etc.), the AIAC will send a conflict check to the identified candidates simultaneously. Once the deadline to respond to the conflict check has lapsed, the Director of the AIAC will consider the responses from the potential candidates and appoint a suitable adjudicator to the adjudication.

At times, the AIAC may send an adjudicator more than one (1) conflict check at a point in time. Adjudicators are requested to respond to each conflict check they receive to assist the AIAC in ensuring appointments are made within the strict statutory timeline.

Adjudicators are also reminded that responding to a conflict check from the AIAC does not automatically mean they will be appointed as the adjudicator in that proceeding. Where an adjudicator is not selected by the Director of the AIAC in a particular instance, the AIAC will ensure that adjudicator is reconsidered for a suitable appointment in the near future.

Yours sincerely,

TAN SRI DATUK SURIYADI BIN HALIM OMAR
DIRECTOR

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ASIAN INTERNATIONAL ARBITRATION CENTRE

ANNOUNCEMENT

INTRODUCTION OF THE AIAC ADJUDICATOR EVALUATION FORM

The Construction Industry Payment and Adjudication Act 2012 ("CIPAA") names the AIAC as the administrative authority for adjudication proceedings, whose function, amongst others, includes the setting of competency standards expected of an adjudicator. As part of efforts to improve the quality and maintain expected competency standards of adjudicators empanelled with the AIAC and in line with Sections 32(a) and (d) of CIPAA, the AIAC is pleased to introduce its AIAC Adjudicator Evaluation Form ("AEF").

The AEF will be issued by the AIAC to each party upon the conclusion of adjudication matters i.e. following the delivery of the Adjudication Decision or late-stage withdrawal matters. This is applicable to all adjudication matters where the appointment of adjudicators were carried out on or after 1st December 2020.

The AEF should take between 5 to 10 minutes to complete. All responses provided will **be kept confidential** and will not be attributed to a party in any manner. A critical component of the evaluation is to obtain the views of parties appearing before an Adjudicator which will then be considered by the AIAC as part of our efforts to improve the quality and competency of adjudicators, and enhance the appointment process under the CIPAA framework.

The AEQ comprises of three parts:

Section A – Background Information
Section B – Preliminary Evaluation
Section C – Adjudicator Evaluation

In **Sections A & B**, you will be asked to provide background details and preliminary information that will help put the AEQ results into context.

For each of the statements in **Section C**, mark the box that best represents your own views, based solely on your experience appearing before the Adjudicator in these proceedings.

On the final page of the AEQ is space for you to provide any comments or additional information on the Adjudicator's performance or the evaluation materials and procedures.

We look forward to receiving the views of parties to adjudication proceedings in this important endeavour and thank you in advance for your participation and feedback. If you have any questions, please write to adj.evaluation@aiac.world.

Dated this 15th December 2020.

Tan Sri Datuk Suriyadi Bin Halim Omar
Director

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ASIAN INTERNATIONAL ARBITRATION CENTRE

ANNOUNCEMENT

CIRCULAR ON THE APPOINTMENT FEE IN AD HOC ARBITRATION MATTERS

Pursuant to Section 13 of the *Arbitration Act 2005* [Act 646] (the "Act"), the Director of the AIAC is designated as the default appointing authority in certain circumstances. Specifically, a party may request the Director of the AIAC, in writing, to appoint either a sole arbitrator or one or more members of a three-member tribunal in an ad hoc arbitration, if certain conditions are satisfied. The Director of the AIAC can also be requested to appoint one or more members of an arbitral tribunal, in an ad hoc arbitration, where a third-party entrusted by the Parties to make the appointment, fails in the exercise of its function to do so (*cf.* Sub-sections 13(4)-13(6) of the Act).

Further, the Director of the AIAC may act as a designated appointing authority on the basis of the Parties' written agreement, including where the Director of the AIAC is designated as the appointing authority for an ad hoc arbitration to be conducted pursuant to the UNCITRAL Arbitration Rules.

This Circular aims to clarify the existing institutional practice in relation to the fee charged for the appointment of arbitrators in ad hoc arbitration matters by the Director of the AIAC. The Party to the dispute requesting the Director of the AIAC to appoint an arbitrator in an ad hoc arbitration matter shall provide the proof of payment of the following appointment fee, alongside its appointment request:

(i) RM1,590.00 (inclusive of SST) for domestic matters; or
(ii) USD795.00 (inclusive of SST) for international matters.

Should a requesting party fail to submit the proof of payment, the Director of the AIAC will not proceed with the appointment request.

Please also note that the above appointment fee is subject to revision by the Director of the AIAC from time to time. For inquiries, please write to arbitration@aiac.world or reach us at +603 2271 1000.

Dated this 18th December 2020.

Tan Sri Datuk Suriyadi bin Halim Omar
Director

ASIAN INTERNATIONAL ARBITRATION CENTRE
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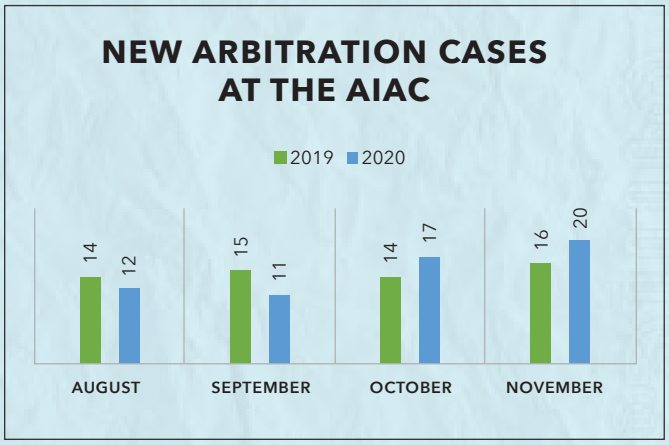
PRELIMINARY CASE MANAGEMENT STATISTICS

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 August 2020 to 30th November 2020. The information presented here is the raw data only.

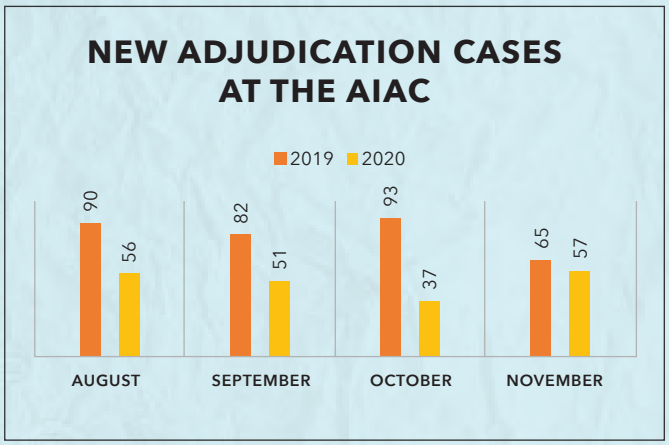
Arbitration

Between August and November 2020, the AIAC received fifty-two (52) new domestic arbitration and eight (8) new international arbitration matters.



Adjudication

Between August and November 2020, the AIAC received two hundred and one (201) new adjudication matters.



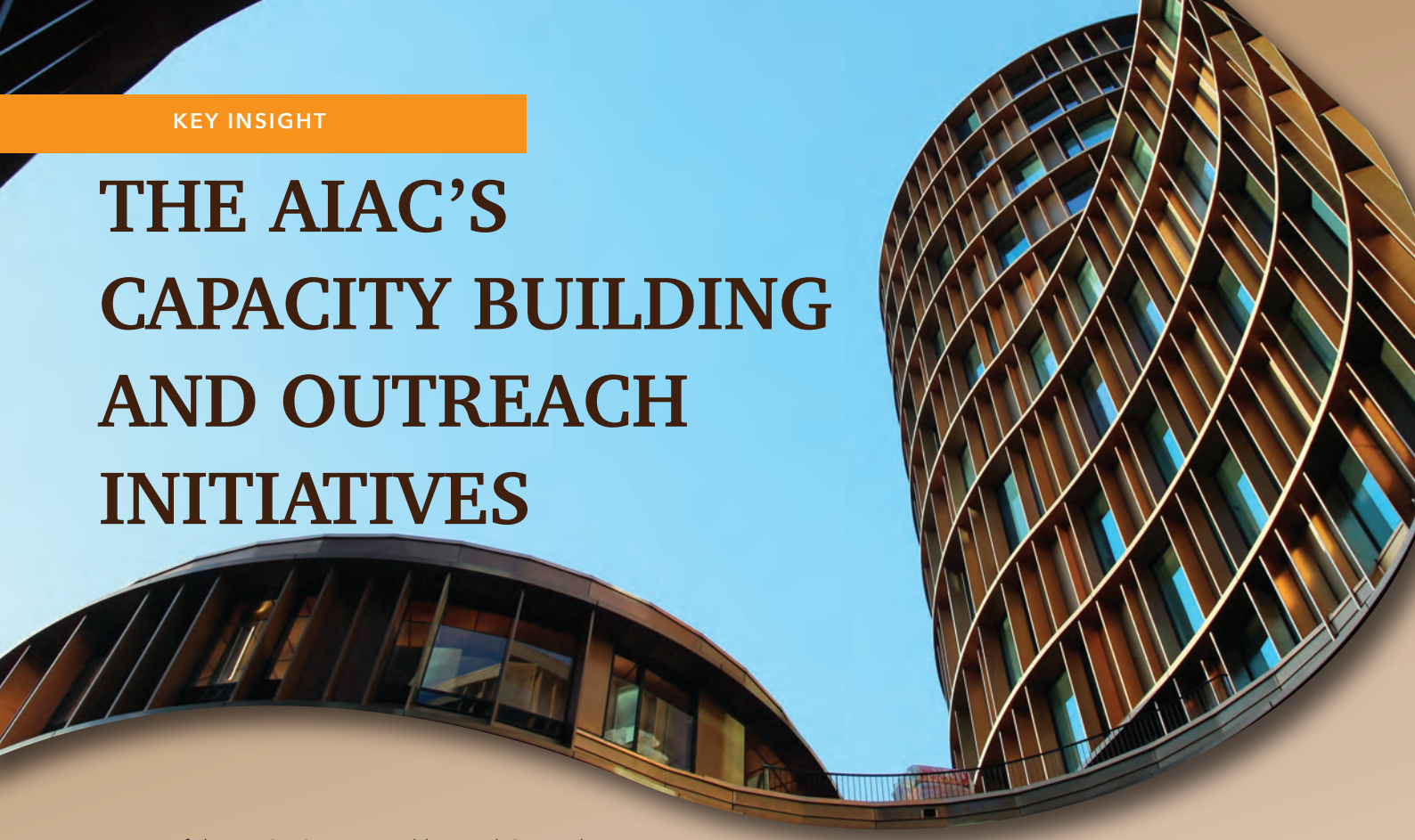
Mediation & Domain Name Dispute Resolution

Between August and November 2020, the AIAC received no new mediation matter and three (3) new domain name dispute resolution matters.

Due to the impact of the COVID-19 pandemic and the absence of a Director at the AIAC until December 2020, the AIAC will unfortunately not be releasing its 2019 Annual Report in 2020. However, the AIAC intends to publish a combined 2019 and 2020 Annual Report in mid-2021 which will contain a detailed analysis of our statistics and achievements across these two years.

KEY INSIGHT

THE AIAC'S CAPACITY BUILDING AND OUTREACH INITIATIVES



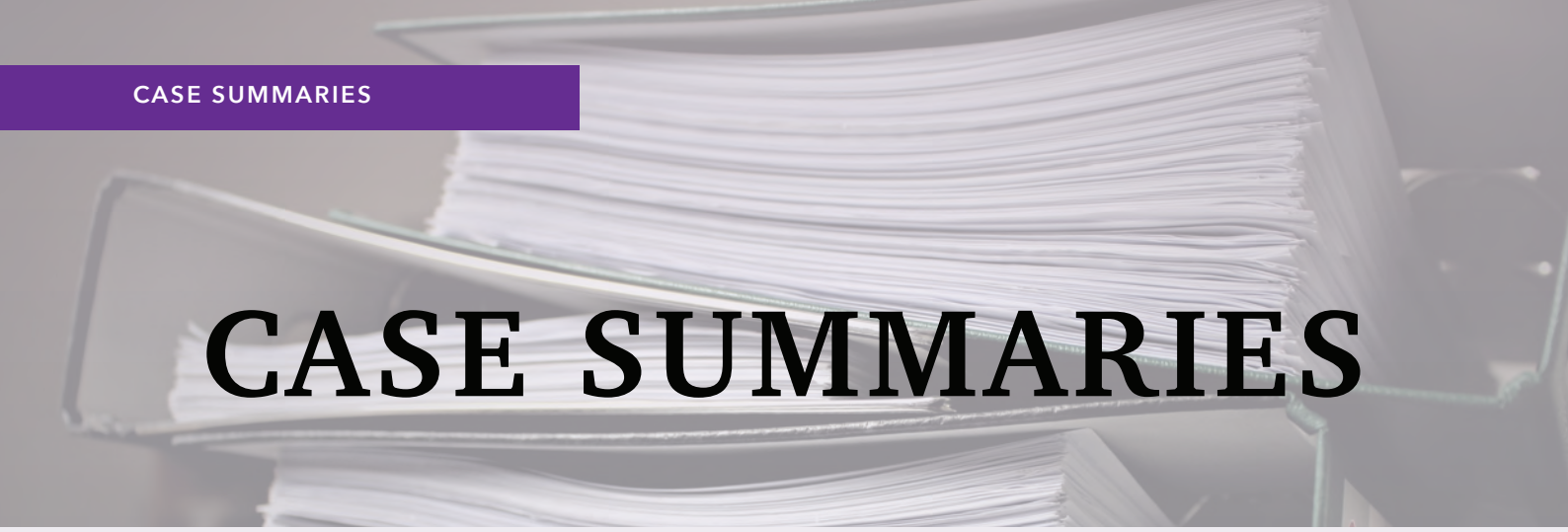
As part of the AIAC's Capacity Building and Outreach Initiatives, the members of the AIAC Legal Services Team regularly present or moderate at conferences or deliver lectures to both students and experienced practitioners, both locally and internationally, on a broad range of topics. Due to the movement 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 August 2020 and November 2020:

- Presenter, "Adjudication under CIPAA 2012", *Persatuan Konsultan Indonesia (PERKINDO)* (Closed Webinar) (12th August 2020);
- Speaker, "Introductory Workshop on International Arbitration" *Universiti Kebangsaan Malaysia* (14th August 2020);
- Speaker, "Discussion on disruptions, legal challenges, mediation and arbitration in commercial contracts, in these challenging pandemic times "*French Australian Chamber of Commerce & Industry* (27th August 2020);
- Presenter, "Secret of Successful Dealmaking: How to Create a Valuable Deal in Negotiation", Alternative Dispute Resolution Enhancement Society, *Universitas Gadjah Mada* (29th August 2020);
- Presenter, "The Infamous Truth of Alternative Dispute Resolution as Compared to Common Court Trials", *Gavelcast by ALSA Malaysia and ALSA BAC* (Podcast) (September 2020);
- Speaker, "Session 11: The Future of ADR – How modern technology will change the Game?", THAC International ADR Webinar Series 2020 (8th September 2020);
- Moderator, "Evolving Landscapes: Updates to International Arbitration," *AMCHAM Malaysia* (15th October 2020);
- Presenter, "Analysing Commercial Disputes Settlement Method Under National Law And International Law", *ALSA UGM* (11th November 2020);
- Panellist, "Arbitration in the Asia Pacific Region: An Overview and Recent Developments", *AIAC and University of Malaya* (18th November 2020); and
- Presenter, "Overview of Arbitration Act and its Amendments" *SEGi Sarawak Lecture Series* (25th November 2020).

Supported Events

The AIAC also supported the following webinars and/or events between August 2020 and November 2020:

- "THAC International ADR Webinar Series 2020", *Thailand Arbitration Center* (24th July - 30th September 2020);
- "6th Annual GAR Live Singapore", *Global Arbitration Review* (1st September 2020);
- "COVID-19 Business Interruption Claims – How Will the Insurance and Reinsurance Disputes be Resolved, and Is Arbitration the Answer?", *Malaysian Bar Council* (10th September 2020);
- 5th CARTAL Conference on International Arbitration -Riding New Tides: Arbitration in Changinng World", *Center for Advanced Research and Training in Arbitration Law* (9th - 11th October 2020);
- "RICS - AIAC Mediation Training Program", *Royal Institution of Chartered Surveyors* (16th - 19th November and 23rd -26th November 2020);
- "Masterclass on Cross-Examination of Expert Witnesses", *Society of Construction Law Malaysia* (17th November 2020); and
- "APEC Alternative Dispute Resolution - Mediation in Post COVID-19 Times", *Malaysia External Trade Development Corporation* (30th November 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 domestic and foreign decisions relating to adjudication and domestic and international arbitration for your reading pleasure. Enjoy!

INVESTMENT ARBITRATION

Vodafone International Holdings BV v Union of India

Permanent Court of Arbitration (25th September 2020)

On 25th September 2020, an international arbitral tribunal held that India had violated the 'fair and equitable treatment' (Vodafone award) guaranteed to Vodafone International Holdings BV ("VIHBV") under the 1995 Bilateral Investment Promotion and Protection Agreement ("BIPA") between the Republic of India and the Kingdom of Netherlands ("India – Netherlands BIT"). This award provides a backdrop concerning the issues faced by foreign investors in India.

The facts of this case are as follows. Hutchinson Telecommunications International Limited ("HTIL"), a Hong Kong entity, sold its stake in a Cayman entity in 2007, which indirectly, through a group of subsidiaries, held shares of Hutchinson Essar Limited (HEL), an Indian company, in VIHBV, a Dutch entity, for a consideration of USD 11.1 Billion. HTIL earned capital gains on the sale. The Indian revenue authorities considered that acquisition of a stake in HEL by VIHBV was liable for tax deduction at source under Section 195 of the Income Tax Act, 1961. Since VIHBV failed to withhold Indian taxes on payments made to the selling Hutch entity, a demand was raised on VIHBV under Section 201(1)(1A) / 220(2) for non-deduction of tax.

Subsequently, on 20th January 2012, the Supreme Court of India discharged VIHBV of the tax liability imposed on it by the Income Tax Department. The Supreme Court quashed the demand of INR 120 billion by way of capital gains tax and also directed refund of INR 25 billion deposited by VIHBV in adherence to the interim order dated 26th November 2010, along with interest at 4% p.a. within two months. After the above judgement, the Indian Parliament passed the Finance Act 2012, which provided inter alia for the insertion of two explanations in Section 9(1)(i) of the Income Tax Act (2012 Amendment) providing elaboration on the terms "through" and "transfer".

In light of the amendment, on 17th April 2012, VIHBV invoked arbitration under the India – Netherlands BIT through a notice of dispute, aggrieved by the imposition of tax by way of retrospective amendment of the Indian tax legislation. On 17th April 2014, VIHBV issued a notice of arbitration to India as required under the India-Netherlands BIT. During this ongoing arbitration, there were other parallel proceedings that were instituted.

On 25th September 2020, the appointed arbitral tribunal comprised of L.Y. Fortier, R. Oreamuno Blanco, and F. Berman, passed an award in favour of VIHBV, reportedly for violation of the fair and equitable treatment standard under Article 4(1) of the India – Netherlands BIT. The arbitral tribunal directed India to reimburse legal costs of approximately INR 850 million to VIHBV.

Please note, the complete award is not available in public records, and the following available excerpts are reproduced:

> *"(3) The Respondent's conduct in respect of the imposition of the Claimant of an asserted liability to tax notwithstanding the Supreme Court Judgement is in breach of the guarantee of fair and equitable treatment laid down in Article 4 (1) of the Agreement, as is the imposition of interest on the sums in question and the imposition of penalties for non-payment of the sums in question.*
>
> *(4) The finding of breach in paragraph (2) entails the obligation on the Respondent to cease the conduct in question, any failure to comply with which will engage its international responsibility …*
>
> *(7) The Respondent will reimburse to the Claimant the sum of £4,327,294.50 or its equivalent is US Dollars, being 60% of the Claimant's costs for legal representation and assistance, and €3,000 or its equivalent in US dollars, being 50% of the fees paid by the Claimant to the appointing authority".*

Xiamen Xinjingdi Group Co Ltd v Eton Properties Limited and Others [2020] HKCFA 32

Court of Final Appeal (9th October 2020)

The background to the parties' dispute arose when Xiamen Xinjingdi Group Co Ltd ("XJ") entered into an agreement with Eton Properties Limited and Eton Properties (Holdings) Limited (together, "EP"). Under the agreement, EP were required to sell to XJ all the shares in their wholly-owned subsidiary, Legend Properties (Xiamen) Company Limited ("Legend Properties"), which indirectly had the right to develop and use a piece of land in Xiamen. EP failed to perform the agreement. Instead of transferring the shares to XJ, they transferred their entire beneficial ownership in the subsidiary to a related party. XJ, therefore, commenced arbitration proceedings against EP before a CIETAC tribunal, which ordered EP to continue to perform the agreement and granted damages of RMB 1,275,000 (representing damages for delay in delivering the land).

Subsequently, XJ was unable to enforce the award. In a nutshell, XJ's application to enforce before a Xiamen court failed because EP were Hong Kong companies whose assets were outside the jurisdiction. XJ had also obtained an enforcement order from the Court of First Instance (the "CFI") in Hong Kong, which required EP to continue to perform. However, the enforcement order was similarly ineffective due to EP's restructuring.

In light of the above, XJ commenced a common law action against EP (together with other claims against other defendants related to EP) on the award before the Hong Kong court. The CFI, disallowed the claim for damages, holding that, at common law, the court is limited to "*mechanistically converting the award into a judgment in terms of the award*". The Court of Appeal allowed XJ's appeal against the CFI's decision on this point, ruling that in a common law action the court is not limited to granting relief which simply mirrors the terms of the award.

In a nutshell, the above decision, amongst other things, raised an important question, that is "*whether the court had the power to grant relief beyond the terms of the award or whether the court was limited to mechanistically converting the award*".

EP argued on the basis of three arguments that the statutory enforcement procedure provided for mechanistic enforcement only, the CFI should have stayed the enforcement action and such enforcement action is bounded by the scope of the award, and, relief granted by the enforcing court was fundamentally inconsistent with and barred by the extant arbitration award.

The Court of Appeal, rejecting the arguments by EP held in favour of XJ. It observed that the remedies available under the common law action were not circumscribed by the statutory framework, distinguished between the enforcement stage and proceedings under arbitration, and held the enforcing court may grant relief due to breach of implied promise, and may grant appropriate relief to the award.

The above CFA judgment draws a clear distinction between the statutory procedure for enforcement under section 2GG of the old Arbitration Ordinance (which is substantially the same as section 84 of the current Arbitration Ordinance (Cap. 609)) and a common law action on an award.

Government of India v Vedanta Ltd. (Formerly Cairn India Ltd.) & Ors

SLP (C) No. 7172 of 2020 (16th September 2020)

The dispute arose out of an Agreement between Cairn Energy India Pty Ltd. ("CIL") (now known as Vedanta Limited), Ravva Oil (Singapore) Pte Ltd. ("ROS"), Videocon Industries Limited ("VIL"), Oil and Natural Gas Corporation Ltd. ("ONGC"), and the Government of India ("GOI") in calculation of Base Development Costs ("BDC") (which included the costs of establishing facilities as were necessary to produce, process and transport petroleum) incurred by CIL, ROS and VIL (collectively referred to as the "Claimants") over and above the cap prescribed in the Agreement. As per the terms of the Agreement, the governing law of the contract was Indian law, and the arbitration agreement was governed by the laws of England. The juridical seat of the arbitration was Kuala Lumpur, Malaysia.

A three-member arbitral tribunal rendered an Award on 18th January 2011 ("Award") *inter alia* holding that the Claimants were not entitled to recover BDC in excess of the cap prescribed under the Agreement for the period 1994-95 to 1999-2000, and that GOI was entitled to be credited with the excess amount recovered by the Claimants. However, the arbitral tribunal interpreted the Agreement to hold that the Claimants were entitled to recover the development costs (amounting to USD 278 million) incurred by them for the period thereafter, notwithstanding the cap on BDC. Subsequent challenges to the Award by GOI were rejected by Malaysian Courts (seat court).

On 16th September 2020, the Supreme Court of India, by a judgement delivered by three-judge bench, upheld enforcement of a foreign award, exercising minimal interference. This judgment clarifies the scope of public policy, the law regarding foreign awards read with Part-II of the Act, and under Limitation Act, 1963 (Limitation Act).

In July 2014, GOI issued a Show-Cause Notice ("SCN") to the Claimants making certain demands under the Agreement.

In October 2014, the Claimants filed for enforcement of the Award before the Delhi High Court. GOI also filed its objections to the enforcement proceeding *inter alia* on the grounds that it was barred by limitation and that the Award was in violation of the public policy of India. The High Court rejected the GOI objection and enforced the Award. This decision was then challenged before the Supreme Court of India.

The issues before the Supreme Court were three-fold, namely:

i. Whether the petition for enforcement/execution of the Award was barred by limitation?
ii. Whether the Malaysian Courts were justified in applying the Malaysian law of public policy while deciding the challenge to the Award?
iii. Whether the Award is against the public policy of India?

On the first issue, the Supreme Court of India clarified the position of law on this issue and held that Article 137 of the Limitation Act would be applicable to foreign awards. The Supreme Court held that the right to apply for enforcement accrued only on the date when the SCN was issued by GOI, i.e., on 10th July 2014. Therefore, the enforcement petition filed on 14th October 2014, was well within the period of limitation.

On the second issue, the Supreme Court of India concluded that Malaysian Courts, being the seat courts, were justified in testing the Award by applying Malaysian law. The SC also refrained from commenting on the judgments passed by Malaysian Courts in view of principles of comity of nations.

On the third issue, the Supreme Court of India held that GOI did not make out a case for conflict with the basic notions of justice or violation of the substantive public policy of India. The Supreme Court also observed that the extension of the Agreement further indicated that it was not contrary to India's interests.

K Line Pte Ltd. v Priminds Shipping (Hk) Co., Ltd. **[2020] EWHC 2373 (Comm)**

High Court of Justice, Queen's Bench Division (7th September 2020)

The Claimant, K Line Pte Ltd ("K-Line") and the Defendant, Priminds Shipping (HK) Co., Ltd ("Priminds") entered into a contract of affreightment for nine separate voyages, to be performed under the standard Norgain form (as amended by the parties). Clause 18 of that contract ("Clause 18") determined the laytime allowed for loading and unloading. The contract also provided (at Clause 19) for the rate of demurrage (liquidated damages) to be paid where loading or discharge of the cargo was not completed within laytime. K-Line nominated a vessel (the "Eternal Bliss") for one of the agreed voyages to carry soybeans (the "Cargo") for discharge in China.

Due to various reasons such as port congestion and a lack of storage space ashore for the cargo in China, there was a delay towards discharge of the cargo. Upon the cargo eventually being discharged at a later time, it was discovered that it was damaged, having "exhibited a significant amount of moulding and caking". K-Line settled the claims of the cargo's receivers and their insurers at a cost of US$1.1million (the "Settlement Costs"), before bringing a claim in arbitration against Priminds seeking damages or an indemnity for the amount of the Settlement Costs, alleging that Priminds' breach of contract was its failure to discharge the cargo at the rate specified in Clause 18.

There were two issues which were raised before the High Court as follows:

> *"Was… [Priminds]…liable to compensate or indemnify…[K-Line]… in respect of the loss, damage and expense referred to therein by way of:*
>
> *(a) damages for… [Primind's] … breach of contract in not completing discharge within permitted laytime ["Question A"];*
>
> *(b) an indemnity in respect of the consequences of complying with… [Primind's] … orders to load, carry and discharge the cargo? ["Question B"]".*

Pursuant to Section 45 of the Arbitration Act, the above questions were referred to the High Court, which provides that parties can apply (subject to some qualifications) to the Court to determine any questions of law that arise during the course of arbitral proceedings seated in England and Wales or Northern Ireland.

The High Court considered and observed that the necessary jurisdictional hurdles under section 45 of the Arbitration Act had been met in order for the High Court to be able to "entertain and determine the question" because of the following:

(i) the questions were coming before the Court by agreement of the parties;
(ii) the issue substantially affected the rights of the parties as "K-Line's claim for the compensation it seeks … requires
(iii) the answer it gives to that question to be correct";
(iv) the parties agreed that the Court had jurisdiction; and subject to a qualification in regards to Question B, it was "just and convenient as a matter of discretion" to entertain the issue.

Accordingly, turning to the two questions, the High Court held as follows:

Addressing Question A, the High Court answered in the affirmative that the damage to the cargo was a different type of loss to the mere detention of the vessel; and a separate breach of contract was not needed (i.e. in addition to the breach of failing to discharge within the permitted laytime) for the vessel's owner (here, K-Line) to be able to recover damages beyond demurrage for a different type of loss (loss that was beyond mere detention of the vessel). Accordingly, the High Court decided in favour of the Claimant.

Addressing Question B, the High Court observed an implied indemnity for the purposes of Question B, as it indicated finding in favour of the Claimant in Question A. This is a significant development in the maritime sector, and also in terms of arbitration proceedings, this case illustrates the operation of the preliminary issue referral procedure under section 45 of the Arbitration Act.

Full Joy Foods Pty Ltd v Australian Dairy Park Pty Ltd **[2020] VSC 672**

Victorian Supreme Court (13th October 2020)

The Applicant Full Joy Foods Pty ("FJF") had entered into a Sales Agreement with the Respondent Australian Dairy Park Pty Ltd ("ADP") in 2017 concerning manufacture and supply, three kinds of infant milk products for consumers of different ages into China. Under the Sales Agreement, ADP agreed to manufacture and supply, and FJF agreed to purchase the milk products. The milk products were to be supplied into the China market and were known as 'Step 1', 'Step 2' and 'Step 3' products, in accordance with the age ranges for which they were produced.

In a nutshell, the entire cargo of Step 1, 2, and 3 products arrived in China, a test conducted by the local authorities found bacteria in the Step 1 product at a higher level than the Chinese import standard allowed. ADP's own tests in Australia and China detected no bacteria in the Step 1 product. The Chinese authorities did not permit any of the products to pass customs, and the whole cargo was returned to Melbourne. ADP subsequently shipped a replacement cargo of the Step 1 product to FJF. However, when ADP offered to ship replacement cargo of Step 2 and 3, FJF indicated that it would not accept delivery of any further batches and demanded ADP return the purchase price for both the Step 2 and 3 products.

The Applicant claimed the Respondent failed to deliver the product in accordance with the contract and sought damages. The Respondent denied it breached the Sales Agreement and claimed that FJF's refusal to accept Step 2 and Step 3 amounted to a repudiation of the contract. The dispute was referred to arbitration, and the sole arbitrator decided in favour of the Respondent finding inter alia that FJF had not proven that the goods did not meet the relevant import standard or were not fit for human consumption.

Subsequently, FJF then applied to the Supreme Court of Victoria to set aside the award under Sections 34(2)(a)(ii) and s 34(2)(b)(ii) of the Commercial Arbitration Act 2011 (Vic) ("Act") on the basis that:

- *"it was "unable to present" its case in arbitration because the arbitrator relied on the meaning of 'CIF' term in clause 5.2 of the Sales Agreement in circumstances where it had not been pleaded or argued; and*
- *as a result of FJF not being able to present its case, the award conflicted with the public policy of the State."*

The Victorian Supreme Court on 13th October 2020 dismissed the application by FJF and observed that it was reasonable for the arbitrator to seek submissions on the CIF issue and that FJF had a reasonable opportunity to present its case on the matter.

The Court further held and stated that an arbitrator is not precluded from addressing an issue not raised by the parties, but the parties must first be given an opportunity to deal with it, the arbitrator is entitled to proceed on the understanding that the parties will be alive to the issue and make decisions as to which items to focus or not focus on; and the notion that a party is entitled to a reasonable opportunity to present its case under section 18 of the Act does not mean ensuring that the party takes the best advantage of the opportunities available to it. The Court also dismissed the public policy ground by the Applicant as it held that the Applicant had a reasonable opportunity to present its case.

The decision is a reminder for parties bringing a future challenge in Australia that, while parties are entitled to a fair opportunity to present their case and to be treated equally, there is no mandatory obligation on an arbitrator or arbitral tribunal to protect a party from its own failures or strategic choices.

***Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb* [2020] UKSC 38**

UK Supreme Court (9th October 2020)

This decision follows from the last edition of AIAC's newsletter where we had presented the position of the Appeal before the UK Supreme Court against the decision of the Court of Appeal.

The Appellant 'OOO Insurance Co Chubb' ("Chubb Russia") made an expedited appeal before the UK Supreme Court against the judgement of the Court of Appeal which decided in favour of the Respondent 'Enka Insaat ve Senayi AS' ("Enka"). The Court of Appeal judgement held that the Appellant was precluded from pursuing a subrogation claim in the Russian courts (the "Russian Court Claims"), and further held that the Russian Court Claim was brought in breach of the arbitration agreement in the Main Contract.

The arbitration agreement appears within clause 50.1 of the Main Contract, which states as follows:

"Resolution of disputes

50.1. The Parties undertake to make in good faith every reasonable effort to resolve any dispute or disagreement arising from or in connection with this Agreement (including disputes regarding validity of this agreement and the fact of its conclusion (hereinafter–"Dispute") … the Dispute shall be referred to international arbitration as follows: the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce, the Dispute shall be settled by three arbitrators appointed in accordance with these Rules, the arbitration shall be conducted in the English language, and the place of arbitration shall be London, England…"

The Appellant had argued before the UK Supreme Court, which was heard on 27th and 28th July 2020, that the arbitration agreement formed an integral part of the Contract, and therefore, upon the application of the rules of contractual construction, the arbitration agreement should be governed by the same system of law as the contract (*i.e.*, Russian law, being the law impliedly chosen by the parties). It further argued that it would be just and convenient for the English court to stay the English proceedings to allow the Russian court to determine whether it had jurisdiction to hear the Russian Court Claim.

The Respondent, Enka, argued that the arbitration agreement was a separate contract, and the starting point should accordingly be the arbitration agreement itself (rather than the Contract, as suggested by Appellant). By agreeing to arbitration seated in London, the parties (i) impliedly agreed that the arbitration agreement was governed by English law; and (ii) therefore submitted to the jurisdiction of the English courts to grant an injunction to restrain a breach of the arbitration agreement and to determine whether there was such breach.

In a nutshell, the above appeal is against the decision of the Court of Appeal which held that:

- the English court as the court of the seat was necessarily an appropriate court to grant an anti-suit injunction, and questions of *forum conveniens* did not arise;
- the arbitration agreement in the Contract was governed by English law.
- Accordingly, it held that there was nothing to suggest an express choice of Russian law as the governing law of the Contract and/or the arbitration agreement.
- Hence, in the absence of any countervailing factors which would point to a different system of law, the parties had impliedly chosen that the arbitration agreement was governed by the law of the seat, i.e. English law.

The UK Supreme Court on 9th October 2020 delivered the decision where it dismissed the appeal by a majority, with Lords Burrows and Sales dissenting.

The majority decision by Lords Hamblem, Leggatt and Kerr agreed with the decision of the Court of Appeal as follows:

- On a proper construction of the Contract there had been no express or implied choice of Russian law to govern the Contract itself.
- The Contract was governed by Russian law by virtue of Article 4(3) of the Rome I Regulation (on the basis that the Contract was more closely connected with Russia than with any other country).
- Concerning the arbitration agreement, it had its closest and most real connection with the law of the seat, which was English law.

- Concerning the anti-suit injunction argument, the Supreme Court affirmed the Court of Appeal's decision that, in principle, it makes no difference whether an arbitration agreement is governed by English or foreign law. *Forum conveniens*, which is an issue that goes to the court's jurisdiction, is not relevant either.

The Supreme Court took a different approach to the Court of Appeal in respect of the determination of the law governing the arbitration agreement, nevertheless, the Supreme Court came to the same conclusion on which system of law governed the arbitration agreement in this case.

In a nutshell, Lords Burrows and Sales, in their dissenting view observed regarding what should be the default position in the absence of implied choice, taking the view that despite a different seat for the arbitration, the arbitration agreement will usually also have the closest and most real connection with the law of the main contract.

The UK Supreme Court's decision has delivered clarity on the question of which law shall govern the arbitration agreement. This decision is being viewed as pro-arbitration instance that provides certainty that the law of the contract will usually govern the arbitration agreement itself.

***Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd* [2020] UKSC 48**
UK Supreme Court (27th November 2020)

The Appellant 'Halliburton Company' ("Halliburton") had made an appeal before the UK Supreme Court against the judgment of the Court of Appeal which decided in favour of the Respondent 'Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)' ("Chubb"). The Court of Appeal judgment had held that the arbitrator was not biased and observed while Mr. Kenneth Rokinson QC ("the Arbitrator") ought to have disclosed his proposed appointment in the subsequent references, an objective observer would not in the circumstances conclude there was a real possibility the Arbitrator was biased.

In a nutshell, Halliburton had raised a challenge after the Arbitrator failed to inform it that he had accepted appointment to another arbitral tribunal in a related case arising out of the same incident concerning explosion of the Deepwater Horizon drilling rig in the Gulf of Mexico in 2010, in which Chubb was a party to the arbitration, but Halliburton was not a party. Both tribunals were tasked with considering claims brought against Chubb in light of liabilities arising out of the same incident.

On 27th November 2020, the UK Supreme Court in a unanimous decision by Lord Hodge (with Lady Arden concurring) upheld the decisions of both the Court of Appeal and the High Court, to dismiss Halliburton's appeal finding that the Arbitrator's failure to disclose other appointments breached a legal duty of disclosure, but that a fair-minded and informed observer would not infer from that a real possibility of unconscious bias on the Arbitrator's part.

Accordingly, on the facts of the case, there was no apparent bias and therefore no grounds removing Mr. Rokinson as an arbitrator. The Supreme Court also stated (at [152]) that "*[t]he assessment of the fair-minded and informed observer of whether there is a real possibility of bias is an objective assessment which has regard to the realities of international arbitration… will depend on the facts of the particular case and especially upon the custom and practice in the relevant field of arbitration*".

Although, the Supreme Court has dismissed the appeal, it has reiterated the primacy of impartiality in English arbitration law and has confirmed the that arbitrators have a legal duty to disclose any circumstances that might give rise to doubt regarding their impartiality.

This judgment also highlighted the commitment by arbitral institutions to promote transparency in arbitration which the Supreme Court addressed (at [80]) as follows:

> *"It is striking that ICC, LCIA and CIArb, which have no financial interest in the outcome of this litigation but have an interest in the integrity and reputation of English-seated arbitration, argue in favour of the recognition of such a legal duty. The existence of a legal duty promotes transparency in arbitration and is consistent with best practice as seen in the IBA Guidelines and in the requirements of institutional arbitrations such as those of ICC and LCIA".*

DOMESTIC ARBITRATION

***UDA Land Sdn Bhd v Puncak Sepakat Sdn Bhd* [2020] MLJU 892**
(16th June 2020)

In 2010, UDA Land Sdn Bhd ("UDA") appointed Puncak Sepakat Sdn Bhd ("Puncak") as its main contractor to carry out and complete a housing project in Hulu Langat, Selangor ("Project"). In 2011 and prior to the completion of the Project, Puncak was wound up by a third party. This led to UDA terminating Puncak's appointment and the subsequent appointment of a substitute main contractor to complete the Project, which caused UDA additional expense.

In 2013, UDA claimed for losses of RM7,140,877,03 from Puncak as a result of additional costs incurred in having the Project completed by the substitute main contractor. Puncak disputed the claim and referred its own claim against UDA for the sum of RM3,370,402.58 and refund of RM487,200 in liquidated ascertained charges levied against it to arbitration under the Asian International Arbitration Centre (formerly Kuala Lumpur Regional Centre for Arbitration). Following the appointment of the arbitral tribunal, UDA obtained leave from the winding-up court to advance a counterclaim against Puncak in the arbitration proceedings.

The specific issue in the above arbitration proceedings was whether UDA was entitled to advance its counterclaim and insolvency set-off against Puncak's claims in the arbitration, given that the claims arose from the Project.

In particular, Section 41 of the then Bankruptcy Act 1967 ("Bankruptcy Act") provided that where there were mutual dealings in insolvency, an account had to be taken of what was due from each party to the other so that the claims could be set off against one another.

In 2019, the arbitral tribunal rendered its final award which declared that he had no jurisdiction to determine the UDA's counterclaim and insolvency set-off, for the following reasons:

- It was not legitimate for UDA to legitimise its claim under the Certificate of Termination Costs as a single continuing transaction which accrued before Puncak's insolvency which continued to subsist after Puncak was wound up in order to rely on Section 41 of the Bankruptcy Act to obtain preferential payment.

- An arbitral tribunal appointed under the Arbitration Act 2005 ("Arbitration Act") cannot be conferred – even with the agreement of the parties – the powers of the winding-up court or the liquidator, which was the power to take account of what was due from each party to the other so that the claims could be set off against one another.
- The appropriate forum to advance an insolvency set-off would be in a winding-up court or before a liquidator only because Section 41 of the Bankruptcy Act provides a proof of debts procedure which is only available through judicial insolvency procedures.
- Insolvency set-off under Section 41 of the Bankruptcy Act cannot be invoked where a creditor already had notice that the debtor company was being wound up. Here, the Final Certificate of Termination Costs was long after Puncak had been wound up, and UDA was fully aware of this.
- Section 41 of the Bankruptcy Act cannot be applied to debts claimed under contract to be set-off against any claim by Puncak.

Having disregarded UDA's counterclaim and set-off, the arbitral tribunal, in its final award, allowed Puncak's claim without abatement. UDA applied to set aside the award under Sections 37(1)(a)(iv), (v) and (2)(b) of the Arbitration Act on the basis that (1) the award deals with a dispute not contemplated by the terms of the submission to arbitration; (2) the award contains decisions on matters beyond the scope of the submission to arbitration; and (3) that the award is in conflict with the public policy of Malaysia where a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award.

The High Court allowed UDA's application to set aside the arbitral tribunal's findings even considering that Malaysian courts have only a narrow discretion to set aside an arbitration award for breach of Malaysian public policy. It specifically held that the arbitral tribunal failed to consider whether Puncak's claim and UDA's counterclaim constituted a single transaction within the contract, nor explained the reasons for not doing so. The arbitral tribunal did not see the claim and counterclaim as an accounting exercise arising from a single transaction of mutual dealings.

It also held that the arbitral tribunal failed to apply the principles in *Sime Diamond Leasing*, which legitimizes the aim of Section 41 of the Bankruptcy Act in giving preferential payment for insolvency set-off where mutual dealings arise under the same contract. It also observed that the gravity of the arbitral tribunal's errors of law, which caused it to disregard UDA's counterclaim in its entirety, was sufficient to satisfy the requirements to set aside the final award under Section 37 of the Arbitration Act. Concerning the intersection between insolvency law and arbitration, the High Court observed that,

> *"…On the facts here, the liquidator of* [Puncak] *chose to sue* [UDA] *to recover unpaid payments via arbitration based on the arbitration agreement in the Contract. It is therefore unsurprising and certainly not wrong of* [UDA] *to seek to set off its counterclaim for the loss and damages suffered against* [Puncak] *in the same arbitration with the leave of the winding-up court. It follows that the arbitrator would be clothed with the jurisdiction and power to deal with mutual set offs pursuant to Section 41 of the* [Bankruptcy Act]."

The High Court's decision indicates that insolvency set-off is arbitrable in Malaysia, which is consistent with recent decisions in England which considered the availability and interaction of insolvency set-off in arbitration, and clarifies the arbitrability of book debts quantification in an arbitration.

Ken Grouting Sdn. Bhd. v RKT Nusantara Sdn. Bhd.
Civil Appeal No. W-02(C)(A)-1560-07/2018 (8th October 2020)

The background to the Parties dispute concerned an arbitrator's mandate and jurisdiction as a result of his failure to deliver the arbitration award in accordance with the timeline stipulated in the rules of arbitration.

Briefly, KEN and RKT were parties to an arbitration before the learned arbitrator ("the arbitrator"). KEN was the claimant, and RKT was the respondent in the arbitration. RKT had a counterclaim in the arbitration. On 21st December 2009, the arbitrator was appointed by the President of PAM as the sole arbitrator for the reference pursuant to Clause 34.2 of the Conditions of Contract and in accordance with the PAM Rules, being the rules of arbitration, which had been agreed by the parties to govern the arbitral procedure. Pursuant to Clause 34.3 of the Conditions of Contract, the Arbitrator shall, upon appointment, conduct the arbitration in accordance with the provisions of the Act and the PAM Rules.

Article 21.3 of the PAM Rules stipulates that the "Arbitrator shall deliver his award as soon as practical but not later than three (3) months from his receipt of the last closing statement from the parties". In the present case, the last closing statement from the parties was RKT's submission in reply dated 29th January 2016. As such, pursuant to Article 21.3 of the PAM Rules, the deadline for the arbitrator to deliver his award was 26th April 2016.

Further, Article 21.3 of the PAM Rules expressly provided that if the arbitrator considers that more time is required for the preparation of his Award, "such time frame for delivery of the award may be extended by notification to the parties". The arbitrator delivered his award on 10th March 2017 ("the Original Award"). The Original Award was delivered without any attempt by the arbitrator to extend the timeline for delivery of the award. The arbitrator later amended the Original Award and issued an Amended Award on 7th April 2017 ("the Amended Award").

During the period from 24th June 2016 to 10th March 2017, neither RKT nor KEN raised any objection to the fact that the deadline for delivery of the arbitration award had passed. It is beyond dispute that the Original Award (dated 10th March 2017) was well beyond the deadline.

Briefly, the dispute concerned the following seven (7) issues in a nutshell:

i. Delivery of Award deadline under Rules of Arbitration is procedural or jurisdictional,
ii. The construction of the Rules of Arbitration relating to the delivery deadline,
iii. Waiver due to failure by parties to raise objection between deadline & delivery of the award,
iv. The applicability and purpose of the above waiver pursuant to Section 7 of Arbitration Act 2005, or Article 20.1 of PAM Arbitration Rules,
v. Delayed delivery of Award in breach of Arbitration Rules and failure to extend deadline amounts to an excess of jurisdiction and set-aside under Section 37(1)(a)(vi) of the Act.
vi. Applicability of Section 18(5) of the Act to preclude any challenge under Section 37(1)(a)(vi), and
vii. Extension of Time to deliver the Award by the Court under Section 46 of the Act.

There were two appeals that were filed in this matter (Appeal 1560 and Appeal 1562), and the Respondent had a cross-appeal in Appeal 1560. The Court on 8th October 2020 dismissed Appeal 1560, the cross-appeal by Respondent and Appeal 1562. The Court ordered Appellant to pay a single set of costs, namely RM35,000.00 for Appeal 1560.

In a nutshell, the Kuala Lumpur High Court held as follows (at [159]):

i. *"Rules of arbitration which stipulate that an award must be delivered by a certain date are time-sensitive. It is mandatory for the arbitrator to comply with such a provision and effects his jurisdiction.*
ii. *Rules of arbitration which stipulate that an award must be delivered by a certain date and which also allow the arbitrator to unilaterally extend time upon notification to the parties, are equally time-sensitive and affect the arbitrator's mandate, and therefore his jurisdiction…*
iii. *There is no general burden or positive duty on parties to raise any objection after the deadline for delivery of the award had passed and before the award is in fact delivered. Consequently, there is no waiver by the party who does not raise any objection. After the deadline for delivery of the award had passed, the arbitrator's mandate and jurisdiction ceases. Therefore, the failure of the parties to raise objection after the deadline for delivery of the award had passed and before the award is in fact delivered, is not a waiver.*
iv. *The arbitrator's failure to deliver the award by the deadline and the failure to extend time as per the rules results in a cessation of the arbitrator's mandate and jurisdiction. The award is therefore a nullity and remains so unless extended under s.46 of the Act. There is no waiver pursuant to Article 20.1 of the PAM Rules or pursuant to s.7 of the Act.*
v. *An award which is delivered in breach rules of arbitration which stipulate that the award must be delivered by a certain date (the deadline) and where the deadline has not been extended albeit provided for in the rules, is "without mandate or authority" of the arbitrator and therefore in excess of his jurisdiction and may be set aside pursuant to s. 37(1) (a)(vi) of the Act.*
vi. *The failure of the parties to raise objection after the deadline for delivery of the award had passed and before the award is in fact delivered, does not preclude a challenge under s. 37(1)(a)(vi) of the Act…*
vii. *Lastly, the court may not extend time on its own volition under s.46 of the Act. The parties or the arbitrator have to make an application for purposes of s.46 of the Act."*

SAVE THE DATE!

16th Jan 2021	CIPAA Trainings and Workshop 2021
18th - 27th Jan 2021	RICS - AIAC Mediation Training Programme
30th Jan 2021	AIAC Adjudicators Continuing Competency Development (CCD) Workshop Series : Adjudication Case Law Updates
5th - 7th March 2021	5th AIAC Virtual Pre-Moot for the Willem C. Vis International Commercial Arbitration Moot

2020

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