NEWSLETTER 01
APRIL 2021

CHARTING NEW WATERS

REVITALISING ADR IN ASIA

AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE

ASIA ADR WEEK 2021

19TH-21ST AUGUST
IN PERSON AT BANGUNAN SULAIMAN AND VIRTUAL VIA BRELLA

ADR IN A KALEIDOSCOPE

BEYOND WHAT MEETS THE EYE

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

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

AT ASIA ADR WEEK 2021, AIAC'S EMBLEMATIC TRIANGLE HOPES TO BE THE EYE PIECE WHERE WE MOVE AWAY FROM A MYOPIC EMPHASIS ON PROCEDURE AND ENFORCEMENT, TO A KALEIDOSCOPIC VISION OF DIVERSITY AND SUSTAINABILITY.

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

GENERAL ADMISSION:

Full Conference	Days 1 & 2 Conference	CIPAA Conference (21st August)	Virtual Pass Conference Only (Brella)	Academia/ AIAC YPG Member (Days 1 & 2 Conference)	Student (Days 1 & 2 Conference)
MYR 1,200 / USD 300	MYR 800 / USD 200	MYR 500	MYR 200 / USD 50	MYR 600 / USD 150	MYR 200 / USD 50

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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 EDITORS' DESK

Greetings from the Asian International Arbitration Centre ("AIAC") and welcome to the first issue of the AIAC Newsletter for 2021! If 2020 could be summed up in a quote, no words would be wiser than those of former US President, John Quincy Adams, who eloquently said "*patience and preseverance have a magical effect before which difficulties disappear and obstacles vanish*".

In the Special New Year's Address by our Director, the AIAC looked back on the year that was with gratitude and fortitude, as we reminded ourselves of the lessons learnt from the obstacles we overcame and the successes we achieved. The time has come to build a more resilient world based on economic prosperity and international solidarity. As the saying goes, there's always a light at the end of the tunnel. Rightly so, fast forward to this year, governments all around the world have pledged and commenced their widespread vaccination programs, with more than 400 million doses of COVID-19 vaccines administered by the end of the first quarter of 2021, barely a year after the first case was reported. Hopefully, this will put everyone's mind at ease and we can all resume our daily pre-pandemic life in the near future.

Closer to home, amidst recovering from the COVID-19 pandemic, the AIAC has continued with its unrelenting efforts and unwavering spirit to establish its position in the field of ADR. To understand the AIAC's mission in times to come, we have included an exclusive interview in this edition of the Newsletter with the Director of the AIAC, Tan Sri Datuk Suriyadi bin Halim Omar, and our Deputy Director, Datuk Dr. Prasad Sandosham Abraham, who have addressed their thoughts on the future direction of the AIAC.

One thing that has and will remain unchanged in 2021 and beyond is the AIAC's commitment to develop initiatives on a global scale. Recently, the AIAC organised the 5th AIAC [Virtual] Pre-Moot for the Willem C. Vis International Commercial Arbitration Moot with over 220 participating arbitrators coming together to select a winner amongst the 95 participating teams from 46 countries across the globe, placing the AIAC Pre-Moot in the running to be the largest Pre-Moot in the world. The AIAC Pre-Moot echoes the goal of the Vis Moot in that it is an invaluable training opportunity for students to refine their advocacy skills. On that note, we at the AIAC would

like to congratulate all the winners and participants for their outstanding efforts and achievements in the AIAC Pre-Moot. We would also like to extend our gratitude to the wonderful arbitrators who volunteered their time and efforts to make the AIAC Pre-Moot a resounding success. We look forward to seeing everyone for next year's Pre-Moot, hopefully at our iconic Bangunan Sulaiman, in which the AIAC Arbitration Rules will be applied for the first time in next year's Vis Moot Problem.

As a precursor to the AIAC Pre Moot, the AIAC and AIAC Young Practitioners' Group collaboratively organised the AIAC YPG Virtual Conference 2021 titled "Exploring the New Frontier: The Modern Landscape of International Arbitration". Prof. Dr. Ingeborg Schwenzer, Dean of Swiss International Law School and Professor Emerita of Private Law at the University of Basel, Switzerland, delivered the keynote address. The Conference featured eminent speakers from around the world, engaging in discussions covering salient topics in international arbitration that also touched upon the 28th Willem C. Vis. International Commercial Arbitration Moot problem – varying from joinder procedures to intellectual property rights as well as the trend of greener arbitration. The event proved to be a remarkable success with overwhelming viewers and participation throughout the whole Conference. The AIAC would like to record our sincere appreciation and thanks to all the panellists who imparted their wisdom as well as the attendees who tuned in.

In terms of other milestones, the past few months have seen the launch of a number of new initiatives at the AIAC, all of which are aimed at restoring confidence in the ADR offerings at the AIAC. December 2020 saw the launch of the AIAC Adjudicator Evaluation Form (AEF) which allows parties and/or their representative to provide confidential feedback on the adjudicator appointed to their proceeding. January 2021 also saw the launch of the AIAC Pro Bono Mediation Initiative and the Continuing Competency Development ("CCD") Workshop Series. The former is aimed at providing accessible 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 latter is aimed at filling in knowledge gaps in empanelled adjudicators with specialised workshops on topics such as judicial developments in adjudication, financial and payment documentation in construction disputes, and the art of drafting an adjudication decision, amongst others. Later in 2021, the AIAC also intends to launch a specialised series of arbitration-related workshops, further information on which will be released in the upcoming months.

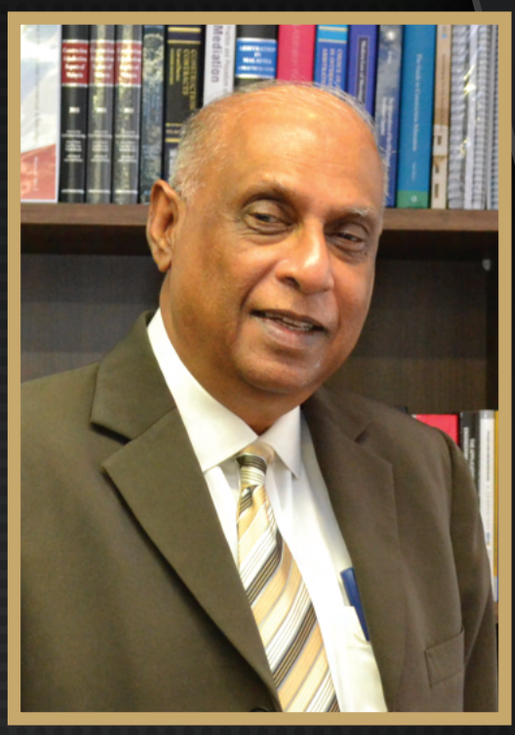
No newsletter would be complete without industry contributions. This edition is exceptional as we shift our focus to not one but three distinct and intriguing interviews, including one dedicated to the theme of International Women's Day 2021. On that note, the AIAC wishes to thank all of the special contributors in this edition of the Newsletter – Ula Cartwright-Finch, James Freeman, Hilary Heilbron QC, Clive Navin Selvapandian, Wendy Tan, Yu-Jin Tay, and Lilien Wong – for sharing their industry insights and practical knowledge with our readers.

As we bid farewell to one of the most extraordinary years of the century, we at the AIAC are proud to have done our part to position ADR as the ideal dispute resolution mechanism for parties throughout the COVID-19 pandemic and beyond. Nonetheless, there is no doubt that more work still needs to be done to boost public confidence in the system. While eagerly looking forward to seeing what 2021 has in store for the ADR community globally, we at the AIAC will continue partnering with all our stakeholders and users in promoting and strengthening the use of ADR across the region.

Till then, take care and stay safe!

– AIAC Newsletter Team

INTERVIEW WITH THE DIRECTOR AND DEPUTY DIRECTOR OF THE AIAC



On 1st December 2020, the AIAC had the pleasure of welcoming Tan Sri Datuk Suriyadi bin Halim Omar ("**TSS**") as the new Director of the AIAC. Shortly thereafter, on 14th December 2020, Datuk Dr. Prasad Sandosham Abraham ("**DP**") took office as the Deputy Director of the AIAC. As a Special Feature of this Newsletter, the AIAC Newsletter Team interviewed the Director and the Deputy Director to learn more about their journeys in the legal profession as well as to gain an insight into their vision for the AIAC. The excerpts of their interview are below.

1. Tell us a bit about yourself.

TSS: I am not exactly a spring chicken. In fact, I will be turning 70 in May. So, my memory may play tricks on me. Regardless, I will dig deep in the recesses of my mind to ensure that the information supplied is correct.

My parents were already eking out a living in Seremban, Malaya, during the Japanese Occupation. Naturally, the details elicited from them resonated with the popular stories. But then, that is for another interview. Without the need for details, they were traders from Bukit Tinggi, Sumatra. I saw daylight in a private hospital in Seremban in 1951, and within months I was carted off to my village called Kampung Pincuran Landai in Sumatra, Indonesia, to ensure that I was brought up in the 'right cultural and religious way'. I guess it was the right thing to do as far as they were concerned. My father, the breadwinner, remained in Malaya while I, under the watchful and guiding eye of my mother, grew up in the cool and deep mountainous region of Bukit Tinggi, Sumatra. Seriously, it was a Jungle Jim[1] area then! I lived there until I was about six years old.

[1] This is a reference to King Feature Syndicate's titular fictional hero of a series of jungle adventures set in South-East Asia.

In 1957, months before Merdeka (Independence), my father fetched me from my village and resettled me back to Malaya to pursue 'the European way' of education. This time my destination was Port Dickson, as my father had spread his wings there. He never managed to enrol me in any primary school as he passed away at the age of 36, a few months before Independence. I was only enrolled at a nearby local school after my mother took charge of my life when she landed here.

In all honesty, life was all fun and games, and the sense of responsibility was never in my psyche, not until I was enrolled into an elite boarding school many years later where success and attainment of good academic results were imbued into the students. That school was Sekolah Datuk Abdul Razak (SDAR at Tanjong Malim). I did fairly well there, and doors began to open. I obtained a scholarship from the Government of Malaysia to pursue a Bachelor of Laws degree at Warwick University and went on to become a Barrister-at-Law at Lincoln's Inn. Many eminent lawyers and judges were my colleagues in England, in the like of the former Chief Justice of Malaysia, Tun Ariffin and former Federal Court judge Datuk Prasad, and we have remained friends to date.

After braving the cold winters of England and overcoming all the academic obstacles, and the sky being the proverbial limit, I returned to Malaysia promptly and joined the Government

Service as a legal-cum-judicial officer. This was in November 1975. I kickstarted my career as a Magistrate in Malacca, i.e. as a judicial officer. Thereafter an array of legal postings followed, namely, the post of Deputy Public Prosecutor in Malacca and Negeri Sembilan and the Anti-Corruption Agency, as a Sessions Court judge in Johor Bharu, Senior Federal Counsel in the Civil Division of the Attorney-General's Chambers, the Inland Revenue and the Home Affairs, and even a short stint at the Advisory Division of the Attorney-General's Chambers. In 1992, I was appointed the Deputy Head of the Prosecution Division (Crime) for Malaysia and, after a couple of years, was appointed as the Public Trustee of Malaysia.

Eighteen years down the road, on 1st November 1994, my career in the judiciary got off the ground. In short, my trembling days before the bench ended, and I now assumed the role of the very people I feared and respected. I began as a Judicial Commissioner and was confirmed as a High Court judge on 12th January 1996. I served in the Malacca, Kelantan and Shah Alam High Courts before being elevated to the Court of Appeal in 2006 and culminating at the Federal Court in 2010. I retired in 2017.

On 1st December 2020, I took up the office of the Director of the AIAC. As the current Director, I look forward to working collaboratively with commercial stakeholders in the alternative dispute resolution (ADR) community to further propel the growth of the AIAC in the region and beyond.

DP: I am 69 years old, and I have had the pleasure of having a diverse legal career both in private practice and as part of the Malaysian judiciary. Upon graduating from the University of Nottingham with a Bachelor of Laws (Hons), I was called to the English and Malaysian Bars, where I became a Barrister-at-Law at Middle Temple. In fact, I met Tan Sri Suriyadi for the first time while preparing for the English Bar, and our friendship has sustained the decades! Thereafter, I practised in several Malaysian law firms as a general commercial lawyer focusing on civil and non-criminal matters, following which I decided to start my own practice focusing on commercial and civil litigation. In 2009, I was appointed as a Judicial Commissioner, and I was later elevated to the High Court in 2011, followed by the Court of Appeal in 2014 and Federal Court in 2017.

2. What inspired you to pursue a career in law, and how would you describe your journey to date?

TSS: I have no stirring story to share that led me to the path of law at the early stages of my life, as the catapult, trapping birds, entrapping spiders for games etc., took much of my attention. Even the Perry Mason detective stories only sustained minimal interest in me. In short, I was just a normal village boy from a faraway land, who lost his father very early in life, until he was rescued by a mother who had braved the Straits of Malacca to do the "mother thing'. Even the Secondary School stage was no better except that I saw more 'Man from U.N.C.L.E' shows! When I was in the midst of studying for my Higher School Certificate (A-levels equivalent) then only was I exposed to the intricacies of life. Former students of SDAR, who were on University vacation, instead of lounging comfortably at home, traversed to my school to nudge us, the un-inspired, to buck up and to see the world for what it really was. With a new insight on things, betterment of my life became the new call. Despite all the stirring advice from seniors to be prepared for the challenging life yet to come, I was still ambling away in the corridors of my youth until a close friend suggested pursuing a career in law in England. I must make mention of the name of this enlightened friend. His name is Ahmad Restu Yusof. He changed everything for me. For me, a youngster whose future career goals stopped at a clerical desk, this suggestion was mind boggling and difficult to comprehend. Naturally, I confided in him that I did not have the financial resources nor the knowledge as to how to go about it. *"Simple"* he said, *"get a decent HSC result first, and then follow it with a scholarship application. Of course, slots at colleges and universities will depend very much on the forthcoming results"*. As the saying goes, the rest is history and here I am.

To summarise, my journey to date as a kampung boy (village boy) from Seremban, to the hills of Sumatra and ending at the Federal Court (and now administering the AIAC's fort) has been challenging and fulfilling, and ongoing.

DP: Coming from an Indian family, when it comes to career choices, there are generally four main career streams: medicine, engineering, accounting, and law. Mathematics was certainly not my forte, and this evidently ruled out the second and third options! However, I did have a penchant for history and political science.

History is such a fascinating area because, as one of my history teachers at school put it, you cannot just take what's on the surface – you need to go back at least 500 years to have a true appreciation of the events that unfolded and how they have shaped modern times. Legal jurisprudence is fairly similar in this regard because, at least in common law jurisdictions, a degree of historical analysis is required to understand how the law has become what it is today and what gaps need to be filled to make the justice system fair and accessible for all.

As such, a career in law just seemed to be the natural choice because: (a) at the time I started to read law, there were seven family members in the profession, which inspired me to follow in their footsteps, and (b) law is an area that is deep-rooted history which reconciled with my career interests. My father was also inspired by Raja Azlan Shah's journey and successes in the Malaysian legal profession, and as such, he encouraged me to study law in England at the University of Nottingham, Raja Azlan Shah's alma mater.

While at law school, I had some amazing professors who were so passionate about their relevant specialisms that their contagious enthusiasm made seemingly mundane topics, like land law, undoubtedly interesting. And thus, my passion for pursuing a career in law was cemented.

I am proud to say that my journey in the legal profession thus far has been full of challenges; however, accomplishments have been plenty, praise God.

3. In the early stages of your career, was there ever a moment or a case you worked on that was, in effect, a turning point in your career? What did you learn from this experience?

TSS: The turning point in my career would be the moment when I had returned to Malaysia as a Barrister-at-Law, and I was subsequently offered a lucrative In-House position at an international conglomerate based in Malaysia. At that point in time, it was certainly an excellent offer for a young lawyer; however, my commitment to serve the Government of Malaysia and the public, in general, superseded any offer, and I continued as a judicial officer and subsequently as a member of the judiciary. In my legal experience of more than three decades, I learned that a commitment to public service must be natural, and one must endeavour with all efforts possible to protect and safeguard public rights. One must also be committed to bringing in positive change within the judicial framework and possess a strong work ethic.

DP: There are two events that stand out for me – the first was when I set up my own legal practice, and the second was the carriage of my first appellate hearing.

Following my admission to the Bar, I worked in a number of firms cultivating experience in general commercial law and dispute resolution. One day, my uncle (who had a very successful legal practice in Penang) and I were discussing how I should go about taking the next step in my career, and he offered to join hands with me to open an offshoot of his practice in Kuala Lumpur that I could spearhead. It was an interesting proposition, so I swiftly took him up on his offer and opened the practice under my name, "Prasad Abraham and Associates". In all fairness, the first two years were heavily straining both financially and mentally as it was difficult to bring cases in and break even. However, as they say, "*good things come to those who wait*"! Over time, the cases started coming in and put me in good stead in the profession. Overall, I would say that the venture was a very humbling experience that taught me about life's hard knocks and moulded me to where I am today.

The other experience that I would consider a turning point professionally was when I worked on my first criminal appellate hearing. If I am to be honest, a career in litigation did not appeal to me in the early stages of my career – in fact, I found the whole advocacy process to be rather daunting. However, I once had the opportunity to work on a criminal case that concerned fraud and other commercial crimes. This required me to gain a deep understanding of the complex nature of the commercial transactions that lay at the heart of this dispute. Our client was convicted in the Sessions Court and wanted me to represent them in appealing the matter to the High Court. Personally, I doubted whether I was competent enough to run an appellate-level hearing; however, Tan Sri Suriyadi was very supportive and encouraged me to give the appellate hearing a go. After months of endless preparation, we succeeded in having the conviction overturned by the High Court – it was a triumphant moment indeed, and it instilled confidence in me to take on more appellate-level work. One key takeaway from this experience for me was that it does not matter how complicated that law or the procedure concerning a dispute may be – what matters is the discipline that goes into preparing pleadings and presenting one's case before the relevant forum.

4. How did you secure your first judicial appointment?

TSS: I believe that a number of factors probably played a decisive role in securing my first judicial appointment. Two factors particularly come to mind. The first was my tenure as a Sessions Court Judge in the State of Johor, where I was entrusted with the responsibility of monitoring the financial affairs of the State's courts. In this role, I had regular interactions with members of the judiciary, including the former Chief Justice of Malaysia Tun Eusoff Chin, who was then a High Court judge, and I believe my efforts were looked upon favourably by all. Thereafter, my tenure as the Public Trustee of Malaysia likely also had a bearing on being considered as a potential candidate for elevation to the bench, given that this role certainly involved significant accountability, integrity and transparency. Consequently, in 1994 Tun Eusoff Chin approached me and asked whether I would be interested in a career on the bench, and following my positive response and a successful interview with members of the judiciary, I was invited to become a Judicial Commissioner in 1994.

DP: As a litigator, I made regular court appearances and was acquainted with members of the judiciary. One day in 2009, the then-Chief Judge of the High Court of Malaya (who went on to become the Chief Justice of Malaysia), Tun (or Tan Sri as he was known then) Arifin bin Zakaria, called me out of the blue and asked whether I would consider going on the bench. I informed Tun Arifin that I would certainly be interested in the same. He asked me to send across my curriculum vitae, and I said I would – only to have forgotten soon thereafter. A few days later, a member of Tun Arifin's staff called and asked me why I hadn't sent across my curriculum vitae as yet. Promptly, I sent across my curriculum vitae, and I was called in sometime in June 2009 for a chat with Tun Arifin and some other members of the judiciary. The panel asked me how much time I would need to take up office, and I told them I would need at least three months' notice to sort out my affairs and undertake a proper handover of my cases. I did not hear back from Tun Arifin or anyone else in the ensuing months, so I thought that was the end of the matter. One day in early October 2009, I received a phone call from Tun Arifin informing me that I will be elevated to the bench on 27th October 2009. I informed Tun Arifin that I needed more time, to which he said I had asked for three months, and those three months started in June. Alas, I swiftly wrapped up my practice in the few weeks that remained and prepared myself for a career on the bench! A fun and lesser-known fact, Tan Sri Suriyadi, who was already on the bench at the time, was the person who took my photographs following the swearing-in ceremony!

5. You have both had impressive legal careers in either the Attorney-General's Chambers and/or private practice, as well as having served on the Federal Court, Malaysia's apex court. Through these positions, you would have had the opportunity to shape Malaysia's justice system and, either directly or indirectly, played a role in facilitating access to justice. In this regard, what were 3 highlights of your career in the public service and/or in the judiciary?

TSS: In terms of three highlights in my career in the public service and the judiciary, I would state the first highlight was during my tenure as the Public Trustee of Malaysia, where I was responsible for the corporatisation of the office, which led to the Public Trust Corporation Act 1995. This, I felt, brought in the necessary accountability to the office. My second highlight was during my tenure as a judicial officer when I represented Malaysia before the United Nations sessions on serious matters concerning narcotics and sanctions for drug trafficking. In those times, it was a significant issue that affected the future of the younger generation of Malaysians who are presently responsible for nation-building. The third highlight of my career involved a couple of high-profile cases, which required not only being sensitive to the nature of the cases but also to deliver justice in the most efficient manner whilst safeguarding due process.

DP: I think rather than trying to focus on three highlights, I would say my entire tenure on the bench was the high point of my career, and the many cases that shaped new areas of law or challenged existing jurisprudence would be my legacy to the bench and the legal fraternity. Personally, I would not single out any particular judgment I handed down as being "landmark" because the term itself is rather subjective – indeed, every case that goes to court is a landmark case for the relevant party because the outcome would play a decisive role in their next steps in addressing the matter at hand. Having said that, some of the matters I am proud to have delivered a judgment on are those concerning political

defamation, my dissenting judgment in a matter concerning the use of indelible ink in election voting papers, and also a land case where I was part of the first court to hold that the land office can be held liable for damages. Objectively speaking, I believe I may have delivered a higher number of dissenting judgments than my contemporaries, although I nonetheless stand by all the judgments I have delivered to date. I would like my tenure on the bench to be remembered through the footprint I left as one amplifying justice, mercy and compassion.

6. What are your thoughts on the use of alternative dispute resolution mechanisms, such as arbitration and mediation, to resolve commercial disputes, as opposed to commercial litigation?

TSS: The use of alternative dispute resolution mechanisms is always welcome. *Sulh* or amicable settlement is a concept that has been well-recognised across multicultural and geographical boundaries for a very long time. In the present times, the commercial world has evolved where both international and cross-border transactions, as well as domestic transactions in Malaysia, collectively play a vital role in the progress of our economy. Inevitably, in the course of such transactions, many issues arise that eventually lead to disputes between the Parties. I sincerely believe that the recognition of modern arbitration mechanisms in progressive commercial jurisdictions is a prerequisite if such jurisdictions are to be perceived to possess a strong legal framework. I am certain that using arbitration to resolve arbitrable disputes will lead to trust amongst commercial stakeholders. However, in non-arbitrable transactions, commercial litigation must be a second resort after mediation. As a former judge who has served decades in the Malaysian judiciary, I am not only aware of present circumstances under the Malaysian commercial litigation mechanism but also of international developments in Dubai, Qatar, Abu Dhabi, and Singapore in the form of international commercial courts. Commercial litigation should be perceived as a partner to alternative dispute resolution mechanisms, not a competitor.

DP: I would say that ADR is a more efficacious way to dispose of commercial disputes despite improvements in the efficiency of the courts. With respect to international arbitration, in particular, I would certainly go as far as to say that it is a very useful method for resolving more sophisticated disputes given its inherent procedural flexibility, its less stringent adherence to complex principles such as the rules of evidence, and also its capacity to provide a more comfortable environment within which to undertake witness examinations.

7. In your opinion, what role has the Malaysian judiciary played in recognising and developing arbitration jurisprudence in Malaysia?

TSS: The Malaysian judiciary has played a significant role in the recognition and development of Malaysia as a pro-arbitration jurisdiction in the Asia-Pacific region. I am delighted to witness in recent years the Malaysian judiciary having clarified the legal position on numerous issues relating to and arising out of arbitration, leading to more predictability in Malaysian-seated arbitrations. The majority of decisions rendered by the courts are in support of arbitration and demonstrate that the Malaysian judiciary seeks to uphold the objectives of the Arbitration Act 2005 with minimal interference in arbitration proceedings, or the setting aside of arbitral awards, alongside recognising the rights of third parties not bound by the arbitration.

DP: The Malaysian judiciary has been supportive in developing domestic arbitration jurisprudence as well as applying international principles to harmonise Malaysia's arbitration framework in tandem with other Model Law jurisdictions. This has been reflected in many recent judicial decisions that have taken a pro-arbitration stance, as well as the active support of judges in activities to further the acceptance of arbitration and the positioning of Malaysia as a safe seat. In the spirit of respecting party autonomy, Malaysian courts have also taken a minimalist approach when interfering with arbitral proceedings. Nonetheless, in the absence of a global or national system to regulate the conduct of arbitrators, particularly rogue arbitrators, there is room to suggest that the judiciary can consider working collaboratively with the arbitration community to device a system whereby checks and balances can be put in place to filter poor arbitration practice. Such a mechanism will go towards ensuring that people do not lose faith in the qualitative benefits of ADR due to the unruly behaviour of certain individuals.

8. Despite its strategic location at the heart of the Asia Pacific region, Malaysia is still considered an emerging jurisdiction when it comes to being a preferred seat of arbitration. In your opinion, what is the reason for the same, and what can Malaysia do to increase its visibility and competitiveness in the arbitration marketplace?

TSS: In my opinion, Malaysia's recognition in recent years as an emerging seat of arbitration is positive. However, it is now imperative for Malaysia to expedite its continuing efforts from a slow-paced manner to goal-oriented steps in order to become one of the leading arbitration seats in the Asia-Pacific. For Malaysia to increase its visibility, it will take collective efforts from all involved stakeholders, namely, the Government of Malaysia, the Malaysian legislature, the Malaysian judiciary, the AIAC as the leading arbitral institution in the nation, international and domestic arbitration practitioners, arbitrators, academics and counsel. Modern, sophisticated and arbitration-friendly legislation with timely amendments will help Malaysia achieve its ambition to become a preferred seat of arbitration in the Asia-Pacific region. In order to be competitive, Malaysia should endeavour to not only to improve the Arbitration Act 2005, but the Malaysian national courts, which have supervisory jurisdiction over the arbitration, must also implement pro-arbitration measures. It is essential for international arbitration users to relate to Malaysia's arbitration legislation, understand the approach of the Malaysian courts to arbitration, be able to place reliance on interim measures and cost-effective litigation processes to seek curial support in arbitral proceedings, be wary of the limited grounds for challenging an award and have confidence in the consistent enforceability of awards. Malaysia must be steadfast in adapting to new trends and best practices in international arbitration. I feel it is a challenge of perception than reality for Malaysia to renew its visibility and competitiveness.

DP: I think Malaysia has made strides in being considered a preferred seat of arbitration. The AIAC is the premier ADR Institution in Malaysia and should strive as an ambassador of Malaysian arbitration to promote itself in the Asia-Pacific region despite regional competitors. A factor that would go a long way to enhancing Malaysia's competitiveness would certainly be if more overt government support could be provided to support the use, growth, and benefits of arbitrating disputes in Malaysia. After all, the fruits of collaborative efforts should never be underestimated!

9. What are your thoughts on your recent appointment as the Director/Deputy Director of the AIAC? What would you consider to be some of the key qualities and attributes you possess that would be instrumental in fulfilling the responsibilities of the office?

TSS: After my retirement as a Federal Court judge in 2017, I was looking forward to spending the remainder of my days adopting a leisurely routine. However, destiny had a better plan for me to embark on a new adventure as the Director of the AIAC to promote not only domestic ADR interests but also the Malaysian interests in international dispute resolution globally. As such, I consider that the key qualities and attributes to succeed in this important role are to be a strong administrator, to give attention to detail in all matters, to maintain the integrity of the office with a solid work

ethic, to ensure and instil discipline in the institution, and to persevere in the pursuit and implementation of new initiatives. I am confident that all these stated attributes have been ingrained in me given my long and successful legal career. Certainly, my time in the judiciary provided me with skills and experience that are very relevant to this role, namely, my strong legal foundation, commitment to dispute resolution, continuously ensuring my adaptability and flexibility to becoming commercially aware of various sectors, maturity in understanding the practice of due process, maintaining a transparent office culture, and effectively communicating with members of the public, the executive and the judiciary.

DP: When I was first approached to take on the role of the Deputy Director of the AIAC, I was very apprehensive. However, I decided to take on the challenge and accept the appointment. In doing so, I am of the view apart from immersing one's self with arbitration jurisprudence, one must be patient, willing to listen, and heed the counsel of the players, users, and stakeholders of arbitration in Malaysia.

I am cognisant that in taking on this new role, I must shift my mindset from that of the bench to a more administrative role, which can be overwhelming at times. From my experience in practice and common law, I have an understanding that a minimalist approach to reviewing awards while on the bench differs from the oversight an institution has over the matters it administers. I have found that being open and receptive to new ideas and listening to the needs and grievances of ADR stakeholders can help guide us in the right direction while challenging the status quo to make the AIAC a formidable centre.

10. What is your vision for the AIAC?

TSS: My vision for the AIAC as we enter this new decade can be summarised in four words: adaptation, innovation, consistency, and integrity, in order to become the best ADR institution in the region and beyond. The AIAC in recent years has proven to be the flagship ADR service provider in Malaysia that attracts not only significant domestic matters but also many international matters from other Asia-Pacific jurisdictions as well as the Middle-East, Europe, and African regions. The AIAC must *adapt* its products and services to meet the evolving needs of ADR users and commercial markets. The AIAC must *innovate* its existing products and services to match with the transformations in the conduct of ADR to be more advanced, sophisticated and preferred. The AIAC must be *consistent* in its essential case management across ADR products to provide cost and time-efficient services. The AIAC must continue to maintain its *integrity* as a not-for-profit, non-governmental international arbitral institution that engages in best practices.

DP: The AIAC must stand tall, effective, transparent, and be a true champion for the cause of arbitration jurisprudence. I truly foresee the AIAC as being the champion for innovation and helping bring the Malaysian market to the forefront of arbitration practice. Having said that, the AIAC must move away from what traditional Malaysian institutions do, that is, being firmly rooted in our own country and floundering in other areas – rather, we should make our presence felt globally. To do so, it is imperative we diversify the AIAC's products and services, for instance, re-vamping the i-Arbitration Rules and focusing on investment arbitration work, all the whilst ensuring that the Centre is well run, efficient and a receptive body. To be receptive means being able to adapt to changes and to overcome matters that may have been overlooked in the past, for instance, investing more in technology given the increased reliance of the same for case management and hearing purposes, as well as having a fallback mechanism to expedite case management issues in the absence of a Director, given the events of 2020.

11. In your opinion, what role do arbitral institutions play in facilitating discourse and championing change in the legal profession, and how important is this?

TSS: An arbitral institution plays a significant role in maintaining the standards of ADR practice as well as promoting new training initiatives for young and new dispute practitioners. In this regard, I am delighted to witness the AIAC's many training events, which were well-thought-out and executed and have assisted in enhancing the skills of Malaysian and international lawyers. Change is perceived with doubt, especially in the legal profession, which has traditionally been a late adopter by default. In this regard, an arbitral institution plays an important part to introduce new adoptions relevant to dispute resolution as well as dispute avoidance mechanisms. In general, arbitral institutions represent a trustworthy and multi-faceted approach to the conduct of proceedings that are flexible, user-friendly and meet the timely demands of ADR stakeholders (or) users. Especially during this ongoing COVID-19 pandemic, I believe the AIAC as an ADR Hub can assist the judiciary towards the efficient resolution of commercial disputes, maintaining business continuity and assisting the revival of the Malaysian economy.

DP: Arbitral institutions play an important role in shaping and changing the mindset of the legal profession to be more receptive to ADR. As neutrals, they are well-positioned to facilitate discourse on matters of utmost importance to the profession, such as providing rules that reflect best international practices, promoting diversity in arbitral appointments, and instilling confidence in the efficacy and impartiality of the ADR process. Arbitral institutions such as the AIAC also have a sense of social responsibility in that they regularly undertake capacity-building and knowledge-sharing activities to upskill new and experienced ADR practitioners while also developing initiatives to nurture the next generation of legal talent. All these roles are important to enhance public confidence in the legitimacy of ADR processes and practices. Maintaining the confidence of the industry will encourage external bodies to take AIAC's views on board, which will help encourage diversity in the system. The AIAC can only do so much, and the pivot has to come from not only institutions but also the stakeholders involved in ADR.

12. Any final words?

TSS: During my term at the AIAC, my ambition is to actively engage with all ADR stakeholders, including the Government of Malaysia, AALCO, members of the Malaysian Judiciary, ADR practitioners, arbitrators, adjudicators, mediators, experts, businesses, and commercial entities in Malaysia and other jurisdictions to facilitate acceptance of the AIAC as a modern multi-service global hub for ADR, with new and improved products & services. I am undertaking steps to implement best and recommended practices for the internal and external conduct of the AIAC to lead responsibly. I hope the AIAC will make inroads to many new sectors and regions in the world.

I will also endeavour in my capacity to further Malaysia's recognition as a pro-arbitration and pro-mediation jurisdiction. It is now the time to act and significantly contribute to a reliable Malaysian ADR framework that will act as a strong partner to Asia's economic progress and growth in this new decade. And just as the Phoenix rose from the ashes, Malaysia and the AIAC too will rise!

DP: The Director and I inherited the leadership of the AIAC after it has gone through turbulent times. Judge us by our actions in uplifting the AIAC, and I urge all involved in ADR to work together with us towards that end. The AIAC aims to serve the arbitration community as a whole, and therefore, we must ensure to collaboratively engage with all stakeholders, practitioners and users in the community to grow the Centre from strength to strength.

CPD POINTS AVAILABLE

AIAC CERTIFICATE IN ADJUDICATION

AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE

SAVE THE DATE!

1st-8th JUNE 2021

The AIAC Certificate in Adjudication is conducted by the AIAC as part of its role as the adjudication authority under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"). The AIAC Certificate in Adjudication is open to all individuals in the construction industry, whether legally trained or not legally trained, who are interested in serving as an adjudicator under the CIPAA in adjudicating payment claim disputes. Apart from training future adjudicators and providing them with the necessary skills to conduct an adjudication, this programme is equally suitable for those who are merely seeking more knowledge on construction adjudication and are not desirous of being qualified adjudicators. The AIAC Certificate in Adjudication is recognised by the CIPA Regulations as a necessary qualification to become an adjudicator under the CIPAA empanelled with the AIAC, subject further to the necessary qualifications of seven (7) years of working experience in relevant fields. The training is conducted over five (5) days by experts from the U4 construction industry and consists of these specialised units:

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

UNIT 1

THE APPLICATION OF STATUTORY ADJUDICATION TO THE CONSTRUCTION INDUSTRY

Offers participants a first-look into statutory adjudication and provides them with the knowledge and understanding of the application of the CIPAA statutory framework in the construction industry in Malaysia.

UNIT 2

PRACTICE & PROCEDURE OF ADJUDICATION UNDER THE CIPAA

Introduces participants and provides them with the knowledge and understanding to grasp the step-by-step practices and procedures of the CIPAA process, and the significant provisions of the CIPAA that make up the adjudication process.

UNIT 2A

CIPA REGULATIONS

Introduces participants to the CIPA Regulations, which serve as a legislative supplement in the execution of the CIPAA, particularly key provisions which facilitate the CIPAA adjudication process.

UNIT 3

FUNDAMENTALS OF CONSTRUCTION LAW

Introduces participants to the Malaysian legal system, in the context of the CIPAA and provides some a foundational study of construction law, including basic principles of the law of contract, tort and evidence.

UNIT 4

THE CONSTRUCTION PROCESS

Introduces participants to the specific technicalities of the construction industry processes, specifically, procurement, contractual documentation and agreements.

UNIT 5

WRITING ADJUDICATION DECISIONS

Provides participants with the skills, knowledge and understanding necessary to draft and prepare Adjudication Decisions in accordance with the provisions of CIPAA.

5TH AIAC [VIRTUAL] PRE-MOOT 2021

Between 4th and 7th March 2021, the AIAC had the pleasure of hosting the 5th AIAC [Virtual] Pre-Moot 2021 for the Willem C. Vis International Commercial Arbitration Moot (the "Pre-Moot"). In what proved to be a tremendous success, the Pre-Moot was truly global in every sense of the word with participation by a record number of 95 teams from 45 countries alongside over 200 arbitrators from across the globe volunteering their time and efforts to preside over the various rounds of the Pre-Moot. Such record participation certainly places the AIAC Pre-Moot in the running to be one of the largest Pre-Moots in the world!

During the Opening Ceremony of the Pre-Moot on 4th March 2021, the arbitrators, participants, and attendees, including many friends of the AIAC, were welcomed by Tan Sri Datuk Suriyadi bin Halim Omar, the Director of the AIAC, as well as Mr. Mohanadass Kanagasabai, the Managing Partner of Mohanadass Partnership, the Platinum Sponsor of the Pre-Moot. In addition to their words of encouragement for the participants, both the Director and Mr. Kanagasabai also stressed the vision of the Pre-Moot, which echoed the goal of the Vis Moot, to be a valuable training opportunity for students to refine and enhance their advocacy skills. On the same day, the AIAC hosted a virtual "Trivia Evening" which saw the participation of nearly 60 individuals who took on the challenge of responding to interesting trivia relating to general knowledge, ADR, as well as the AIAC's history.

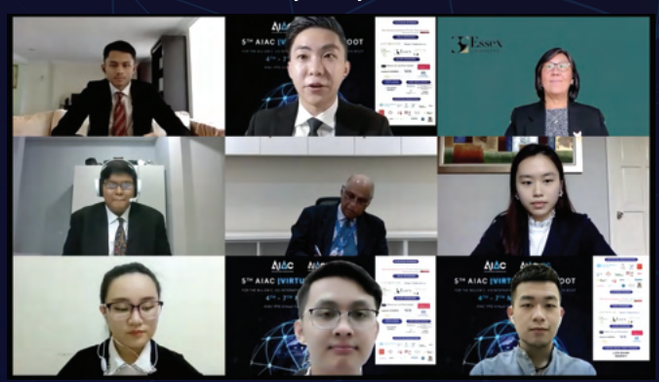
5th and 6th March 2021 saw two full-days of intense and spirited General Rounds with four General Rounds per day. The participants' levels of energy and passion were inspiring despite teams having to deal with time zone differences and navigating virtual advocacy. It was a tough fight indeed as only 16 out of 95 teams advanced to the Elimination Rounds on 7th March 2021, namely:

1. Aarhus University;
2. Dr. Ram Manohar Lohiya National Law University;
3. Federal University of Bahia;
4. Georg-August-Universität Göttingen;
5. National Academy of Legal Studies and Research (NALSAR);
6. National Law Institute University, Bhopal (NLIU);
7. National Law University Delhi;
8. National University of Singapore;
9. Royal Institute of Colombo;
10. SASTRA Deemed University;
11. The Chinese University of Hong Kong;
12. Universidad Rafael Landivar;
13. University of Miami, School of Law;
14. University of San Diego School of Law;
15. University of São Paulo Largo San Francisco; and
16. University of Vienna.

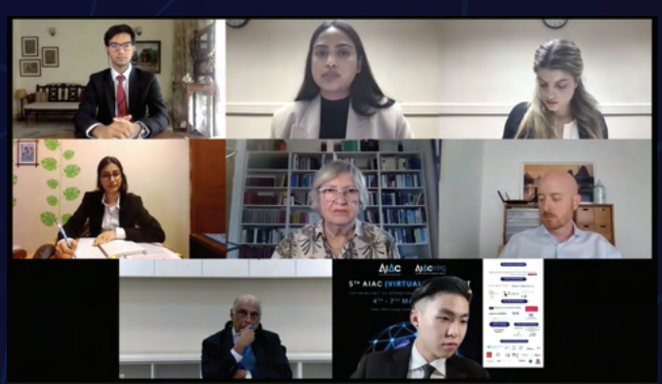
During the Round of 16, the teams and many oralists performed and scored exceptionally well in the nerve-wracking knock-out matches. The following teams advanced to the Quarter-Finals:

1. Aarhus University;
2. Dr. Ram Manohar Lohiya National Law University;
3. Federal University of Bahia;
4. National Academy of Legal Studies and Research
5. (NALSAR);
   National University of Singapore;
6. Royal Institute of Colombo;
7. University of Miami, School of Law; and
8. University of São Paulo Largo San Francisco.

After the Quarter-Finals, four universities, Dr. Ram Manohar Lohiya National Law University, National University of Singapore, Royal Institute of Colombo, and University of Miami, School of Law, advanced to the Semi-Finals. This took place concurrently with the Malaysian Final wherein Brickfields Asia College competed against International Islamic University Malaysia.



The Final saw the University of Miami, School of Law, compete against Dr. Ram Manohar Lohiya National Law University for the Championship, with the National University of Singapore and Royal Institute of Colombo facing each other in the Third-Place Round.



The AIAC Pre-Moot was graced with the presence of Prof. Dr. Ingeborg Schwenzer and Dr. Christopher Boog as arbitrators in the Final, as well as Tan Swee Im and Prof. Dr. Christopher Kee as arbitrators in the Malaysian Final. The Deputy Director of the AIAC, Datuk Dr. Prasad Sandosham Abraham, also served as the presiding arbitrator for both the Malaysian Final and Final.

Although everyone worked tirelessly over the preceding days, three additional virtual social events were organised for the participants as well as the arbitrators on 7th March 2021. The first virtual social event of the day was an arbitrator-teams speed networking session. Networking is an essential element to the Pre-Moot as it accords the participants the opportunity to advance their careers in international arbitration and engage in professional development. In the virtual setting, networking is severely hindered, so the speed networking session aimed to fill the gap presented in this year's competition. Many participants also joined the second virtual social event, a stand-up comedy special by Rizal Van Geyzel, which enabled the participants to unwind before tuning in to the award ceremony. The final event was an arbitrators-only networking session, which allowed the arbitrators to catch up with old friends as well as meet new ones.

During the Closing Ceremony on 7th March 2021, Prof. Dr. Stefan Kröll, the Director of the Willem C. Vis Arbitration Moot in Vienna and Ms. Michelle Sunita Kummar, Head of Legal at the AIAC, delivered the closing remarks. They both congratulated the impressive performance of all the participants and urged everyone to celebrate their outstanding achievements. They reiterated that the participants' hard work had just begun as the learning process in international arbitration most certainly does not stop with the Pre-Moot!

The AIAC thoroughly enjoyed organising this year's Pre-Moot and we would like to take this opportunity to thank all the sponsors and supporting organisations of the Pre-Moot, without whose support this event would not have been a resounding success:

Platinum Sponsor	Mohanadass Partnership
Gold Sponsors	39 Essex Chambers, Lee Hishammuddin Allen & Gledhill, James Monteiro, Shearn Delamore & Co., University of Miami, School of Law
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Supporting Organisations	UNCITRAL Regional Centre for Asia and the Pacific, AIAC Young Practitioners' Group, Asia-Pacific Forum for International Arbitration, Arbitrator Intelligence, Asian Law Students' Association Malaysia, China-ASEAN Legal Cooperation Center, Careers in Arbitration, Chartered Institute of Arbitrators Malaysia Branch, Digital Coffee Break, Equal Representation in Arbitration, Global Arbitration Review, Greener Arbitrations, United Kingdom & Eire Malaysian Law Students' Union, Moot Alumni Association, Malaysian Institute of Arbitrators, Transnational Dispute Management, Tales of the Tribunal, Women Way in Arbitration LATAM and Hong Kong Institute of Construction Adjudicator.

We look forward to meeting everyone next year when the AIAC Arbitration Rules, in its revised form, will feature for the first time in the 29th Vis Moot problem!

Award Recipients for the 5th AIAC [Virtual] Pre-Moot

Academic Awards

Champion	University of Miami, School of Law
Winner of the Malaysian Final	International Islamic University Malaysia
Runner-Up Award	Dr. Ram Manohar Lohiya National Law University
Third Place Award	Royal Institute of Colombo
Fourth Place Award	National University of Singapore
Runner-Up of the Malaysian Final	Brickfields Asia College
Best Oralist of the International Final	Noozyara Eshaba, University of Miami, School of Law
Best Oralist of the Malaysian Final	Emilia Lye Jia Jia, Brickfields Asia College
Best Oralist of the Elimination Rounds	1. Amasha Samarasinghe, Royal Institute of Colombo 2. Leong Kit Weng, National University of Singapore
Best Oralist of the Preliminary Rounds	1. Wee Min, National University of Singapore 2. Siddhant Ahuja, Dr. Ram Manohar Lohiya National Law University 3. Luiza De Sousa Braz, University of São Paulo Largo San Francisco 4. Alena Bischinger, University of Vienna 5. Leong Kit Weng, National University of Singapore 6. Philip Ashok Alex, National Law University Delhi
Best Memorandum on behalf of the Claimant	University of San Diego School of Law
Honourable Mention for the Best Memorandum on behalf of the Claimant	Kobe University School of Law
Best Memorandum on behalf of the Respondent	University of Warsaw tied with Georg-August-Universität Göttingen
Best Outline on behalf of the Claimant	Brickfields Asia College
Best Outline on behalf of the Respondent	Brickfields Asia College

Non-Academic Awards

The Early Bird Team	Federal University of Bahia (registered within 30 minutes)
Social Media Diva	Amity Law School, Mumbai (with 280 likes)
Spirit of the 5th AIAC [Virtual] Pre-Moot 2021	Peking University Law School

AIAC YPG VIRTUAL CONFERENCE 2021

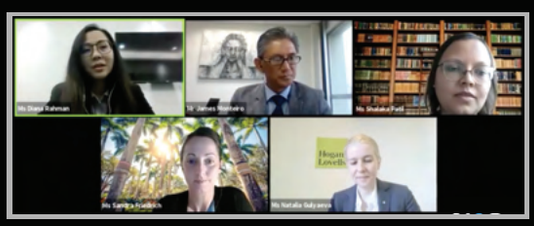
On 3rd March 2021, the AIAC and AIAC's Young Practitioners' Group ("AIAC YPG") virtually broadcasted the AIAC YPG Virtual Conference 2021 (the "Conference") with the title "*Exploring the New Frontier: The Modern Landscape of International Arbitration*". The Conference was held in conjunction with the 5th AIAC [Virtual] Pre-Moot for the Willem C. Vis International Commercial Arbitration Moot and saw the registration of over 300 attendees.

Irene Mira, the Co-Chair of the AIAC YPG and International Case Counsel at the AIAC, kickstarted the Conference by delivering the Welcoming Remarks. The Conference was then officially opened by Tan Sri Datuk Suriyadi bin Halim Omar, the Director of AIAC. Syarihah Razman of Mohanadass Partnership, the Platinum Sponsor of the 5th AIAC [Virtual] Pre-Moot, delivered opening remarks on her firm's behalf.

Prof. Dr. Ingeborg Schwenzer, the Keynote Speaker of the Conference, enlightened the audience on the topic of "*Private International Law, Commercial Law, and Alternative Dispute Resolution: Amuse-Bouches to the Contemporary Law of Sale of Goods*". Prof. Dr. Schwenzer walked the participants through the development of the United Nations Convention on Contracts for the International Sale of Goods ("CISG") as well as its impact on the international arbitration landscape in this modern age. She then discussed the applicability of the CISG to the merits of arbitration and the applicability of CISG to the arbitration agreement. In that regard, Prof. Dr. Schwenzer also highlighted the different theories about the applicable law of an arbitration agreement.

Session 1 of the Conference, titled "*Solving the Puzzle: Joinder Procedure in International Arbitration*", navigated the advocacy aspects of the joinder procedure in international arbitration whilst weighing its risks and benefits from a commercial perspective. This session was expertly moderated by Jae Hee Suh of Allen & Overy. The panel consisted of Dato' Nitin Nadkarni of Lee Hishammuddin Allen & Gledhill, K. Shanti Mogan of Shearn Delamore & Co., Shamsul Bahrin Manaf of Mohanadass Partnership, and Joe-han Ho of 39 Essex Chambers. The panel explored the rationale of joinder as a potential solution to multi-party and multi-contract disputes, considerations for allowing and deciding against joinder applications, the comparisons of joinder mechanisms under different arbitral rules, and the strategies and tools for effectively managing matters with multiple contracts and/or parties where joinder is not an option. Further, the panellists shared their practical views as arbitration practitioners when encountering issues in relation to joinder in international arbitration.

Session 2 of the Conference titled "*Debunking Myths: Intellectual Property Rights in International Arbitration*" dealt with the current state of intellectual property ("IP") arbitration following a rise in the popularity of this niche area. This session was seamlessly moderated by AIAC's very own Senior Case Counsel, Diana Rahman. The speakers for Session 2 were Shalaka Patil of Cyril Amarchand Mangaldas, Sandra Friedrich of the University of Miami, School of Law, Natalia Gulyaeva of Hogan Lovells, and James Monteiro of James Monteiro. The panellists exchanged views on the arbitrability of IP disputes in different jurisdictions together with the factors to consider and benchmark to follow in initiating an IP claim in arbitration. The speakers and the moderator also discussed the advantages and disadvantages of arbitrating IP disputes, common procedural issues thereof, including enforcement of the award, and the development of IP arbitration across different jurisdictions.



The last and long-awaited session was the Hot Debate which focussed on the trend of "greener arbitrations". Nereen Kaur Veriah of Christopher & Lee Ong served as the moderator of the Hot Debate and did not leave any stones unturned in setting the stage for the debate! Ann Ryan Robertson, the incumbent President of the Chartered Institute of Arbitrators and an International Partner at Locke Lord LLP, represented House A which defended the motion that "*This House believes that "greener" arbitration is not only the new trend, but it is also here to stay even after the pandemic ends*". On the other hand, Niuscha Bassiri of Hanotiau & van den Berg represented House B which defended the motion that "*This House believes that "greener" arbitration is simply a passing trend and it is to fade after the pandemic ends*". Both speakers presented persuasive and compelling arguments of the pluses and minuses of virtual arbitration hearings and its impacts not just on the environment, but also on the development of arbitration law and trends across the globe. Important aspects such as the integrity and confidentiality of arbitral proceedings and the push for diversity were simply the tip of the iceberg in this intellectually stimulating Hot Debate! Moreover, the participants who tuned in also had the opportunity to cast their votes for House A or House B, making this session an excellent closing to the Conference.

Finally, Lim Tse Wei of Herbert Smith Freehills and the Co-Chair of the AIAC YPG conveyed his closing remarks in which he highlighted the AIAC YPG's upcoming initiatives such as the launch of the AIAC YPG Essay competition, AIAC YPG Regional Representatives programme, and the AIAC YPG Webinar series, with the aim of expanding the AIAC's and AIAC YPG's outreach and global footprint in years to come.

ASIAN INTERNATIONAL ARBITRATION CENTRE

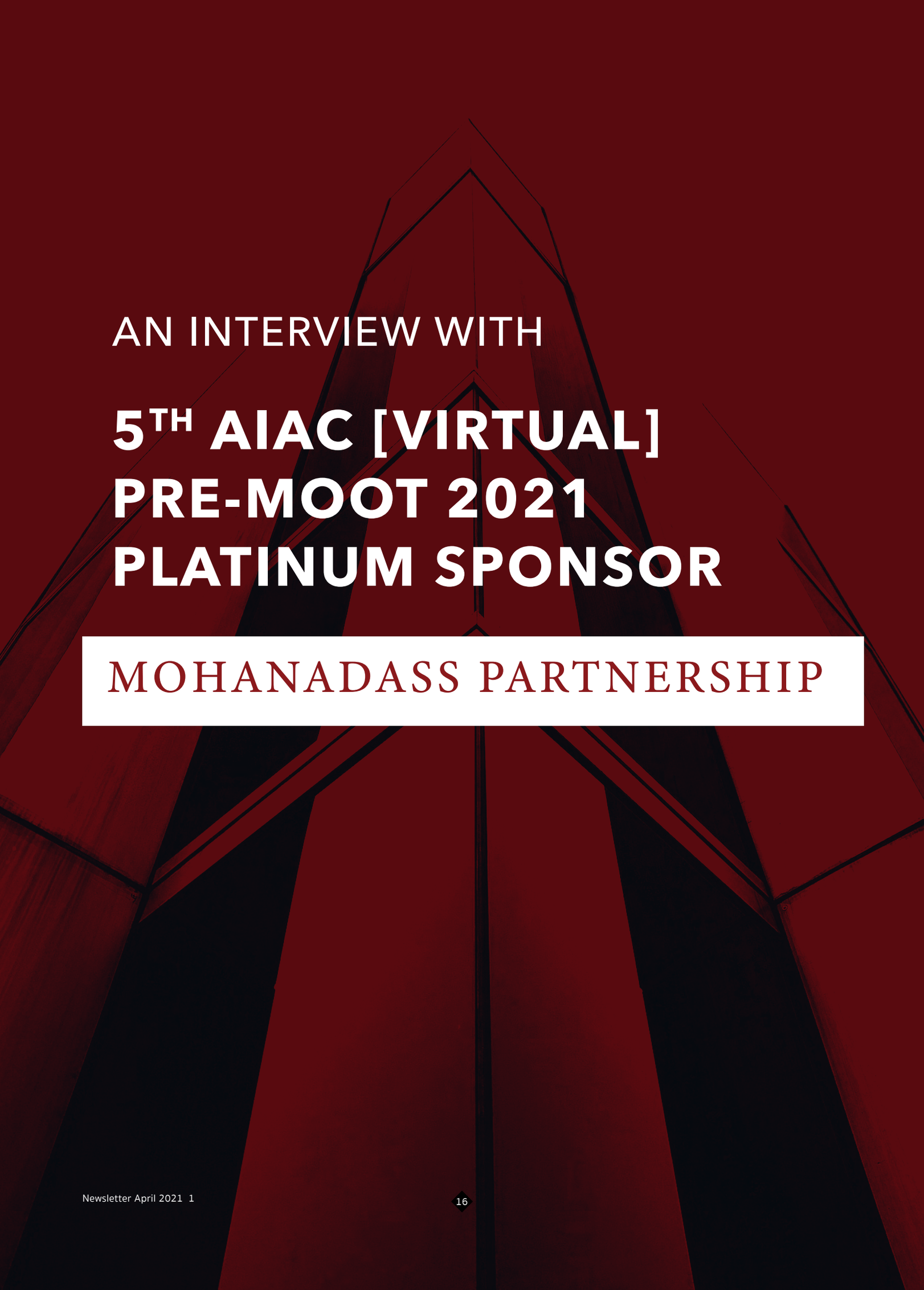
5TH AIAC [VIRTUAL] PRE-MOOT

FOR THE WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

5TH - 7TH MARCH 2021

THANK YOU
SPONSORS

As part of the sponsorship packages for the Platinum, Gold and Silver Sponsors of the 5th AIAC [VIRTUAL] Pre-Moot, the sponsors were provided with the option to either participate in an interview or showcase their logo in the AIAC Newsletter. The following pages will showcase the relevant interviews and/or logos of these sponsors, neither of which shall reflect the AIAC's endorsement of the relevant firms, the individuals associated with these firms or any products or services so advertised. During the Pre-Moot, the sponsors acted as arbitrators in the general and elimination rounds and also participated as speakers in the events surrounding the Pre-Moot and assisted in encouraging others to participate and support the events.



AN INTERVIEW WITH

5TH AIAC [VIRTUAL] PRE-MOOT 2021 PLATINUM SPONSOR

MOHANADASS PARTNERSHIP

MOHANADASS PARTNERSHIP
Advocates & Solicitors

Thank you for being our Platinum sponsor. Could you tell us what inspired you to support the 5th AIAC [virtual] Pre-Moot 2021?

We have a strong commitment to education and support of activities that will train and equip the next generation of arbitration professionals with the skills they need. Investing in education is necessary to ensure the continuing vibrancy of arbitration.

How do you think students will benefit by participating in the pre-moot or other mooting competitions?

The moots conducted by the AIAC are of a very high standard, both in terms of content and the exceptional quality and commitment of the arbitrators involved in the process. It comes very close, in my view, to a real world experience. Mooters will have to up their game on this playing field. This is a learning experience par excellence.

What do you think about the effectiveness, enhancements to facilities being provided in the competition by AIAC?

World class.

Do you have tips for students who wish to have a career in international arbitration?

Arbitration makes for a rewarding career, financially and intellectually. The world of arbitration is a meritocracy where talent supply is in abundance. Its know-how that matters. Professionals who constantly and faithfully improve themselves, and whose integrity is beyond question will succeed.

In your opinion, what are the 3 main skills one needs to succeed in the arbitration industry?

Arbitration work is demanding. Typically, cases are complex, document heavy and raise cross-border issues. There is also the constant need for speed. Armed with everything you know about a case you then also need to persuade an independent Tribunal. Broadly speaking, qualities (not just skills) for success are integrity, intellectual and persuasive ability, and, most importantly, a capacity for tremendous hard work.

Would you recommend teams to participate in future editions of the AIAC pre-moot and if so, why?

Absolutely. If you give it a good go, you will learn, and be enriched. This is an excellent learning opportunity and should not be missed by anyone seeking a career in arbitration.

AN INTERVIEW WITH GOLD SPONSOR

Thank you for being our Gold Sponsor. Could you tell us what inspired you to support the 5th AIAC [virtual] Pre-Moot 2021?

- The AIAC pre-moot has gone from a standing start to an event of epic proportions of some 100 teams in a mere 5 years, a testimony of AIAC's hard work and dedication, and which is most deserving of support
- This is more so when the in-person event has pivoted so quickly and efficiently to a virtual event, responding very well to current needs in changing times

How do you think students will benefit by participating in the pre-moot or other mooting competitions?

- Students benefit in myriad and all-encompassing ways, from the technical aspect of mooting and learning advocacy, to meeting and bonding with students from around the world, to meeting arbitration practitioners and leading lights
- Such experiences could never be had within the confines of a course, university or country
- It also builds their confidence in an international setting

What do you think about the effectiveness, enhancements to facilities being provided in the competition by AIAC?

- Excellent

Do you have tips for students who wish to have a career in international arbitration?

- Spend the time at the start of your career to build strong foundations in the law
- Get exposed to litigation in court, front-end contract drafting as well as project life advisory and dispute resolution
- That cradle-to-grave experience will enable you to understand so much more of the disputes and issues in any arbitration, and allow you to be far more effective than those whose experience is more limited

In your opinion, what are the 3 main skills one needs to succeed in the arbitration industry?

- Strong foundation in the law and being a diligent and effective lawyer – that is a given, and will not be considered in this answer as one of the 3 main skills

  1) Interest in arbitration and ADR – not just because it is fashionable to get into arbitration

  2) An international mindset – that will enable you to be culturally fluent across jurisdictions, languages and cultures

  3) Be result orientated – open to ideas that will promote efficient resolution of disputes, and not be mired in process and "the usual way"

Would you recommend teams to participate in future editions of the AIAC Pre-Moot and if so, why?

- Absolutely
- Benefits as outlined above
- AIAC Pre-Moot is open to more teams because it is a PRE-moot, and it is more friendly and a learning experience rather than purely about winning

AN INTERVIEW WITH GOLD SPONSOR

5TH AIAC [VIRTUAL] PRE-MOOT

FOR THE WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

5TH - 7TH MARCH 2021

bit.ly/aiacpremoot2021 klpremoot

LH AG ADVOCATES AND SOLICITORS

Thank you for being our Gold Sponsor. Could you tell us what inspired you to support the 5th AIAC [virtual] Pre-Moot 2021?

It is a pleasure to be part of the 5th AIAC Virtual Pre-Moot 2021, and indeed, to be recognised as a Gold Sponsor. Our firm has always placed emphasis on educational programmes, which help students to explore career pathways and build meaningful relationships. Apart from having the privilege to participate in AIAC's moot competitions over the past few years, we have also provided students with internship opportunities via KPUM's 30 Days of Summer Internship Programme. Additionally, our firm regularly organises talks and webinars for university students, from introducing them to arbitration to sharing insights about the day-to-day responsibilities of a lawyer. It is hoped that with our support in these programmes, we will continue to make a positive impact on students, particularly those whom aspire to secure a legal career.

How do you think students will benefit by participating in the pre-moot or other mooting competitions?

Mooting is the closest experience to arguing in a courtroom or arbitration and learning about the formalities involved. It enables students to engage in interesting legal issues and allows them to apply the legal theories learnt in law schools to real-life problems.

The AIAC mooting competitions are arbitrated by experienced legal practitioners across Malaysia. Such platforms therefore serve as a good opportunity for students to be evaluated and receive feedbacks on their performance in oral submissions and written submissions. Students will then be able to enhance their oral and written advocacy skills from those feedbacks.

What do you think about the effectiveness, enhancements to facilities being provided in the competition by AIAC?

Befitting its status as a premier hearing centre, AIAC has state-of-the-art facilities equipped with modern IT technology and services, which made the competition such a huge success. We were impressed by how the previous pre-moot was structured to resemble actual virtual arbitration hearings, helping students experience the future of arbitration. Worldwide, there are numerous virtual hearings with witnesses examined or consulted by video conference. As technology continues to improve, virtual hearings will become more common, as all parties become more comfortable with it and appreciate the cost and other advantages it offers. The AIAC has the necessary resources to meet the anticipated demand for virtual hearings.

Do you have tips for students who wish to have a career in international arbitration?

Arbitration is growing in importance each year. In fact, most modern commercial and construction contracts prescribe arbitration as the sole method of dispute resolution. For students who have an interest in arbitration, they may wish to join a community group for young arbitrators, such as the Young Practitioners Group under the auspices of AIAC, and the Young Members Group of the Chartered Institute of Arbitrators, Malaysia Branch. Additionally, students should to track global developments on arbitration blogs such as Kluwer Arbitration Law blog and Global Arbitration Review.

In your opinion, what are the 3 main skills one needs to succeed in the arbitration industry?

Strong foundation in the law and being a diligent and effective Advocacy skills, interpersonal skills and creativity. In order to argue convincingly in the hearing room before the arbitrator or the judge, advocacy skills are essential. Such skills can be cultivated during your studies by participating in mooting, debating or even general public speaking competitions. However, law is not an abstract practice. Any senior lawyer will tell you that the best lawyers are not necessarily those who scored the highest marks in their university exams. At its heart, law is about the regulation of interactions between people. To achieve the best for her client, a lawyer must be able understand and work effectively with people, whether it be her witnesses, opposing counsel, or the judge/arbitrator. Interpersonal skills are therefore critical. Last but not least, lateral thinking. Lawyers should not only be logical and analytical, but should be creative in their problem solving, so as to assist the client's commercial strategies, and business decisions.

Would you recommend teams to participate in future editions of the AIAC Pre-Moot and if so, why?

Definitely. The AIAC pre-moot is not just a preparation for Vis, but a platform for students to explore the arbitration world. The AIAC pre-moot and mooting competitions as a whole have always been organised in a way to facilitate better understanding of the practice of arbitration as a dispute resolution mechanism. By participating in these competitions, students are exposed to common challenges present in real-life hearings (in-person or virtual) such as handling technical difficulties, the ability to keep eye contact with arbitrators or judges and control your pace of presenting to maintain that level of persuasiveness and many more. It is hoped that with this exposure, students will continue to sharpen their skills and be better prepared when they start practice.

AN INTERVIEW WITH GOLD SPONSOR

5TH AIAC [VIRTUAL] PRE-MOOT

FOR THE WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

5TH - 7TH MARCH 2021

bit.ly/aiacpremoot2021 klpremoot

Shearn Delamore & Co.

Thank you for being our Gold Sponsor. Could you tell us what inspired you to support the 5th AIAC [virtual] Pre-Moot 2021?

At Shearn Delamore & Co., we pride ourselves on providing pragmatic and creative solutions for our clients. Our history in the Malaysian Legal Market is testament to our Firm's dynamism and innovation, which allows us to be ahead of the curve. We value quality, integrity and practicality.

We associate ourselves with the objectives and aspirations behind such moots generally, and particularly the 5th AIAC Virtual Pre-Moot 2021, where AIAC overcame the global pandemic to bring international participants and arbitrators together to provide a unique, dynamic and innovative platform to hone mooting skills, pit talents against international competitors and foster goodwill and a sense of camaraderie.

We are honoured to be a Gold Sponsor for this unique initiative.

How do you think students will benefit by participating in the pre-moot or other mooting competitions?

Mooting competitions enable students to:

- Enhance both oral and written advocacy,
- Improve legal research skills,
- Engage with, and analyse legal issues and provide solutions to such issues,
- Improve teamwork skills,
- Enhance their confidence and ability to think on their feet, and
- Portray themselves as marketable and competent to prospective employers.

What do you think about the effectiveness, enhancements to facilities being provided in the competition by AIAC?

AIAC's facilities are top-notch and we commend AIAC for providing such facilities to ensure the smooth running of the competition. AIAC made the event appear seamless whilst being on hand every step of the way to guide those of us who may have lost our way somewhat. It is a testament to the AIAC how quickly they adapted to the virtual setting when the pandemic first hit our shores and we commend AIAC in its proactive ability to make this happen.

Do you have tips for students who wish to have a career in international arbitration?

The International Arbitration scene is growing and thriving on a daily basis. Be proactive. Look for opportunities whereby you can develop your skills and knowledge in this particular area. For example, if you enjoy writing and publishing, you may consider publishing articles or write-ups on upcoming trends, latest news and cases which are of interest to you on LinkedIn, Legal Blogs or Journals. Put yourself out there, showcase your interest in the field and reach out to people with similar interests. Immerse yourself in the numerous courses available on the subject, attend events, conferences and increase your knowledge and visibility in the Industry.

Networking is an essential skill and proves to be beneficial to students and practitioners alike. In the new normal, virtual webinars and networking sessions are conducted almost daily or weekly. It is a great time to build connections with leading practitioners, authors and students across the world.

Reach out to formal and informal mentors. Having a mentor may prove to be beneficial for one's professional growth in this Industry. Students may also benefit from joining Young Practitioner Arbitration Groups such as AIAC YPG, HK45, Young ICCA and CIArb's Young Members Group, amongst others, as such groups organise regular networking sessions, talks and seminars as well as provide mentorship schemes.

In your opinion, what are the 3 main skills one needs to succeed in the arbitration industry?

In our opinion, the 3 main skills one needs to succeed in the Arbitration Industry are as follows:

a) Resilience
The Arbitration Industry is known to be challenging, but rewarding. One needs to be resilient and adaptable to the many changes and challenges which one will face throughout their journey in the Industry.

b) Creativity and Open-Mindedness
Creativity and open-mindedness are skills which one may need to thrive in the Arbitration Industry. These skills will enable practitioners to develop individual unique selling points (USPs) and provide out of the box or unique commercial solutions to their clients.

c) Reliability
One has to ensure that they are someone their peers and superiors are able to rely on to complete assignments or initiate new projects. This skill is essential for one's continuous growth and future in the Industry.

Would you recommend teams to participate in future editions of the AIAC Pre-Moot and if so, why?

We would recommend students to participate in future editions of the AIAC pre-moot. Teams will be able to greatly benefit from such exposure prior to the Willem C. Vis Vienna and Vis (East) International Commercial Arbitration Moot. The participants were good. However, there is always room to learn from each other. Also the arbitrators brought different perspectives. Teams are able to receive invaluable advice, feedback and training from the coaches and world-renowned arbitrators. Students will also be able to learn from their peers and fellow competitors. In our view, teams would greatly benefit from experiencing the atmosphere of a real arbitral proceeding prior to the Vis Moot.

AN INTERVIEW WITH GOLD SPONSOR

UNIVERSITY OF MIAMI
SCHOOL of LAW

Thank you for being our Gold Sponsor. Could you tell us what inspired you to support the 5th AIAC [virtual] Pre-Moot 2021?

The University of Miami School of Law has a strong commitment to experiential learning and created a variety options for students to develop skill building and practical, hands-on opportunities outside of the scope of the regular law school classroom. Notably, Miami Law is the only law school in the U.S. with an International Moot Court Program specifically focused on international law competitions, including in international arbitration, investment law, human rights, maritime law, criminal law and taxation. In addition, Miami Law also has a long tradition of engagement with the law of arbitration, which is embodied in its International Arbitration Institute and prestigious White & Case International Arbitration LL.M. Program, one of eight boutique LL.M. programs for foreign and U.S. lawyers offered. Supporting the 5th AIAC Pre-Moot as a Gold Sponsor provides a wonderful opportunity to help inspire and train the next generation of international arbitration lawyers.

How do you think students will benefit by participating in the pre-moot or other mooting competitions?

International arbitration moot court competitions like the AIAC Pre-Moot provide students with a valuable opportunity to hone their legal research, writing and advocacy skills. Students gain practical experience in a mock arbitration setting outside of the law school classroom. This authentic exercise requires students to act as advocates, analysing and arguing both sides of a hypothetical legal dispute, using procedures modelled after those employed before real-life international arbitration tribunals. In addition, international moot competitions provide great networking opportunities for students, coaches and arbitrators from around the globe.

What do you think about the effectiveness, enhancements to facilities being provided in the competition by AIAC?

Our experience participating in the AIAC Pre-Moot, as a sponsor, arbitrator, panelist in the YPG Conference and with a student team, was excellent. The AIAC Pre-Moot allowed our Miami Law student team to be exposed to a variety of arbitrators who due to their diverse legal and cultural backgrounds significantly enriched the team's thought process around the Vis case with their questions and feedback. Additionally, the quality of the opposing team's legal arguments and presentations challenged the Miami Law team in each round and helped tremendously to continue the preparation for Virtual Vienna. Finally, the AIAC Pre-Moot was extremely well organized. Together with the social events, it was very enjoyable for students, coaches and arbitrators alike, despite the significant time difference.

Do you have tips for students who wish to have a career in international arbitration?

When pursuing a career in international arbitration, it is very important to have a solid foundation in public and private international law, international commercial and investment arbitration, as well as comparative law. Students should pursue studies in these areas while in law school, if possible. In addition, and especially where course offerings on these topics are limited at a student's home university, students should consider pursuing a graduate law degree with a focus on theoretical foundations as well as hands-on lawyering skills in these areas. Miami Law's specialized White & Case International Arbitration LL.M. may serve as an example of a graduate program in this field. It offers specialized theoretical and practical international commercial and investment arbitration courses, including basic and advanced lectures, workshops, and seminars, as well as academic writing and hands-on lawyering skills courses, including semester-long student placements with international arbitration firms and institutions in Miami and beyond. Notably, the LL.M. program offers a number of scholarships, including a half-tuition Vis Moot Scholarship for current or former participants of the Willem C. Vis Moot (East), including students, coaches and arbitrators.

In addition to acquiring the academic foundations, students also should seek to hone their lawyering skills in moot competitions like the Vis Moot and connect with their peers and arbitrators.

In your opinion, what are the 3 main skills one needs to succeed in the arbitration industry?

To succeed in international arbitration, it is very important to have a solid foundation in international arbitration law and related fields. In addition, excellent legal research, writing and advocacy skills are essential. Moreover, it is key to develop cross-cultural competences to effectively communicate and work with people – clients, co-counsel, arbitrators, etc. – across different cultures and legal systems. Foreign language skills are a plus as well.

Would you recommend teams to participate in future editions of the AIAC Pre-Moot and if so, why?

Absolutely! The AIAC Pre-Moot provides a wonderful opportunity for students to hone their advocacy skills, test their arguments and prepare for the Global Rounds of the Vis Moot (East). With nearly 100 teams from around the globe, this pre-moot provides a great training ground for Vis Mooties and plenty of opportunities to network and connect with students, coaches and arbitrators from around the world.

AN INTERVIEW WITH GOLD SPONSOR

JAMES MONTEIRO
Advocates & Solicitors

Thank you for being our Gold Sponsor. Could you tell us what inspired you to support the 5th AIAC [virtual] Pre-Moot 2021?

We have a history of supporting AIAC (KLRCA) events and will continue to do so as long as we can. The AIAC represents all of us in Malaysia who have an interest in arbitration and adjudication. Therefore, continuing to promote the AIAC internationally will benefit all stakeholders in the industry.

How do you think students will benefit by participating in the pre-moot or other mooting competitions?

It allows the best students to showcase their abilities. It allows both the orators and the background supporting members to work as one team to put forth their best case, thereby preparing them for real life in legal practice.

What do you think about the effectiveness, enhancements to facilities being provided in the competition by AIAC?

This was the first virtual platform for mooting under the AIAC. It certainly showcased the AIAC's ability to adapt and stage a world class moot competition on this platform.

Do you have tips for students who wish to have a career in international arbitration?

Choose the right firm and you have to be on top of your game.

In your opinion, what are the 3 main skills one needs to succeed in the arbitration industry?

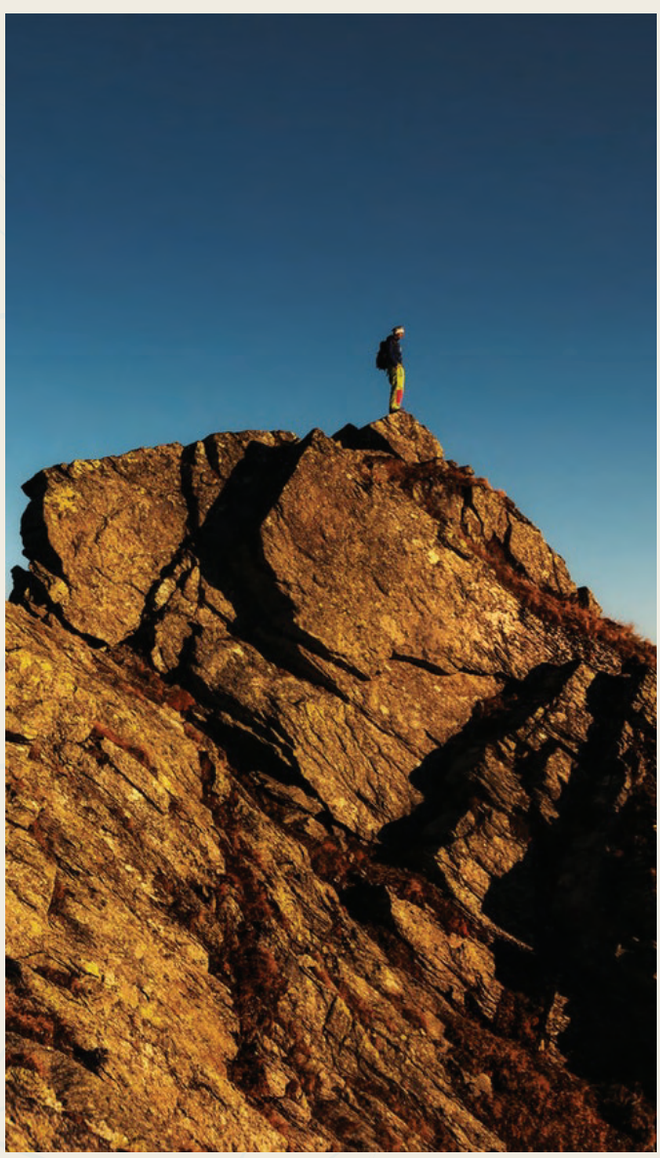
i. Appetite for learning as the industry is fluid and constantly evolving

ii. Ability to deal with people from different cultures and countries

iii. Good command of English

Would you recommend teams to participate in future editions of the AIAC Pre-Moot and if so, why?

Definitely. It's a great platform to learn and build much needed skills for practic



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FROM THE CHAISE LONGUE:
OBSERVING ARBITRATION THROUGH PSYCHOLOGY

When discussing psychology and the legal sphere, most people will think of the studies undertaken in assessing witness memories and testimonies in criminal matters. However, it is possible to use psychological research to understand the biases of witnesses, counsels, and arbitrators in international arbitration proceedings, all of which can play a key role in determining a party's strategy in putting forth its case. Furthermore, such insights can also assist in understanding how an arbitration practitioner can be at the peak of performance, which in turn will enable the practitioner to provide better representation, whilst also promoting a more conducive working environment. To discuss these thought-provoking issues, the AIAC caught up with Ula Cartwright-Finch[1] to discuss how psychology can be used to improve both the lives of arbitration practitioners and arbitration practice as a whole.

1. What sparked your interest in exploring the intersection of psychology and neuroscience with business and law, and what continues to fuel your passion to date?

From my first week in a law firm, it was clear that there was a pretty big disconnect between what I had learned in psychology and what happens in typical legal practice. For example, total sleep deprivation is disastrous for your cognitive functioning, and I remember the surprise I felt seeing colleagues who were visibly impaired after pulling all-nighters. It's a false economy to stay up all night, but most lawyers don't know the data from sleep research or the restorative benefits of a quick nap.

At that point, though, I was still learning how to be a lawyer myself. It wasn't until several years later that I really thought critically about the intersection of psychology and law. I was in Hong Kong at the time, and a colleague found out I had a PhD in cognitive neuroscience. They had a brilliant idea about delivering a client seminar on cognitive biases, so I put that together – and the event was so popular we were literally turning people away at the door. So, it was really other people's passion for the topic that inspired me initially.

The way lawyers and arbitrators respond to themes like witness memory, or biased decision-making is also what keeps me interested. Now that I'm working on this full time, I also have a deeper appreciation of just how much scope there is to use science to improve business and legal practice.

2. Your legal experience is not only extensive but impressive, with over 12 years in various global firms spanning London, Hong Kong, and Madrid. But you started your career in psychology and neuroscience. What made you switch to law?

I'd been studying psychology for almost a decade before I went into law. I absolutely loved the subject, and I learned a great deal during my PhD. But there were aspects of academic research I struggled with. At that time, partnerships with industry were relatively rare, and one of my big frustrations was the impact factor. You could work really hard, discover brilliant things, but your practical impact on the world would be quite small. Academic journals have relatively select readerships!

So, I started looking at other careers. I considered training as a gas engineer so I could open a plumbing business run by and for women. But it takes three years to qualify as a gas engineer in the UK and only two to convert to law, so law school won!

Law had been in my mind when I was young. I studied it as an extra subject at school. During my PhD, I worked with a lawyer when I ran some experiments at the Science Museum in London. We had to negotiate a contract between UCL, myself and the museum, and I really enjoyed that process. I went on to do a vacation scheme at the lawyer's firm, Farrer and Co., and fell in love with the whole experience. Farrer & Co. is based in Lincoln's Inn, which is like Hogwarts for lawyers. It's enchanting, and I loved the work I did on my placement. The subject matter was sensitive and human but solving it legally required rigorous analysis, so it felt like a good match for my skills. After that, I was sold.

[1] Dr Ula Cartwright-Finch is Managing Director of Cortex Capital, a consultancy that fuses insights from behavioural and brain science with the practice of business and law. Ula trains and advises lawyers, arbitrators and experts on topics including virtual hearings, witness memory & interviewing, negotiation and decision-making. She also works with a range of corporate and banking clients on leadership, diversity & inclusion and wellbeing programmes.

Ula has more than 12 years' experience as an international arbitration lawyer working in global law firms in London, Hong Kong and Madrid. She also has first-hand experience in regulatory, risk and compliance in investment bank and telecoms firms. Before converting to law, Ula studied psychology for over a decade, including a PhD in Cognitive Neuroscience. Now she collaborates with leading researchers applying psychology to legal practice.

Ula served as Scientific Advisor to the ICC Task Force on the Accuracy of Fact Testimony in International Arbitration. She is a Visiting Lecturer at Queen Mary University of London and Humboldt University of Berlin, and an Honorary Research Fellow at the University of Warwick.

3. Your days running Cortex Capital must involve operating on a very tight schedule. How do you ensure to protect your well-being and ability to continue to perform? Are there practical strategies you would like to share?

I'm very deliberate and very disciplined when it comes to well-being practices. Partly because I've learned the hard way what happens when you neglect that side of things and partly because I've read the research on how they benefit your performance. I started looking into the scientific literature on mindfulness when I was preparing a training session on difficult conversations. The benefits to cognitive functioning were so compelling, I signed up for a meditation retreat the moment I could. I don't always want to, but now I practise mindfulness most mornings. I also go on tech-free retreats twice a year as a proper reboot. Having a full week away from email requires some planning but what it gives you in clarity of thinking and perspective is worth the Netflix sacrifice.

I also run or cycle most days. And I prioritise sleep, which is boring but necessary. Something new I picked up this winter is cold water swimming. It's difficult to capture with words what jumping into freezing water does for you, but bang for buck, it's the most effective well-being practice I've found so far. And I'm all for getting results fast! I also deliver training on wellbeing, and it helps communicate the message when you've walked the walk.

4. Of your contributions in literature, in the form of books, journals, and articles, as well as in speaking engagements, what is one of the memorable experiences that you cherish?

It's difficult to pick one! An article I wrote on gender diversity and team performance in international arbitration is a favourite for a few reasons.

First of all, I broke the back of it when I was on holiday in Fiji, so some very happy associations there. The research literature itself is also fascinating – though not always easy to reconcile. Assimilating everything into a comprehensive but coherent argument, I remember being an enjoyable intellectual challenge.

To be able to bring science and data to discussions on diversity is also something I'm really pleased I can do. It gives people an accessible and neutral framework within which to handle what can otherwise be quite a sensitive topic. I think there's a lot of fear in speaking about diversity issues. No one likes to make mistakes – especially lawyers – and so it's often that which holds us back, rather than lack of desire to get involved. Science offers a global language we can use to talk about things. Even better than that, it points us towards the most effective solutions.

Diversity as a topic is also close to my heart. My mother has always been a passionate advocate for social justice, so I grew up steeped in Amnesty International posters and feminist thinking. We don't often reflect on the impact of our formative experiences – or we assume everyone has the same influences – but it's an area that runs deep for me.

5. Although the fields of science and law appear disconnected, your work highlights that the practice of international arbitration, or dispute resolution in general, is a field that depends on the operation of numerous human minds – arbitrators, counsels, experts, witnesses and secretariats. In this regard, what is the importance of importing scientific breakthroughs into the legal industry?

As an interdisciplinary field of study, psychology and law has been around for decades for exactly the reasons you mention. Every aspect of dispute resolution rests on our actions and decision-making. But we don't come with an operating manual that explains how or why we behave the way we do. The goal of psychology is to understand human behaviour and cognition, so learning about these processes is an obvious way to improve legal practice.

For a long time, research in this area has been stuck on eyewitness testimony and jury decision making. But what I see is enormous potential to apply scientific knowledge across the entire cosmos of dispute resolution – from de-biasing our decisions around selecting arbitrators, to gathering and evaluating witness evidence more accurately, to delivering more persuasive submissions, to improving arbitrator's decision-making, to creating the best environment for negotiating a settlement. You could even get down to the nuts and bolts of legal practice and use behavioural design architecture to nudge lawyers to improve their time recording.

The bottom line is that we can use the scientific understanding of human behaviour to improve outcomes of human behaviour in the context of international arbitration.

6. What advice would you have to professional arbitrators and legal counsels alike to avoid biases in their critical decisions on a day-to-day basis?

Each decision faces different potential biases, so it's difficult to give generic advice. But there are simple things we can do if we want to beat biases.

Setting aside a bit more time to consider the issue is really important. Most of us operate in a state of perpetual time famine where everything is done under huge time pressure. If we want to make good decisions, we need to give ourselves proper time to reflect.

Stress testing the decision is another effective step. Thinking through alternative options, assuming our decided position is wrong, and bouncing ideas off others are all useful strategies.

In the context of legal decision-making, our intuition can lead us astray, so relying on data instead of gut instinct is also a must.

7. Listening is often said to be an art form in itself. Given the monumental amount of information exchanged during most arbitration hearings, which often go on for several days, involving early hours and late nights, how would you suggest one embarks on the process of training their brain to respond to this information influx, process it, and remain focused on the important aspects of the case?

Big arbitration hearings are a bit like marathons for the mind. Listening is an active process, not a passive state, so doing it well takes more energy and more skill than we might think. This is especially true when the subject matter is unfamiliar or complex.

Ideally, we need to be doing everything we can to put ourselves in the right state for peak performance – eating well, sleeping well, regular exercise and mental training. All these things improve our brain's ability to focus, to understand and to remember what we hear.

We can also be clever about how we use breaks. There's a lot of science around what sort of break packs the most punch when it comes to recharging our brain's ability to perform. During virtual hearings, for example, most people switch immediately from one virtual room to another in the breaks. This means they miss out on the energising effects of physically moving around or getting some fresh air. The key here is learning how to keep your mind functioning optimally over a long period of time.

8. You served as the Scientific Advisor to the ICC Task Force on 'Maximising the Probative Value of Witness Evidence'. What were some interesting facts that you found during this experience with regard to the accuracy of the witnesses' memory in international arbitration?

For me, it wasn't the science itself that was surprising. I was already familiar with the research on false memory and eyewitness testimony from my studies, and I'd written several papers applying those findings to international arbitration.

What was fascinating to me personally was hearing arbitrators and practitioners discussing witness evidence and their views on human memory. I often fall into the trap of assuming everyone knows what I know, so this made me appreciate how much vital education there is to be done on this topic. The Task Force also gave me a much greater understanding of the cultural nuances in handling witness evidence across jurisdictions.

It was also a fantastic opportunity to introduce the arbitration world to scientific research – and vice versa. A big part of our work involved collaborating with Dr Kimberley Wade at the University of Warwick. With her guidance, we conducted an original experiment testing for memory biases in the context of a contractual dispute of the sort typically submitted to arbitration. This study provided compelling evidence that witness testimony in arbitration suffers exactly the same memory biases we see in the criminal sphere. Now Kim and I are working together to expand that research, so there will be more to come on this fascinating topic.

9. Witnesses can often be unreliable, have fudgy memories, or lie. Without giving away your trade secrets, what methods have you found work best when approaching witnesses, be it your own or the opposition's?

This very much depends on the context, but an interviewer or cross-examiner's demeanour can have a significant influence on how many beans a witness is prepared to spill. I think carefully about how I come across throughout an interview, for example, to enable the best communication between myself and the witness. That includes spending time building rapport, making the right sounds to encourage the witness to keep talking, allowing them the silence to think and speak.

The other foundational skill in gathering evidence is reading the witness. I pay attention to what they are doing with their hands and their arms. Have they suddenly shifted position, paused their testimony or changed their tone of voice? Any changes from a witness's baseline behaviour tell me I should look deeper. It's called body language for a reason – there's a great deal you can translate outside of the spoken word when you take the time to look.

10. With the benefit of all your work in psychology, in your opinion, will arbitral awards rendered as a result of virtual hearings be accepted as being as fair and just as those made following in-person hearings?

I don't think we're going to see a swathe of successful set asides solely on the basis that the hearing was held virtually rather than in person.

There's no doubt that a virtual environment has certain inherent limitations that impact the lived experience of arbitration hearings. We have fewer social data to go on, like body language and eye contact, which reduces the amount we can communicate and perceive interpersonally. The higher cognitive demands of a busy hearing screen filled with multiple faces, documents and control panels means that we may take less in. As a result, there will be some disputes that are far less suited to being heard virtually, such as lengthy, complex cases or cases where a witness's credibility is in issue. But in general, I think we've discovered that video conferencing does have the capability to handle arbitration hearings, despite the psychological implications for arbitrators and advocates.

In fact, there's a great deal that arbitrators and counsel can do to improve virtual hearings when you understand the psychological factors involved. I'm doing a lot of work in this area right now, advising on the sorts of adjustments science would suggest we make to deliver the most effective submissions over Zoom, for example, or to reduce the chances of witnesses behaving badly on the virtual stand.

11. You have published many works supporting your belief that it is important to increase diversity in arbitral tribunals. What do you think arbitral institutions, like the AIAC, as well as those selecting neutrals, can do to push for progress in this area?

Arbitral institutions are already leading the way in promoting diversity on arbitral tribunals. Looking at the statistics, it's really law firms that have the serious catching up to do.

But we are still far from parity in gender or ethnicity, and there is always more we can do. I'm working on a big project at the moment, putting decision-making around arbitrator selection under the microscope. Dissecting how these decisions are made has thrown up some really great ideas about how to de-bias arbitral appointments and where to focus in future to encourage change.

One of the biggest obstacles in law firms proposing diverse candidates is that they aren't as familiar with them. For obvious reasons, counsel and parties want their arbitrations to be run and decided by someone tried and tested who they know they can trust. Initiatives that raise the profile of both experienced and up-and-coming diverse arbitrators will help parties expand their "go-to" list of candidates. That's another direction arbitral institutions could pursue to help promote progress.

12. Looking back on your journey, what would you like to suggest, of course, with the benefit of hindsight and work in psychology, to your former colleagues in legal practice that you believe would greatly improve their personal and professional lives?

Ending where I began, get more sleep! It's a difficult piece of advice for lawyers to take because the billable hour ties individual success to the number of hours worked – and therefore awake. But sleep is the tide that raises all health boats. As any wellbeing expert will tell you, if you only do one thing to improve your cognitive performance and emotional health, it's prioritising your sleep.

More generally, spending more time on our well-being. It's easy to get caught up striving for the next goal and the next goal. We often don't reflect on whether we could be living better or happier lives day to day.

Our state of mind is probably the biggest factor determining our quality of life and our performance. We can do exactly the same thing and have a great time doing it or a terrible time doing it, depending on our mindset. Yet few people spend the time actively cultivating their mental state. Luckily, it's one of those areas where you get out what you put in, so it's well worth the time investment.

IN CONVERSATION WITH THE WONDER WOMEN OF ARBITRATION:

A REFLECTION ON INTERNATIONAL WOMEN'S DAY 2021

If there is any commonality between the characteristics of the Amazons of Themyscira[1] and female practitioners in international arbitration, it would undoubtedly be an innate sense of justice, perseverance and resilience to overcome any hurdles that may come one's way, as well as the desire to make the world an inclusive place. In the spirit of International Women's Day 2021, the AIAC interviewed three (3) leading female arbitration practitioners who are at different stages of their careers – Hilary Heilbron QC ("HH"),[2] Wendy Tan ("WT"),[3] and Lilien Wong ("LW")[4] – to understand how they #choosetochallenge and how they have faced and overcome challenges during the course of their careers. The excerpts from their interview are below.

1. What inspired you to become a lawyer? If not a lawyer, what would have you been?

Hilary Heilbron QC

Wendy Tan

Lilien Wong

HH: My mother, Rose Heilbron, was a very famous and pioneering English advocate and lawyer of the last century. She was England's first female senior judge and joint first Queen's Counsel. She became a trailblazer and legal icon, achieving many firsts in the legal profession and was an inspiration to many young women who later followed in her footsteps. Her story is told in the biography I have written of her, currently in paperback, entitled "Rose QC". It is a story of achievement against the odds, of her brilliant advocacy and her fascinating cases, as well as a window on life in the second half of the last century, particularly for women professionals.

I was one of those whom she inspired, and although I practised in a different area of the law, undoubtedly it was because of my mother that I became a barrister and later a Queen's Counsel myself. My father was a doctor, and I would have loved to have been a doctor, but somehow, I don't think I could have coped with the blood and gore!

WT: Candidly, I went into law school without any aspiration of becoming a lawyer. Once I started my first day at work as a lawyer, I never looked back. I found the practice of law meaningful, dynamic and intellectually stimulating. Since having discovered the joy of motherhood, if I were not a lawyer, I would probably look at pursuing a career in early childhood development and education.

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[1] This is a DC Comics reference.

[2] Hilary Heilbron QC is a barrister at Brick Court Chambers who now focuses on international arbitration, primarily as an international arbitrator, but occasionally still as counsel. She has accepted well over 100 appointments as arbitrator (party nominated and chair) both under the main arbitral institutions and ad hoc in many very substantial cases. As counsel, Ms. Heilbron QC has been involved in some of the leading English cases in the field of arbitration, including appearing before the UK Supreme Court in *Dallah Real Estate Tourism Holding Co v Government of Pakistan* and before the English Commercial Court in *Sulamérica Cia Nacional de Seguros v Enesa Engenharia S.A.* as well as many other commercial cases. She is currently a member of various international task forces on current topics in international arbitration and a former member of the LCIA Court and the ICC UK Arbitration and ADR Committee. Ms. Heilbron QC has spoken and written widely on international arbitration and cross-border litigation. She is also the biographer of *"Rose QC"*, the remarkable story of her mother, Dame Rose Heilbron, a trailblazer and legal icon of her time, re-issued in paperback in November 2019.

[3] Wendy Tan is a partner at Morgan, Lewis & Bockius LLP and also a director at Morgan Lewis Stamford LLC, a Singapore law corporation affiliated with Morgan, Lewis & Bockius. She is a member of the steering committee of the firm's ML Women initiative, a team established to harness the strength of women in Morgan Lewis through partnership with clients, and to create opportunities for women to come together around a shared industry or practice. Ms. Tan's practice covers litigation and transactional matters. She has over 20 years' experience counseling clients on a wide range of commercial litigation and international arbitration disputes, particularly those relating to the energy, maritime and international trade sectors. She represents clients in the Singapore Courts and is also regularly retained as counsel in international arbitrations seated in various jurisdictions including Singapore, Hong Kong and London. Ms. Tan's work has won her recognition from the industry, including being nominated for "Dispute Resolution Lawyer of the Year" at the Asia Legal Business South East Asia Law Awards 2019, "Local Disputes Resolution Star" in international arbitration, general commercial, shipping, and insurance by *Benchmark Litigation Asia-Pacific, and Best Lawyers* in Singapore for maritime law and trade law. Her experience in commercial arbitration was also mentioned in the 2020 edition of *Global Arbitration Review (GAR) 100*, a guide to the leading international arbitration firms.

[4] Lilien Wong is a Partner at Shearn Delamore & Co., a leading law firm in Malaysia. Upon graduating with 1st Class Honours in law in 2010, she joined Shearn Delamore & Co. In 2014, she received scholarships to pursue her postgraduate studies and obtained a sabbatical from the firm to complete a full time LLM programme. She returned to Shearn Delamore & Co in 2016 upon obtaining a Distinction in Master of Laws (International Commercial Law). Ms. Wong was made a Senior Associate in 2016 and was promoted as a Partner in 2019. She represents clients in commercial litigation and arbitration, both domestic and international. Whilst Ms. Wong has represented client from various industries on a wide range of disputes, she focuses on disputes in e-commerce, telecommunications & multimedia, social media, project development and gaming activities. She also has extensive experience in regulatory compliance work which fall under the purview of various authorities including the Competition Commission, the Communications and Multimedia Commission, the Malaysian Aviation Commission, the Anti-Corruption Commission and the Personal Data Protection Commissioner.

LW: The reason why I decided to venture into law upon completion of my tertiary education was attributed to my late father. He served the Bar for 30 years. Although I spent many weekends and school holidays dawdling around in his law firm when I was younger, I was not very inclined to start a career in law initially, knowing well that it is a path that would put me in a constantly strenuous working environment and in a situation where I may have to continuously deal with conflict between personal and work priorities. I could remember that many of our dinner conversations revolved around my father sharing the many cases that he was handling. Nevertheless, through the qualities demonstrated by him both as a father figure and as a lawyer, he has inspired me to embark on this path of law and to be a lawyer who is compassionate towards those who need assistance and passionate to keep up with the rapidly changing legal developments. More importantly, my father inspired me to act "without fear or favour".

If I had not pursued law, I would have most likely become a restauranteur, a chef or a baker. During my idle time, I do enjoy hanging about in the kitchen, recreating the taste of family recipes, improvising existing recipes, and inventing new ones. The countless possibilities in mixing and matching raw ingredients into different cuisines excite me. I find tremendous joy in seeing my family and friends enjoying my food. So, if you no longer see me in court or the arbitration centre in future, there is a chance of you seeing me running one of the restaurants in town.

2. Why did you choose to pursue a career in international arbitration?

HH: I did not choose to pursue a career in international arbitration as I started life as a commercial barrister in commercial Chambers doing mostly cases in the Commercial Court in England and appearing from time to time in arbitrations, initially, in my early career as a junior barrister, in maritime arbitrations. My participation and more recent focus on international arbitration has evolved in the last 20 years as a natural progression from my earlier practice in the Commercial Court. The type of work is not dissimilar save that it is more global and, not wanting to be a judge in the English courts, it was a natural progression from being exclusively an advocate in the courts to focusing principally on being an international arbitrator, although occasionally still trying my hand at advocacy in the international arbitration context.

WT: I have an interest in conflicts of law. I started my legal career in shipping, a practice area where international arbitration is the default dispute resolution mechanism. Along the way, I gained experience in a broad range of commercial disputes and saw the growth in the use of arbitration as an alternative to traditional litigation. I enjoy the intellectual challenge of handling cross-border disputes, learning about other legal systems and the opportunity to interact and work with people from different countries and cultures.

LW: The diversity in international arbitration! My first international arbitration was a cross border dispute involving counsel and arbitrators from 5 different jurisdictions. Working with counsel from another country and a civil law background was an eye-opening experience. Being a junior counsel then, it was fascinating to witness the Senior Counsel from different countries conducting the matter. This is different from a court proceeding in Malaysia which is heavily regulated by written rules. The setting of an arbitration and a litigation matter are also quite different. One feature which I am fond of is the level of autonomy and flexibility offered to the counsel and the client. The flexibility in procedural matters makes it an appealing dispute resolution process. For example, timelines are often agreed upon between the parties rather than being imposed on the parties, reducing technical procedural objections which happens more often in court.

Notwithstanding the above, a less formal response to the question would be the opportunity to travel to different places, something which I enjoy, be it for work or leisure.

3. The three of you are at different stages of your respective careers. What do you consider is your greatest professional achievement to date? What has been the greatest challenge you have faced and overcome?

HH: It is always difficult to point to one specific achievement or case or one specific challenge. I think the answer to the question is that I have managed to stay the course as a female barrister at a time when it was still difficult for women to progress in the profession, particularly in commercial work, and to achieve the status of Queen's Counsel at a time when it was still a relative rarity. Obviously, appearing in cases in the Supreme Court, and its predecessor, the House of Lords, and the Court of Appeal have been stimulating and interesting experiences as well as some specific cases which I have undertaken. I also consider it an achievement to have transitioned from a national barrister to one with an international profile in the arbitration world and to be able to count as friends and colleagues, lawyers from all over the world.

WT: Winning a case on a novel legal issue in the face of a mountain of precedents in other jurisdictions stacked against me. It was gratifying to have arguments that I had spent hours crafting accepted by the judge. Even more so when the decision was later affirmed by the apex court in Singapore. This outcome played a strategic pivotal role in the client's successful resolution of a series of similar disputes.

The greatest professional challenge is learning to accept the reality that in litigation, there is inevitably a winner and a loser no matter how much hard work you devote to the case, and to cope with the ensuing disappointment and self-doubt. Years ago, I took on a difficult appeal as counsel for the appellant. Till this day, I remember the exchange vividly with a respected senior judge at the end of the hearing. To my surprise, he told me that I had "made an impossible case arguable". Although I lost that appeal, I gained tremendously from the encouragement. It is a source of motivation that I tap into whenever the going gets tough.

LW: I had the privilege of being made a partner in one of the oldest and largest firms in the country, 8 years after being called to the Bar. In 2014, I obtained a scholarship to pursue a full-time Master of Law (LLM) Programme in the United Kingdom. Eager to explore the other parts of the world, I was prepared to make some sacrifices, one of them being to give up my career in the firm. It came to me as a pleasant surprise when my mentor, Shanti Mogan, expressed her support for me to further my studies on sabbatical instead. I was also fortunate to obtain the support of other partners to pursue my studies.

One of the greatest challenges I faced was during my junior years when I first started chambering. The transition from university to a corporate culture was not easy. This, coupled with the fact that I was quite an introvert and a shy person at that time, made me wonder if this career was right for me. Nevertheless, thanks to the support offered by my mentor, Shanti Mogan, my other partners and peers, I have overcome this challenge, and I am glad I stayed on!

4. As you know, the theme for International Women's Day 2021 is #ChooseToChallenge. What does #ChooseToChallenge mean to each of you, and have you ever #ChooseToChallenge?

HH: As a bit of a dinosaur who does not use social media to any great extent, I have to address this question at a more basic level. Way back in the 1950s, my late mother who used to speak frequently on women's issues and would call for such things as

equal pay for women. The clarion call remains 70 years later. I believe, as women, we should all play our part in promoting and ensuring equality of opportunity and pay for women.

There are things that one can do as a senior professional to try to ameliorate the situation, for example, trying to ensure that female arbitrators are put on lists of arbitrators if one is in a position to do so or similarly to ensure that there is adequate female representation on panels at conferences and simply showing that it can be done.

WT: It means standing up against gendered actions or assumptions.

In the early years of my career, I once flew on short notice from Singapore to London to attend an urgent multi-party settlement negotiation meeting with a client. When I arrived at the reception of the opponent's law firm where the meeting was held, I was assumed to be my client's secretary. I soon discovered that I was the only woman lawyer in the big board room. When the meeting started, the fraternity of male lawyers conducted the meeting as if I was not in the room. It was intimidating, but I made a conscious effort to speak up and insist on my right to participate in the discussion. What left an indelible impression on me was my male client saying this to everyone in the room: "I will listen to whatever Wendy advises me to do". He remains a good client to this day.

LW: Society pressure, peer pressure, gender disparity and many other external factors often make us feel that we do not have a choice in our day-to-day lives. The theme reminds us that having the right to "choose" is an inherent and fundamental value in our lives. It does not have to involve big decision in life. It can be as easy as expressing our view and raising awareness of gender equality issues with our friends, family or colleagues.

Some years ago, I co-organised a female lawyers networking event which was initiated by a few senior female practitioners. Each core member was to invite 1 senior female lawyer and 1 junior female lawyer to the event. The objective of the event was to empower female lawyers to strive in the legal fraternity. We had participants comprising of fresh graduates, lawyers who left practice after marriage and decided to return to the workforce, as well as junior lawyers who just started up their own practices or are in the midst of considering a change in career. In this event, we provided a platform for junior female practitioners to empower each other and to seek guidance, inspiration and moral supports from the seniors. All in all, this would be an event which I would like to explore again at the working level as one of the #ChooseToChallenge initiatives.

5. Over the decades, many articles, interviews, and commentaries have been published and broadcast about women in different professions "breaking the glass ceiling". What does the concept of "breaking the glass ceiling" mean to you professionally as a legal practitioner and personally as a woman, particularly when it comes to balancing work and family lives?

HH: In my view, the phrase "breaking the glass ceiling" is rather outdated. While it is true that there remain many positions that have not yet been held by women, the real problem today is not that senior positions have not occasionally been filled by women, from Prime Minister to the chair of the board of a public company, but that these events remain rare rather than the norm. I look forward to the day when it is no longer a matter of note as to whether or not the person promoted is male or female, and I always say that I am a barrister who happens to be a woman, not a woman who is a barrister.

I have never been someone who has looked over my shoulder and viewed my successes or failures against the background of being a woman but on the basis of professional recognition by those using my services or promoting me, though undoubtedly there has been prejudice behind-the-scenes. I am of the generation where one just got on with the job, something which is rightly not tolerated today. Women have found their voice, but the real change I have seen is in the number of women in the legal profession, which means that the sheer force of numbers has started to bring about change and will continue to do so.

WT: Being assessed and treated by others as an equal based on merit, and not by gender. I am fortunate to be in a firm that is committed to recruiting, retaining and advancing women lawyers. Morgan Lewis is one of the largest law firms in the world led by a woman, Jami McKeon, a mother of four children. Our ML Women initiative embodies the firm's commitment to ensuring that women are involved in client relationships, and that gender parity remains at the forefront. The firm has also implemented programs such as a Remote Working Program and established a Parent Lawyer Network to be a foundational pillar in helping our women lawyers advance while meeting parental and client needs.

LW: My personal view on the "glass ceiling" phenomenon in the legal profession is that we have more female lawyers at the junior level while the top positions are often held by senior male partners. The law firm that I am working in turns 116 years old this year. It was established in 1905. We had our first-ever lady Managing Partner, Datin Grace Yeoh, after more than a century, in 2016. The firm's Dispute Resolution Department has also been historically headed by senior male practitioners. It is not until recent years we had our first female Head of Department, Datin Jeyanthini.

Personally, I have seen talented practitioners fall off the corporate track when they started having a family. Imagine a working mother having to pick up her kids from school, send them for tuition classes and fetch them from one extra-curricular activity to another. At the same time, this same mother has several project deadlines to meet. Being a lawyer is already known to be a highly competitive, fast-paced and stressful career. Eventually, you will hear about mothers who have had to juggle between family and their legal careers quitting or changing their careers to other jobs with a reduced job scope and lesser pay so that they can prioritise their family. That is the reality. I believe the key factor to balancing work and family lives is flexibility, both in terms of working hours and location. In practical terms, it requires a joint effort by both the employer and employee to reach a sustainable solution.

6. In your opinion, should the focus of advancing women in international arbitration in contemporary times be centred on "breaking the glass ceiling", or should attention be diverted to promoting another ideal? If so, what should that ideal be?

HH: I have partly answered this question in my answer to the previous question. The goal, in my view, should be equality of opportunity and success and promotion dependent upon merit and hard work and not on any other basis.

WT: Yes, though personally, I prefer to express it in terms of empowering women. When women are empowered, the ceilings will be cracked.

LW: I would focus on raising the awareness of gender equality between men and women. Many still believe that since women are biologically and psychologically different from men, gender inequality is the norm and the acceptable position. Cultural upbringing may have a role to play in this. The concepts of men picking up the bills and women should do the chores are still very

much seen as the ideal family concepts at different levels of society. This has an impact on the cause of advancing women in their respective career paths. Hence, when we speak of ways in "breaking the glass ceiling", perhaps we can start from the basic, i.e., identify if there is a glass ceiling, what it is and make people of different genders aware of the same.

7. Do you believe there are presently sufficient efforts to enhance the participation and attrition of women in international arbitration, or the legal profession in general, or does more need to be done?

HH: There is always more that can be done, but many of the initiatives, such as the Pledge and those from various arbitral institutions, are all pointing in the right direction. I have always believed, as I said above, that the sheer force of numbers of women entering the legal profession around the world makes it inevitable that the talent which they offer cannot be ignored, and the groundswell of this tide of female talent will inevitably change things even more, although we may have to be a little patient.

WT: I applaud the progress made, but we are not there yet. There is room to do more, and to do it better. One of the greatest challenges for women practitioners aspiring to be arbitrators is the lack of opportunity to gain experience. Without experience, it is difficult to be listed in institutional rosters, and that, in turn, limits the visibility and potential appointment opportunities available to them. It would help if parties and their counsels can actively apply their minds when drawing up a list of potential arbitrators to include a fair representation of women candidates.

LW: I think there is still much for us to do in the international arbitration community. It has been encouraging as we see more female judges in the judiciary in Malaysia during these recent years and having the first female Chief Justice in 2019, after more than 50 years of achieving independence. There are many roles that are traditionally filled up by men and remain unchanged to date. Of course, as the saying goes, Rome was not built in one day. Hence, one way to increase women's participation in international arbitration is to focus on the up-and-coming group of young female practitioners - by having more female role models to inspire young practitioners to venture into international arbitration, encourage them to engage in supportive networking and promote female counsel and arbitrators.

8. In recent times, large strides have been taken both locally and globally to enhance the participation of working parents, particularly working mothers, in the legal profession. These include policies on access to paid parental leave, flexible working arrangements, and access to emergency childcare, to name a few. However, access to such policies and/or benefits is not uniform globally, and at times, is considered a rarity in Asian jurisdictions, particularly in local firms or organisations. In such circumstances, what advice would you give to female practitioners who are desirous of advancing their international arbitration careers and seek to create or maintain a family life as well?

HH: I do not have children myself and so have not had to face this difficult problem, but as being the child of a working mother at a time when a female professional mother was extremely rare, I can attest to the fact that, although parents feel guilty, one can come out alright (I hope!) at the other end. I never felt deprived by having a working mother and it gave opportunities to me which I would not otherwise have had. In those days, there was no maternity leave or flexible working, so things have improved. In those days, there were no female-orientated policies such as parental leave.

One of the very few benefits of the awful COVID-19 pandemic is that it has opened the world's eyes to the feasibility of flexible working and more working from home, which should help female professionals.

WT: Take action. Speak to other women in your organisation, start a dialogue with senior management, advocate your case and seek implementation of changes that will enable women to thrive. If your organisation refuses to listen, it is not the right place for you. There are organisations which are committed to promoting inclusion and diversity and have strong parental and family accommodation policies. I am proud that Morgan Lewis is one of them. At the same time, it is also important to have a support network at home. It is tough without a partner who supports your career aspirations and access to trusted family members and friends who can help care for the children.

LW: Due to the pandemic, working from home has become far more acceptable in the workplace than it ever was before. One common concern or fear by employers is whether that affects the productivity of employees. Nonetheless, if employees can manage this "working from home" culture effectively, this would encourage and promote the practice of enabling employees to regularly work from home (not just during this pandemic era) and to also negotiate for flexible working hours.

9. Do you believe the international arbitration community should continue to push for diversity and gender parity causes? Why or why not?

HH: Clearly, the international arbitration community should continue to pursue initiatives to enhance representation at all levels and in all spheres of international arbitration, both on diversity and gender grounds.

WT: Absolutely. The best talent is not defined by gender or race. Diversity brings a variety of perspectives and experiences that will improve the quality of reasoning and decisions. This enhances the legitimacy and user confidence in the outcomes of the arbitral process.

LW: Yes. I believe that advancing diversity and gender parity causes are mutually beneficial to both men and women in every sphere of life; at the workplace, in the family and to the society at large. The United Nations has identified that gender equality has the attributes in accelerating sustainable development. A few female world leaders made it to global headlines recently with their prompt response to the pandemic. They are shining examples of the importance in empowering women and promoting gender equality.

Promoting access to equal opportunities for female practitioners in the international arbitration community and empowering them to take on more leadership roles will increase competition in the community and help female practitioners to level the playing field between men and women. Hence, encouraging more female leaders in the community, I believe, will contribute to the advancement of the international arbitration community as a whole.

10. Former US Secretary of State, Madeleine Albright once famously (and controversially) remarked, "There is a special place in hell for women who don't help other women".

Hilary, as an internationally revered female arbitration practitioner, how do you use your knowledge and influence when you #ChoosetoChallenge?

HH: I think I may have answered this question in one of the earlier questions, but I think it extremely important for females in the profession to push other females on the same basis as they push their male colleagues, and I hope I do this when the opportunity arises.

Wendy, how do you place yourself as a sounding board and mentor for younger female practitioners – have you ever had any challenging moments where you wished you could have done things differently?

WT: I encourage communication and aim through it to understand their challenges and goals in order to see how I can support them in their professional development. I strive to help them acquire the confidence to make their own decisions by giving and creating opportunities to practice that in the conduct of the case.

Lilien, as the youngest interviewee here, how do you find the symbiosis between senior and junior female practitioners in terms of supporting each other, and what is your biggest aspiration for diversity and parity causes?

LW: I remember a comedian who once said that 'It takes very little to be a great dad, but it also takes very little to be considered a bad mom'. If a father takes the child to see a doctor or change a diaper, he will be perceived as a good dad. In contrast, a mother who inadvertently forgets to pick up the child from school will be seen as neglecting her child.

It is not uncommon to hear that sometimes women are making things more difficult for women. I believe that everyone (both men and women) has a role to play in advancing diversity and gender parity causes. The key is to realise that women are different from men, accept that there will be issues which matter for a female but might not be common for male and offer more support and compassion towards one another. Specifically, in a senior-junior relationship, having more senior female leaders in the legal fraternity who make conscious efforts to inspire the juniors to climb up the corporate ladder will no doubt aid the #ChooseToChallenge cause.

11. If you had the opportunity to set the theme for next year's International Women's Day, what would it be and why?

HH: Difficult to say – perhaps "Fulfilling the goal of equality".

WT: #StepUp. We can all do more to achieve a gender-equal world.

LW: "Dare to Pursue"! In addition to being aware that you have the right to make a choice, have the courage to pursue what you believe in and stand by your decision when you face obstacles or hear the sound of disapproval.

12. What advice would you give to your younger selves and/or to the present and future "Hilarys, Wendys and Liliens" out there?

HH: Work hard, do your best, don't be put off when things go wrong, don't constantly look over your shoulder but look forward to see how you can avoid the same thing happening in the future and prove your ability. International arbitration is a fulfilling and expanding area of the law both for advocates and arbitrators. However, I think patience is a trait which is often forgotten. One cannot run before one can walk, and, for example, to be an arbitrator, one needs experience of arbitrations and a sound grounding in various areas of the law: not just the procedure of arbitration. I often say to people if you were having brain surgery, you would not want someone who had just been qualified for 4 years - you would want someone who had been a brain surgeon for a considerable period of time.

WT: Don't fear failures. When you encounter failures – and you will – don't lose heart and write yourself off. Losing a case does not make you a failure. Learn from it, find the courage to pick yourself up and carry on. And above all, be true to yourself and do what is right.

LW: To my younger self (and to the juniors who are reading this): Be more confident of yourself and have more courage in pursuing what you believe in. There is a story which I find motivating. You are doing your first job, and your objective is to sell a book to the owner of a house. You knock, wait for the door to be answered, introduce yourself and your product. If you succeed, you make your first sale. If you get rejected, you stand right where you begin. Go for it, there is nothing to lose!

To the present self: You have done a good job, keep it up!

To the future self: You have been through a lot. Do continue to assist those who are in need and inspire those who are in pursuit of their goals and dreams.

TRENDS IN ARBITRATING FINANCE AND TECHNOLOGY DISPUTES

A reason for the popularity of arbitration globally is its effectiveness in resolving disputes concerning an array of arbitrable subject matters, including matters that were traditionally considered best suited for litigation. In the 2021 editions of the AIAC Newsletter, we will be publishing a three-part special where leading practitioners will share their insights on trends in arbitrating disputes across a range of industries. Part I of this special publication showcases insights from James Freeman ("JF")[1] and Yu-Jin Tay ("YJT")[2] on trends in arbitrating finance and technology disputes, respectively. The excerpts of this interview are below.

James Freeman

Yu-Jin Tay

1. What features of arbitration promote the resolution of technology and/or financial disputes?

JF: Banks mainly turn to arbitration for enforcement reasons. Historically, banks have preferred common law courts in the expectation of robust and predictable decision-making and, to some extent, speed (through summary judgment). However, they tend to prefer arbitration if a court judgment will not be enforceable where the counterparty's assets are located. The New York Convention remains arbitration's greatest point of distinction.

Other features of arbitration can be attractive in certain cases. A survey by Queen Mary University of London in 2013 of attitudes to arbitration in the financial sector suggested that users appreciate the ability to appoint specialist decision-makers in international arbitration. This may be more of a factor in jurisdictions where the courts have less of a reputation for experience in complex financial disputes. It was an important factor behind the establishment of the P.R.I.M.E. Finance arbitration centre in the aftermath of the 2008 global financial crisis. The limited use of the P.R.I.M.E. Finance arbitration rules to date suggests that this may be less of a distinguishing factor than the 2013 survey would lead us to expect.

Perhaps a more important factor in the growth of arbitration in the financial sector is the general (but not universal) presumption of confidentiality in international arbitrations. This has been a key driver in the growing use of arbitration in M&A (including in the financial sector) and in private wealth, for example.

YJT: There are three features that are most often discussed relative to the alternative of litigation.

The first is the fact that arbitration can be confidential and is thus private and away from the public eye.

The second is that it may be possible to nominate or select your own arbitrator. Parties may be interested in particular expertise and experience or, indeed, cultural affinities.

The third is often a decisive element, and it concerns 'portability' of enforcement - whether the outcome of the dispute resolution procedure is enforceable in the relevant jurisdictions. For instance, some tech companies and their general counsel have traditionally preferred their disputes to go to litigation before specialist courts that they regard to be more predictable (and reliable) than international arbitration. However, if the judgments of those courts are not enforceable in the likely places of enforcement, then international arbitration has to be considered.

2. What are the most common claims raised in financial disputes that are referred to arbitration?

JF: In my own experience, the variety of claims in finance-related arbitrations can be very wide. This reflects the breadth of commercial practices which fall under the 'finance' umbrella. Trade finance and derivatives, for example, are very different things. I have personally conducted cases involving derivatives and swaps, bail-out legislation in the 2008 financial crisis, loans, trade finance, real estate finance, project finance and insolvency, among other things.

Overall, the most common claim type is, unsurprisingly, a claim for debt. These claims often look straightforward at the start. But experience has taught me that debtors always find a way to raise a defence when the sums at stake are large enough. A truly straightforward claim is therefore rare.

3. What are the most contentious claims raised in technology disputes that are referred to arbitration?

YJT: It is difficult to answer such a question with generalisations because by the time a case gets to a full-blown arbitration, more and more issues tend to get thrown into the mix, and every little issue can seem highly contentious. To parties bitterly engaged in

[1] James Freeman is a partner in the International Arbitration Group in the London office of Allen & Overy LLP. He has conducted arbitrations under all the major sets of arbitration rules and all the major seats (including in APAC) and has particular experience of acting for financial institutions in arbitrations. He is a Solicitor Advocate and routinely appears as an advocate at substantive hearings. He also sits as an arbitrator. In addition to his work as counsel and arbitrator, Mr. Freeman advises banks on the drafting of arbitration clauses for complex multi-party transactions. In particular, he advised ISDA on the second edition of its Arbitration Guide which sets out market-standard arbitration clauses for use with the ISDA Master Agreement.

[2] Yu-Jin Tay is a partner in Mayer Brown LLP's Singapore office and head of the firm's international arbitration practice in Asia. He has practised in Singapore, London, Paris and Washington DC and has over 20 years of specialist arbitration experience across a wide range of sectors including energy, natural resources, technology and manufacturing, construction and infrastructure, banking and financial services and investment treaty arbitration, involving the world's leading arbitral seats and institutions. Mr. Tay was one among four Asian lawyers featured in *Global Arbitration Review's 2011 global 45 under 45* ranking and has been ranked among the top partners in *Arbitration: Future Leaders* for consecutive years. He is recognised annually as a leading individual in major legal directories including GAR's International Who's Who (since 2010), *Chambers Asia-Pacific* (since 2008; currently ranked in the Asia-wide, Singapore, Indonesia, South Korea, and India chapters), *Legal 500* (since 2008), *Euromoney Guide to the World's Leading Experts in Commercial Arbitration* (since 2006) and *Benchmark Litigation* (ranked Local Disputes Star since 2013).

battle, they would often be hard-pressed to identify what is the 'most contentious'!

Generally, the most contentious or hard-fought disputes tend to be those with the highest stakes for the parties concerned. This typically means that the amount in dispute is very high or the dispute involves 'bet the company' or 'bet the business' elements.

In technology-related disputes such as high-stakes licensing disputes, this could be a fight over the technology licensee's development of new technologies which are asserted by the licensor to be in breach of the licensor's IP. This could be matched by counter-arguments that the licensor's licence agreement is overreaching and should be invalidated by the application of antitrust laws. At its core, such a dispute could be about preventing the licensee from becoming a major competitor of the licensor's in the licensee's home market or even in global markets.

Other examples of 'bet the business' disputes that are highly contentious include arbitrations with parallel litigation that often seek to prevent a business competitor (who may have been a former collaborator over a joint business within a small sector) from going to market with a new product or service on the grounds that doing so infringes the claimant's IP rights. There may be emergency arbitrator procedures invoked, and sometimes the granting of interim relief can effectively dispose of the dispute. This could render the early stages of the dispute 'most contentious'.

Other cases are considered 'most contentious' in the sense that the dispute is not amenable to easy settlement. The case could involve very little middle ground and be 'all or nothing' in the sense that either one side prevails fully in its interpretation of an agreement or the other side prevails. The stakes could also be high or involve market access or market share such that neither side is prepared to compromise. Such technology-related cases can also be considered 'most contentious'.

4. What kind of issues arise in terms of arbitrability within the technology and/or financial sectors?

JF: Arbitrability concerns the question of which categories of dispute can validly be submitted to arbitration. If an issue is not arbitrable under the law of the seat, an arbitration will not be allowed to proceed. Non-arbitrability can also be an issue at the enforcement stage. In all major commercial jurisdictions, the categories of subject matter which cannot be submitted, and are therefore not arbitrable, are few and narrow, and have become fewer and narrower over time.

The vast majority of disputes arising out of financial transactions will be regarded as arbitrable. Financial transactions are, after all, a core commercial activity, and the resolution of commercial disputes is the very essence of commercial arbitration. The categories of disputes now regarded as non-arbitrable are generally in some way removed from financial disputes in their nature (e.g. issues arising under criminal or family law). Generally, there needs to be some public interest which makes it essential for a dispute to be resolved in a court rather than before a private arbitral tribunal.

Where there are issues of non-arbitrability, they arise under particular national laws. It is, therefore, hard to make generalisations. Nevertheless, three pockets of the financial sector where arbitrability can be an issue are claims based on breaches of securities laws, claims connected with insolvency, and claims involving consumers. But even in these pockets, non-arbitrability issues are rare and confined only to specific jurisdictions.

Where there are issues of non-arbitrability, they arise under particular national laws. It is, therefore, hard to make generalisations. Nevertheless, three pockets of the financial sector where arbitrability can be an issue are claims based on breaches of securities laws, claims connected with insolvency, and claims involving consumers. But even in these pockets, non-arbitrability issues are rare and confined only to specific jurisdictions.

YJT: It is relatively rare to encounter arbitrability questions and whether these types of issues arise tends to be due to the laws of the arbitral seat that has been selected by the parties rather than due to the sector from which the dispute arises.

An example of an arbitrability issue that could arise in a technology dispute could be a question of whether resolution of a licence dispute implicates questions about the validity of underlying patents or other IP rights and the assertion that a determination of those rights may not be arbitrable in the seat of arbitration.

In financial services sector cases, there could be a dispute over a business combination that turns on a determination of questions relating to competition or antitrust law or some other mandatory regulatory law and the assertion is that that issue is not arbitrable under the law of the seat. Further, although disputes relating to an underlying debt can be arbitrated if governed by an arbitration agreement, bankruptcy and winding-up applications per se are not arbitrable in most jurisdictions.

Incidentally, it is not always the case that the assertion of non-arbitrability is correctly argued. Sometimes parties simply assert non-arbitrability as a way to delay arbitral proceedings or to encourage a court (that is distrustful of arbitration) to assume jurisdiction over the dispute.

5. What impact has the COVID-19 pandemic had on technology and/or financial disputes?

JF: We all know that COVID-19 has had a significant impact on international arbitration generally, although the most striking point is that arbitrations have generally progressed in spite of the pandemic. Arbitration has arguably adapted better than court systems in most jurisdictions, with arbitration practitioners now habitual users of virtual hearing technologies. This adaptation reflects the resources often available to parties in arbitration which may not be available to court litigants. It also reflects that arbitration is less affected by the policy issues, which have made courts more hesitant to use remote systems for some types of dispute (such as criminal or family matters).

It is difficult to distinguish a particular impact of the COVID-19 pandemic specifically on financial disputes. One might observe that financial disputes have not faced the obstacles that some disputes face, such as construction cases which might sometimes require site visits. Generally, financial disputes have arguably been more readily adaptable to the world of virtual hearings than other dispute types because they are largely document-based and are likely to have less oral evidence than (again) construction cases.

Some industries have faced notable financial stress as a result of the pandemic (such as the hospitality and travel industries). Financial stress often leads to disputes, and this crisis has been no exception.

YJT: The pandemic has impacted timetables for hearings in that parties have had to make arrangements to adjust from in-person to virtual hearings, but there is now a lot of positive experience around this.

The most uncertain initial period of the pandemic (mid-2020) may have impacted the timing of commencement of disputes to some extent. But this is no longer the case.

6. The financial services sector appears to be somewhat receptive to using arbitration for syndicated loan and derivatives disputes. What is the reason for such, and are there still times where parties, particularly bank and financial institutions, have showcased a preference for litigating as opposed to arbitrating such disputes?

JF: As a firm with one of the world's leading finance practices, we review a lot of dispute resolution clauses. In our experience, the default preference for financial institutions remains court litigation, provided that the decision will be enforceable. Of course, in most of the world, it is not easy to enforce a court judgment from one jurisdiction in another jurisdiction. As a result, arbitration has become a preferred means of dispute resolution for banks in the APAC region, where the options for cross-border enforcement of judgments are limited. There is less use of arbitration in Europe in the finance sector because the regime under the Brussels Regulation for enforcing judgments within the EU works well.

It is a curiosity which is not easy to explain that the use of arbitration can vary between different finance product types. Thus, the derivatives market prefers 'plain vanilla' arbitration clauses. When I drafted the most recent edition of the ISDA Arbitration Guide, the feedback from ISDA's members was that this was what the derivatives market preferred. In contrast, the syndicated loan market tends to prefer 'optional' clauses, which require the debtor to bring any dispute to (e.g.) arbitration but give the banks the choice between arbitration or litigation. These clauses carry some risk since it is not clear in many jurisdictions whether they are valid, while in other jurisdictions (e.g. Russia), it is clear that they are not valid, yet the loans market values their flexibility, notwithstanding this enforcement risk.

7. What is the main difference between disputes involving hard versus soft technology? Does this difference impact the arbitration process?

YJT: If, by disputes involving 'hard technology', you are referring to manufacturing disputes, then the key difference tends to be with regard to the gathering and preparation of evidence. In cases involving 'hard technology' or things that are being made (as distinct from a service being provided through an application), there tends to be the ability to visit a site or to inspect certain machinery or products. That physical inspection may be part of the evidential process.

Otherwise, to me, there is little difference between disputes involving hard or soft technology.

For example, if the dispute concerns the interpretation of the scope of a geographical limitation underlying a manufacturing licence and a related distribution agreement, it makes little difference what the nature of the underlying technology is.

Or if the dispute turns on whether IP rights have been infringed, even taking into account the point of difference that I mentioned above, there is in fact very little difference in terms of how one would approach the case in preparation and in an arbitration. One still has to define what the technology or IP is and then decide if rights in connection with that technology or IP have been infringed in some way. The hard or soft nature of the technology merely concerns how it is to be explained or shown but does not otherwise impact how the arbitration is conducted.

8. Are there downsides to resorting to arbitration when resolving technology and/or financial disputes?

JF: Financial institutions tell us that there are reasons why they prefer court litigation over arbitration. They perceive arbitral decision-making as potentially less robust, with more risk of a compromise outcome from a three-member tribunal than a judge in a leading commercial jurisdiction, and less recourse against a 'rogue' decision in arbitration because generally there is no right of appeal on the merits. We tell them that there are ways of mitigating these risks, such as stipulating qualifications for the arbitrators in the arbitration clause, e.g., for an English law loan, that all three arbitrators must be English qualified. Moreover, in some jurisdictions, it is possible to contract in the arbitration clause for an appeal on a point of law.

The other disadvantage of arbitration cited by banks is that decision-making can be swifter in the courts, particularly when summary judgment is available. However, experience tells us that it is often harder to obtain summary judgment from a court than it appears. Moreover, it is helpful that many arbitral institutions are now adopting rules which introduce processes akin to summary judgment into arbitration.

YJT: Some tech companies and banks who face regular claims involving particular areas of law do prefer common law litigation for its precedential value and rights of appeal, as well as procedures for summary dismissal of obviously unmeritorious claims.

As I mentioned earlier, they may also prefer a specialist court which has deep expertise and experience over the subject matter and a track record that makes it more predictable than an arbitral tribunal that is constituted ad hoc – even if that tribunal may also be said to comprise experts or specialists.

9. What are some possible reforms that can be made to improve the arbitrability of technology and/or financial disputes and/or the suitability of arbitration as the preferred dispute resolution mechanism for such disputes?

JF: In my view, there is no pressing need for reform to improve the arbitrability of financial disputes because they are already widely arbitrable.

The greater challenge is to enhance the attractiveness of arbitration to users in the finance industry. One goal, which would be welcomed by users generally and not just in the finance industry, is to continue to improve the efficiency and cost-effectiveness of the process. Institutions are thinking seriously about this now, and there have been improvements. Time limits for the production of awards are one notable recent example. In my view, two possible areas of focus are (1) to consider whether arbitrations can get up and running more quickly, since tribunal formation is an increasingly protracted process; and (2) for tribunals to take closer control over submissions and evidence, pushing back on the current presumption that a party can submit any evidence that it sees fit.

YJT: Some countries have enacted laws that render disputes over patent validity arbitrable. Singapore did so in November 2019. This is an example of a measure that can make arbitration more attractive to parties.

Another example is a clarification that disputes over a wide range of shareholder disputes, including minority shareholder rights (such as minority oppression), are arbitrable. The Singapore courts have held that minority oppression claims are generally arbitrable: see T*omolugen Holdings Ltd and another v Silica Investors Ltd and other appeal* [2015] SGCA 57, and *L Capital Jones Ltd and another v Maniach Pte Ltd* [2017] SGCA 3.

10. In your opinion, what considerations should be kept at the forefront when selecting a seat of arbitration or the arbitral institution to resolve technology and/or financial disputes?

JF: Different considerations apply when selecting a seat or an arbitral institution.

For the choice of seat, the key question is whether the courts are familiar with and supportive of (rather than prone to interfere in) arbitration. A good arbitration law is a must, but the practice of the courts is more important. We all know examples of jurisdictions with arbitration laws which look good on paper, but where the courts' decisions erode confidence in the jurisdiction as a seat of arbitration.

For the choice of arbitral institution, differences between the rules are (in my view) lessening in importance because recent years have seen a growing harmonisation between the various sets of rules. For example, these days, they generally contain provisions for consolidation and joinder, summary determination and emergency arbitration. I think that it is more important to consider how effective the institution is at managing international arbitrations. Some institutions are noticeably more efficient than others, which can make a real difference to the user's experience. The most important role of the institution is to make sensible arbitrator appointments when called upon to do so. In the arbitration of financial disputes, there is an opportunity for institutions to show that they can choose arbitrators in whom their users will have confidence.

YJT: It follows from some of my observations above that parties who wish to have less uncertainty over their arbitrations should opt for pro-arbitration seats, the laws of which already make clear that a wide range of disputes are arbitrable. Not only do the laws have to be clear, but the courts of those seats should also be consistent and predictable in their application of those laws.

As regards the arbitral institution, if possible, it is helpful to select institutions whose secretariats have a strong track record in administering technology and financial services sector disputes.

11. How have technological advancements (including virtual hearings) benefitted the arbitration of technology and/or financial disputes?

JF: The technology for virtual hearings has existed for a while. I remember seeing an effective demonstration of a virtual hearing some years ago. However, it has taken a pandemic for the technology to be widely adopted. Now, a year of practice has shown that almost any arbitration can be held virtually. Perhaps the greatest challenge is managing participants in numerous time zones. Financial disputes are usually well suited for the virtual hearing format because they generally turn on documents and oral evidence rather than physical evidence.

There are interesting developments in the use of technology for financial disputes more widely. For example, there are interesting questions as to how far low-value financial disputes can or should be resolved online rather than in person.

YJT: Virtual hearings (whether fully virtual or semi-virtual) are here to stay – the pandemic has resulted in widespread early adoption and democratisation of such technologies. This development has certainly benefited parties and users of arbitration in that it potentially lowers costs of hearing by creating more reliable options for users, including lawyers and arbitrators.

These benefits are equally enjoyed by all and are not limited to the technology and financial services sectors.

12. What are the current observable trends in arbitrating technology and/or financial disputes?

JF: The most notable trend is the growth in the use of arbitration in the finance sector. This is evident in the data published by a number of arbitral institutions, which shows a growing proportion of their growing case loads taken by financial disputes.

JF: The most notable trend is the growth in the use of arbitration in the finance sector. This is evident in the data published by a number of arbitral institutions, which shows a growing proportion of their growing case loads taken by financial disputes.

More granular data, about which financial products are generating arbitrations, is not readily available. Our own experience suggests that arbitrations in the loan markets remain relatively rare because lenders will tend to have recourse in the first instance to self-help remedies such as enforceable security. We have seen more arbitrations in the swaps and derivatives market because these self-help remedies can be less available in that market.

We also see increasingly sophisticated arbitration clauses as users grow in their understanding that an arbitration can be moulded by the parties' agreement to a greater extent than court litigation. We see users including provisions which, for example: stipulate qualifications that the arbitrators must hold; limit disclosure; provide for expedited processes; allow for appeals (where the law of the seat allows this); and define the circumstances in which interim relief should be available.

YJT: There is still a general trend that more cross-border disputes are going to arbitration as the primary form of dispute resolution rather than merely an alternative to litigation.

One possible further trend is that as more developing court and legal systems become familiar with international arbitration, then a wider range of disputes may be rendered arbitrable such as in the area of IP and shareholder disputes which we've just discussed.

13. What are some of the recent notable developments (e.g., landmark decisions, legislative and/or policy changes, etc.) that have a bearing on the resolution of technology and/or financial disputes in your jurisdictions?

JF: I would draw attention to changes to institutional rules which make arbitration more attractive to financial institutions, and in particular: rules which facilitate the consolidation of disputes under related contracts without the need for detailed bespoke drafting in the arbitration clauses themselves; rules expressly authorising the arbitral tribunal to dismiss claims or defences on a summary basis if they are manifestly lacking in merit (effectively, a summary judgment rule for arbitration); and the greater availability of interim relief at an early stage through the widespread adoption of emergency arbitrator rules. On the first of these points, I am involved currently in a dispute involving claims under multiple related trade finance agreements, which would be substantially less attractive to pursue without the availability of consolidation provisions in the relevant institutional rules.

YJT: Taking the example of legislating for patent disputes to be arbitrable, Singapore enacted legislation in November 2019 for this purpose.

In relation to clarifying that minority shareholder disputes are also arbitrable, Singapore's Court of Appeal clarified this in 2015 and again in 2017 (see key cases such as *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeal* [2015] SGCA 57; *L Capital Jones Ltd and another v Maniach Pte Ltd* [2017] SGCA 3).

14. What advice would you give to those interested in specialising in technology and/or finance arbitration?

JF: My view is that a career or practice is unlikely to be built simply on finance arbitration because this would be too narrow a specialism. It is likely to be approached either through the experience of financial disputes in other fora (notably national courts) or through wider arbitration experience. I would suggest that wider experience of arbitration is likely to be more valuable because, while familiarity with the relevant financial products is clearly important, mastery of the arbitration process is likely to be even more important. Of course, it is optimal to have mastery of both the arbitration process and the relevant financial products. To this end, it can be helpful to practise in a law firm which (like mine) has a deep and successful transactional practice. The subject matter expertise of my transactional colleagues can be a real point of distinction in a pitch, in contrast with specialist litigation firms.

YJT: Each of these sectors is fast-moving and innovative. The best way to get a head start in these sectors is to work in some of the most dynamic companies (or parts of those companies) in tech or in financial services for sufficient time to be immersed and conversant in the commercial, legal and other issues faced by companies in these sectors.

HALLIBURTON V CHUBB

A DISCUSSION FROM A MALAYSIAN PERSPECTIVE

By Clive Navin Selvapandian[1]

1. Introduction

An appearance of bias could result in the disqualification of an arbitrator in international arbitrations. It is controversial whether repeat appointments of an arbitrator give rise to an appearance of bias due to issue conflict.

Halliburton Company v Chubb Bermuda Insurance Company [2020] UKSC 48 ("Halliburton") revolves around repeat appointments of the same arbitrator in multiple references relating to the same factual matrix. In addition, all these arbitrations share one common party. This Supreme Court decision sheds light on two main issues:

(i) whether repeat appointments of the same arbitrator in this context give rise to an appearance of bias; and
(ii) whether the arbitrator has the duty to disclose his/her repeated appointments, if in the affirmative, whether the failure to disclose justifies the disqualification of the arbitrator.

This decision:

(i) clarifies the test to determine an arbitrator's impartiality or apparent bias;
(ii) classifies as a question of fact whether repeat appointments in multiple references arising from the same factual matrix and involving a common party give rise to apparent bias;
(iii) clarifies an arbitrator's duty of disclosure; and
(iv) reconciles the competing tensions of party confidentiality and the duty to disclose repeated appointments.

2. Brief Facts

In Halliburton, Mr. Rokison was appointed as an arbitrator in three parallel references stemming from the Deepwater Horizon Incident. All three references concern claims made by the insureds against the same insurer, which is Chubb Bermuda Insurance Company ("Chubb"). The Claimant in the first reference was Halliburton, whereas Transocean Holdings LLC ("Transocean") initiated the subsequent two references.

Halliburton challenged the appointment of Mr. Rokison for his repeat appointments in references involving the same factual matrix and a common party, which is Chubb. Halliburton alleged that there was an appearance of bias on Mr. Rokison's part in favour of the insurer. Halliburton further based its challenge on Mr. Rokison's failure to disclose to Halliburton his appointments in the other two references.

3. Apparent Bias

3.1 The Test of Apparent Bias

The test of apparent bias is an objective one. The presence of apparent bias is determined by whether a fair-minded and well-informed observer would consider that there is justifiable doubt about an arbitrator's impartiality. To quote the House of Lords in *Halliburton*,

> *"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

This test is adopted in the UNCITRAL Model Law, which Malaysia is a signatory to. It has been incorporated in **Section 14 of the Arbitration Act 2005** and **Rule 5 of the AIAC Arbitration Rules**. Malaysian Courts have also consistently applied the same test, for instance, in the Court of Appeal decisions in *Federal Flour Mills Bhd v Fima Palmbulk Services Sdn Bhd and another appeal* [2005] 6 MLJ 525, *Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd* [2003] 1 MLJ 49, *Hartela Contractors Ltd v Hartecon FV Sdn Bhd & Anor*, the *High Court decision in Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd & Anor* [1999] 5 MLJ 137 and by Raja Azlan Shah J (as he then was) in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210.

Clive Navin Selvapandian

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The views expressed in this article are the author alone and do not necessarily reflect the views of Christopher & Lee Ong nor the AIAC. Any questions, queries or comments relating to this article can be directed to clive.selvapandian@christopherleeong.com.

3.2. Do repeated appointments in multiple references involving the same or overlapping subject matter give rise to justifiable doubt?

The House of Lords in Halliburton laid down factors to be taken into account in determining whether the repeat appointments of an arbitrator give rise to apparent bias, which justifies disqualification.

(i) Arbitration is a consensual form of dispute resolution. Section 1(c) of the UK Arbitration Act 1996 seeks to limit the intervention of the court in arbitral proceedings.
The principle of party autonomy should be given priority. Therefore, as a general rule, a challenge against an arbitrator would be dismissed unless the party making the challenge can prove apparent bias.
(ii) There is no avenue to appeal in arbitration.
(iii) An arbitrator is appointed by parties and has a financial interest in obtaining further appointments as an arbitrator. Therefore, the court shall keep an eye out for relationship conflict between the parties and the arbitrator, in addition to issue conflict.
(iv) There might be inequality of knowledge in favour of a common party or a repeat arbitrator. This gives the common party or repeated arbitrator an unfair advantage from the knowledge acquired from another reference.

In short, the courts must take into account the factual circumstances in its entirety and evaluate whether there is a justifiable basis to disqualify a repeated arbitrator. The Malaysian Court takes a consistent position, as evident in Tan Sri Dato' Professor Dr Lim Kok Wing v Thurai Das a/l Thuraisingham & Anor [2011] 9 MLJ 640 [HC].[2]

3.3 The Roles of Party-Appointed Arbitrators

There is a common misconception that in an arbitration panel of three, the president is neutral, whereas the party-appointed arbitrators represent the interests of their appointing parties. The House of Lords clarified that under English law, a party-appointed arbitrator is expected to come up to precisely the same high standards of fairness and impartiality as the person chairing the tribunal. In other words, a party-appointed arbitrator does not serve as a *de facto* advocate for the appointing party.

4. The Duty of Disclosure

In *Halliburton*, Lady Arden, who is also a Member of the Permanent Court of Arbitration in The Hague, clarified that the primary duty of an arbitrator is to act fairly and impartially. The duty to disclose is a secondary obligation which arises if the arbitrator wants to take a further appointment in a different arbitration.

4.1 When does the duty to disclose arise?

Section 24 of the UK Arbitration Act 1996 stipulates that "*disclosure should be given of facts and circumstances known to the arbitrator which would or might give rise to justifiable doubts as to his impartiality*". Similarly, in Malaysia, the **Arbitration Act 2005, Section 14(1)** mandates an arbitrator to "*disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence*". **Article 11 of the AIAC Arbitration Rules** incorporates an identical standard.

In other words, there is no duty to disclose if the circumstances are not likely to give rise to justifiable doubts about an arbitrator's impartiality. As put by Mary Lim J in the High Court decision *MMC Engineering Group Bhd & Anor v Wayss & Freytag (M) Sdn Bhd & Anor* [2015] MLJU 477, there must be a causal link between an arbitrator's alleged non-disclosure and his/her ability to deal impartially and independently with the claims and issues in the present arbitration.

The **IBA Guidelines on Conflicts of Interest in International Arbitration** illustrates circumstances that give rise to justifiable doubts in its Red List, which might give rise to justifiable doubts in its Orange List and circumstances which do not give rise to justifiable doubts and hence require no disclosure in its Green List. Although the IBA Guidelines is not binding, it is highly persuasive and has constantly been referred by tribunals and courts in challenges against arbitrators.

4.2 When does a breach of the duty to disclose justify disqualification of an arbitrator?

As a general rule, a breach of duty to disclose does not give rise to a real possibility of apparent bias. It requires something more. Factors which are to be considered in determining whether the failure to disclose gives rise to justification to disqualify an arbitrator are:

(i) Whether the non-disclosed circumstances justify an inference of apparent bias;
(ii) Whether the failure to disclose was accidental or deliberate;
(iii) The degree of overlap between the arbitrations; and
(iv) The deprivation of opportunity for the other party to address potential unfairness in such appointment, as added by Lady Arden.

To exemplify the application of these factors, in *Halliburton*, Lady Arden opines that Mr. Rokison has breached his duty to disclose. However, the House of Lords decided that such breach of duty did not justify disqualification because:

(i) There was an uncertainty under the English law on the existence and scope of an arbitrator's duty of disclosure at the time the duty of disclosure by Mr. Rokison arose;
(ii) The time sequence of the arbitrations may have been an explanation for the non-disclosure to Halliburton of the two references involving Transocean;
(iii) Mr. Rokison had explained that both the subsequent overlapping references would be resolved by way of preliminary issue, which meant there would, in fact, be no overlapping evidence or submissions. Furthermore, Mr. Rokison had offered to resign from the subsequent references if they were not resolved at the preliminary stage. Hence, it was unlikely that Chubb or Mr. Rokison would benefit as a result of the overlapping references;
(iv) Mr. Rokison did not receive any secret financial benefit; and
(v) Mr. Rokison's conduct revealed no subconscious ill-will. His response to the challenge had been "*courteous, temperate and fair…and there is no evidence that he bore any animus towards Halliburton as a result*".

[2] Here, an arbitrator was appointed in two arbitral proceedings involving a common party and partially overlapping subject matter. The Malaysian High Court decided that there was no **justifiable basis** to remove the arbitrator on the ground that both proceedings were at different stages. The applicant's contention that the arbitrator would be influenced by the second proceedings in determining the first proceedings was baseless because the trial date had been fixed for the first proceedings whereas the second proceedings was still at its preliminary stage where the procedure has not yet been set.

It is unclear whether the challenge against the arbitrator would have succeeded had the arbitrator's appointment in the second proceedings been challenged rather than the first proceedings. However, what is clear is that Malaysian courts have consistently applied the threshold of justifiable doubt in determining challenges, this case dealing with the specific context of repeat appointments involving a common party.

4.3 How to reconcile an arbitrator's duty to disclose with his/her duty of confidentiality?

In the confine of both the duty of confidentiality and the duty to disclose, an arbitrator usually discloses his/her involvement in other arbitrations involving a common party without disclosing the identity of the other party or details concerning the arbitration. This is common practice for arbitrators in Bermuda Form arbitrations, such as in this case. This is also common practice in the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the Chartered Institute of Arbitrators (CIArb) arbitrations.
However, if the situation requires the disclosure of the other party's identity or further details of the reference, express consent from the parties of the other references should be obtained prior to such disclosure. If the arbitrator is unable to obtain the consent of the other party, the arbitrator should decline the subsequent appointments.

4.4 How does this decision impact arbitrators in international arbitrations?

This decision cautions arbitrators that it is better to be safe than sorry in relation to the duty of disclosure. Apart from the factual circumstances of each appointment, the customs and practice of a particular area of laws also impact the threshold for disclosure.
Repeat appointments are common occurrences in specialised areas due to a limited pool of specialist arbitrators, such as in treaty reinsurance arbitrations and maritime claims. Due to its prevalence, there is generally no duty to disclose. The Grain and Feed Trade Association and the London Maritime Arbitrators Association agreed with the approach of the House of Lords in Halliburton, which is a higher threshold has to be met before an arbitrator can be deemed to appear biased from his/her breach of duty to disclose.

On the other hand, the London Court of International Arbitration and the International Chamber of Commerce questioned the approach taken by the House of Lords. They opined that the test propounded is not sufficiently strict in comparison with international norms. They put forward that the acceptance by an arbitrator of multiple appointments in related references without full disclosure to all parties may, without more, give rise to justifiable doubts as to his/her impartiality.

5. Key Takeaways

To conclude, there is no "one size fits all" solution. Both the duty of disclosure and the test of apparent bias are highly fact-dependent. To recapitulate, the following are the key points derived from the House of Lords' landmark decision in *Halliburton*.

1. It is established that the objective test of apparent bias is the applicable standard in an arbitrator's challenge in Malaysia. The application of such test is highly facts specific.

2. A party-appointed arbitrator is expected to be neutral and impartial, like the chair of the tribunal.

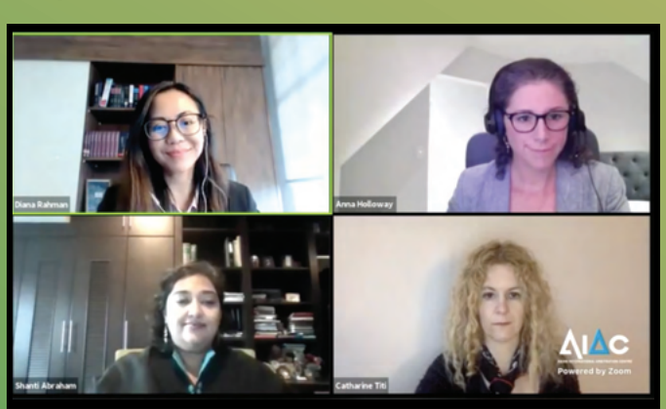
3. It is always good practice for an arbitrator to make disclosure in appointments which are of potential interest to the parties. In the context of repeat appointments involving a common party and stemming from the same factual matrix, it is prudent for an arbitrator to disclose his/her appointments to prevent future challenges.

4. In reconciling an arbitrator's duties of confidentiality and disclosure, it is recommendable for an arbitrator to disclose his/her repeat appointments in multiple references involving a common party. The identity of the other party and further particulars of the other references should be left out due to confidentiality. However, if these details are required, express consent from the parties of the other references should be obtained prior. If such consent is not obtainable, the arbitrator should decline the subsequent appointments.

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 December 2020 and 31st March 2021.

Promoting the Use of Mediation in Investor-State Dispute Settlement (3rd December 2020)



This webinar explored the use of mediation as a mechanism in resolving investor-state disputes. With such disputes predominantly being resolved by way of arbitration, the panel comprising Dr. Catherine Titi (French National Centre for Scientific Research (CNRS)-CERSA, University Paris II Panthéon-Assas), Anna Holloway (ICSID), and Shanti Abraham (Shanti Abraham & Associates), with Diana Rahman (AIAC) as moderator, extensively discussed the growing rise of mediation as the next preferred method for dealing with investor-state disputes. The panellists expressed their views on how mediation may serve as a perfect tool in resolving these disputes, for it can provide parties with both a highly flexible and proactive recourse when disputes arise.

The panellists comprehensively covered the advantages that mediation would provide in these cases, including that it is a wholly voluntary process where the participants will always be in control and thus, have a say in the outcome. The panellists also made several comparisons with investment-state related arbitration procedures, which were pegged to be considerably more expensive and time-consuming.

The panellists discussed the expansion of mediation in bi-lateral and multi-lateral treaties. Such treaties have made reference to mediation as a pre-requisite dispute resolution mechanism that parties must utilise prior to resorting to arbitration. Additionally, the panellists highlighted the notable push within the international community, particularly in relation to treaties, to expand upon the role of mediation.

Also explored was the role of organisations such as the International Mediation Institute, a non-profit which sets the applicable standards for mediation, in promoting the use of mediation as well as the role of international agreements, such as the Regional Comprehensive Economic Partnership - being the world's biggest free trade agreement - and the manner in which mediation may be set out as a primary dispute resolution method in investor-state disputes.

Formulating a Successful COVID-19 Claim under Middle East & South Asia Construction and Engineering Contracts (26th January 2021)

In this webinar, with the expert moderation of Diana Rahman (AIAC), the panel compromising John Coghlan (C&E Legal Solutions), Lam Wai Loon (Harold & Lam Partnership), Ashlea Reed (Driver Trett), and Phil Duggan (Driver Trett) delved into the various intricacies of COVID-19 claims in Middle Eastern jurisdictions such as the United Arab Emirates, the optimal strategies involved in formulating successful COVID-19 claims as well as highlighted the role of the independent technical experts, which is paramount in such claims.

The panellists provided a detailed overview on various COVID-19 related issues in relation to FIDIC contracts and how protection can be sought for one's position from the impact of the pandemic in the field of construction, including delays, and on force majeure clauses and the implications under the laws of the Middle East. The panellists went on further to explain several strategies involved in formulating COVID-19 claims, such as conducting legal analysis in order to discern what the contract meant to the parties at the time it was entered into and to identify the extent to which the contract complies with the governing law, as it may only be enforced to the extent of its compliance. Similarly, another strategy entailed reviewing heads of claims and assessing their prospect of success on a balance of probabilities.

The panellists also discussed the formulation of COVID-19 claims in relation to standard form contracts in Malaysia, such as Public Works Contract (PWD), PAM Standard Form of Contract, AIAC Standard Form of Contracts (SFC), and FIDIC contracts. It was noted that force majeure clauses were drafted, in a wider sense, into certain contracts such as PAM and SFC, which may extend to cover recent measures implemented by the Malaysian Government. Similarly, the panellists pointed out that although recent legislative measures, such as the Temporary Measures for Reducing the Impact of The Coronavirus Disease 2019 (COVID-19) Act 2020, offer protection to parties impacted by COVID-19, the burden is placed on the contractors to prove that a delay/inability to perform or an ultimate impact on the completion date of a project was in fact, a result of the Movement Control Order imposed.

The panellists also highlighted the role of the independent technical experts. Here, the panellists discussed the importance of the role of an expert in relation to COVID-19 claims as well as the duty he or she owes to the tribunal as opposed to the parties. Although an expert would work closely with a parties' lawyers, their independence must be maintained. Additionally, the panel highlighted the distinction where delay experts would analyse the different COVID-19 related impacts and how they arise from varying entitlements. For example, a quantum expert would instead work closely with the delay expert to ascertain compensable items. However, not all claims may arise from delays as there is a wide array of other factors which must be considered

.

To Be or Not To Be – Stare Decisis v. Public Policy (9th February 2021)

This webinar dissected the recent UK Supreme Court decision of *Enka v Chubb* (2020), which was a landmark judgment on the governing law of an arbitration clause. The case was highly contentious and involved five Supreme Court judges deciding upon the matter. It was essential to fully explore this judgment through the international perspectives of the panel, comprising Prof. Dr. Richard Wilson (36 Commercial), Lim Tuck Sun (Chooi & Company + Cheang & Ariff), Michael Patchett-Joyce (36 Commercial), Celso De Azevedo (36 Commercial) and Chelsea Pollard (AIAC), with Sajid Suleman (36 Commercial) acting as moderator.

The panellists first explained the decision in *Enka v Chubb* (2020), wherein the Supreme Court decided in a 3-2 majority that where there is no express choice of law, and the law applicable to a contract differs from the law of the seat, then an arbitration clause would be governed by the law expressly or impliedly selected by the parties or the law with which the agreement is most closely connected to. The panellists then highlighted how the decision achieved both clarity in principle for its avoidance of complexity as well as in policy for it provides for consistency with international law standards and commercial purposes, upholding a reasonable expectation for contracting parties who have chosen to settle disputes in a specified place but made no choice on the law governing the arbitration clause.

The panellists then went on and drew comparisons between *Enka v Chubb* (2020) and cases where different approaches were taken, such as *Sulamérica v Enesa* (2012) and *Thai-Lao Lignite Co Ltd & Anor v Government of the Lao People's Democratic Republic* (2017). When discussing the latter case, the panellists expressed their views that the decision could be taken as the simplest way to go forward as the Federal Court had employed the closest connection test. The panellists shared that the decision indicates a tendency for jurisdictions to default to their domestic law, which however, may likely now be impacted by the recent decision in *Enka v Chubb* (2020).

Another Proactive Step: The AIAC Pro Bono Mediation Initiative (16th March 2021)

With the launch of the AIAC's Pro Bono Mediation Initiative, a panel comprising Prof. James Claxton (Waseda University), Vasantha Stesin (Stesin Legal), Jayems Dhingra (Tiberias Management Consultants), and Louise Azmi (Ravindran and Azmi Chambers) joined Albertus Aldio Primadi (AIAC) acting as moderator, to exchange their thoughts and views on the process of mediation as well as the possible application and benefits of the Pro Bono Mediation Initiative to selected small and medium-sized enterprises ("SMEs") in light of the COVID-19 pandemic.

The said Initiative aims to assist SMEs which lack the sufficient resources needed to resolve disputes during these difficult and challenging times by providing them with affordable and easy access to mediation as an alternative dispute resolution avenue. In this webinar, the panellists shared the motivation behind this Initiative, the applicable criteria which must be met to participate and the potential advantages which may be gained by SMEs through this Initiative.

In relation to the COVID-19 pandemic, the panellists discussed the high success rate mediation has achieved in countries such as Australia when dealing with today's disputes such as rent relief, once parties have become much more aware of the process of mediation as an alternate route to resolve ongoing disputes, instead of going to the courts which already have to cope with a significant volume of cases.

The AIAC has long been offering mediation services, only imposing minimal administrative charges. However, the Pro Bono Initiative goes a step further as it invites SMEs to utilise mediation to resolve their commercial disputes either for free or at a significantly reduced cost. The panellists additionally provided an overview of the mediation procedure that one would expect to receive through the Pro Bono Initiative.

NEW INITIATIVES IN 2021

2020 was, without a doubt, an extraordinary year. This time last year, we witnessed the outbreak of the COVID-19 pandemic – one that would later take away the lives of more than 2 million people. The economic and social disruption of the pandemic, which attacked our society at its core, was catastrophic. Fast forward to today, with the roll-out of the vaccination programme in late February, there are more vehicles on our highways, businesses are back in operation, and children are going back to classrooms. Meanwhile, the AIAC has also resumed its operations with strict precautionary rules in place as preventive measures. As the AIAC continues its march on the journey to cement Malaysia's presence in the global dispute resolution map, let us take a look at the new initiatives that the Centre has launched between December 2020 and March 2021.

- **Adjudicator Evaluation Form**

As the sole administrative authority under the CIPAA 2012, the AIAC is responsible for continually ensuring the quality and competency of its empanelled adjudicators in order for the effectiveness of the adjudication process to be maximised. To this end, the AIAC launched the Adjudicator Evaluation Form ("AEF") in December 2020. The AEF allows each party, at the conclusion of an adjudication proceeding, to complete a confidential questionnaire, for the sole use of the AIAC, on the conduct of the proceeding and any feedback they may have on the appointed adjudicator. Such feedback is imperative for understanding the strengths and weaknesses of adjudicators given that empanelled adjudicators have a wide range of professional expertise and competence. As such, the AEF feedback will play a key role in the AIAC's identification and development of adjudicator training programmes whilst also enhancing the effectiveness of the AIAC's empanelment and appointment process.

- **Pro Bono Mediation**

As the COVID-19 pandemic still continues to affect nearly every sector of society, the AIAC is cognisant that access to dispute resolution may prove to be a hurdle for certain segments of society. To overcome this hurdle, the AIAC launched its AIAC Pro Bono Mediation Initiative with effective from 1st January 2021. 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 has laid out the criteria for the applicability of the AIAC's Pro Bono Mediation Initiative, according to which parties stand to gain from a list of non-exhaustive advantages, including the assistance of the AIAC's Case Counsels to monitor and supervise the mediation process and discounted administrative fees.

- **AIAC Adjudicators' Continuing Competency Development (CCD) Workshop Series**

As part of the AIAC's commitment to enhancing the competency of adjudicators, the AIAC launched its "Adjudicators' Continuing Competency Development ("CCD") Workshop Series" in January 2021. The CCD will see monthly workshops on a range of adjudication-related topics such as case law updates, financial and payment documentation in adjudication proceedings, how to draft effective adjudication decisions, etc., targeted at bridging any knowledge gaps in both legally trained and non-legally trained individuals. The overarching role of the CCD is to enhance the reliability of the adjudication decision-making process and all empanelled adjudicators, as well as those interested in the adjudication process generally, are encouraged to participate. Further information regarding the CCD Workshop series will be made available on the AIAC's website and social media platforms in due course.

- **Launch of the AIAC UNCITRAL Protocol**

On 10th February 2021, the AIAC launched its Protocol for the Administration of Arbitrations pursuant to the UNCITRAL Arbitration Rules ("AIAC UNCITRAL Protocol") to provide a framework for the AIAC's administration of arbitrations conducted solely pursuant to the UNCITRAL Arbitration Rules. The AIAC UNCITRAL Protocol applies to the 2013 version of the UNCITRAL Arbitration Rules, however it can be opted into by the Parties for an earlier version of the UNCITRAL Arbitration Rules. AIAC UNCITRAL Protocol covers matters such as the registration and commencement of the arbitration, collection of deposits and the release of fees, challenges to an arbitrator, and matters relating to the use of the AIAC's services and facilities such as its technical review service and the appointment of a tribunal secretary. With the launch of the AIAC UNCITRAL Protocol, the AIAC is hopeful that parties will find the AIAC's services more lucrative for the administration of disputes under the UNCITRAL Arbitration Rules.

With all launch of these key initiatives, the AIAC is confident that public confidence in the utility of alternative dispute resolution processes as well as the AIAC's capacity to deal with the same will be enhanced throughout 2021. On that note, readers are also urged to keep an eye out for information on other key events and initiatives in 2021 such as Asia ADR Week 2021, Diversity in Arbitration Week 2021, the launch of the AIAC Arbitration Rules 2021, as well as the AIAC's inaugural Arbitration-in-Practice Workshop Series.

KEY INSIGHT

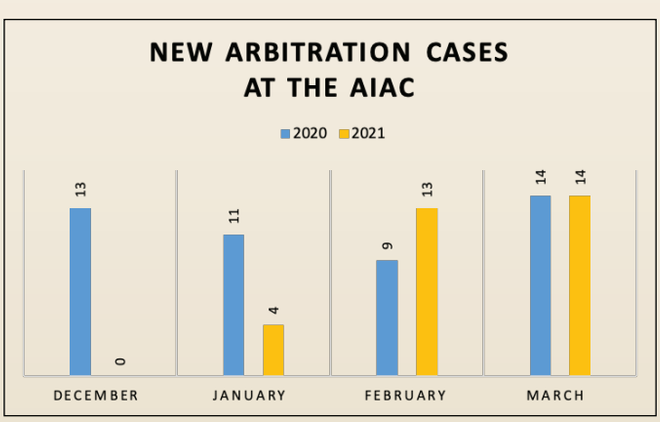
PRELIMINARY CASE MANAGEMENT STATISTICS

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 December 2020 to 31st March 2021. The information presented here is the raw data only.

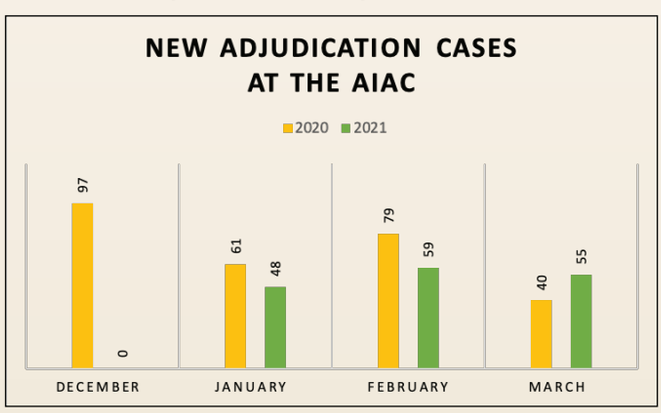
Arbitration

Between December 2020 and March 2021, the AIAC received forty-three (43) new domestic arbitration matters and one (1) new international arbitration matter.



Adjudication

Between December 2020 and March 2021, the AIAC received two hundred and fifty nine (259) new adjudication matters.



Mediation & Domain Name Dispute Resolution

Between December 2020 and March 2021, the AIAC received four (4) new mediation matters and two (2) new domain name dispute resolution matters.

For further information on the AIAC's case management statistics for 2019 and 2020, please keep an eye out for the AIAC's combined Annual Report for 2019 and 2020 in the coming months, which will contain a detailed analysis of our statistics and achievements across these two years.

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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ANNOUNCEMENT
January 01, 2021

Publication of New AIAC CIPAA Circulars

The AIAC is pleased to announce the publication of four (4) new circulars to assist in the AIAC's exercise of its functions as the sole adjudication authority under the *Construction Industry Payment and Adjudication Act 2012* (the "CIPAA"). The AIAC's power to issue circulars relating to the CIPAA is enshrined in Section 32(d) of the CIPAA which deems that the AIAC is responsible for "*any functions as may be required for the efficient conduct of adjudication under this Act*". A summary of the four (4) new circulars that will take effect from 1st January 2021 is below.

AIAC CIPAA Circular 1B

This circular supersedes AIAC CIPAA Circular 1A and reinforces the prospective application of the CIPAA as determined by the Federal Court in *Jack-in Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd and Another Appeal* [2020] 1 MLJ 174 and *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd and Other Appeals* [2020] 1 MLJ 311. It reinforces the scope and application of CIPAA, as well as the AIAC's position that payment disputes under the CIPAA that relate to contracts executed prior to 15th April 2014 will no longer be registered by the AIAC, save for in specified circumstances.

AIAC CIPAA Circular 5A

This circular supersedes AIAC CIPAA Circular 05 to reflect the repeal of the *Goods and Services Tax Act 2014* in June 2018 and the enactment of the *Services Tax Act 2018* in September 2018. It reflects the AIAC's instructions to parties and to adjudicators on the manner for the collection of Sales and Service Tax ("SST") in adjudication proceedings, particularly with respect to the adjudicator's fee and the AIAC Administrative Fee.

AIAC CIPAA Circular 09

This is a new circular which addresses the differing positions taken by the High Court on the calculation of "working days" under the CIPAA. The purpose of the circular is to clarify the AIAC's position on the calculation of working days under the CIPAA, as well as to reinforce the necessity of parties providing proofs of service alongside their registration and appointment requests to the Director of the AIAC.

AIAC CIPAA Circular 10

This is a new circular which introduces the AIAC's Continuing Competency Development ("CCD") scheme for adjudicators commencing on 1st January 2021. The CCD scheme complements the AIAC's ongoing efforts to improve the quality and maintain expected competency standards of adjudicators empanelled with the AIAC, and is launched in furtherance to the AIAC Adjudicator Evaluation Form. The purpose of the CCD scheme is to equip adjudicators with the necessary know-how to confidently navigate through the various legal, technical, and procedural issues that may manifest in the course of an adjudication proceeding. In certain instances, the Director of the AIAC may give weightage to an adjudicator's successful participation in the CCD scheme in determining the suitability and/or advancement of an adjudicator's appointment(s) in proceedings. However, such consideration is not guaranteed.

The AIAC will be incorporating the abovementioned circulars, as well as the recently announced AIAC CIPAA Circular 07 and AIAC CIPAA Circular 08, in its latest publication of the AIAC CIPAA booklet, a copy of which will be made available on our website in due course.

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

Yours sincerely,

TAN SRI DATUK SURIYADI BIN HALIM OMAR

DIRECTOR

ASIAN INTERNATIONAL ARBITRATION CENTRE

ANNOUNCEMENT

1ST JANUARY 2021

THE AIAC PRO BONO MEDIATION INITIATIVE

In recognition of the numerous advantages that mediation offers as an alternative dispute resolution (ADR) option and cognizant of the fact that access to dispute resolution may prove to be a hurdle for certain segments of the society, the AIAC is pleased to announce the launch of the **AIAC 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.

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

- a 100% waiver of the AIAC's Mediation Fees comprising the AIAC Registration Fee and AIAC Administrative Costs;
- a complete waiver or discount on the Mediator's Fee;
- appointment of a participating AIAC Pro Bono Mediation Initiative mediator by the Director of the AIAC from a list of over 80 experienced and qualified domestic and international mediators from the AIAC Panel of Mediators ranging across 22 specializations;
- established and comprehensive framework for mediation proceedings in the form of the AIAC Mediation Rules 2018;
- the provision of free administrative support by the AIAC in administered mediation matters;
- assistance of experienced AIAC Case Counsel to monitor and supervise the mediation proceedings;
- range of linguistic capabilities including English, Mandarin and Malay / Bahasa Malaysia; and
- the provision of physical and/or virtual solution facilities by the AIAC at a discounted rate, for the conduct of mediation hearings and meetings.

Given the various benefits and incentives offered above, a Request for Mediation under the AIAC Pro Bono Mediation Initiative must, upon application, satisfy the following criteria:

1. A commercial dispute has arisen due to conditions and/or contractual breaches arising from or relating to the COVID-19 pandemic.

2. A commercial dispute includes, but is not limited to, issues or matters arising from the following area(s) of the law:

   a) Agency / Dealerships / Distributions / Franchising
   b) Automotive / Mechanical
   c) Aviation & Airports
   d) Banking / Financial Instruments
   e) Banking / Financial Instruments (Islamic)
   f) Company (Shares & Equities / Joint Venture / Partnership / M&A)
   g) Concession Agreement
   h) Construction / Engineering / Infrastructure / Architecture & Design / Quantity Surveying
   i) Employment / Industrial Relations
   j) Energy / Mining / Oil & Gas / Power / Natural Resources
   k) Health & Safety / Pharmaceutical / Biotechnology
   l) Information Technology / Telecommunications
   m) Insurances / Reinsurances
   n) Intellectual Property / Trademark / Copyright / Patent
   o) Investment / Commodities / Treaty
   p) Maritime (Admiralty / Shipping / Charter Party / Vessels / Bill of Lading / Shipbuilding)
   q) Media & Broadcast / Advertisements / Arts / Entertainments
   r) Real Estate (Land / Properties / Tenancy / Conveyancing)
   s) Sciences & Technology / Geology / Geophysics / Agricultural
   t) Services / Supply of Goods / Sales & Purchases / Trading & Marketing
   u) Sports
   v) Trust / Anti-Trust

If you are of the view that your dispute is a commercial one which does not fall within any of the above categories, you may contact probono.mediation@aiac.world to obtain clarification.

3. Such dispute has yet to be referred to any other Court or Tribunal.

4. Applicants qualify for **one** of the following two (2) schemes under the AIAC's Pro Bono Mediation Initiative:

   SCHEME A: FULL WAIVER OF AIAC'S ADMINISTRATIVE FEE AND FULL WAIVER OF THE MEDIATOR'S FEE

   (i) Where the subject matter of the dispute is quantifiable, the amount in dispute does not exceed RM250,000.00 (or any currency of an equivalent amount in value); OR

   (ii) If the subject matter is unquantifiable, the AIAC retains the discretion to consider the surrounding circumstances of the dispute and its nexus to COVID-19 pandemic, in determining the applicability of Scheme A to the dispute.

   SCHEME B: FULL WAIVER OF AIAC'S ADMINISTRATIVE FEE AND DISCOUNT ON THE MEDIATOR'S FEE

   (i) Where the subject matter of the dispute is quantifiable, the amount in dispute is within the range of RM250,001.00 to RM1,000,000.00 (or any currency of an equivalent amount in value); OR

   (ii) If the subject matter is unquantifiable, the AIAC retains the discretion to consider the surrounding circumstances of the dispute and its nexus to COVID-19 pandemic, in determining the applicability of Scheme B to the dispute.

5. Please be informed that all cases under the AIAC Pro Bono Mediation Initiative will be administered using the AIAC Mediation Rules 2018.

Upon submission of the Request for Mediation, the AIAC will revert to confirm the status of your application and to advise you on further details. Please be advised that the AIAC retains the absolute discretion to qualify and approve the commencement of mediation matters under the AIAC Pro Bono Mediation Initiative.

We would also like to take this opportunity to invite AIAC empanelled mediators to express your interest and participate in this first of a kind AIAC Pro Bono Mediation Initiative.

For further information regarding the AIAC Pro Bono Mediation Initiative, please contact probono.mediation@aiac.world or visit our website at aiac.world.

Yours sincerely,

TAN SRI DATUK SURIYADI BIN HALIM OMAR
DIRECTOR

ASIAN INTERNATIONAL ARBITRATION CENTRE
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ANNOUNCEMENT
January 26, 2021

Publication of New Arbitration Circulars

The AIAC is pleased to announce the publication of two (2) new arbitration circulars to clarify certain matters relating to the AIAC suite of arbitration rules. A summary of these circulars that will take effect from 26th January 2021 is set out below.

AIAC Arbitration Circular 02

This circular clarifies the manner in which advance deposits on costs in arbitration proceedings administered by the AIAC under the AIAC Arbitration Rules 2018 are collected pursuant to Rules 13 and 14. Specifically, the circular explains the three (3) tranches in which advance deposits on costs are collected – provisional advance deposit, advance preliminary deposit, and additional deposit – as well as clarifying the power of the Director of the AIAC to fix separate advances on costs where a counterclaim is filed. This circular also sets out the impact of the non-payment of advances on costs on the continuation of the arbitral proceedings, as well as reinforcing the AIAC's obligation to provide an accounting of the deposits received in the arbitral proceedings.

AIAC Arbitration Circular 03

This circular clarifies the scope of the Fee Agreement the Parties and the Arbitral Tribunal may agree to enter into pursuant to Rule 13(4) of the AIAC Arbitration Rules 2018, Rule 14(4) of the AIAC i-Arbitration Rules 2018, and Rule 24(4) of the AIAC Fast Track Arbitration Rules 2018. Specifically, it clarifies that in administered arbitrations, all advance deposits on costs shall be made to and held by the AIAC, irrespective of the existence of a Fee Agreement.

It is anticipated that the abovementioned circulars will aid users of the AIAC's suite of arbitration products to better understand their rights and obligations for the payment of advance deposits on costs in arbitral proceedings.

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

Yours sincerely,

TAN SRI DATUK SURIYADI BIN HALIM OMAR

DIRECTOR

AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE

ANNOUNCEMENT
4TH MARCH 2021

AIAC'S REVISED OPERATING HOURS AND 50% CAPACITY FOR HEARINGS, MEETINGS, ROOM BOOKINGS AND EVENTS HELD AT BANGUNAN SULAIMAN

Following the Government of Malaysia's updated directive on 2nd March 2021 setting out various general Standard Operating Procedures ("SOPs") for the organising of government and private events under the Conditional Movement Control Order ("CMCO") in the Klang Valley, the Asian International Arbitration Centre ("AIAC") wishes to advise its users and members of the public of changes that will be implemented for the duration of the affected period ("CMCO Period"), effective **5th March 2021.**

1. AIAC Operating Hours

The AIAC premises will be open with usual business hours resuming from **Monday to Friday,** between **8:30 a.m. – 5:30 p.m.** For the purposes of effecting physical service of documents upon the AIAC, an area has been designated for drop-off of all documents at the Business Centre / Reception located on the Ground Floor.

Access to the AIAC premises will be limited to the front lobby i.e. the Business Centre / Reception located at the Ground Floor, and only for the purposes of effecting physical service of documents upon the AIAC. An area has been designated for drop-off of all documents thereat.

When accessing the AIAC premises, please extend your co-operation in adhering to the following measures which remain in place:

- Daily temperature recording at the guard's station at the entry point. **Please be advised that access to the AIAC premises will not be granted to individuals with a recorded temperature of 37.5°C and above.** Such individuals will be asked to kindly leave the premises to seek immediate medical advice.
- All visitors entering the AIAC premises will be required to use MySejahtera to check-in, either by using the MySejahtera application or scan the MySejahtera QR Code using your phone's camera at the guard's station.
- All visitors are required to bring and wear a face mask and maintain a physical distance of one (1) meter with others, at all times whilst at the AIAC premises.
- Sanitisers have been placed on all floors and at various locations within the AIAC, which visitors are encouraged to use.

2. Case Management

The AIAC will continue to accept the registration of all alternative dispute resolution ("ADR") matters during the CMCO Period. Existing and ongoing ADR matters will proceed unaffected, including all appointment requests, decisions and/or approvals requiring the Director of the AIAC's consideration.

For all case management related enquiries, 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. **Usual business hours from Monday to Friday, between 8:30 a.m. – 5:30 p.m. apply.**

3. 50% Capacity for Hearings, Meetings, Room Bookings & Events

The AIAC will allow the conduct of in-person hearings and meetings as well as the holding or hosting of external events at its premises for the duration of the CMCO Period, strictly subject to the limited attendance of only 50% capacity of the rooms booked, and compliance with physical distancing as well as the mandatory wearing of face masks in accordance with the SOPs for Organising Government and Private Events mandated by the Government of Malaysia on 2nd March 2021.

Users with scheduled hearings and meetings during the CMCO period at the AIAC affected by these maximum capacity requirements, are requested to contact the AIAC's Reservations Team at reservations.team@aiac.world to modify their room bookings. We strongly encourage and invite all users to explore the option of conducting a virtual hearing and/or a meeting with the use of the AIAC's Virtual Hearing Solutions. Please contact the AIAC's Case Counsel in charge of the registered matter or the AIAC's Reservations Team for unregistered matters, if you would like to know more.

Please expect the above requirements to be updated from time-to-time in accordance with Government issued directives and as the circumstances warrant.

Thank you for your cooperation and understanding during this period.

Yours sincerely,

TAN SRI DATUK SURIYADI BIN HALIM OMAR
Director
Asian International Arbitration Centre

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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, the AIAC's Legal Services Team participated in the following external webinars and/or training sessions between December 2020 and March 2021:

- Speaker, "Appointment and Challenges, Rights and Obligations of Arbitrators", *SEGi Sarawak Lecture Series* (2nd December 2020);
- Panellist, "Introduction to AIAC ADR Products Suite & Services" *Queen Mary University of London Online LLM in International Dispute Resolution Programme* (4th December 2020);
- Presenter, "Categories of Arbitral Awards & AIAC Technical Review" *SEGi Sarawak Lecture Series* (9th December 2020);
- Panellist, "ISDS: Is Spring Coming?", *CIArb YMG ADR World Tour 2021* (20th January 2021);
- Panellist, "Careers Roundtable in International Arbitration", *Stockholm University* (28th January 2021);
- Panellist, "Career Pathways in Arbitration", *KPUM #Stay at Home Series* (30th January 2021);
- Panellist, "Women in Construction Law #ChoosetoChallenge", *Young Society of Construction Law Malaysia* (12th March 2021); and
- Panellist, "What's Inside the Treaty Spaghetti Bowl?: A Perspective of International Commercial Arbitration", *AIAC, MABC and MNZCC Joint Webinar* (30th March 2021).

Supported Events

The AIAC also supported the following webinars and/or events between December 2020 and March 2021:

- "*SCL Malaysia's Annual Construction Review*", Society of Construction Law Malaysia (21st January 2021); and
- "*Women in Construction Law:#ChoosetoChallenge*",Young Society of Construction Law Malaysia (12th March 2021).

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!

DOMESTIC ARBITRATION

1. *Garden Bay Sdn Bhd v Sime Darby Property Bhd* [2021] 2 MLJ 281

Briefly, the Respondent appointed the Appellant as its Contractor for turfing and landscaping works. Disputes subsequently arose between the parties and were referred to arbitration. The Appellant, as the Claimant in the arbitration, claimed a sum of RM338,666.89 from the Respondent, being the balance sum unpaid, interest and costs. The Respondent counterclaimed for general damages to be assessed for the Appellant's delay in completing the landscape works, as well as a sum of RM246,978 for *inter alia* rectification works. The Tribunal determined that the Respondent shall pay the Appellant a sum of RM282,512.00 with interests and costs and that the Appellant was liable to pay the Respondent a sum of RM21,154.39 in relation to the counterclaim (the "Award"). The Respondent applied to the High Court to set aside the award pursuant to Section 37 of the AA 2005. The High Court, by consent order, remitted the award back to the Tribunal and ordered that the Tribunal state sufficient reasons for its assessment of the sum awarded with respect to the counterclaim. The Tribunal did so and issued a "Supplemental Award". Thereafter, the Respondent once again applied to the High Court to set aside the Award and the Supplemental Award, whilst the Appellant sought the recognition of the same. The Respondent was successful in having the High Court set aside the awards, and the Appellant appealed the same to the Court of Appeal.

The Court of Appeal, however, overturned the decision of the High Court and upheld the award made by the Arbitrator. The Court of Appeal observed that the High Court erred when it failed to consider both the Award and the Supplementary Award in their entirety – had the High Court done so and undertaken a proper analysis of the Tribunal's reason for the dismissal of the counterclaim, it would have been apparent that there was no breach of the rules of natural justice to warrant the setting aside of the whole award.

INTERNATIONAL ARBITRATION

1. *Danieli & C Officine Mecchaniche SPA v Southern HRC Sdn Bhd* [2021] MLJU 203

In this case, the Plaintiff, an Italian company that *inter alia* manufactures steelmaking plants, entered into an agreement with the Defendant, a Malaysian company, for the construction of a hot-rolled coil plant in Malaysia and a related services agreement. Subsequently, disputes arose, and the matter was referred to Arbitration in Singapore before a three-member Tribunal. The Tribunal rendered an Award in favour of the Defendant. The Plaintiff challenged the award in the Malaysian High Court, requesting various declarations and orders allowing it to inspect the plant and equipment referenced in the Award. The Defendant resisted the Plaintiff's application and, in turn, applied to the Malaysian High Court for a declaration that it lacked jurisdiction in respect of the Plaintiff's relief. The Defendant alleged that when an arbitral award has been rendered, the Court's powers under the Arbitration Act ("AA") 2005 are limited to enforcing the award.

The Malaysian High Court clarified that once an award is handed down, the Court's interference is limited to the recognition and enforcement of the arbitral award under Sections 38 and 39 of the AA 2005, and it cannot grant any other relief in respect of a foreign award. More importantly, the High Court noted that although the 2011 amendments to Sections 10 and 11 of the AA 2005 permit a party to apply to the High Court for any interim measure in an international arbitration that is not seated in Malaysia, such assistance can only be provided either before or during the arbitral proceedings. The Court further observed that the Plaintiff could have made an application for an interim measure for inspection of the plant before or during the arbitral proceedings, which the Plaintiff failed to do. Thus, the Court agreed with the Defendant's contention that the Court did not have jurisdiction to entertain the Plaintiff's application which sought to re-open matters already decided in the arbitration and/or attempts to attack the award.

2. *Helice Leasing S.A.S. v PT Garuda Indonesia (Persero) TbK* [2021] EWHC 99 (Comm)

The English Commercial Court granted a stay of proceedings under Section 9 of the Arbitration Act ("AA") 1996, finding a reference to "court" in the lease contract to be a reference to the London Court of International Arbitration ("LCIA"). In this case, the underlying lease contract contained two contradictory dispute resolution clauses, *i.e.*, Clause 15.2 that referred to the LCIA and Clause 13.2 that gave the lessor an option to "*proceed by appropriate court action*" in the Event of Default, which included non-payment. The Commercial Court noted that Clause 13.2 was "*not happily worded*" and accordingly, in order to give the contract a business common sense construction, the Commercial Court considered that "*court action*" in Clause 13.2(b) must reasonably have been intended by the parties to mean action before the LCIA, *i.e.*, action within Clause 15.2. The Commercial Court further observed that all Clause 13.2 is doing is setting out the options that are available to the Claimant – its "*rights*" – in the event of a default by the Defendant. The Commercial Court stated that what the parties objectively intended was to refer any dispute to arbitration and, in Clause 13.2, the Parties were intending to provide that in the case of an Event of Default. Accordingly, the Commercial Court noted that Claimant would have a series of rights, which included proceeding to arbitration to enforce performance of the lease or to recover damages, and that would not prevent it from seeking the other items of relief listed in Clause 13.2.

The Commercial Court also relied on the construction provided in Clause 2.1(k) that highlights what was objectively intended, whereby the Defendant represents and warrants to the Claimant that "*The choice by* [the Defendent] *of the law of England and Wales to govern this lease agreement as set out in section 15.1 and the submission by* [the Defendent] *to the non-exclusive jurisdiction of the courts as set out in section 15.2 are valid and binding*." Hence, Clause 15.2 is a consent to jurisdiction clause – both Parties' consent to submit to the jurisdiction of the LCIA. The Commercial Court noted that perhaps most importantly, were the Claimant's construction of Clauses 13.2 and 15.2 to be adopted, it is difficult to see how Clause 13.2 would operate as it only applies "*If an Event of Default occurs*" and does not say "*If an Event of Default is alleged*". If there is a dispute as to whether an Event of Default has occurred, that is something which must surely be resolved by arbitration pursuant to Clause 15.2 and not through the courts. To assume that the reference to the "*court*" in Clause 13.2 implied something other than the LCIA would be inconsistent with the "*one-stop approach*" placing reliance on the House of Lords judgement in the *Fiona Trust v. Privalov [2007] UKHL 40*.

3. *Republic of Sierra Leone v. SL Mining Ltd* [2021] EWHC 286 (Comm)

In this case, a dispute arose out the suspension and subsequent cancellation by the Claimant of a large-scale mining licence agreement which contained a multi-tier dispute resolution provision under Clause 6.9 and particularly sub-paragraph (c), which provided that "*In the event that the parties shall be unable to reach an amicable settlement within a period of 3 (three) months from a written notice by one party to the other specifying the nature of the dispute and seeking an amicable settlement, either party may submit the matter to the exclusive jurisdiction of a Board of 3 (three) Arbitrators who shall be appointed to carry out their mission in accordance with the International Rules of Conciliation and Arbitration of the ... ICC ...*".

The Defendant served the Notice of Dispute on 14th July 2019 and subsequently served the Request for Arbitration on 30th August 2019. The Claimant challenged this on the basis that no arbitration proceedings could be commenced before 14th October 2019 (three months from the Notice of Dispute), and therefore, the Arbitral Tribunal lacked jurisdiction. The Arbitral Tribunal rejected this jurisdictional challenge.

The English Commercial Court dismissed the Claimant's challenge made under Section 67 of the Arbitration Act ("AA") 1996, finding that failure to comply with a precondition to arbitration is an issue of admissibility, rather than calling into question of jurisdiction and, if it were, the Claimant would fail, because it has consented to the Request for Arbitration on 30th August, and, in any event, as at 30th August there was no bar to the commencement of arbitration by the Defendant. The Commercial Court held that the Arbitral Tribunal is in the best position to decide questions relating to its jurisdiction and whether the conditions precedent have been satisfied. The Commercial Court consequently agreed with the conclusions of the Arbitral Tribunal that "*if reaching the end of the settlement period is to be viewed as a condition precedent at all, therefore, it could therefore only be a matter of procedure, that is, a question of admissibility of the claim, and not a matter of jurisdiction*". Accordingly, the Commercial Court held that Section 30(1)(c) and Section 67 of the AA 1996 were not engaged in respect of the challenge that the claim was made prematurely to the Arbitral Tribunal.

4. *AB v CD* [2021] HKCFI 327

In this matter, the Hong Kong SAR Court of First Instance set aside an arbitral award due to the wrongful identification of a party.

Briefly, AB Bureau and CD entered into an agreement in 2013 that contained an arbitration clause. Around the time of the agreement's execution, the group of companies of which AB Bureau was a part of was restructured. Prior to the restructuring, the entity known as "AB Engineering" was a subsidiary of AB Bureau. After August 2016, AB Engineering became a subsidiary of another company. Disputes arose under the agreement, and CD brought a claim against AB Bureau, placing reliance on the arbitration clause.

After issuing the Notice of Arbitration, a series of events arose which led to the Respondent's name in the proceeding being amended to "AB Engineering". CD supported its application for this amendment with reliance on AB Engineering's website, which suggested that AB Bureau was the predecessor of AB Engineering. The sole arbitrator issued an order giving effect to the name change and also ordering that no further notice of service was necessary. The final award issued in March 2020 named AB Engineering as the Respondent. However, neither AB Bureau nor AB Engineering participated in the arbitration.

Consequently, AB Engineering applied to set aside the final award on the grounds, *inter alia*, that it was not a party to the agreement, there was no valid arbitration agreement between it and CD, and that it had not been given proper notice of the arbitrator or the arbitral proceedings. CD argued that AB Engineering is estopped and debarred from denying that the award is enforceable against it and from applying to set aside the award on the basis that employees of AB Engineering had misled CD and the Tribunal into believing that AB Bureau had been renamed to AB Engineering and that AB Engineering had failed to state its objection to any procedure in the arbitration. CD placed reliance on the fact that the definitions section in Clause 1.4 of the agreement defined "AB" to mean "*AB Bureau or any other Affiliated entity*". It, therefore, argued that AB Engineering fell within the scope of this definition.

The Court of First Instance distinguished the facts from *Giorgio Armani SpA v Elan Clothes Co Ltd [2019] 2 HKLRD 313 and [2020] 1 HKLRD 354*, in which the agreement was clearly expressed to have been made "*by and between*" the parent company, SpA, "*together with its branch offices and Affiliates*". In contrast, there was no clear indication in the instant case, and no reference to any other subsidiary or affiliate of AB Engineering or AB Bureau in other parts of the agreement, which set out the rights and obligations of the parties to the agreement. There was also no evidence that AB Engineering had any role in relation to the performance under the agreement, the rights conferred, or the obligations imposed thereunder. Accordingly, the Court of First Instance ruled that AB Engineering was not the same entity as AB Bureau, and it was also not a party to the agreement.

In any event, the Court of First Instance held that if it was wrong, and AB Engineering can be said to be a party to the agreement, AB Engineering had nonetheless not been given proper notice of the arbitral proceedings or the appointment of the arbitrator. This was sufficient for the award to be set aside.

5. *Amazon.com NV Investment Holdings LLC v. Future Coupons Private Limited & Ors.*
O.M.P. (Enf.) Comm 17/2021 dated 18th March 2021

Amazon filed a petition seeking for enforcement of the interim order dated 25th October 2020 passed by the Emergency Arbitrator under Section 17(2) of the Arbitration and Conciliation Act, 1996 ("A&C") read with Order XXXIX Rule 2A and Section 151 of Code of Civil Procedure ("CCP"). The Respondents, on the other hand, raised a legal objection to the maintainability of this enforcement petition on the ground that the Emergency Arbitrator is not an "arbitrator" within the meaning of Section 2(1)(d) of the A&C. Hence, the interim order dated 25th October 2020 is not an order under Section 17(1) and, therefore, not enforceable under Section 17(2) of the A&C.

In the present case, the arbitration agreement contained in the Shareholder's Agreement dated 22nd August 2019 held that all disputes between the parties have to be referred to and resolved by arbitration in accordance with the Rules of Singapore International Arbitration Centre ("SIAC"). The seat of arbitration was New Delhi, and the Courts in New Delhi had exclusive jurisdiction. Notably, the SIAC Arbitration Rules contain provisions for the appointment of an Emergency Arbitrator to consider the Emergency Interim Relief. Rule 1.3 defines an "Emergency Arbitrator" as an arbitrator appointed in accordance with Schedule I, and Rule 7 of Schedule I empowers the Emergency Arbitrator to exercise all powers of an Arbitral Tribunal.

The High Court of Delhi clarified that Section 17 of the A&C empowers the Arbitral Tribunal to issue an interim order and Section 17(2) provides that the interim order issued by the Arbitral Tribunal shall be deemed to be an order of the Court and shall be enforceable as an order of the Court. Thus, by virtue of Section 2(8) of the A&C, the SIAC Arbitration Rules are incorporated in the arbitration agreement between the parties, and by doing so, the Parties have agreed to the provisions relating to Emergency Arbitration.

Accordingly, the High Court observed that the Emergency Arbitrator is an Arbitrator for all intents and purposes, which is clear from the conjoint reading of Sections 2(1)(d), 2(6), 2(8), 19(2) of the A&C and the SIAC Rules of Arbitration which are part of the arbitration agreement by virtue of Section 2(8). Therefore, Section 2(1)(d) is wide enough to include an Emergency Arbitrator and the order of the Emergency Arbitrator is an order under Section 17(1) and enforceable as an order of the Court under Section 17(2) of the A&C. The Court further held that the Respondents had deliberately and willfully violated the interim order dated 25th October 2020 and are liable for the consequences enumerated in Order XXXIX Rule 2A of the Code of Civil Procedure.

INVESTMENT ARBITRATION

1. *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34

This case concerns a dispute based on the United States-Panama Trade Promotion Agreement ("TPA") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The Claimants, Bridgestone Licensing Services, Inc. ("BSLS") and Bridgestone Americas ("BSAM") are United States subsidiaries of a Japanese company ("BSJ") and part of the "Bridgestone Group" of companies. The Bridgestone Group's central business role is the manufacture and sale of tires under the trademarks FIRESTONE and BRIDGESTONE, which have been registered in Panama.

On 6th May 2002, Muresa Intertrade S.A. ("Muresa"), a member of the Luque Group, applied to register the RIVERSTONE trademark for tires in Panama, which was opposed by BSJ and BSLS, as owners of the FIRESTONE and BRIDGESTONE trademarks registered in Panama on the ground that the similarity between the rival trademarks would give rise to a grave risk of confusion. In 2007, Muresa and Tire Group of Factories Ltd. Inc. ("TGFL"), a distributor of RIVERSTONE tires, filed a civil action in Panama against BSJ and BSLS claiming for USD5 million, being the losses allegedly suffered in consequence of having to cease selling RIVERSTONE tires as a result of the Trademark Opposition Proceedings. This claim was subsequently allowed by the Panama Supreme Court. It held BSJ and BSLS liable for reckless and bad faith conduct of legal proceedings, which constituted a civil tort under Article 217 Judicial Code of the Republic of Panama.

In the present case, it is the Claimants' case that the Panama Supreme Court Judgment ("Judgment") treated their investments in a manner that was not fair or equitable in that (i) the Judgment penalized BSLS for legitimate steps taken to protect its investment;

(ii) the effect of the Judgment was to devalue the FIRESTONE and BRIDGESTONE trademarks; and (iii) the Judgment constituted a denial of justice in as much as the defects in the Judgment were so egregious that they lead inexorably to the conclusion that the Supreme Court was either incompetent or corrupt. The Claimants maintain that the result reached by the Supreme Court was shockingly perverse. The Claimants submitted that the denial of justice by the Supreme Court mainly involved the failure to comply with procedural rules and a failure properly to appraise the evidence, particularly the alleged wrongful admission and error of appraisal of the 'Foley Letter' as evidence.

The Tribunal, which comprised Lord Nicholas Phillips Baron of Worth Matravers, Horacio A. Grigera Naón and J. Christopher Thomas, dismissed the claims of BSAM and BSLS. The Tribunal observed that the Judgement was startling as it held BSJ and BSLS liable in damages simply for exercising their procedural right to file an objection to an application to register the RIVERSTONE trademark. However, after detailed analysis, the Tribunal understands the reasoning that led to the Supreme Court's majority reaching its decision in the Judgement. Although the Tribunal identified defects in the reasoning, those were no more than errors of judgment. The Tribunal concluded that even if this conclusion was erroneous, this was not an egregious error of the kind that could amount to, or contribute to, a denial of justice under the relevant principles of international law. Accordingly, the Tribunal noted that the aforementioned lends no support to the Claimants' case that the decision of the majority of the Supreme Court was one that no honest and competent court could have reached and fall far short of demonstrating that the judgment was the product of incompetence or corruption.

ADJUDICATION

1. *LP Capital Construction Sdn Bhd v TKJ Builders Sdn Bhd* [2021] 7 MLJ 753

In this case, the dispute arose concerning a construction contract in which the Plaintiff had awarded the execution and completion of works in connection with a project in Sarawak, Malaysia, to the Defendant pursuant to a Letter of Award. The Plaintiff initiated a suit against the Defendant in the Kuching High Court, in which the Defendant had filed its Defence and Counterclaim concerning three payment claims under the contract, two of which were resolved. With regard to the remaining payment claim, Claim No. 8, the Defendant proceeded to file a Payment Claim under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"). The Plaintiff objected to this since the Defendant had already raised the payment claim in its Counterclaim before the High Court, it could not raise the same subject matter in the CIPAA proceedings. The Plaintiff's alleged that this was an abuse of process to allow the CIPAA proceedings to continue side-by-side with the Counterclaim as there was a multiplicity of proceedings concerning the same subject matter. The Plaintiff argued that although Section 37(1) of the CIPAA allowed a dispute in respect of payment under a construction contract to be referred concurrently to adjudication, arbitration or the court, it was subject to Section 37(2) where the phrase '*being adjudicated*' means that the dispute has to have been initiated by way of a CIPAA proceeding first before it could be referred to arbitration or the court.

In dismissing the application, the High Court held that adjudication under the CIPAA was never designed to conflict with arbitration and litigation, and it could be activated at any time when there was a valid payment claim under a construction contract. Accordingly, the question of which should prevail over the other did not arise at all. Statutory adjudication stood alone from all other alternative modes of dispute resolution such as arbitration or litigation and did not require the agreement of parties to commence the process. The phrase '*being adjudicated*' in Section 37(2) of the CIPAA did not mean that there must be an existing adjudication before parties could turn to litigation. The CIPAA proceedings and the counterclaim in the High Court could exist concurrently and did not amount to an abuse of process due to multiplicity of proceedings. The CIPAA only dealt with payment and how to secure the payment, and this did not stop the parties from arguing the issue of payment later or concurrently at a separate proceeding initiated in court or arbitration.

2. *KPF Niaga Sdn Bhd v Vigour Builders Sdn Bhd and another case* [2021] MLJU 229

In this case, the Respondent was awarded the total adjudicated amount of RM2,173,766.00 for outstanding payment for services/work done incurred under the Construction Contract and pursuant to Section 12(5) of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"). Aggrieved with the Adjudication Decision ("AD"), the Claimant sought to set aside the said AD before the High Court of Malaya on the reason of improperly procured adjudication decision under all four limbs of Section 15 of the CIPAA.

The grounds upon which the Claimant had mounted its attack against the said AD are due to the concealment of the fact that the Respondent did not have a valid certificate of registration issued under Subsection 25(1) of the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 [Act 520] ("CIDB Act"), concealment of the full text of the WhatsApp Messages ("WAM") such that the Adjudicator was given the impression that the supplier of Claycrete had indorsed the works carried out by the Respondent for the Project and concealment of the fact that the Respondent, and not the Claimant, had placed the order for Claycrete.

In the decision of the High Court, it was noted that this is one of the rare cases where the Court was satisfied that the Plaintiff in an application to set aside an adjudication decision had discharged the legal burden to prove, on a balance of probabilities, that the AD was improperly procured through fraud or in other words, that limb (a) in Section 15 of the CIPAA has been established. The Court held that the Respondent's conduct in concealing the fact that it does not possess a valid certificate of registration under the CIDB Act and selecting only parts of the WAM, which would otherwise prove that the correct amount of Claycrete was not used for the road, and yet submitting its claims to the Claimant for the CIDB Levy and the Claycrete Road, amount to wilful acts of dishonesty and are therefore fraudulent. The Court further found that the fraudulent behaviour, acts or omissions raised by KPF in this application fall under the category of fraudulent behaviour, acts or omissions which were not raised as a defence in the adjudication but which emerged afterwards.

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16th - 21st August 2021	Asia ADR Week 2021
13th October 2021	**ADGMAC & AIAC MESEA Webinar Series 2021**: Renewable and Non-Renewable Energy Dispute Resolution in MESEA
22nd November 2021	**ADGMAC & AIAC MESEA Webinar Series 2021**: Disputes in Fintech and Complex Technology Sector in MESEA

2021

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Charlton Martin Consultants Sdn Bhd

John Wong
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