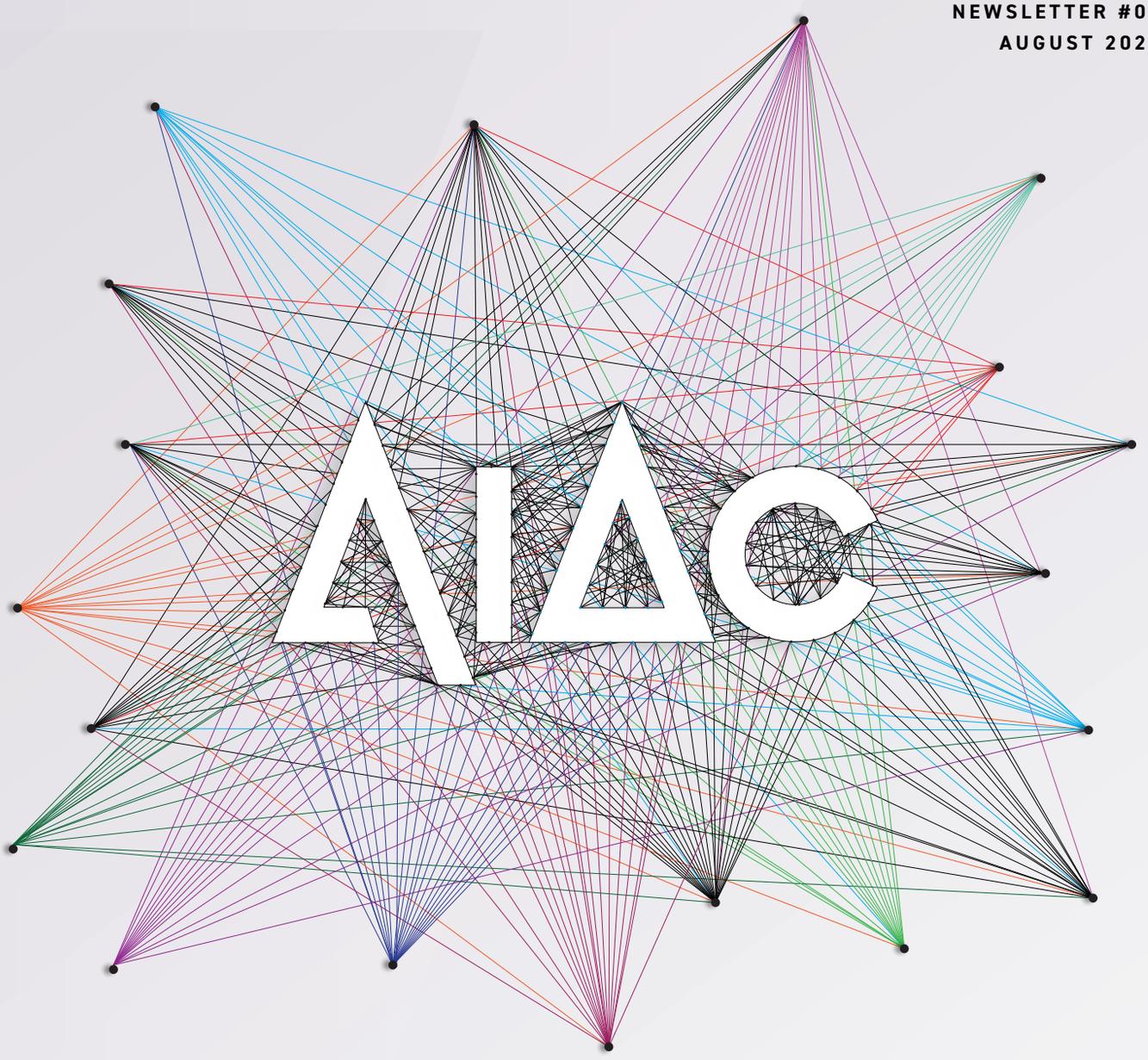
ASIAN INTERNATIONAL ARBITRATION CENTRE

NEWSLETTER #02
AUGUST 2021



ADR AS A CULTURAL TAPESTRY

Weaving Diversity into Practice

AIAC SEPTEMBER

SPORTS MONTH 2021

AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE

2nd
SPECIAL: SPORTS MONTH OLYMPIC WEBINAR
United By Sports Arbitration: A Reflection on the Tokyo Olympic 2020
FREE

5th
AIAC VIRTUAL FITNESS SESSION
Virtual Crossfit Workout
FREE

7th
SPORTS AND MENTAL HEALTH WEBINAR
A Year Into COVID-19: The Strain on the Sports Industry and Athletes' Mental Health
FREE

9th
CAS FRAMEWORK WORKSHOP
Disputes to CAS: Understanding the Sports Arbitration Framework
RM30

12th
AIAC VIRTUAL FITNESS SESSION
Total Body Workout
FREE

14th
THE SUN YANG CASE WEBINAR
The Sun Yang Case: The Implications of the Swiss Tribunal's Decisions
FREE

19th
AIAC VIRTUAL FITNESS SESSION
Align + Flow (Beginner-friendly)
FREE

21st
WOMEN IN SPORTS WEBINAR
Women in sports: Above the Quota
FREE

SUPPORTING ORGANISATIONS

Sports Law Association of Malaysia

23rd
CAS MEDIATOR WORKSHOP
Becoming a CAS Mediator: an Asian Perspective
RM30

26th
AIAC VIRTUAL FITNESS SESSION
Hustle HIIT Out
FREE

28th
STANDARD OF PROOF IN DOPING WEBINAR
The Standard of Proof in Anti-Doping Arbitrations: Understanding Comfortable Satisfaction
FREE

30th
THE GREAT SPORTS DEBATE: THE SEQUEL
FREE

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

TABLE OF CONTENTS

NEWSLETTER #02

August 2021

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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.

DIRECTOR'S MESSAGE

Welcome to the August 2021 edition of the Asian International Arbitration Centre's ("AIAC's") Newsletter! What a ride the past few months have been! Malaysia entered into its second full lockdown in June 2021 due to skyrocketing COVID-19 numbers potentially attributable to the Delta variant. Fortunately, the nation's vaccination drive has been on an upward trend, with approximately 50% of the adult population being fully inoculated to date.

The past few months have equally been eventful for the AIAC. Between April and July 2021, we rolled out a number of projects to continue spearheading alternative dispute resolution ("ADR") in Malaysia and beyond.

One of our utmost priorities was the drafting and finalisation of the AIAC Arbitration Rules 2021, which was successfully launched on 1st August 2021. The AIAC Legal Services Team spent the past seven (7) months diligently working on this project, which saw two (2) rounds of reviews with an external advisory committee made up of leading domestic and international arbitrators, a fifteen (15) day public consultation period in June 2021, and numerous internal revisions. The AIAC Arbitration Rules 2021 are a testament to the AIAC's commitment to embody best practices in international arbitration in our procedural rules, with the ambition of the Centre becoming a leading global ADR hub.

As announced previously, the Moot Problem for the 29th Willem C. Vis International Commercial Arbitration and 19th Vis (East) Moots will use the AIAC Arbitration Rules 2021. In line with this, the AIAC will host a Pre-Moot in March 2022, registrations for which will open on 9th October 2021.

The AIAC also launched a new series of webinars in May 2021 titled *"Middle East and Southeast Asia (MESEA) Webinar Series 2021"*, following the signing of a historic Cooperation Agreement between itself and Abu Dhabi Global Market Arbitration Centre (ADGM Arbitration Centre). The series will feature five (5) webinars focusing on topics of interest to both regions with the aim of promoting the advancement of arbitration and mediation as a means of settling disputes arising out of commercial transactions in the Middle East and Southeast Asia regions.

In June 2021, the AIAC, in collaboration with the Chartered Institute of Arbitrators (Malaysia Branch), launched its Arbitration-In-Practice ("AIP") Workshop series for 2021. Aimed at providing continuous practical and professional development training to certified arbitrators, this platform serves as a refresher and provides insight into the conduct of arbitral proceedings. The AIP Workshop series are designed in a lecture format with the requirement for advance preparation of case studies as well as breakout discussions with tutors and the conduct of mock advocacy exercises on, amongst others, examination of witnesses, conduct of hearings, and drafting of arbitral awards. Selected senior and prominent arbitrators feature as lecturers and tutors throughout these workshops.

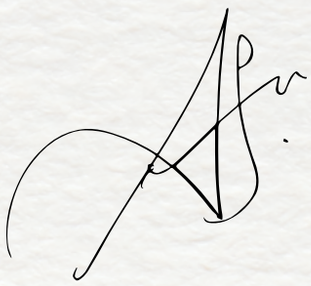
In July 2021, the AIAC organised and hosted Diversity in Arbitration Week 2021, the second edition of the series. This year's initiative was themed "*Charting the Way*" and involved showcasing multiple interviews daily on the personal journeys of the featured arbitration practitioners who were of varied genders, ages, professions, jurisdictions, races and ethnicities. The purpose of the series was to enable the audience to understand the challenges these esteemed practitioners have faced in their careers and the lessons they learnt from these experiences to become the pioneers they are today. The week's events also featured an entertaining and thought-provoking live debate focussed on whether we are still #ChartingtheWay to achieve diversity in international arbitration. We would like to thank our collaborating organisations – ArbitralWomen, Chartered Institute of Arbitrators (Malaysia Branch), Rising Arbitrators Initiative, ICCA-ICSID Webinar on the Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings and Racial Equality for Arbitration Lawyers – for their efforts in bringing this year's initiative to fruition.

No newsletter would be complete without industry contributions. This edition once again features three special interviews, namely one on cross-cultural communication in international arbitration, the second on trends in maritime, shipping and commodities disputes and the third on the nifty innovation we know as Arbitrator Intelligence. On that note, the AIAC wishes to thank all of the special contributors in this edition of the Newsletter – Prof. Catherine Ann Rogers, Chong Ik Wei, Fahira Brodlija, Kevin Kim, Rajat Malhotra and Siva Kumar Kanagasabai – for sharing their industry insights and practical knowledge with our readers.

Looking to the future, the remainder of 2021 also boasts an impressive lineup of events, including a whole month of sports arbitration-related events during the September Sports Month, and a number of new initiatives that will be spearheaded by the AIAC Young Practitioners' Group, including a reboot of the Careers 2.0 series. Please keep an eye out on our email blasts and social media platforms in the coming weeks for updates on these and other initiatives. And don't forget to catch the next edition of our newsletter which will feature a summary of the events held during our Asia ADR Week 2021 between 16th and 21st August 2021, including the launch of the AIAC 2019 Standard Form of Building Contracts Manual and Draft Technology Expert Committee Standard Forms – Software Development Contract.

We look forward to further strengthening the AIAC's products and services in line with our commitments to holistic dispute management, capacity building, and diversity and inclusion. As we move into the final quarter of 2021 we hope that the world begins to mend while maintaining the lessons learned during these exceptional times.

Till then, take care and stay safe.

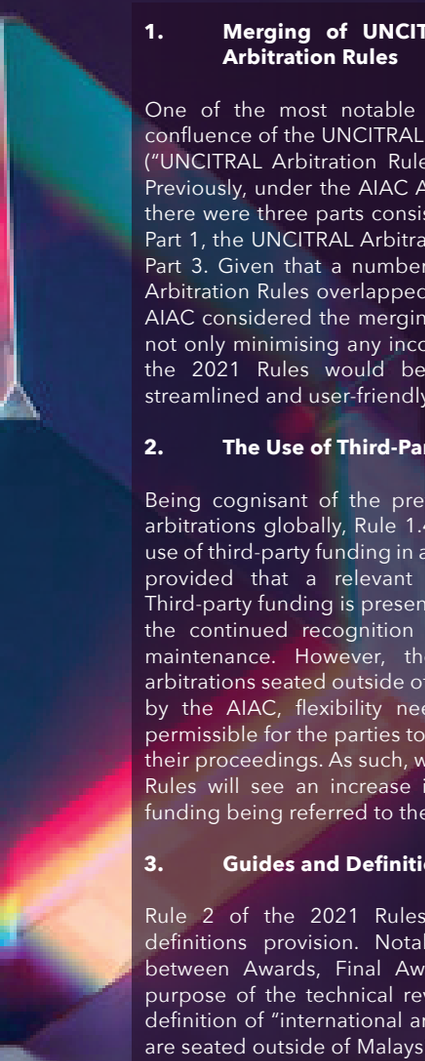


TAN SRI DATUK SURIYADI BIN HALIM OMAR
Director of the AIAC

KEY INSIGHT

LAUNCH OF THE AIAC ARBITRATION RULES 2021

On 1st August 2021, the AIAC launched its much-awaited AIAC Arbitration Rules 2021 ("2021 Rules"). The 2021 Rules are the culmination of the AIAC's conscientious effort to meet the current and future needs of the arbitration community by providing an updated product that reflects contemporary standards and practices in international arbitration. This article will provide a brief summary of the salient features of the 2021 Rules.



1. Merging of UNCITRAL Arbitration Rules and AIAC Arbitration Rules

One of the most notable features of the 2021 Rules is the confluence of the UNCITRAL Arbitration Rules (as revised in 2013) ("UNCITRAL Arbitration Rules") and the AIAC Arbitration Rules. Previously, under the AIAC Arbitration Rules 2018 ("2018 Rules"), there were three parts consisting of the AIAC Arbitration Rules in Part 1, the UNCITRAL Arbitration Rules in Part 2 and Schedules in Part 3. Given that a number of the provisions in the UNCITRAL Arbitration Rules overlapped with the AIAC Arbitration Rules, the AIAC considered the merging of Parts 1 and 2 to be pertinent to not only minimising any inconsistencies but to also ensuring that the 2021 Rules would be viewed as a harmonious, highly streamlined and user-friendly set of procedural rules.

2. The Use of Third-Party Funding

Being cognisant of the prevalent use of third-party funding in arbitrations globally, Rule 1.4 of the 2021 Rules now permits the use of third-party funding in arbitrations administered by the AIAC, provided that a relevant law does not provide otherwise. Third-party funding is presently not recognised in Malaysia due to the continued recognition of the doctrine of champerty and maintenance. However, the AIAC does recognise that for arbitrations seated outside of Malaysia that are to be administered by the AIAC, flexibility needs to be accorded to the extent permissible for the parties to find a suitable mechanism to finance their proceedings. As such, we hope that this inclusion in the 2021 Rules will see an increase in arbitrations subject to third-party funding being referred to the AIAC.

3. Guides and Definitions

Rule 2 of the 2021 Rules contains a revamped guide and definitions provision. Notable inclusions are the distinctions between Awards, Final Awards and Consent Awards for the purpose of the technical review process, an amendment to the definition of "international arbitration" to include arbitrations that are seated outside of Malaysia where neither party has its place of business at the seat, and a wide definition of the word "virtually" to keep in line with the global trend of having institutional rules that explicitly permit the conduct of virtual proceedings.

4. Notification/Communications and Calculation of Time Limits

Rule 3 of the 2021 Rules is a new provision on communications and calculation of time limits that adopts and expands Article 2 of the UNCITRAL Arbitration Rules. The specific additions relate to clarifications on how the service or the delivery of documents is deemed to be effected where there are multiple parties or multiple addresses or modes for service on the same party. There is also a new provision that recognises the validity of documents executed by the Director of the AIAC or the AIAC electronically, given that such execution has been prevalent over the course of the past 18 months.

5. Commencement of Arbitration

Under the 2018 Rules, an arbitration with the AIAC was deemed to have commenced upon the complete submission of a commencement request comprised of a written arbitration clause, the contractual documentation containing the arbitration clause, the notice of arbitration and proof of payment of the non-refundable registration fee.[1]

The commencement of arbitration under the 2021 Rules has now been revamped and fused with a provision for the registration of the arbitration. This essentially means that an arbitration is deemed to have commenced *on the date when the notice of arbitration is delivered to the Respondent*.[2] However, upon commencing the matter, the Claimant would then need to comply with the procedural requirements laid down in Rule 7 and submit their Registration Request to the AIAC.[3]

The Registration Request shall include a statement for reference of the dispute to arbitration under the AIAC Arbitration Rules, a copy of the written arbitration agreement, a copy of the documentation in which the arbitration agreement is contained, a copy of the notice of arbitration, a copy of the response to the notice of arbitration, a request for Fast Track Procedure (where applicable), a statement on whether any pre-conditions to arbitration have been satisfied or waived by the parties, any communication between the parties concerning the intended arbitration, and proof of payment of the non-refundable registration fee.[4]

The Registration Request may be submitted to the AIAC at any time after the arbitration is deemed to have commenced, whereby the date on which the AIAC receives the complete Registration Request will be the date on which the arbitration was registered under the 2021 Rules.[5]

[1] Rule 2.1 of the 2018 Rules.
[2] Rule 5.1 of the 2021 Rules.
[3] Rule 7.1 of the 2021 Rules.
[4] Rule 7.2 of the 2021 Rules.
[5] Rules 7.3 and 7.4 of the 2021 Rules.

6. Fast Track Procedure

One of the primary highlights of the 2021 Rules is the incorporation of a self-contained fast track procedure.

Prior to the introduction of the 2021 Rules, the AIAC maintained a standalone product for the conduct of expedited arbitrations known as the AIAC Fast Track Arbitration Rules 2018. Given that many of the provisions in the normal arbitration rules and the fast track arbitration rules were analogous, save for the specification of thresholds for the applicability of a fast track arbitration and the prescription of time limits in the same, the AIAC considered it would be more efficient and user friendly to embed a fast track procedure within the 2021 Rules itself.

As a result, the Fast Track Procedure in Rule 8 effectively replaces the AIAC Fast Track Arbitration Rules 2018 for arbitrations commenced on or after 1st August 2021, unless otherwise agreed to by the Parties.

To enliven the Fast Track Procedure, at the time a Registration Request is submitted to the AIAC, a party may also submit a Fast Track Request in the following instances: firstly, where the Parties have agreed to adopt the Fast Track Procedure or any other edition of the AIAC Fast Track Arbitration Rules;[6] secondly, where the amount in dispute is less than USD500,000.00 (international arbitration) or RM2,000,000.00 (domestic arbitration);[7] and thirdly, in the event of exceptional urgency.[8] After considering all relevant circumstances considered appropriate, the Director will then determine whether the Fast Track Procedure should apply to a dispute.[9] By default, an arbitration under the Fast Track Procedure is to be heard before a sole arbitrator and will proceed as a documents-only arbitration unless otherwise determined by the Arbitral Tribunal.[10]

The Fast Track Procedure also contains an achievable timeframe of 180 days within which the Final Award shall be rendered by the arbitral tribunal from the delivery of the first procedural order by the arbitral tribunal. The AIAC has taken the opportunity to revisit a number of the time limit provisions enshrined in AIAC Fast Track Arbitration Rules 2018 to ensure a smoother arbitration. Uniquely, Rule 8.10 of the 2021 Rules also permits an arbitral tribunal to opt-out of the Fast Track procedure if it is impractical for the arbitral proceeding to be conducted in accordance with the prescribed time limits. With this mechanism, we hope to continue to provide our administrative support services to such proceedings to ensure a more efficient and hassle-free arbitration

7. Appointment Procedure

Rule 9 of the 2021 Rules is our new appointment provision which largely reiterates Rule 4 of the 2018 Rules.

Some noticeable changes are the inclusion of a specific appointment process where the Parties have opted for an even-numbered arbitral tribunal as well as a new provision on multi-party appointments, which aims to overcome the issues relating to the equal treatment of parties raised in the *Siemens-Dutco* decision of the French Cour de Cassation. With respect to multi-party appointments specifically, the new Rule 9.7 prescribes a separate procedure for the appointment of both even- and odd-numbered arbitral tribunals whereby the multiple Claimants or Respondents are to act collectively in nominating their share of the required number of arbitrators, failing which, the Director will constitute the entire arbitral tribunal and will exclude or release any nominated or appointed arbitrators from consideration, unless otherwise agreed to by the Parties.

In the spirit of enhancing transparency, Rule 9.8 of the 2021 Rules now also prescribes that the default mode of appointing the arbitral tribunal by the Director of the AIAC would be by list procedure, unless otherwise agreed to by the parties or determined by the Director. The AIAC is positive that this added layer of transparency in the appointment process would make parties and the broader arbitration community more confident in the manner by which the Director exercises his power of appointment, which in turn would enhance the utility of arbitration as a consensual dispute resolution mechanism.

8. Independence of and Challenges to an Arbitral Tribunal

The 2021 Rules now contain a new provision in Rule 10 on the impartiality, independence and availability of the arbitral tribunal to reinforce the matters prospective arbitrators should have in mind at the time they are approached in connection with an appointment in an arbitration matter. Importantly, greater emphasis has been placed on the importance of the arbitral tribunal to remain impartial and independent at all times and to ensure that proper disclosures of any perceived conflicts are made throughout the course of the arbitral proceedings.

The language of the challenge provision in Rule 11 has also been modified to factor in situations where a party is aware of an existing circumstance at the time of the arbitrator's appointment that was then not a cause for concern, although a change in circumstances during the course of the arbitral proceedings later gives rise to justifiable doubts. We anticipate that by availing such a provision, the parties would be able to address any allegations of bias at an early stage of the arbitral proceedings rather than waiting for the release of the Final award to refuse the recognition and enforcement of the Final award.

9. Interim Measures and Emergency Arbitration

The 2021 Rules now provide a more detailed provision on interim measures and Emergency Arbitrations.[11]

Rule 16 of the 2021 Rules relates to the power of the arbitral tribunal to award interim measures. This rule is predominately a reproduction of Article 26 of the UNCITRAL Arbitration Rules (as revised in 2013) and also reflects Sections 19 – 19J of the Arbitration Act 2005. An interim measure is described as a temporary measure issued by the Arbitral Tribunal or an Emergency Arbitrator at any time prior to the issuance of the Final Award.[12] An interim measure is designed to order a party to, *inter alia*, maintain or restore the status quo pending determination of the dispute, preserve evidence that may be relevant and material to the resolution of the dispute.[13]

Tied to Rule 16 are Rules 17 and 18, which relate to the appointment of an emergency arbitrator and the conduct of emergency arbitration proceedings. These provisions are not new to the AIAC Arbitration Rules – rather, they have been moved from Schedule 3 of the 2018 Rules into the main text of the 2021 Rules. Some linguistic changes have also been made to provide greater clarity to these provisions, given that some concerns were raised regarding the ambiguity of the earlier provisions.

Rule 17.1 specifically provides that an Emergency Arbitrator Request can be submitted where urgent interim measures are sought prior to the constitution of the arbitral tribunal. The Emergency Arbitrator Request will be considered by the Director, and if approved, an emergency arbitrator will be appointed by the Director within two days of receiving the request. Thereafter, the emergency arbitrator is required to issue a first procedural order within three days of their appointment, following which an emergency award shall be delivered to the AIAC no later than fifteen days thereafter. As such, the entire emergency arbitration process can be completed with a 21-day period.

[6] Rule 8.2 (a) of the 2021 Rules.
[7] Rule 8.2 (b) of the 2021 Rules.
[8] Rule 8.2(c) of the 2021 Rules.
[9] Rule 8.3 of the 2021 Rules.
[10] Rule 8.5 of the 2021 Rules.

We have also included provisions relating to the conduct of emergency arbitration proceedings, such as permitting the conduct of proceedings *in absentia* where a party fails to participate in the emergency arbitration, clarifying that the proceedings can be conducted physically, virtually or on a documents only basis, and we have also clarified that the emergency arbitrator is empowered to make any order or award that the arbitral tribunal itself may make, although the arbitral tribunal has been given the ultimate power to consider whether the emergency award shall be retained or vacated.

10. Summary Determination

Another new inclusion in the interest of creating a more efficient arbitration process is the new Summary Determination procedure in Rule 19 of the 2021 Rules.

The summary determination procedure is similar to the early dismissal procedures that are found in many institutional rules. The purpose of this provision is to ensure that any claims, counterclaims, or defences that are manifestly without merit, including legal or factual merit, can be dismissed by the arbitral tribunal at an early stage of the proceedings. This places an onus on the parties to ensure that they are able to properly articulate their claims in the early pleadings in the proceeding. A Summary Determination Request can be filed by any party within 30 days of the filing of the statement of defence and counterclaim, and the request itself will be determined by the arbitral tribunal within 45 days of its receipt of the final submission in relation to the Summary Determination Request.

We anticipate that the inclusion of this provision will provide time and cost efficiencies to parties and the arbitral tribunal, which in turn will strengthen confidence in arbitration as an effective dispute resolution mechanism.

11. Joinder and Consolidation

The joiner and consolidation provisions in Rules 21 and 22 of the 2021 Rules predominately reflect the equivalent provisions in the 2018 Rules, save for some changes to the applicable tests and a new provision in the consolidation provision relating to multi-contract disputes.

Specifically, Rule 21.1 permits the submission of a Joinder Request on the new ground that the participation of the Additional Party to be joined is necessary for the efficient resolution of the dispute and that such participation directly affects the outcome of the arbitral proceedings. We considered such an inclusion necessary as we are aware that there are, at times, residual grounds to those enshrined in Rule 21.1(a) and (b) that would warrant the joinder of a third-party to a proceeding. An example would be where an entity that is not a party to the arbitration agreement nonetheless has a controlling interest in one of the parties to the arbitration that would warrant its participation in the proceedings.

We have also clarified that the test for approving or rejecting a Joinder Request shall be one that considers "all relevant circumstances" as opposed to "any relevant circumstance" to bring our joinder provision in line with similar tests in other institutional rules.

With respect to the consolidation provision in Rule 22, we have now included Rules 22.4 and 22.6 to permit the consolidation of multi-contract disputes in a single notice of arbitration. If the Director dismisses such a multi-contract consolidation request, the Claimant would be required to serve separate notices of arbitration with respect to each dispute and file separate Registration Requests with the AIAC.

12. Closure of Proceedings and the Drafting of Awards

Also worth highlighting are our revised provisions in Rules 32 to 39 of the 2021 Rules relating to the closure of proceedings, the form and contents of awards, the technical review process and the issuance of additional awards. This provision essentially expands on Rule 12 of the 2018 Rules while also incorporating Articles 33 – 34 and 36 – 39 of the UNCITRAL Arbitration Rules.

Specifically, Rule 32 clarifies when the arbitral tribunal is required to declare the closure of proceedings and how such shall be declared in the context of bifurcated proceedings or in instances where the arbitral tribunal intends to issue multiple awards in a multi-party proceeding. Rule 32.5 also empowers the arbitral tribunal, in exceptional circumstances, to consider re-opening a closed proceeding prior to the delivery of the Final Award, provided that the Director has been consulted on the same.

Rule 33, which relates to decision-making and the form of awards, clarifies how a majority decision may be arrived at where an arbitrator is in dissent. It also explicitly provides for the arbitral award to be signed either physically or electronically in light of the increasing trend for electronic signatures attributable to the pandemic.

Rule 34 provides a detailed explanation of the technical review process that will be undertaken by the Director of the AIAC on the draft Final Award. Importantly, it is clarified that the technical review is not a merits review process, however, its purpose is to draw the arbitral tribunal's attention to any perceived irregularities in the form of the draft Final award, including matters relating to the procedural history, general content issues, and any clerical, typographical or computational errors. Since the introduction of the technical review process in the AIAC Arbitration Rules 2017, the Director and the AIAC have undertaken a technical review of more than 50 arbitral awards where many of the arbitral tribunals whose awards were subject to technical review have acknowledged the diligence of the AIAC's Legal Services Team in drawing the arbitral tribunal's attention to a range of procedural irregularities.

Rule 36 is also a new provision that reflects and expands on Article 36 of the UNCITRAL Arbitration Rules (as revised in 2013) by setting out the manner in which the arbitral tribunal may deal with the settlement or termination of an arbitral proceeding. Of note is Rule 36.1, which requires the arbitral tribunal to turn its mind to whether the dispute is "*arbitrable and the settlement is genuine and within its jurisdiction*". The purpose of this inclusion is to deter the use of arbitration proceedings as a vehicle for money laundering, thus enhancing the legitimacy of the arbitration process.

[11] Rules 16-18 of the 2021 Rules.
[12] Rule 16.3 of the 2021 Rules.
[13] *Ibid*.

Rule 39 is also noteworthy given that it expands on the Additional Award provision as contained in Article 39 of the UNCITRAL Arbitration Rules (as revised in 2013). We considered it prudent to provide a more detailed provision, given that the language of Article 39 was rather ambiguous. Rule 39 clearly explains the instances where an arbitral tribunal may consider issuing an Additional Award. Specifically, the arbitral tribunal may do so on its own initiative if it is considered appropriate following an interpretation of an award pursuant to Rule 38 or a correction to an award pursuant to Rule 38. Additionally, a request for an additional award can also be submitted by a party provided that such request is made within 30 days after the receipt for an order for the termination of the proceedings or the receipt of the Final Award, and provided that the Arbitral Tribunal considers the request justified and is able to determine the claim without re-opening the proceedings. We envisage that such a clarification and substantiation of the Additional Award provision would make the provision more appealing for the Parties' consideration.

13. Costs and Deposits

With respect to the costs of the arbitration and the deposits payable, the AIAC has taken a policy decision not to increase any of its fees or the prescribed costs of arbitrations given the financial difficulties many businesses, individuals, and organisations have been facing in recent times. What we have done is we have corrected some computational inconsistencies to ensure a more accurate deposit calculation.

Pursuant to Rule 40.5(b) and Schedule 2, Clause 1.1(e) of the 2021 Rules, it is now permissible for parties and the arbitral tribunal to enter into fee agreements for the interim release of fees, provided that the total fees subject to interim release do not exceed 50% of the arbitral tribunal's total fees and expenses. This is a departure from the 2018 Rules, which did not expressly accommodate for the interim release of fees.

There are two additional points to note about our new deposit provisions – firstly, pursuant to Rule 41.3(b), the AIAC is now authorised to treat any claims where the provisional advance deposit remains unpaid as withdrawn without prejudice, provided that the arbitral tribunal is yet to be constituted. An analogous provision can be found in the Fast Track Procedure in Rule 8.7(f)(i) of the 2021 Rules. However, the distinguishing point to note is that unlike a normal arbitration where the AIAC collects deposits in at least two separate tranches – one being a 30% provisional advance deposit and the second being a 70% advance preliminary deposit – under the Fast Track Procedure, the AIAC collects 100% of the deposits upfront in the spirit of enhancing the operational efficiency of the fast track procedure.

The AIAC is also maintaining separate fee schedules for normal arbitrations and fast track arbitrations, where a marginal cost saving can be realised where the fast track procedure applies.

14. Confidentiality

Rule 44 of the 2021 Rules contains a revised confidentiality provision that bolsters one of the prime cornerstones of arbitration. Rule 44.1 reinforces the confidential nature of arbitral proceedings, whilst Rule 44.2 provides an explanation of the scope of the obligation to cover the existence of the proceedings, the deliberations of the arbitral tribunal, the pleadings, evidence and other materials and documents produced in the proceeding, save for those already available in the public domain. Rule 44.3 emphasises that the confidentiality obligation applies not only to the parties and the arbitral tribunal, but it equally applies to the Director, the AIAC, any tribunal secretary, as well as any witnesses or experts appointed by the arbitral tribunal. The Parties are also obligated to seek a similar confidentiality undertaking from any representative they chose to engage in the arbitration as well as any fact or expert witness or service provider they engage.

In the event of a breach of confidentiality, the Arbitral Tribunal is empowered to take appropriate measures such as issuing an order or an Award for costs or damages.[14] Given this power, the Arbitral Tribunal can take steps swiftly to sanction a party in breach thus, preserving a higher threshold of confidentiality.

The most striking feature of Rule 44 is subsection 44.6, which allows the AIAC to publish a redacted copy of an arbitral award with the consent of the parties, in either the award's entirety or in summary form. The AIAC envisages that such a provision would not only enhance transparency, in the sense that published awards can be considered as a soft reference in future proceedings, but it also considers that publishing such redacted awards would provide guidance and encouragement for new and young arbitrators in drafting their initial few arbitral awards.

Conclusion

The AIAC is proud of the 2021 Rules, which contain significant amendments to the 2018 Rules to bring the AIAC's procedural rules in line with best practices in international arbitration. With this new product, the AIAC hopes to be able to better service the arbitration community in the Asia-Pacific region and beyond as we work towards our goal of being recognised as a global ADR hub.

The AIAC would also like to take this opportunity to thank the members of the Rules Revision Committee for their dedication to and support of the drafting of the AIAC Arbitration Rules 2021, namely Anna Grishchenkova, Professor Chin Leng Lim, Dr. Crina Baltag, Dato' Nitin Nadkarni, Erin Miller Rankin, Foo Joon Liang, Dr. Hassan Arab, Professor Joongi Kim, Professor Dr. Maxi Scherer, Nahendran Navaratnam, Nicholas Lingard, Peter Godwin, Rajendra Navaratnam, Sitpah Selvaratnam, Sun Wei, Tan Swee Im and Vyapak Desai.

[14] Rule 44.5 of the 2021 Rules.

CHARTING THE WAY

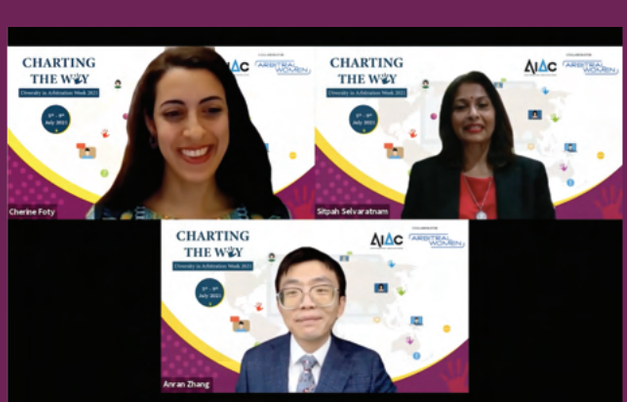
Diversity in Arbitration Week 2021

Following its inaugural feature in 2020, the AIAC hosted the second edition of its Diversity in Arbitration Week between 5th and 9th July 2021, titled "*Charting the Way*" ("DAW 2021"). Throughout the week, multiple interviews were showcased daily on the personal journeys of the featured arbitration practitioners who were of varied genders, ages, professions, jurisdictions, races and ethnicities. The interviews highlighted how these professionals have charted their way and have overcome their fair share of challenges in order to reach incredible career heights in international arbitration. The week's events also featured an entertaining and thought-provoking live debate focussed on whether we are still #ChartingtheWay to achieve diversity in international arbitration.

Adventures of the Captain Marvels of International Arbitration

Whilst the legal profession has always been known to be dominated by men, it is undoubtedly that women, too, have made great strides in the field over the past few decades. In celebrating the sheer strength showcased by women in the industry, the AIAC collaborated with ArbitralWomen to discuss the everchanging landscape of women in the realm of international arbitration. On 5th July 2021, we showcased the journeys of three (3) remarkable women who provided insights on their experiences with issues such as unconscious bias and the pipeline leak.

The DAW 2021 kickstarted with the AIAC's very own Ms. Michelle Sunita Kummar alongside Ms. Tope Adeyemi (33 Bedford Row) interviewing the highly accomplished Dr. Affef Ben Mansour (Affef Ben Mansour), who is also an ArbitralWomen board member. Dr. Ben Mansour reiterated that although there are many roads to pursuing a career in international arbitration, the journey will always remain a continuous one. In order to succeed in this industry, it is important for women to take an active role in enhancing their visibility whilst having a strong grasp of substantive legal issues. According to Dr. Ben Mansour, traits such as adaptability, hard work and perseverance are essential in becoming an arbitrator, particularly when it comes to the challenge of securing one's second appointment as an arbitrator, which in Dr. Ben Mansour's experience was much more challenging than the first. Dr. Ben Mansour also stressed the importance of young practitioners having access to mentorship programmes so they can be inspired by the journeys of other female practitioners in forging their own careers in this industry.



The second interview for the day featured Dr. Anran Zhang (AIAC) and Ms. Cherine Foty (Jones Day) interviewing one of Malaysia's leading female arbitrators, Ms. Sitpah Selvaratnam (Tommy Thomas). With over 30 years of experience and being one of the

world's leading minds in maritime law, Ms. Selvaratnam shared that she has had her fair share of difficulties in getting to where she is today, including having to endure both gender and racial discrimination during the initial days of her career. However, looking back at her journey to date, she summarised her experience as being purposeful, exhilarating and blessed. Ms. Selvaratnam emphasised that gender diversity in an arbitral tribunal is essential to a complete wholesome determination of the dispute as it not only brings in different perspectives but it also reflects the social and economic composition of society. In concluding the interview, Ms. Selvaratnam urged the younger generation of women to be brave and authentic to their selves.

In the final interview for the day, Ms. Nivvy Venkatraman (AIAC) and Dr. Annabelle Möckesch (Schellenberg Wittmer Ltd) interviewed Ms. Jelita Pandjaitan (Linklaters Singapore Pte. Ltd) on her stellar career in arbitration in Asia. Ms. Pandjaitan reminisced that she had an unconventional start to her career in international arbitration, having first started in financial regulatory practice. Having treaded various paths, she now proudly describes her journey as an evolutionary one. Ms. Pandjaitan emphasised that the traits of agility and adaptability are essential to forging a successful legal career in Asia. She also provided the audience with tips on how to navigate networking at arbitration conferences which can be a daunting task for many, especially young practitioners. Being a beneficiary of the move to enhance gender diversity, Ms. Pandjaitan posited that gender diversity has certainly improved over the years, and she is hopeful that the nomination of women as arbitrators will soon become a norm without any need for an explanation as to why a particular female arbitrator should be on the list. The interview concluded with Ms. Pandjaitan's encouraging young practitioners to seek help, support and guidance from senior practitioners as and when required, and she also urged senior practitioners to lend a helping hand to bring up the next generation of arbitration practitioners.

The World is Your Oyster – A Reflection on Professional Diversity

In collaboration with the Chartered Institute of Arbitrators (CIArb) (Malaysia Branch), four (4) interview sessions titled, *"The World is Your Oyster – A Reflection on Professional Diversity"* were featured on 6th July 2021.

The first interview saw Ms. Shanti Abraham (Shanti Abraham & Associates) and Mr. Ahmad Haniffitri (AIAC) diligently interview Dr. Christopher To (Gilt Chambers). Dr. To reflected on how his interest in arbitration was piqued while he was working as an engineer in the aviation industry, an interest which eventually saw him pursue legal qualifications and ultimately embark on a highly successful international arbitration career. Dr. To opined that while lawyers are best-placed to tackle legal issues, non-lawyers who are industry professionals do bring a plethora of insight to a proceeding; indeed, highly technical disputes should be resolved by an industry professional arbitrator who possesses the technical know-how as opposed to solely being resolved by a lawyer. That said, industry professional arbitrators cannot avoid having to attain an understanding of legal concepts and keeping up-to-date with legal developments in their field of expertise. In this regard, Dr. To encouraged industry professional arbitrators to embark on ADR courses through CIArb and other reputable institutions or shadow a counsel or arbitrator to hone their skills.

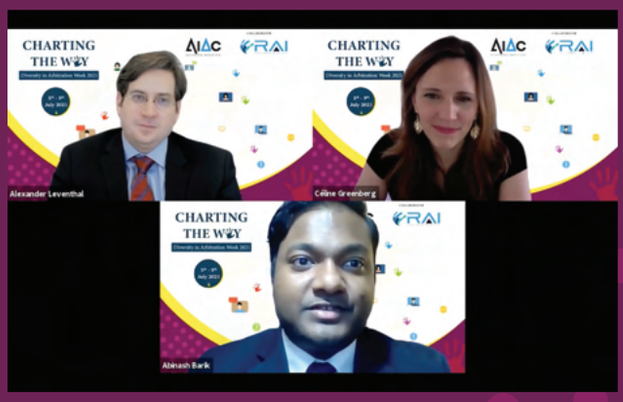
The second interview was conducted by Ms. Crystal Wong Wai Chin (Lee Hishammuddin Allen & Gledhill) and Mr. Shazrin Shafiqi Shahizan (AIAC) who had the pleasure of interviewing the insightful Mr. Michael Peer (PwC Singapore). Being an accountant by profession, Mr. Peer shared his experience as both an expert witness and an arbitrator and commented that industry professionals from all walks of life could be arbitrators, especially if they are committed to being life-long learners. He commented that the transition from being an expert witness to an arbitrator has been an enjoyable path for him and has provided him with a new perspective on arbitration. Mr. Peer emphasised that since legal issues are part and parcel of a dispute, it is necessary and important for non-lawyer arbitrators to grasp the law and express his/her train of thought to the tribunal as well as the parties. This all boils down to the effectiveness of the communication skills showcased by the arbitrator.

The third session was brilliantly moderated by Mr. Choon Hon Leng (Raja, Darryl & Loh) and Ms. Sharifah Shazuwin (AIAC), who interviewed maritime expert Capt. Milind J. Karkhanis (KVH). In Capt. Milind's view, it is important for arbitral tribunals to contain both lawyer and non-lawyer arbitrators, especially in maritime disputes, because such a composition balances out the tribunal and showcases the uniqueness of the non-lawyer arbitrator and the practical solutions he/she can offer. Although professional diversity is moving in the right direction, more could be done by institutions to normalise the appointment of non-lawyer arbitrators and promote professional diversity. For aspiring young arbitrators, Capt. Milind highlighted three main ingredients to secure one's first appointment: perseverance, patient and lastly, passion.

The last engaging interview for the day saw Ar. David Cheah Ming Yew (DCDA Architect) and Ms. Chelsea Pollard (AIAC) interviewed Mrs. Suzanne Rattray (Rankin Engineering Consultants) on her successful career as an arbitrator with an engineering background in Zambia. Being an engineer by profession, Mrs. Rattray emphasised the importance of providing mentorship for budding female engineers and arbitrators, given that both fields are mainly dominated by males. While recognising that arbitral tribunals are predominately composed of those from the legal profession, Mrs. Rattray highlighted that the inclusion and appointment of arbitrators from different professions bring a great deal of pragmatism to the tribunal, and for practical legitimacy, a diversified tribunal should be formed. Nonetheless, Mrs. Rattray echoed the views of the other interviewees that industry professional arbitrators should attend trainings with CIArb to equip themselves with the necessary skills to be effective in this profession, and they should also be voracious readers since there is an abundance of information and developments they will need to keep abreast of during the course of their arbitration careers.

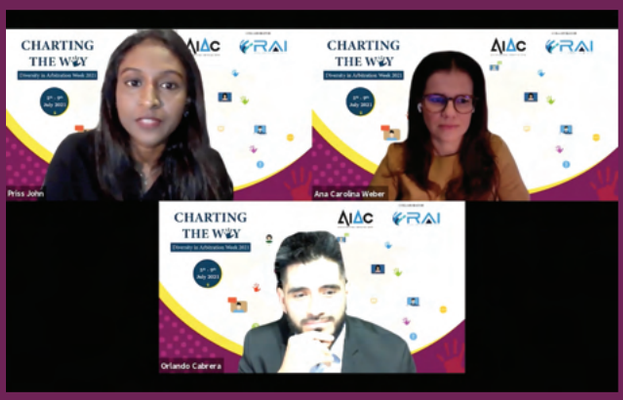
The Rise of the Young Arbitrator: A Tale of Trials and Triumphs

On the third day of DAW 2021, the AIAC collaborated with the Rising Arbitrators Initiative (RAI) to release interviews with four (4) rising arbitrators who discussed the topic of age diversity in international arbitration. The interviewees shed light on what it takes to establish a career in the competitive field of international arbitration and shared handy tips on securing that coveted first appointment.



The first interview featured Ms. Céline Greenberg (Mayer Greenberg), who was interviewed by Mr. Alexander Leventhal (Quinn Emanuel Urquhart & Sullivan LLP) and Mr. Abinash Barik (AIAC). Ms. Greenberg opined that apart from age and experience, personal and intellectual maturity also plays a vital role in performing a judicial function such as acting as an arbitrator. In Ms. Greenberg's opinion having a generationally diverse tribunal would foster a good decision as the more experienced arbitrators would bring in their experience whilst the younger arbitrators would bring in the motivation, dedication and excitement to the proceedings.

The second featured Mr. James Ding Tse Wen (C.H. Tay & Partners), who was interviewed by Mr. Baptiste Rigaudeau (LALIVE) and Ms. Nur Nadhirah Syahmi (AIAC). The takeaway from this interview was the when transitioning from an arbitration practitioner to an arbitrator, one has to bear in mind that his/her duty would be extended to both parties. As such, an arbitrator ought to balance views from both sides and uphold a higher standard of ethics, especially with respect to any conflict of interest. Mr. Ding considered that appointing a younger arbitrator would not only bring diverse perspectives to the proceedings but would also enhance the efficacy of the proceedings whilst saving costs as younger generations are more adaptable to new technology.



The third interview featured Dr. Ana Carolina Weber (Eizirik Advogados), who was interviewed by Mr. Orlando Cabrera (Hogan Lovells) and Ms. Prissilla John (AIAC). As a lymphoma survivor, Dr. Weber emphasised that perseverance is the key to overcome any adversity. She also mentioned that mental strength plays an important role in achieving great results. When questioned about some of the challenges she encountered when securing her first appointment, Dr. Weber explained that she struggled to secure her second appointment more so than her first appointment – the only way to deal with such situations is to remain patient and continue to diligently engage in activities to enhance one's visibility. As a final piece of advice, Dr. Weber reminded young practitioners to be patient and further encouraged them to be more involved in mentoring programmes.

In the final interview for the day, Ms. Rocío Digon (White & Case LLP) and Ms. Tharshini Sivadass (AIAC) had the pleasure of interviewing Mr. Seguimundo Navarro Jiménez (inARB). Mr. Navarro explained that when conducting proceedings, arbitrators need to be *"an iron fist in a velvet glove"*. Mr. Navarro also highlighted that possessing a strong academic background whilst cultivating relevant experience in substantive law in one's chosen area of expertise, whether through litigation or arbitration, are both key skills to succeeding as an arbitrator. Mr. Navarro also suggested that young practitioners would largely benefit from serving as tribunal secretaries as they would be able to better understand and appreciate the operation and functioning of an arbitral tribunal, although they would not be in the front line.

Are We Still #ChartingTheWay – A Live Debate

In collaboration with the AIAC Young Practitioners' Group and the ICCA Cross-Institutional Taskforce on Gender Diversity, an intriguing debate titled *"Are We Still #ChartingTheWay?"* was held on 8th July 2021. This debate was niftily moderated by Ms. Louise Barrington (Independent Arbitrator and Mediator) and featured Ms. Jennifer Ivers (White & Case LLP) and Ms. Lilien Wong (Shearn Delamore & Co) for the affirmative team, alongside Ms. Ashley Jones (Freshfields Bruckhaus Deringer) and Mr. Daniel Chua (Herbert Smith Freehills LLP) for the negative, all of whom explored the following proposition:

> *This House believes that the international arbitration community is still #ChartingtheWay to achieve diversity and that more collective efforts are required in the years to come to achieve these goals.*

The debaters noted that gender diversity is indeed flourishing, as reflected in the statistical data published by major arbitral institutions. Nonetheless, increased efforts are required across the board to bridge the diversity gap. For instance, arbitral institutions should enhance transparency in the appointment process to showcase how diversity aspects are factored into their decision-making. Parties and counsel also need to play a role in enhancing diversity by being committed to a fair representation of diverse candidates when exchanging their list of nominees. Presently, a scarcity of information has resulted in a lack of ethnic and geographical diversity, inevitably leading to unconscious biases. In light of this, more data should be made available to arbitration users to overcome such a lack of diversity and promote the composition of arbitral tribunals that are a better reflection of a cross-section of society.

Tackling Intersectionality and Beyond - #LETSGETREAL!

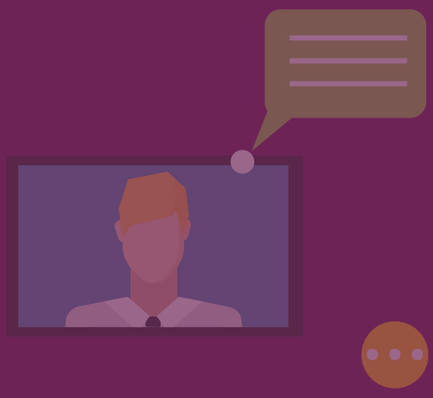
On 9th July 2021, the AIAC showcased three (3) interviews in collaboration with Racial Equality for Arbitration Lawyers (REAL) on the nature of intersectionality and racial diversity in international arbitration and how these factors have played a role in shaping the careers of the relevant interviewees.

In the first interview, Ms. Rekha Rangachari (New York International Arbitration Center) and Ms. Diana Rahman (AIAC) interviewed none other than the creator of the popular podcast series "Tales of the Tribunal", Mr. Christopher Campbell (Baker Hughes). Mr. Campbell explained that one of the things he noticed early in his career was that there was a lack of racial, gender and socio-economic diversity in international arbitration. To address this issue, he wrote an article on the topic that was not only well-received, but also opened up a world of opportunities for him in international arbitration. On that note, Mr. Campbell encouraged those who are trying to establish careers in this field, especially in jurisdictions outside their home jurisdiction, to "flood the zone" by creating content and reaching out to organisations to assist with initiatives, be helpful and genuine, and also to appreciate the process – after all, everything takes time.

The second interview saw Dr. Crina Baltag (Stockholm University) and Ms. Teoh Shu Ling (AIAC) interview Ms. Earl J. Rivera-Dolera (Frasers Law Company) on her success in establishing a career in arbitration in the Asia-Pacific region. Ms. Rivera-Dolera shared that she embarked on a career in arbitration by chance when she moved from the Philippines to Singapore, and the opportunities she embraced at that point in time have played a pivotal role in shaping her international arbitration career to date. She outlined the importance of acquiring the skills to be an effective counsel and arbitrator, and she also noted the benefits of finding a mentor and being open to seizing all opportunities that may come one's way. Ms. Rivera-Dolera emphasised that there will inevitably be hurdles, particularly in the appointment context, as those from minority backgrounds try to establish themselves and prove their integrity in the field. When confronted with such hurdles, the best way forward is to soldier on and not take things personally because there will always be other opportunities.

The final interview for DAW 2021 was conducted by Dr. Kabir Duggal (Arnold & Porter) and Ms. Irene Mira (AIAC), who had an insightful conversation with Ms. Sara Koleilat-Aranjo (Al Tamimi & Co.). While sharing her journey in pursuing a career in international arbitration, Ms. Koleilat-Aranjo stressed that it is important for practitioners to remain resilient and positive when faced with barriers because highs and lows are common in everyone's careers, including those of world-prominent arbitrators. She noted that although there has been a fair deal of focus on gender diversity, there have been fewer discussions on racial and ethnic diversity – platforms such as REAL are effective for facilitating discourse on such issues. Reflecting on a personal experience, Ms. Koleilat-Aranjo also encouraged the audience to respectfully call out bad behaviour and draw people's attention to the conscious or unconscious biases that may be projected because we now live in a world that is more open to differences.

We would like to take this opportunity to thank all the interviewers, interviewees, supporting organisations and collaborators without whose support DAW 2021 would not have been successful.



TRAVERSING THE NUANCES OF CROSS-CULTURAL COMMUNICATION IN INTERNATIONAL ARBITRATION:

IN CONVERSATION WITH KEVIN KIM

A primary highlight of any career in international arbitration is the ability to interact and work with clients, colleagues, arbitrators and other stakeholders from various cultural backgrounds and legal traditions. Such dynamism necessarily entails that there will be different approaches to navigating procedural matters, undertaking advocacy and effectively communicating during the course of a proceeding, much of which can either lead to confusion or misinterpretation due to a lack of cultural awareness. The AIAC recently had the opportunity to interview Kap-You (Kevin) Kim[1] on his experience navigating cross-cultural communication nuances in international arbitration, the excerpts of which are below.

1. What inspired you to pursue a career in international arbitration and what has been your most memorable experience to date?

Among other things, the idea that a lawyer born in Asia and accustomed to Asian languages and cultures would be able to represent his clients more precisely and persuasively in terms of their language and culture inspired me to pursue my career in international arbitration. It is hard to pick one memorable experience, but if I have to, I would say it was in 2011 when my team was awarded both GAR30 and "Win of the Year" for winning a 4 billion US dollars case.

2. What motivated you to become qualified in multiple jurisdictions? Has this played any role in your understanding of different cultures in international arbitration? If so, how?

I have always been interested in other cultures and culture plays a very important role in both international transactions and international disputes. This motivated me to qualify in the US after being qualified in Korea, and to expand my practice in London and America. Such experiences are enormously helpful when it comes to international arbitration practice. To be able to know, feel and understand the cultural differences and drivers, enables you to better tailor the submissions and presentation. More importantly, knowing the differences between cultures enables you to better understand your culture. This applies to laws as well. Understanding different legal systems enables you to understand and present the law of your home country to others in a way they can relate to.

3. What are your thoughts on the impact of cultural differences in international arbitration? In your experience, are counsels and arbitrators typically well-attuned to navigating such issues?

Cultural differences have a great impact on international disputes. For instance, culture has a huge impact on internal documentation and reporting system within a company. As language is closely related to culture, one can easily misunderstand documents when reviewing them if he/she does not have the cultural/language knowledge or background. One example can be that in Asian culture we say "sorry" just to be polite, but this can be misunderstood as an admission of wrongdoing by Western arbitrators or counsel.

Counsel and arbitrators are not always well-attuned to navigating cultural issues. There are not that many counsel or arbitrators who are multi-jurisdictional or multi-cultured. Most of them are accustomed to only one jurisdiction or a certain culture.

[1] Kap-You (Kevin) Kim is a senior partner at Peter & Kim, a firm that he has co-founded. He is based in Seoul and was previously a senior partner at Bae, Kim & Lee LLC, where he worked for the past three decades in various roles, including as the co-founder and head of the International Arbitration Practice and the head of the Domestic and International Disputes Group. Over the past 30 years, Mr. Kim has acted as counsel, presiding arbitrator, co-arbitrator, or sole arbitrator in more than 300 cases of international arbitrations under various arbitration rules. Presently, he is involved in several arbitrations, both investment and commercial. Among other positions that he holds, Mr. Kim is an Advisory Board Member of the International Council for Commercial Arbitration (ICCA) and Chairman of the Korean Commercial Arbitration Board's (KCAB) International Arbitration Committee. In the past, Mr. Kim has served as the Vice President of the ICC International Court of Arbitration (2014–2021), Secretary-General of ICCA (2010–2014), member of the LCIA Court (2007–2012) and Vice-Chair of the IBA Arbitration Committee (2008–2010).

4. What sort of cross-cultural communication issues are typically encountered during the early stages of an arbitral proceeding and what impact do such differences have on the subsequent conduct of the proceedings?

Normally in arbitral proceedings, Asians, particularly from Confucius-dominated societies, have a perspective that they should not be aggressive, leading them to be more accommodating to what the other side or tribunal suggests. However, in many cases, it turns out that the desire to accommodate has caused their position to be compromised. Arbitrators should pay close attention to those kinds of situations. Sometimes Asian parties admit suggestions made by the tribunal out of politeness and respect, even though it might not be beneficial for them.

Another example would be the fact that there is no such concept as "lead counsel" in Asian legal systems or cultures. In Asian courts, any counsel can comment whenever they need to – more like an open discussion setting. Where only a lead counsel is allowed to comment and cross-examine, it can be quite intimidating to Asian counsels. The risk here is that Asian counsels feel awkward and end up not speaking or expressing their thoughts freely.

5. Have you ever encountered language barriers during the course of a hearing, and if so, how did you navigate this issue?

A lot of times. In fact, it is almost impossible to translate the nuance of a certain language to perfection. Moreover, it is even not easy to find a competent enough interpreter who can translate to an acceptable level. It is never enough to emphasise the importance of good translation and good interpreters. Not all interpreters who are registered are good – you have to experience and find out who is actually competent. You should not be focusing on neutrality too much.

Whether your mother tongue is English or the language in which the arbitration is conducted makes a big difference. Even though a party, counsel or expert is very good at English (when the arbitration is conducted in English), it would be very hard for him/her to maintain the same level of fluency in the language when he/she has to listen, speak, argue and debate for hours. 30 minutes is possible, but it will definitely be different over 3 hours.

Arbitrators should be considerate of this issue. For arbitrators, it is also very hard to be attentive for hours, listening to the original language followed by the interpretation. Especially for expert witnesses, I find that experts in their mother tongue and whose words have to be interpreted sometimes create a different impression on the tribunal. But this should not be the case. Arbitrators should not think it is cumbersome to be attentive to the interpreted language. It is quite an imperialistic attitude and intellectually lazy.

6. In dealing with the common and civil law approaches to document production, how do you find a middle ground when the opposing sides take different positions?

Different approaches in document production from common law and civil law perspectives do not make as much trouble as you think. It is case-by-case in terms of different positions to document production. For example, in many cases, American companies are not keen on document production, and it is rare to see any civil law party refusing to produce documents. Civil law jurisdictions do not view document production as strange, and normally give no resistance if the arbitration is conducted under the IBA Rules, for instance, which is more or less a middle ground.

7. Cultural differences may manifest in the quality and quantity of the witness' evidence and oral submission by parties. How does cross-examining a witness from Asia differ from examining a witness from a Western jurisdiction?

Cross-examination itself is not an issue of cultural differences, in my opinion. I have seen as many Asian witnesses perform well under cross-examination – and many Western witnesses perform poorly. In my view, the real risk comes from the need to translate into English (assuming that is the language of the arbitration). Specifically, the risk is that the arbitrators listen to the tone of the language to be translated and as spoken by the witness and draw conclusions based on that, without really knowing or understanding what the tone means or what is being said. It can mistakenly create the impression that someone is shy, or nervous or aggressive, when a native speaker would not draw those conclusions at all. So, it is not really a question of culture, but more an issue of whether your arbitrators are worldly enough, patient enough and broad-minded enough not to jump to conclusions over things they do not really understand.

8. The COVID-19 pandemic has undoubtedly placed an increased reliance on technology globally. In your opinion, has the increased use of technology and the conduct of virtual hearings made cultural differences more apparent or has it made us more alike?

If I have to choose one, I would say that the increased use of technology and the conduct of virtual hearings have made us more alike. Everyone feels awkward to be in front of a camera. When it comes to an in-person setting, naturally, cultural elements play more of a role. Technology makes cultural differences more neutral, as in virtual settings, other elements such as attire and gestures etc., are limited when projected on the screen. It will become even more neutral if you choose a language channel and only get to listen to the interpreted language without hearing the original language.

9. We note that cross-cultural barriers often call for third-party interpreters to assist in bridging the gap. Would you consider disengaging these interpreters if you find that the parties can partially communicate in English?

I would be cautious to do so. In the case of foreign languages, how your brain processes the information is totally different than speaking in your mother tongue. One can feel comfortable with communicating in English for 30 minutes but not for 3 hours. It is much harder to maintain the same concentration for such long hours when communicating in a foreign language.

Thus, I need to stress again the importance of retaining a reliable third-party interpreter. You will have to find out who has great experience and speciality in legal interpretation in international disputes.

10. In your opinion, what are three skills practitioners need to develop or fine tune to confidently address cultural nuances in international arbitration?

It may be useful if I share these three small tips. First, I normally try not to translate a word or phrase that has a distinctive meaning in its original language. For instance, "위법성(*Weebupsung*)" under Korean law is not the same as "wrongfulness" in any Western legal system, and is very different to "illegality". If one translates that term in English as "wrongfulness" or "illegality" it would be easily misunderstood as what "wrongfulness" or "illegality" mean in that legal system. That is not what you want to happen. In case a legal term has a unique meaning with different implications to any similar terms in the English (or foreign) legal system, then it is important not to allow opposing counsel or the arbitrators to fit that into any similar term of their own legal system. Sometimes we bring Latin or old English terms or words to describe a concept so that no one can easily think of the word or phrase as the already existing similar (but different) legal concept in their own legal system. The same applies to the term "조합(*Johap*)" in Korean law. We never use the direct translation of "partnership" because they are not the same. We either use *Johap* or a Latin word so that the arbitrators understand it is unique and approach the concept with caution.

Another skill can be to use a diagram or image to describe a unique concept in your legal system. For example, "tattoo" as what you normally think and "tattoo" in New Zealand can be quite different, and this can be understood much easier if you use an image of a New Zealand meaning of "tattoo".

It would be good to present an analogy as well to explain the differences in cultures. For instance, in Korean a husband calls his wife "*our wife*" not "my wife" although obviously it is not our wife. No one knows why it is called "*our wife*" but that is sometimes what culture is about – that a usage or phenomena is not explainable but it exists as is.

Through these kinds of small skills, you may be able to achieve, first, a proper understanding of and attention to a different language or culture. For instance, you may get a better understanding and knowledge of the structure of the Indonesian language which can be important in arbitration. You may also be able to understand the culture from a more practical point of view. If necessary, it would also be helpful to communicate with a person in your own country but who has deep knowledge and understanding of a certain culture to get to know such culture practically. The most important thing is to know how such differences in culture and language could possibly be understood or misunderstood in other jurisdictions or in Western societies. This is very important. For instance, in some jurisdictions, black colour means politeness but in others it means death. Whereas in some cultures, white colour means pureness but in others it means death. It will help present the differences in cultures and languages more precisely and more effectively if you know how they will be construed in the other's (or Western) jurisdiction. To be able to construe and deliver all these different nuances in cultures and languages, you need to have an interest in other cultures and languages and be open to understanding the differences.

TRENDS IN ARBITRATING COMMODITIES, SHIPPING AND MARITIME 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 II of this special publication showcases insights from Chong Ik Wei ("CIW")[1] and Siva Kumar Kanagasabai ("SKK")[2] on trends in arbitrating commodities, shipping and maritime disputes. The excerpts of this interview are below.

Chong Ik Wei

Siva Kumar Kanagasabai

1. ***Lord Donaldson in Pando Compania Naviera S.A. v. Filmo, S.A.S., (1975) 1 Lloyd's Rep. 560 (Q.B.) once said: "The shipping and commodities trades of the world are unusual in that they do not regard arbitration with abhorrence. On the contrary, they regard it as a normal incident of commercial life; a civilised way of resolving the many differences of opinion that are bound to arise." In your opinion, does this statement hold true today? If so, what features of arbitration promote the resolution of commodities, shipping and/or maritime disputes?***

CIW: The statement still holds true, in my opinion. Shipping disputes range from simple issues to complex claims with multiple parties involved in back-to-back chain contracts. Such disputes need to be adjudicated by specialist arbitrators, and the availability of maritime and trade arbitrators is key to parties continuing to opt for arbitration in resolving their disputes. Shipping and international trade work are by definition cross-border in nature, and the ease at which cross-border enforcement of arbitration awards is assured by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention") has encouraged the use of arbitration (instead of Court action) in resolving shipping disputes. The confidential nature of the arbitral process is also an attractive proposition for parties who would often prefer pricing, hire and commercially sensitive information to be kept confidential. However, there is a concern within the fraternity that the rise in the use of arbitration has resulted (or could potentially result) in the decrease in volume of available jurisprudence by way of shipping-related Court decisions/judgments which have been the bedrock of shipping law over the past century.

SKK: Certainly, that statement continues to hold true today. This is because shipping and commodities trading is very much an international business. If there is a dispute, both parties would prefer not to litigate in the other's judicial system due to concerns over "home" bias (even though that is not necessarily the case). Arbitration, which provides a neutral forum with no country bias, is a nice solution to disputes that may arise.

Apart from neutrality, I can think of 3 other features of arbitration which make it the forum of choice for the effective resolution of commodities, shipping and maritime disputes.

[1] Chong Ik Wei is the Managing Partner (Asia) of Clyde & Co where he works within the shipping, insurance and dispute resolution practice and also spearheads the development of the firm's business across Asia. His main areas of practice are in shipping, insurance, natural resources and energy, with a particular focus on disputes connected with China and the ASEAN region. He has extensive experience in advising and representing clients in international and regional arbitration, including at the ICC, LCIA, LMAA, SCMA, SIAC, HKIAC, CMAC and CIETAC. Mr. Chong is a Director of the Singapore Chamber of Maritime Arbitration and sits on the Singapore International Arbitration Centre Users' Council. He is also an arbitrator of the China Maritime Arbitration Commission and Hainan International Arbitration Court. In addition to England and Wales, Mr. Chong is also admitted to practise in Hong Kong and Singapore. He is fluent in English, Mandarin, Chinese dialects and Bahasa Malaysia. He is recommended and recognised by various legal directories including Asia Pacific Legal 500 and Chambers Asia Pacific as one of the leading individuals for shipping work.

Mr. Chong would like to acknowledge the contribution of Ms. Natasha Rai, Associate at Clyde & Co Clasis Pte Ltd, for her contribution to the responses herein.

[2] Siva Kumar Kanagasabai heads the Maritime and Shipping practice group at Skrine. He has acted and advised local and international clients in ship arrests, charterparty disputes, oil pollution claims, vessel detentions, cargo claims, Incoterm contracts and enforcement of ship mortgages under conventional and Islamic facilities. Mr. Kanagasabai also co-heads Skrine's Employment practice of which he has over 20 years' experience. He is also involved in general corporate/commercial litigation and has acted as counsel in both domestic and international arbitrations. Mr. Kanagasabai is a regular contributor to law publications and is often invited to speak at law conferences. He is a Fellow of the Chartered Institute of Arbitrators, holds a Diploma in International Arbitration and is an AIAC panel member.

Firstly, arbitral awards are enforceable in almost every country around the globe. The New York Convention currently has 168 contracting states as of 27th July 2021. Compare that with court judgments which are difficult to enforce outside a country's territory unless there are statutory reciprocal enforcement arrangements with other countries, which in most cases, tend to be only between a handful of countries.

Secondly, some of these disputes tend to involve complex and technical issues of law and/or fact. Arbitration provides parties with the freedom to appoint persons with the requisite legal, technical and commercial expertise as arbitrators in their dispute.

Finally, there is the freedom to choose the seat of arbitration in a jurisdiction which is arbitration friendly and a venue where expertise necessary to arbitrate a shipping or commodities dispute already exists.

2. What are the most common and the most contentious claims raised in commodities, shipping and/or maritime disputes that are referred to arbitration?

CIW: On the shipping front, the more contentious matters revolve around maritime casualties, as these cases are more technical in nature. On the trade front, contentious matters tend to be from the energy and natural resources sectors, especially those involving state entities. The most contentious claims are not necessarily the most common in arbitration. Common claims in arbitration are cargo claims, unpaid invoices in commodities contracts, dead freight claims, demurrage claims under charterparties and sales contracts, and quality and quantity disputes.

SKK: There is a broad range of disputes that can arise, which are usually categorised as 'dry' and 'wet' disputes. The types of 'dry' disputes that are referred to arbitration include cargo related claims, charterparty disputes, shipbuilding contractual disputes and bunker supply disputes. While in the case of 'wet' disputes, which involve disputes that arise from things done at sea, those that may be referred to arbitration include ship collision and salvage claims.

3. Are there any issues with respect to arbitrability that arise in relation to commodities, shipping and/or maritime disputes?

CIW: Some disputes are more complex than others and may not purely be a commodities, shipping and/or maritime dispute. As the shipping and commodities industry is in a constant state of flux, there may be cross border issues or insolvency related issues. For example, assuming a charterparty has been terminated and there exists a claim for unpaid charter hire. This dispute may be resolved by way of arbitration under the charterparty. However, the charterers are also facing multiple claims for unpaid charter hire and are in poor financial health. The vessel owner is left to decide whether arbitration is the best means of recovering its losses or whether alternative steps, in light of the charterers' financial health, should be taken.

Whilst there is nothing stopping the vessel owner from arbitrating, it will likely opt not to do so and may instead consider insolvency through the court process. Commercial considerations and industry practice affect the arbitrability of disputes as claimants tend to look to alternative and potentially quicker / more effective means of recovery.

SKK: No, unless such disputes are contrary to public policy or are not able to be determined by arbitration under the laws of the seat. For example, Section 4(1) of the *Arbitration Act 2005* in Malaysia states that "*any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia*".

The types of disputes normally considered not arbitrable are disputes relating to criminal offences, matrimonial disputes, bankruptcy and public law matters, which are mostly not related to commodities, shipping and/or maritime disputes.

4. What impact has the COVID-19 pandemic had on the commodities trading and/or shipping & maritime industries and disputes arising therefrom?

CIW: The COVID-19 pandemic has fueled the demise and insolvency of a number of shipping and commodity companies. This has resulted in ship arrests, judicial management proceedings, winding up proceedings as well as schemes of arrangement. Apart from the impact on the survival of shipping and commodity companies, the COVID-19 pandemic has also caused serious disruption to trading activities as a result of delays, quarantine requirements and government restrictions. As commodity contracts and charterparties entered into pre-pandemic likely did not anticipate the COVID-19 pandemic and/or the effects of the pandemic, contracts were ill-equipped to address losses, increased costs and damages suffered as a direct or indirect consequence of COVID-19.

Over different phases of the pandemic, we have encountered different types of legal issues/disputes. Firstly, it was advising on many *force majeure* issues under shipping/trading contracts with parties looking at getting out of or deferring their contractual obligations due to the pandemic. It was then followed by advising on contractual clauses and provisions which could better protect parties' position going forward (e.g. BIMCO Infectious & Contagious Disease clauses). Many countries also passed temporary relief legislation, which led to advising on the legal impact of such legislation. The drastic drop in oil/commodity prices at one point in the first half of 2020 also caused the collapse of many traders in the energy/commodity sector such as GP Global, Hin Leong, Phoenix, Ocean Tankers, just to name a few, resulting in many disputes. Finally, there has also been a rise in disputes involving crew changes and quarantine cost/expenses and their impact under charterparties and other contracts.

SKK: The fortunes of the shipping industry are very much tied to global trade. The measures imposed by governments around the world to control the spread of COVID-19, amongst other things, disrupted the supply chain and reduced global maritime trade. This, in turn, resulted in lower shipping demand and port traffic.

For example, in Malaysia, the movement control measures imposed to deal with the pandemic resulted in a contraction in our GDP in 2020 compared to 2019. Malaysia's total trade in May 2020 reported a 27.8% decrease compared to May 2019. Many shipping firms were already operating at low-profit margins even before the pandemic. So, the plunge in global trade resulted in an increase in defaults and insolvency related disputes globally. While Malaysia's total trade in May 2021, having expanded by 48.7% year-on-year is a positive sign, we are not out of the woods yet.

There were also delays in delivery due to ships not being able to call or no longer calling at certain ports, or cargo not being able to be collected from warehouses. These delays affected deliveries down the supply chain. For a period last year, there was an increase in disputes from declarations of *force majeure*.

As for commodity trading, there was a big dip in global commodity prices due to reduced demand last year. However, commodity prices have now recovered, and the prices for many raw materials have continued surging into June 2021.

5. How have technological advancements (including virtual hearings) benefitted the arbitration of commodities, shipping and/or maritime disputes?

CIW: Cost savings is one of the biggest benefits. As hearings take place online, parties, counsels, experts, and the tribunal need not be physically present in a single location to conduct the arbitration. This results in savings such as travel expenses, accommodation expenses, costs incurred for the booking of hearing venues, etc. It has also made arbitration a more convenient means of dispute resolution as there are no strict formalities that otherwise apply to litigation, for instance.

An arbitration hearing could be conducted with real-time transcription services in place, standby technical support from a service provider, better collaboration between legal teams, experts and clients through private chat functions and, real-time note-taking applications, which cut down the time spent locating details for closing submissions. All documents, videos, evidence and materials required for the arbitration may be stored in a single location and pulled up easily when called upon by the tribunal. For instance, in a collision matter, AIS records and other visual records may be accessed and produced with ease.

Aided by the adjustments and adaptations made by all arbitration stakeholders during the pandemic, I think the arbitration landscape for shipping and trade disputes will change forever. Virtual hearings will increasingly become the norm post-pandemic, especially in cases where expensive and time-consuming international travel is otherwise required. Physical/in-person hearings will only be called for in high value, document-intensive cases, especially when witness evidence is critical to the outcome of such cases.

Virtual arbitration, which, by definition means greener and more environmentally-friendly arbitration, would also gain traction in the years to come as corporates start to embrace and adopt ESG initiatives and policies.

SKK: COVID-19 changed the mindset of participants in the arbitral process on how hearings could be conducted. In the past, there was general resistance to embrace technology in the hearing process as people were more comfortable with face-to-face hearings. However, due to necessities brought upon us by the pandemic, we were forced to improvise, change and embrace technology so that hearings could proceed. Suddenly there was this 'light bulb' moment when we started to realise that an entire arbitral proceeding from start to completion could be conveniently and efficiently conducted virtually. Virtual hearings have now become the norm, and to support that, virtual hearing protocols have been formulated by arbitral institutions while technology continues to make further advances.

One of the biggest benefits of virtual hearings is the cost and time savings when arbitrators, lawyers and witnesses are not located in the same place. From an environmental perspective, technology has also reduced the use of paper and brought about a reduction in carbon dioxide emissions contributed by travel for arbitral proceedings.

6. Are there any downsides to resorting to arbitration when resolving commodities, shipping and/or maritime disputes?

CIW: Particularly with arbitrations dealing with commodities, shipping and/or maritime disputes, legal literature is limited. Many legal issues addressed in arbitrations do not reach the Courts. This stifles the development of the law to some extent and limits legal literature to reported cases. Other downsides include possibly limited discovery, especially in cases where expedited procedures are in place, the lack of regulation on evidence production, and costs in cases involving modest claims or where the Respondent does not participate in the arbitration.

SKK: Despite its numerous advantages, there are disadvantages to using arbitration to resolve such disputes. One such disadvantage is cost. While court litigation comes at a minimal cost to parties, arbitrations costs are considerably higher, stemming largely from arbitrator's fees and the administration fees of the arbitrational institution (should parties choose an institutional arbitration).

Moreover, due to the increased efficiency of courts in some jurisdictions, the arbitration process is no longer necessarily faster than court litigation. For example, in Malaysia, court cases are usually disposed of within 9-15 months from commencement, with judges using their powers to push parties to meet deadlines. In contrast, arbitrations could take longer to resolve.

There is also a limited scope to challenge the arbitral award, as compared to a court judgment. If the award is well written and is generally in line with the law and evidence, then there is little to complain about. The problem is when the award is not and there is a limited avenue to correct an erroneous decision. This makes it so much more important that from the outset, parties carefully select their arbitrator(s).

7. When observing the composition of arbitral tribunals in commodities, shipping and/or maritime disputes, what benefits can be derived by having industry experts as opposed to solely legal professionals on the arbitral tribunal?

CIW: When deciding which arbitrator to appoint, parties should consider an arbitrator who is familiar with the issues, whether legal, factual or industry-specific and is neutral and fair. The benefits of having an industry expert as opposed to a legal professional on the arbitral tribunal depend largely on who is a better fit for the dispute at hand. If the dispute relates to legal issues, in particular complex contractual terms, then a legal professional would most definitely be a better arbitrator as he/she would be in a position to make a sound decision on the law. If, however, the dispute is fact-based, industry-specific or relates to a technical matter, then an industry expert would be the better choice. In a technical arbitration dealing with causes of an engine failure, for example, a chief engineer would be better placed to sit as an arbitrator as he/she would have the technical expertise, which a legal professional, unless sea-going, is unlikely to have.

SKK: This really depends - every arbitrator has their own strengths and every dispute is different.

A maritime, shipping or commodities arbitration can involve factual disputes over complex technical matters which are more easily understood by a relevant industry expert. An appropriate industry expert can then use his/her knowledge and expertise to grasp the evidence and decide the dispute quite efficiently. That an industry expert can do so without breaching the rules of natural justice was recently reaffirmed by our Federal Court in *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd v Iswarabena Sdn Bhd* [2021] 1 MLJ 1.

However, where a dispute involves issues of law and is not factually complex, appointing industry experts as arbitrators might be of limited value and parties may be better off with a legal professional as an arbitrator.

If it is a 3-member arbitral tribunal and the issues are both legally and factually complex, then a mix of legal professionals and industry experts would likely result in a nice balance on the panel.

8. In your opinion, how important are specialised arbitration rules explicitly catered to the commodities, shipping and/or maritime industry?

CIW: The existence of specialised arbitration rules for the commodities, shipping and/or maritime industry is a testament to the differences in the way the maritime and shipping industry conducts its business and resolves its disputes. The nature of the maritime and commodities business is interconnected. The industry takes a very commercial attitude with regard to the resolution of its dispute and specialised arbitration rules recognise that. The Singapore Chamber of Maritime Arbitration (SCMA), for instance, maintains various sets of arbitration rules, each designed for a specialised area of the maritime and shipping business: SCMA Arbitration Rules, SCMA Small Claims Procedure, Bunker Claims Procedure, SCMA Expedited Arbitral Determination of Collision Claims. Many of the legal issues have no parallel in general international commercial disputes. For example, the concepts of maritime adventure, charterparties, bills of lading, the transfer of title, maritime liens, marine insurance, bunker disputes are unique to shipping and trade.

SKK: Specialised arbitration rules can provide significant benefits as they are normally designed to meet the needs of the industry, such as providing specialised procedures and the use of technical experts. For example, in the Asia Pacific region, the Singapore Chamber of Maritime Arbitration (SCMA) rules provide specialised arbitration procedures to deal with distinct claim types such as Small Claims, Bunker Claims, & Collision Claims. It is also good for marketing – so I would encourage the AIAC to formulate specialist rules for the shipping and commodities industry as it intends to attract more arbitrations of that nature.

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

CIW: Any reform must take into account the needs, commercial concerns, customs and practices of the shipping and commodities industry. As international trade moves at a rapid pace, so must the speed of the arbitral process. As mentioned earlier, the issues affecting arbitrability are the influence that other factors have on the dispute in question, such as cross border enforcement issues or insolvency related issues. Reforms in respect of these issues may be difficult as they are largely jurisdictional in nature. However, some possible reforms could include placing greater emphasis on obtaining security for claims very early on in arbitration proceedings so that there is a safety net upon which a party may rely should the counterparty become financially unstable or dissipate its assets by moving potentially enforceable assets across multiple jurisdictions.

SKK: Possible reforms which could enhance the suitability of arbitration as the preferred dispute resolution mechanism include implementing measures to lower costs associated with arbitrations and to improve the efficiency and speed of the arbitration process. There is a lot of pressure on the finances of those involved in shipping and lowering costs would certainly help the industry.

The measures could include formulating specialised rules after taking into account feedback from the industry, continuing to timelines for deciding disputes even when fast track rules are not being employed.

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

CIW: Some key considerations would be (1) the reputation and quality of the judiciary, (2) whether the jurisdiction is a signatory to international treaties or agreements governing the recognition and enforcement of foreign arbitral awards, (3) arbitration friendliness of the seat, (4) neutrality, and (5) ecosystem with experienced arbitrators, lawyers and experts.

SKK: To my mind, the key factors which should be taken into account are as follows:-

1. whether an award issued from that seat can be enforced pursuant to the New York Convention;
2. the reputation and efficiency of the local courts and the arbitral institution (if institutional arbitration is contemplated);
3. the extent of the local court's ability to support the arbitration and/or grant interim remedies;
4. the right to appeal, challenge and review the arbitral award;
5. the convenience and cost likely to be incurred at the seat of arbitration; and
6. the availability and ease of access to relevant expertise on the ground (e.g. arbitrators, industry experts and specialist lawyers).

11. What are the current observable trends in arbitrating commodities, shipping and/or maritime disputes that arbitration practitioners should be wary of?

CIW: Arbitrators and arbitration practitioners should be wary of US sanctions policy as it develops over the coming years. They should carry out thorough due diligence to ensure they do not fall foul of US sanctions policy. The US has increased the force and scope of its sanctions regimes and has targeted the maritime and commodities sectors in particular. This is because US foreign policy and sanctions focus more closely on the maritime and shipping supply chains. Linked to that, China has also recently (in June 2021) passed its Anti-Foreign Sanction Law, which will also add another layer of complexity in manoeuvring the complicated web of international sanction regimes in the face of geopolitical tensions.

An arbitrator may be subject to the Office of Foreign Assets Control enforcement action where the arbitrator is considered a US person or be subject to designation or secondary sanctions if considered a non-U.S. person. Arbitrators provide a service, value and benefit to the parties involved. Where arbitrators render that service to a party subject to US sanctions, they risk contravening the sanctions, which generally prohibit directly or indirectly providing services or benefits to sanctioned persons. The sanctions often allow the provision of specified legal services to, or on behalf of, persons blocked by a sanctions program, provided that receipt of payment of professional fees and reimbursement of incurred expenses must be specifically licensed. The limitation on such legal services includes matters related to arbitration.

Finally, and on a positive note, with the ongoing focus on environmental protection, we should start to see more arbitrations in the future around the shipments and trading of cleaner and greener fuels such as LNG, hydrogen and so on.

SKK: The most important trend I have noted is the need to embrace technology. This also comes up in my discussions with other arbitrators. As much as we all do miss face to face human

contact, this is the way of the future. If you are not ready to accept technology and adapt, then you will have difficulty in conducting arbitrations.

The other trend and this may be due to the economic and unique conditions, is that parties are more open to settling cases and not insisting on their contractual rights and triggering arbitration clauses which may result in an expensive dispute. It seems to have affected the number of transportation disputes that were referred to arbitration last year, but we need to see the statistics for this year.

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

CIW: The Singapore High Court in The "Ocean Winner" [2021] SGHC 8, considered the interaction between insolvency law and admiralty law. The Court addressed the tension between the statutory moratorium afforded by the insolvency regime and the ability of maritime claimants to protect their interests by way of admiralty actions such as filing of protective writs and ship arrests.

This decision in Singapore is instructive for maritime claimants wanting to protect their interests by commencing admiralty actions against companies which are restructuring or facing insolvency proceedings. The case makes clear that the statutory moratorium does not bar the filing of admiralty writs. A claimant can preserve its statutory lien against the ship, protect its *in rem* claim from any transfer of ownership and prevent its claim from being time-barred by filing the admiralty writ notwithstanding the statutory moratorium. However, if the claimant wishes to proceed with service of the writ or arrest of the ship, permission of the court would still be required.

SKK: In Malaysia, from a legislative perspective, some key changes were introduced by the *Arbitration (Amendment) (No. 2) Act 2018* ("Amendment Act") include the widening of the scope of interim measures that may be granted by the court and the arbitral tribunal. It also broadened the concept of an arbitration agreement being in writing to include that which is recorded in any form, which would make it clear that agreements recorded through electronic means are covered. The Amendment Act has also removed the right of parties to a domestic arbitration to refer to the High Court "any question of law arising out of an award". This means that a challenge on a domestic award can only be made by way of an application to set aside the award under Section 37 of the *Arbitration Act 2005* on limited grounds such as breach of natural justice, that the award is in conflict with public policy and/or that the subject matter of the dispute is not arbitrable.

From the court decisions, the Malaysian courts have continued to be supportive of arbitration and arbitral awards save in exceptional circumstances. There have been some important cases in the context of setting aside on the grounds of breach of natural justice. In the *Pancaran Prima Case* which I mentioned earlier, the Federal Court found no breach of natural justice when an arbitrator who was an engineer relied on his own knowledge and expertise in determining the loss of profit payable by a party. While in *Master Mulia Sdn. Bhd. V Sigur Ros Sdn Bhd* [2020] 12 MLJ 198, the Federal Court held that the breach of natural justice must be significant or had an impact on the outcome of the arbitration. However, unlike in Singapore, it found that there is no requirement to show prejudice, although it is a relevant consideration.

There was also an important decision by the Federal Court on a non-party obtaining an interlocutory injunction to restrain arbitration proceedings. That was the decision of *Jaya Sudhir v Nautical Supreme* [2019] 5 MLJ 1, where a non-party to an arbitration was granted an injunction to freeze arbitration proceedings because his proprietary rights may be impinged in his absence. The Federal Court rejected the stricter test applied in the English case of *J Jarvis and Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] All ER 96 when a party to an arbitration sought an injunction and held that when a non-party to an arbitration seeks an injunction, the general and usual test for granting interlocutory injunctions as set out in *Keet Gerald Francis* will apply. This is a landmark case in Malaysia dealing with a situation where a dispute involves multiple parties, but not all parties to the dispute are parties to an arbitration agreement.

On the mediation front, the United Nations Convention on International Settlement Agreements Resulting from Mediation ("the Singapore Convention") came into force in September 2020, and Malaysia is a signatory to the same.

13. What advice would you give to those interested in specialising in commodities, shipping and/or maritime arbitration?

CIW: Having sound knowledge of shipping and trade law is a given, but more importantly, stay close to and remain well-informed on the current trends in the industry and adapt to new and exciting streams of arbitration work that may arise. I would strongly encourage young lawyers from diverse backgrounds to start getting involved in shipping and trade arbitration work. It is exciting, legally complex, fast-moving and very international work. I have been doing this for 25 years and enjoying every moment of it!

SKK: To my mind, there are 2 main aspects to this area of practice which stand out and make it different from general commercial arbitration. Firstly, there is the law which is peculiar to the industry. There are concepts like demurrage, general average, collision rules and carriage of goods to pick up. Secondly, is understanding the industry practice and knowing how things work in the industry as the law is there to support the industry. There is a lot to learn in this regard, and I continue to learn new things today – which is what makes it exciting for me. The internet is a great source of knowledge on development in the industry. So, while it may seem a bit daunting at first, with the tools available and some reading and curiosity, you will be able to grasp it. I would say that if you have an interest in the area and accept that learning is a lifelong experience, then it is never too late to work towards specialising in this area!

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

ADGM ARBITRATION CENTRE AND AIAC
MESEA WEBINAR SERIES 2021

On 3rd February 2021, the AIAC and the Abu Dhabi Global Market Arbitration Centre ("ADGMAC") signed a historic Cooperation Agreement for the purpose of promoting the advancement of arbitration and mediation as a means of settling disputes arising out of commercial transactions in the Middle East and Southeast Asia regions. In the spirit of the Cooperation Agreement, the AIAC and the ADGMAC jointly launched the Middle East and Southeast Asia ("MESEA") Webinar Series 2021 in May 2021. Under this initiative, five (5) webinars will be conducted, focussing on topics that are specific to these regions. A summary of three of the webinars conducted to date are below.

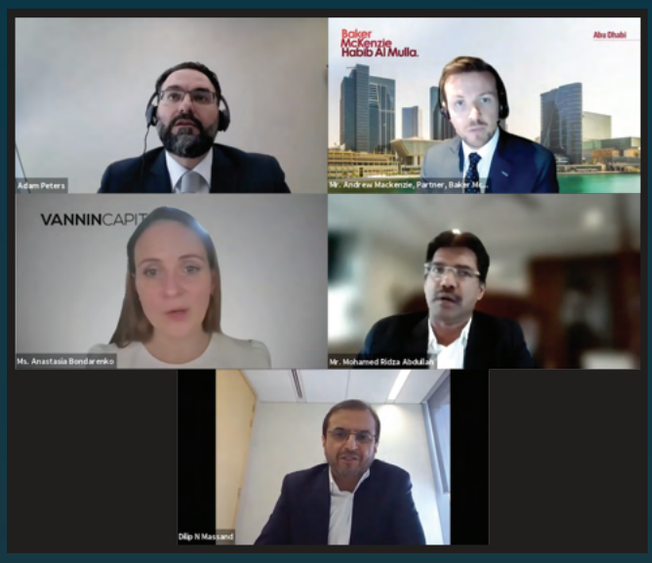
i-Arbitration Rules in MESEA

The MESEA Webinar Series 2021 was successfully inaugurated virtually on 19th May 2021, with the first webinar on the topic of *"i-Arbitration Rules in MESEA"*. The Director of the AIAC, Tan Sri Datuk Suriyadi Bin Halim Omar, together with the Registrar and the Chief Executive of ADGM Courts, Ms. Linda Fitz-Alan, gracefully provided opening remarks for this inaugural session.

The webinar was moderated by Mr. Abinash Barik (AIAC) and featured Dr. Thomas R. Klötzel (Thümmel, Schütze & Partner), Prof. Dr. Nayla Comair-Obeid (Obeid Law Firm), Prof. Dr. Georges Affaki (AFFAKI), Dr. Hassan Arab (Al Tamimi & Co.) and Mr. Abdullah Abdul Rahman (Chooi & Company + Cheang & Ariff). The panellists explored the powers and duties of an Arbitration tribunal, explained Arbitral procedures guided by Shariah practices and the enforceability of Islamic Finance Arbitrations Awards under the New York Convention, as well as expert recommendations towards modernising the i-Arbitration Rules 2018 to complement regulatory guidelines in the Islamic finance industry. The panel also comprehensively dissected a number of judicial decisions, considered the application of ta'widh and gharamah as penalty charges for late payment, discussed the reference mechanism to the Shariah Advisory Council of the Central Bank of Malaysia as provided for by legislation and its implications, and also provided insights on areas for improvement in relation to Islamic arbitration procedural rules from the global perspective.

The panellists also expressed their views on how i-arbitration may serve as a perfect tool in resolving Islamic finance disputes.

Third-Party Funding: A First for Malaysia but a Leap for Islamic Investors in MESEA



The second webinar of the MESEA Webinar Series 2021 was held on 16th June 2021 on the topic *"Third Party Funding: A First for Malaysia, but a Leap for Islamic Investors in MESEA"*. This webinar was moderated by Mr. Adam Peters (ADGM Courts) and featured Mr. Andrew Mackenzie (Baker McKenzie Habib Al Mulla), Ms. Anastasia Bondarenko (Vannin Capital), Mr. Dilip N. Massand (Phoenix Advisors Ltd) and Mr. Mohamed Ridza Abdullah (Mohamed Ridza & Co).

This webinar explored the role of third-party funding ("TPF") in the context of both conventional and Islamic disputes and discussed the unprecedented challenges faced by both Islamic and non-Islamic parties in a post-pandemic world to financially manage ongoing dispute resolution proceedings. Interestingly, the legal position of TPF under the common law doctrine of champerty and maintenance was also deliberated to provide some historical features and recent developmental aspects of TPF in the present context.

The panellists also highlighted the impact of TPF on international arbitration for Islamic investors and potential financial considerations when a funder is assessing whether to enter into a TPF arrangement across multiple jurisdictions. A comprehensive overview of Sharia law relating to TPF was then examined along with the possibilities for third-party funders to invest in a new asset class aimed at Islamic investors in the Islamic finance sector across

jurisdictions such as Malaysia and other prospects in regions including Middle East, Southeast Asia, Europe and Africa.

On that note, the panellists shared practical insights and perspectives on the future of emerging third-party funders but highlighted the need for more regulatory reforms to ensure a robust framework is in place for TPF globally.

Construction and Infrastructure Dispute Resolution in MESEA

The third webinar of the MESEA Webinar Series 2021 was held on 14th July 2021, covering the topic "*Construction & Infrastructure Dispute Resolution in MESEA*."

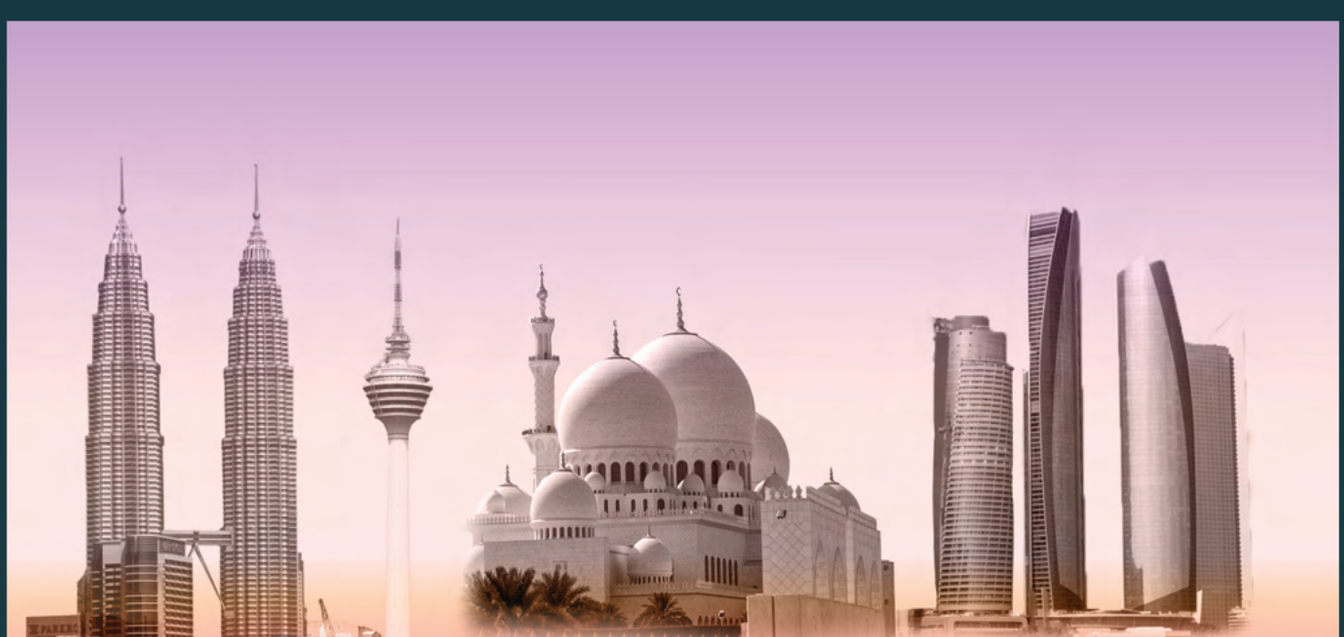
The webinar was moderated by Mr. Abinash Barik (AIAC) and featured Mr. Sean Yates (China State Construction Engineering Corporation (Middle East) LLC), Mr. Mohan R Pillay (Pinsent Masons MPillay LLP), Ms. Erin Miller Rankin (Freshfields Bruckhaus Deringer), and Mr. Mohanadass Kanagasabai (Mohanadass Partnership). The webinar delved into the recent trends and developments in construction and infrastructure dispute resolution from the perspective of a general counsel, arbitrators and legal practitioners engaged in the MESEA region.

The webinar focused on whether parties in the construction and infrastructure industry have been more innovative in managing risks and resolving construction disputes in the ongoing COVID-19 pandemic. In exploring this question, the panellists provided an insight to the construction industry and contemporary legal principles frequently applied in construction contracts in the Middle East and Southeast Asia regions.

The panellists also highlighted the role of general counsels when managing construction disputes, the internal relations with non-legal counsels, the adoption of technology forced by the ongoing pandemic and the limited ability for mobility and the challenges faced by parties during the dispute process from a tribunal's perspective. The panellists then shared examples of how arbitrators managed their response to the pandemic as compared to the courts, as well as the current trends involving construction disputes in the Middle East and in other jurisdictions. In discussing the current trends, the panellists observed that court litigation and arbitration are progressing and remain as the preferred dispute resolution routes with the existence of dedicated judges and experts despite the challenges presented by the pandemic.

At the comfort of disputing parties in Malaysian construction or infrastructure disputes, it was also noted that the Construction Industry Payment and Adjudication Act 2012 provides a speedy and interim finality to such dispute, thus emphasising another ideal and available dispute resolution mechanism.

The two remaining webinars in the MESEA Webinar Series 2021 will explore the topics of "Renewable and Non-renewable Energy Dispute Resolution in MESEA" and "Disputes in Fintech and Complex Technology Sector in MESEA" on 13th October 2021 and 22nd November 2021, respectively.



REVOLUTIONISING ARBITRAL APPOINTMENTS THROUGH LEGALTECH

THE STORY OF ARBITRATOR INTELLIGENCE

One of the hallmarks of international arbitration is the ability of the parties to choose the members of the arbitral tribunal who will preside over the proceeding. At times, parties and counsel may find themselves in a state of choice paralysis given the vast number of qualified arbitrators who may be considered for a particular dispute. However, the existence of such a choice can also be a double-edged sword as parties and counsel may have a preference for choosing arbitrators they are familiar with rather than actively seeking to expand the potential pool of arbitrators and promote diversity. One reason for the same is the lack of information available in the industry on the performance of arbitrators and the quality of arbitral awards due to the confidential nature of arbitral proceedings. For international arbitrators in non-mainstream arbitral jurisdictions, the challenge of securing appointments in international arbitrations can be even more profound for these and other reasons. A revolutionary tool which aims to address such information barriers in arbitrator appointments is Arbitrator Intelligence ("AI"). The AIAC recently had the opportunity to interview the Founder and CEO of AI, Prof. Catherine Ann Rogers, alongside AI's Head of Research, Fahira Brodlija, the excerpts of which are below.

The first section of the interview reflects the personal background and views of our guests, while the second section combines their perspectives and insights from AI.

SECTION 1

1. How have the different places you have worked affected your experience and development as an international lawyer and scholar?

Catherine: I ended up accidentally starting my legal career in Hong Kong, which is where I had my first position as a young lawyer. There happened to be an opening in the very small international arbitration team at the firm, and I was asked to join. Since then, as a professor, I have also been fortunate enough to teach around the world, including formal appointments in the United States, the United Kingdom, and Italy, as well as visiting positions in numerous other countries.

There is nothing more stimulating and enriching than working with students and colleagues from around the world—they challenge the way you think about legal problems as well as the way to convey your ideas or develop legal solutions.

Fahira: My professional path has taken me across continents and legal cultures, which has immensely enriched my knowledge and broadened my perspectives. From my first internship in Sarajevo (Bosnia and Herzegovina), to my work in the USA, Jordan and the Western Balkans, I was able to draw significant lessons in legal sophistication and excellence from some of the brightest minds of the world. Today, I am working on reform projects under the framework of the UNCITRAL Working Group III and in academia, both of which feed into my work as Research Director in Arbitrator Intelligence, managing a team of brilliant young experts. While seeking to navigate this increasingly dynamic field of international arbitration, I have learned that it is crucial to keep an open mind and listen. Such an attitude fosters constant development, which is essential in the legal profession.

Prof. Catherine Ann Rogers

Fahira Brodlija

[1] Prof. Catherine Ann Rogers is a scholar of international arbitration and professional ethics at Bocconi University in Milan, with a dual appointment as Professor of Ethics, Regulation, and the Rule of Law at Queen Mary, University of London, where she is also Co-Director of the Institute for Ethics and Regulation. Her scholarship focuses on the convergence of the public and private in international adjudication, the intersection of markets and regulation in guiding professional conduct, and on the reconceptualization of the attorney as a global actor. Prof. Rogers teaches, lectures, and publishes on these topics around the world, including as an invited participant at two Stanford-Yale Junior Faculty Fora. She is also a Reporter for the American Law Institute's Restatement of the U.S. Law of International Commercial Arbitration. Before entering academia, Prof. Rogers clerked for the Ninth Circuit Court of Appeals, and practiced international litigation and arbitration in New York, Hong Kong, and San Francisco.

[2] Fahira Brodlija is the Research Director of Arbitrator Intelligence She is also the country coordinator for a regional GIZ project dedicated to ISDS reform, and an adjunct lecturer at the International University of Sarajevo Faculty of Law. Ms. Brodlija is a regular coach of Vis Moot teams from Bosnia and Herzegovina. As a member of Association ARBITRI, an NGO gathering young attorneys in Bosnia and Herzegovina, Ms. Brodlija works to enhance and promote the arbitration system in the country. She is a frequent speaker and author on topics related to international arbitration and ISDS Reform.

2. As the founder and CEO of AI, what was your inspiration behind the idea to digitise and revolutionise arbitral appointments?

Catherine: AI started as a research project about the market for international arbitrators for an article called The Vocation of the International Arbitrator. In that article, I analysed how the market for international arbitrators is dysfunctional because of high barriers to entry (it is really hard to become an arbitrator), lack of transparency (the vast majority of awards are secret) and profound information asymmetries (some parties and counsel have a lot more information than others because past awards are secret).

I believed then that the solution was finding a way to share meaningful information about arbitrators, while still protecting the secrecy of awards. AI grew out of this identified need and was developed by seeking input and support from literally hundreds of practitioners and experts around the world.

3. Can you describe the future of arbitration in your eyes?

Catherine: Increasingly, I believe we are in the midst of momentous changes, which we will only fully be able to appreciate when we look back at some point in the future.

To the extent I can provide a preview, I would say that we are seeing not only an expansion in a number of cases and an increase in diversity of participants, but a democratisation in the structures and sources that determine what international arbitration is and should be.

Diversity in international arbitration used to be discussed as a value or obligation that some of the most established, powerful organisations and institutions should work to accommodate or promote. Today, by contrast, we see a range of organisations composed of the most interested players owning and animating the diversity debate–from ArbitralWomen, to R.E.A.L, to the Rising Arbitrators Initiative, to regional institutions no longer acting like the "little sister" of the big names.

It used to be that only the most celebrated, illustrious arbitrators had published books, taught in universities, been listed on premier rosters, or were invited to speak at seminal events. Today, with an unintentional assist from COVID-19, teaching and speaking are much more fluid and open to anyone with something interesting to say. Meanwhile, authorship opportunities have expanded and the flow of ideas is truly multidimensional and much richer as a result.

This expansion among people, organisations, institutions, ideas, and dialogue will expand and grow international arbitration in ways that only a few years ago seemed almost unimaginable.

That is the change I see happening. And it is truly exciting.

SECTION 2

4. Could you briefly explain to a new user the end goal of AI and how it works to achieve this goal?

AI seeks to level the playing field between users of international arbitration around the world by increasing the scope of information on international arbitrators and making it accessible on equal terms to all those who seek it. We create Reports on individual arbitrators based on information we collect through our online platform. We developed an electronic survey through which users submit structured feedback about arbitrators' past decision-making.

The Reports provide users with unique insights that capture the key features of the arbitrators' past appointments at a glance, thus allowing them to see beyond the one-dimensional online profiles and to make informed decisions in the process of selecting and appointing arbitrators.

By increasing the scope and accessibility of information on arbitrators, AI seeks to enhance the arbitrator selection process and to provide equal visibility to better and less-known arbitrators.

5. The AI Report is currently one of the major selling points of AI, and in promoting this Report, AI claims to be able "to collect crucial data and feedback on individual non-public cases, while still maintaining parties' confidentiality." What steps are taken to ensure the accuracy, and more importantly, the objectivity of said data and feedback?

Cross-examination itself is not an issue of cultural differences, in AI collects feedback from parties and counsel who have appeared before a particular arbitrator in past arbitrations. The feedback is provided either through our online platform or directly through a phone call in an interview form. The collected data is non-confidential and the identity of the Responders is not shared with the users, nor can their responses be connected to them in any way.

The feedback consists of:

1. factual information about the general background of the case (such as dates and amounts requested and awarded, procedural rulings by the tribunal, and characteristics of the procedures and award); and

2. the evaluation of the procedural rulings, case management and decision-making processes of the arbitrators.

These are the same kinds of information that parties and counsel currently seek through person-to-person inquiries (usually by phone), but now the information is collected more systematically and does not require that you actually know personally the individual who has the information you need.

6. In collecting the data from practitioners on arbitrators, what steps does AI take to ensure confidentiality is maintained? And can information ever be shared without the consent of the arbitrators?

AI does not collect or process any confidential data and all the questions on our platform are framed in a way that maximises the usefulness of the information without stepping into the zone of confidentiality. For example, neither the parties' names nor even their nationalities are requested. We do not collect details about either the specific facts or legal issues in dispute in the case. These topics are revealed when a redacted award is published, which is in part why many parties still resist the publication of redacted awards.

In this way, we are able to collect and present the information that is most important to parties when they are selecting an arbitrator, without intruding on aspects of their dispute that they want to remain confidential.

Prior to providing any Reports to end-users, arbitrators have an opportunity to review its content and are informed about their rights related to the processing of the collected data, including the right to object to its use. AI does not offer or sell Reports on arbitrators who have objected to such use of the collected data.

7. Recently, AI has gained a few States to join as members with feedback about arbitrators as part of the Membership Program. How would engagement from a State-party impact your initiative? How do you convince more States to join your initiative?

With the increasing number of investor-State claims, States and their in-house lawyers are becoming more sophisticated players, particularly in arbitrator selection. Nevertheless, States still have some unique needs and challenges in the arbitrator selection process. It is much more difficult for in-house State attorneys to pick up the phone and call around for information. On the other hand, State attorneys want to be able to provide feedback about their experiences with previously appointed arbitrators. Membership for State parties addresses both these needs, which is why States have been particularly receptive to our project. We are also finding that States are uniquely concerned about and committed to diversifying the pool of investment arbitrators, but find it challenging to find relevant information.

These interests and needs translated into interest among several States. The government of Canada was an early adopter as a member since last year and we are in negotiations with governments in Latin America and Europe. We hope to add more States, both to ensure they have the information they need to be confident that they are optimising their arbitrator selection and to provide a means for them to give meaningful feedback.

8. Diversity in arbitration has been receiving an increasing amount of attention. With your personal experience in mind, do you believe that we have already come a long way in changing attitudes on the topic of diversity in arbitration or are we still at the nascent stages of improving diversity, statistically? What are the specific ways that AI may contribute towards better diversity in arbitration?

Diversity is of course an important concern and a target for various reform efforts in international arbitration. It is also one of the core principles of the work of AI that permeates all our efforts.

To date, numerous initiatives and projects that have produced meaningful and measurable statistical shifts. But there is still considerable work to be done to ensure an inclusive and diverse arbitrator marketplace that reflects the diversity and complexity of the arbitration community. Although there is unchallenged support for diversity initiatives in the international arbitration community, we believe more meaningful information about newer and diverse arbitrators will mean that parties can consider arbitrators outside the relatively narrow pool that currently dominates.

In September, AI is launching a global diversity campaign that will engage arbitrators and practitioners alike. The goal is to get substantive contributions from those who have, so far, been cheering from the sidelines. We are seeking to collect substantial information about diverse arbitrators and to engage all relevant stakeholders in meaningful dialogue about different ways to contribute to this goal.

AI seeks to provide an equal platform to arbitrators from all backgrounds, those with hundreds of cases and those with a couple of appointments alike. By placing a spotlight on a large number of diverse arbitrators, it is our hope that parties and counsel will increasingly leverage the available information to appoint diverse arbitrators at a larger rate.

We are on a good path towards diversity in international arbitration, but it will take a significant attitude shift towards information sharing and transparency on a larger scale before we can come anywhere near the desired levels of diversity.

9. How will the tools available with AI be able to make an impact on arbitration as it is practised in developing countries, especially the region of Southeast Asia?

Southeast Asia has a long and proud tradition in international arbitration, including renowned arbitrators and globally competitive institutions. With shifting global foreign investment flows, it is inevitable that these strengths will translate into an increasingly important role in shaping international arbitration trends.

Despite these trends, however, many prominent international arbitrators in the region are less well-known outside the region. By making arbitrator reputations global and equally accessible, now parties and counsel in the traditional European and North American hubs can easily learn about Southeast Asian arbitrators' track records, but also parties and counsel from other regions, such as Latin America, Africa, the Middle East, Eastern Europe, and beyond.

10. "Midas, they say, possessed the art of old; Of turning whatsoe'er he touch'd to gold". In moving from a non-profit to a private company, you have had to engage investments from venture capitalists. How does AI maintain its neutral role while also maintaining the interests of the investors?

The decision to become a for-profit entity was compelled by economic necessity—if there was no money to continue building, we would have had to shut our doors. In wrestling with that decision, I consulted a wise friend and mentor who advised me not to get hung up on titles.

There are, he said, innumerable "non-profits" that do all sorts of bad things in the world. And there are innumerable for-profits that provide essential goods and services that make the world a better place. In fact, much of his scholarship on diversity focuses on the intersection of doing well (financially) and doing good (morally). They are not mutually exclusive or necessarily contradictory. But it does take extra creativity and commitment to find the fit.

Our entire business model is based on trust—parties entrust us with information about their cases; users trust the information we provide is accurate and independent; arbitrators trust us that we will treat them fairly and respectfully; and institutions and organisations trust us to stay true to our core values.

Betraying that trust will be bad for business, which our investors know. Notably, to date, most of our investors are those who support university-related research start-ups or individuals from the international arbitration community itself, which means they understand well this imperative.

11. Reproducing your quote, "Arbitrator Intelligence Reports are both a natural evolution from the recent spate of arbitrator related transparency reforms and a disruptive innovation that will help reshape the market for international arbitrators". Keeping with the theme of disrupting markets, how does a young upcoming arbitrator best make their mark on the AI platform?

One of the great things about AI Reports is that you don't need to be a big arbitrator with many cases to have a Report. Our Reports are built on information we receive through our platform—as long as even one party or counsel submits feedback on an arbitrator, we can create a Report. We have many Reports with feedback from just one case, which can be an invaluable complement to a newer or diverse arbitrator's biographic profile.

Arbitrators can also make their mark by participating in our arbitrator interview series. The interviews are conducted by our team of Ambassadors who engage in in-depth conversations with the arbitrators about their philosophy and procedural preferences in arbitral proceedings. These interviews are a valuable complement to the Reports, providing arbitrators' perspectives on various aspects of case management, but they are also a rich independent resource that will provide the users with a very good sense of the arbitrators' philosophy and soft skills.

AI is not a rating agency and we do not give preferential treatment to arbitrators on any basis. We do, however, work to spotlight individual arbitrators on our platform. One recent example was the announcement of the Arbitrators of the Year for 2020 and 40 Distinguished Arbitrators, all of whom received positive feedback from self-identified losing parties in the arbitration. As it turned out, our two big winners were diverse arbitrators (one woman from the Middle East and one man from Latin America). They are both regionally well-known, but their specific performance as an arbitrator has not been so well-known outside their respective regions.

12. You posit that AI will benefit all stakeholders: the disputing parties, their representatives, arbitrators, State-actors, and arbitral institutions. However, one may argue that a coin has two sides. Do you believe that there are any potential drawbacks with the use of AI?

I would not say that there are drawbacks to the use of AI, but there are risks. First, there is always what we can the "disgruntled losing party problem," meaning a concern that losing parties will unfairly and irresponsibly try to exact revenge against an arbitrator by giving a negative review.

We have several procedures and quality control mechanisms in place to control for this problem, and we have been fortunate that we have not really seen this kind of abuse. We have also seen arbitrators who have received some negative feedback from a self-identified losing party take the feedback in stride, recognising that some level of disappointment may be inevitable. In fact, disappointed parties are the cost for having arbitrators who make tough but meaningful decisions instead of splitting the proverbial baby to keep everyone happy.

There are of course other risks, which we regard as challenges not obstacles. These challenges force us to constantly reassess how to keep the right balance, how to engage meaningfully with our various constituencies, and how to constantly improve both our methods and products.

CONSTRUCTION DISPUTE RESOLUTION IN INDIA:

MULTI-TIER DISPUTE RESOLUTION CLAUSES AND THEIR ENFORCEABILITY

By Rajat Malhotra [1]

India's liberalization journey began in 1991. This was followed by a shift from government-sponsored infrastructure development to private player-driven PPP (Public-Private-Partnership) structures spanning long-term revenue generation models. This change necessitated the adoption of global best practices, and therefore the universally acknowledged and accepted standard form contracts.

The Government of India, through its Planning Commission, indicated its preference for FIDIC standard form contracts, published by the International Federation of Consulting Engineers. Most large-scale construction projects in India today draw from the FIDIC suite of contracts or similar universally acknowledged standard form contracts. In addition to lending uniformity and efficiency to project execution, the adoption of such standard form contracts introduced comprehensive dispute resolution clauses to the world of construction and infrastructure development in India.

These multi-tier dispute resolution clauses (MTDRCs)[2] set out a waterfall of resolution mechanisms - including some like mediation, negotiation or amicable settlement[3] that are ordinarily non-binding, resulting as a last resort in the invocation of arbitration. MTDRCs may also employ pre-arbitral steps such as expert determination or resolution by dispute adjudication boards. Construction contracts being long term commitments, a multitude of disputes are bound to arise. MTDRCs thus provide parties with the opportunity to settle the disputes amicably through non-confrontational, non-binding mechanisms and to avail binding adjudicatory mechanisms like arbitration as only if attempts at settlement were to fail.[4] Such clauses also permit parties to raise all their minor and major claims and provides them with the flexibility to decide the stage till which they intend to pursue such claims, many of which may get resolved either at the very first stage with the employer or during the attempt at amicable resolution.

However, this flexibility allowing for a combination of enforceable and non-enforceable mechanisms, though well suited for project execution, gives rise to the vexed issue of enforceability of such MTDRCs. Would ordinarily non-enforceable mechanisms like mediation and amicable settlement become automatically enforceable when coupled with enforceable mechanisms like arbitration in structured MTDRCs? Complications also arise when such clauses provide for post-arbitral steps in the form of appellate arbitration clauses. Courts across common law and civil law jurisdictions have thus struggled to answer this question when appointing arbitrators or when adjudicating challenges to awards.

Enforceability in Common Law Jurisdictions

Common law jurisdictions have generally upheld MTDRCs. However, this position has evolved through several years of precedents on the issue. In one of the earlier decisions in the United Kingdom,[5] the High Court ruled against the enforceability of a MTDRC where parties had contracted to engage in good-faith negotiations before a reference to arbitration. The High Court held that such a clause was unenforceable as the court would have

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The views expressed in this article are the author alone and do not necessarily reflect the views of Laware Associates or the AIAC. Any questions, queries or comments relating to this article can be directed to rajatmalhotra@lawareassociates.com.

[2] Reference may be made to Clauses 20.5 and 20.6 of the FIDIC Red Book (1999 edition).
[3] In the case of Afcons Infrastructure Ltd. v Cherian Varkey Construction Co. (P) Ltd, the Supreme Court of India held that when a court refers a dispute to mediation, the settlement that is borne from such a mediation proceeding will be binding on the parties. Nonetheless, the law in India does not mandate for the parties to necessarily attempt resolution through mediation or such non-binding resolution mechanisms, and as such a clause providing recourse thereto is not enforceable.
[4] Craig Tevendale, Hannah Ambrose, Vanessa Naish, 'MTDRC'S and Arbitration' Turkish Commercial Law Review, Vol. 1, No. 1, February 2015.
[5] Cable & Wireless v IBM [2002] EWHC 2059 (Comm). It is instructive to note that although the High court laid down the factors that would make MTDRCs enforceable, the clause in the case itself was found not enforceable.

insufficient objective criteria to decide whether one or both parties were in compliance or breach of such a provision. In 2013, however, in *Wah v Grant Thornton*,[6] the High Court laid down relevant principles that may make such pre-arbitral steps enforceable. The Court held that such clauses should be sufficiently clear and uncertain, and the intent to bind parties to the entire waterfall of resolution mechanisms must be discernible from the contract. If so, then the court would test whether the contractually agreed procedure had been satisfactorily followed before recourse to arbitration. In 2014, in *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited*,[7] the High Court finally upheld the enforceability of a MTDRC requiring parties to engage in amicable settlement before referring the dispute to arbitration. Such clauses were found to be consistent with the public policy to encourage negotiated resolution of disputes.

Jurisprudence has similarly developed in Australia, where courts have reasoned that ordinarily non-binding pre-arbitral resolution mechanisms may become enforceable if recorded in clear and precise terms as pre-conditions to binding adjudicatory mechanisms. In *United Group Rail Services v Rail Corpn. New South Wales*,[8] the Supreme Court of New South Wales found a promise to negotiate in good faith to be binding as it was read to constitute a condition precedent to the invocation of arbitration.

The position in Singapore, interestingly, was always unambiguous. In *International Research Corpn. Plc v Lufthansa Systems Asia Pacific Pte Ltd*,[9] the Singapore High Court held that a clause which mandated mediation before arbitration was enforceable. The Singapore Court of Appeals agreed with this reasoning of the High Court and held that, *"Where the parties have clearly contracted for a specific set of dispute resolution procedures as preconditions for arbitration, those preconditions must be fulfilled"*.

Thus to ensure enforceability, any MTDRC must be phrased in a manner that pre-arbitral procedures double as pre-conditions to the invocation of arbitration.

Enforceability in Common Law Jurisdictions

Courts in civil law jurisdictions such as France and Switzerland have also encouraged enforcement of MTDRC's. In France, in the case of *Medissimo v. Logica*,[10] the *Cour de cassation* (Court of Cassation), while upholding a MTDRC noted that non-binding pre-arbitral steps shall be mandatory if the clause makes them compulsory in nature. Failure to comply with the clause in its entirety would then lead to a *"fins de non-recevoir"* (Plea of Non-Admissibility). The claims could, in such cases, be declared inadmissible without entering into the merits and without requiring the party to raise the plea to prove any damage.[11] The Court also laid down a three-stage test to determine the enforceability of such clauses; (i) whether the pre-arbitral procedure is mandatory, (ii) whether the pre-arbitral procedure is a condition precedent to invoke arbitration, and (iii) whether the clause detailing a pre-arbitral procedure is appropriately comprehensive or not.

In *A. SA v. B. SA*,[12] the Swiss Federal Supreme Court ruled similarly when it was approached, claiming that the Dispute Adjudication Board (DAB) was still seized of the matter and hence arbitration could not have been invoked. The court agreed with the proposition and ruled that a reference to the DAB before arbitration was a mandatory step in the dispute resolution process in the FIDIC Contract binding the parties. In other cases, [13]too, Swiss Courts have enforced MTDRCs in totality, including finding the ordinarily non-binding components thereof as pre-conditions to the invocation of arbitration. Thus, a satisfactorily defined and unambiguous MTDRC has more often than not found favour with courts in both civil and common law jurisdictions.

Enforceability In India

Ordinarily, arbitration constitutes the binding end of variously worded MTDRCs. Arbitration in India is regulated by the Arbitration and Conciliation Act, 1996, that is largely based on the UNCITRAL Model Law.[14] Much like the universal convention, the Indian legislation too gives primacy to party autonomy. The parties have been left free to agree on and arrive at any form of an arbitration clause, including a multi-tier dispute resolution mechanism, so long as the intent to arbitrate can be clearly ascertained from the agreement.

Under Indian law, recourse to courts is not needed for the appointment of arbitrators *except* where parties either fail to agree on a procedure for an appointment or the agreed procedure fails due to inaction[15] or an inherent illegality.[16] It is on such occasions that the courts in India have been faced with the question of enforceability MTDRCs.

The common thread the binds Indian judicial precedent on enforcement of MTDRCs is deference to party autonomy. So long as the procedure set out for dispute resolution is not in conflict with any legal provision, the same has been held to bind the parties and read as mandatory. Courts in India have tended to read arbitration agreements strictly and thus ordinarily ruled in favour of MTDRCs.[17] They have developed a reasoning similar to the Court of Cassation in France (plea of non-admissibility), where non-compliance with the pre-arbitral steps may render the dispute non-arbitrable.[18]

Giving primacy to party autonomy, the Supreme Court of India in *Centrotrade Minerals & Metals Inc v Hindustan Copper Ltd*[19] even enforced a MTDRC that provided for two sets of arbitration, the second tribunal being an appellate body ruling on the correctness of the award passed by the first tribunal. The court held that if the parties by agreement provide for a MTDRC then the same shall necessarily bind them unless any of the stages were in conflict with a provision of law. In doing so, the Supreme Court enforced a foreign award passed by an ICC Tribunal in London, to which recourse had been taken after a party was dissatisfied with the outcome of the first round of arbitration in India.

[6] Wah v Grant Thornton [2013] 1 Lloyd's Law Reports 11.
[7] Emirates Trading Agency LLC v Prime Mineral Exports Private Limited [2014] EWHC 2104 (Comm).
[8] United Group Rail Services v Rail Corpn. New South Wales (2009) 127 Con LR 202.
[9] International Research Corpn. Plc v Lufthansa Systems Asia Pacific Pte Ltd [2012] SGHC 226.
[10] Cass.com. 29-4-2014, n° 12-27.004.
[11] Gregory Travaini, 'Multi-tiered dispute resolution clauses, a friendly Miranda warning' Kluwer Arbitration Blog, September 30, 2014.
[12] A. SA v. B. SA, 4A_124/2014, (English translation by C Ponset).
[13] BGer. 4A_46/2011, consid. 3.1.3.
[14] Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL]) UN Doc A/40/17, Annex I.
[15] Section 11(6), Arbitration and Conciliation Act, 1996.
[16] Section 14, Arbitration and Conciliation Act, 1996.
[17] Oriental Insurance Co. Ltd. v Narbheram Power and Steel (P) Ltd. (2018) 6 SCC 534.
[18] United India Insurance Co. Ltd. v Hyundai Engg. & Construction Co. Ltd. (2018) 17 SCC 607.
[19] Centrotrade Minerals & Metals Inc v Hindustan Copper Ltd (2017) 2 SCC 228.

While MTRDCs have been found enforceable, exceptions have been carved out basis the very same principle of party autonomy. In *M.K. Shah v State of Madhya Pradesh*,[20] the Supreme Court held that even though the pre-arbitration steps mentioned in the agreement were essential, they were "*capable of being waived and if one party has by its own conduct or the conduct of its officials disabled such preceding steps being taken, it will be deemed that the procedural pre-requisites were waived*". This reasoning was later reaffirmed in *Demerara Distilleries (P) Ltd. v Demerara Distillers Ltd*.[21]

Consistent with the view of the Supreme Court, various state High Courts have also ruled in favour of the enforceability of MTDRCs. In *Simpark Infrastructure Pvt. Ltd. v Jaipur Municipal Corporation*,[22] the Rajasthan High Court strictly interpreted the arbitration agreement and held that attempt at conciliation was mandatory before the invocation of arbitration. Recourse to arbitration was thus found pre-mature. An identical decision was reached by the High Court of Delhi[23] when ruling on a hierarchical mechanism for adjudication of claims (MTDRC). The Bombay High Court[24] stressed the importance of the unambiguous language of such clauses and its impact on enforceability and reiterated the tests evolved in other common law jurisdictions.

However, there have been notable exceptions to this rule favouring enforcement. The Delhi High Court, one of the busiest commercial courts in the nation, has on more than one occasion ruled that non-binding pre-arbitration resolution mechanisms are not mandatory. In *Ravindra Kumar Verma v BPTP Ltd*,[25] the Court reasoned that holding such prior pre-arbitral steps as mandatory would defeat the valuable right to get disputes decided by arbitration and which position was not acceptable in law. This decision was reaffirmed in a later judgment titled *Union of India v Baga Brothers*.[26]

These deviations reflect that the jurisdiction on the enforceability of MTDRCs in India is not yet settled and that it continues to be a work in progress. This also leads to uncertainty among industry players when incorporating these universally acknowledged multi-tier dispute resolution mechanisms in Indian construction contracts.

Conclusion

It is sufficiently clear that while the position on the enforceability of MTDRCs in India is still maturing, certain fundamental principles have emerged that may be employed to tilt the balance in favour of enforcement. The clause must be so worded that it mandates parties, in no uncertain terms, to engage in all pre-arbitral procedures as a pre-condition to the invocation of arbitration. Such clauses must set out clear, ascertainable parameters for each step and must reflect that the parties intended for all stages of the dispute resolution mechanism to be followed *in toto*. These clauses are strictly construed, and therefore it is essential that the same are drafted with precision or derived correctly from universally accepted standard form contracts or the model clauses proposed by arbitral institutions. If these conditions are met, the courts in India would ordinarily enforce the MTDRC by deferring to the universally accepted principle of party autonomy.

[20] M.K. Shah Engineers & Contractors v State of M.P. (1999) 2 SCC 594.
[21] Demerara Distilleries (P) Ltd. v Demerara Distillers Ltd. (2015) 13 SCC 610.
[22] 2012 SCC OnLine Raj 3833.
[23] Ved Prakash Mithal & Sons v Delhi Development Authority (2018) SCC OnLine Del 9884.
[24] S. Kumar Construction Co. v Municipal Corporation of Gr. Bombay (2017) SCC OnLine Bom 130.
[25] Ravindra Kumar Verma v BPTP Ltd. (2014) SCC OnLine Del 6602.
[26] Union of India v Baga Brothers (2017) SCC OnLine Del 8989.

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 opportunity to innovate and 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 April 2021 and 31st July 2021.

To Disclose or Not to Disclose, that is the Question – A Dialogue on Halliburton v Chubb (20th April 2021)

This webinar explored the UK Supreme Court's landmark judgment in *Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 on arbitrator bias and the duty of disclosure. The panel comprised Dr. Mariel Dimsey (CMS Hong Kong), Mr. Nahendran Navaratnam (Navaratnam Chambers) and Prof. Dr. Colin Ong QC (36 Stone & Eldan Law LLP), with Ms. Nivvy Venkatraman (AIAC) moderating the session. The panellists explained that the decision focused on apparent bias and what constituted an "appearance of bias". The Court held that the correct legal test 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".

The panellists noted that although civil law and common law jurisdictions may appear to have different positions on the issue of bias, this largely comes down to whether the relevant jurisdiction is a Model Law or non-Model Law jurisdiction, where a more uniform approach can be found in the former. It was further commented that issues of actual bias are rare in both jurisdictions, and issues of apparent bias are far more common.

That being said, the panellists agreed that the Halliburton case is not a game-changer for Model Law jurisdictions as it simply serves as a reminder of the proper considerations that should be borne in mind in satisfying the "justifiable doubts" test and thereby enlivening the duty of disclosure. They also reinforced that although England is a non-Model Law jurisdiction and the matter in question related to an ad hoc arbitration, what Halliburton signifies is that the Model Law approach of "justifiable doubts" is very similar to the objective "real possibility of bias" test at English common law.

The panellists also explored the comments made on the duty of disclosure in the decision, namely that where there are multiple overlapping appointments, an arbitrator may be required to disclose the acceptance of those appointments depending on the facts on hand, confidentiality and privacy considerations and, where there is no consent, whether the consent from the parties to disclose such information can be inferred from the contract having regard to customs and practices in the field.

The relevance of the IBA Guidelines on Conflicts of Interest in International Arbitration and topical issues such as repeat appointments and double hatting were also canvassed by the panellists, who also shared insights on their individual experiences in navigating such issues.

A Tale of Synergies – Uncovering Islamic Finance and Arbitration

This webinar provided an overview of the Islamic finance sector as an alternative to conventional banking and finance over the past decades. The webinar was moderated by Mr. Abinash Barik (AIAC) and featured prominent speakers, namely Mr. Megat Hizaini Hassan (Lee Hishammuddin Allen & Gledhill), Dr. Amel Makhlouf (Paris Bar / Sorbonne Law School), Dr. Gordon Blanke (Blanke Arbitration LLC) and Mr. Arvindran Manoosegaran (Omni Bridgeway).

The panellists highlighted jurisdictions such as the Middle East, United Kingdom, France, Malaysia, and Singapore, as attractive hubs for Islamic finance investments and discussed the transactional aspects of Islamic Finance products. The panellists further elaborated regarding the Shariah-compliant requirements of Islamic finance transactions and their compatibility with the principles of dispute resolution. The panellists also discussed the feasibility for semi-secular arbitrations in Islamic finance contracts relating to banking and other sectors.

The shortcomings of litigation in managing Shariah risks was also highlighted where it was proposed that arbitration would be the most effective mechanism for resolving commercial disputes involving Shariah-related issues. The panellists emphasised that domestic and international arbitration provides for party autonomy over the choice of national law and the application of Shariah rules. To promote further access to arbitration post the COVID-19 pandemic, the panellists highlighted the growing importance of Third-Party Funding ("TPF") and discussed both the practitioner's and funder's view on the applicability of TPF in Islamic Finance disputes as a legitimate means of external funding. The panellists also discussed the various factors that a Third-Party Funder must take into account before being involved in funding arbitrations or related litigations in the national courts.

Space Jam: The Commercialization of Space & Related Disputes (29th June 2021)

This webinar discussed the development of space commercialisation, its future and the best way to settle space-related disputes. The webinar was moderated by Ms. Chelsea Pollard (AIAC), the panel consisting of Ms. Rachael O'Grady (Mayer Brown International LLP), Prof. Timiebi U. Aganaba (Arizona State University), Prof. Yun Zhao (University of Hong Kong and Jonathan Hung (Singapore Space and Technology Limited).

The first discussion was on the contractual relationship between the parties involved in space-related contracts. The panellists explained that the initial relationships dealing with space were only between States. However, with the current development of space-age technology and advancements, not only nations but private businesses and entities have ushered in a new area of space commercialisation.

The panellist then discussed the issue of space contracts. Amongst the issues raised were obtaining insurance, liability for private individuals, rights to Outerspace and the relevant approving bodies, and intervention of third-parties or third-parties' interest. While many of these issues can be provided guidance from other areas of law, the element of space makes all disputes in this area unique.

The existing framework dealing with space-related disputes is the Outer Space Treaty 1967, which has not been amended since the Cold War era. Accordingly, the panellists agreed that such requires updating and clarification. For example, Article 3 provides that international law applies in space, however, it is unclear as to what international law is to be applied.

For now, disputes in the area of space are rare but will continue to grow. The panellists agreed that a framework needs to be established for these disputes and that arbitration would be a fitting one. It was also highlighted that recently, a dispute between the USSR and Canada on a satellite crash was resolved through negotiations and subsequently a private settlement.

RCEP Investor-State Dispute Settlement Mechanism: A Calculated Risk or a Pure Gamble? (28th July 2021)

This webinar focused on the Regional Comprehensive Economic Partnership ("RCEP") free trade agreement and the investment dispute settlement mechanism contained therein. The session was moderated by Ms. Irene Mira (AIAC) with Ms. Elodie Dulac (King & Spalding) and Mr. Junianto James Losari (UMBRA - Strategic Legal Solutions) participating as panellists.

The discussion started off with a brief introduction of the RCEP, which is dubbed to have formed one of the world's largest trading blocs, its signatories to date, how it may translate into domestic law once the instrument is ratified, and the polarising reception to the RCEP from both the signatories and the international arbitration community in general.

The panellists then delved into the workings of the investment dispute settlement mechanism under the RCEP which is inspired by the World Trade Organisation's own dispute settlement mechanism. The panel also discussed how the RCEP's investment dispute settlement mechanism may or may not speak to the classic, and rather old, notion of diplomatic protection versus an investor's right to access of justice in a neutral forum when an investment dispute arises. The lively session further touched upon the COVID-19 pandemic's impact vis-à-vis investment disputes, especially those that will probably be brought under the RCEP in the future.

Finally, the panellists shared their various experiences in building their respective careers in international arbitration and, in particular, investment arbitration. They also shared some tips to the younger members of the audience who aspire to have a career in the field.

KEY INSIGHT

PRELIMINARY CASE MANAGEMENT STATISTICS

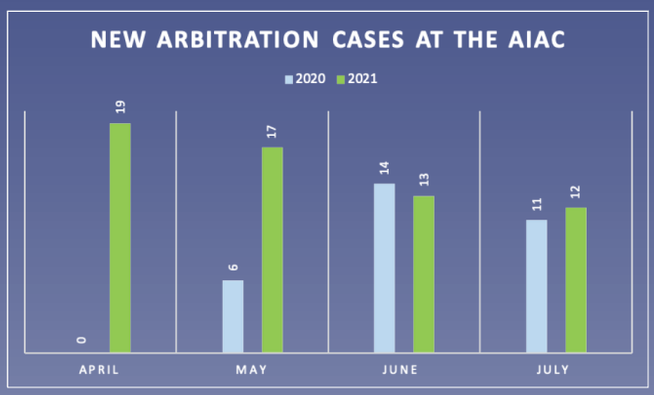
A significant component of the work undertaken by the AIAC is the administration of a range of alternative dispute resolution ("ADR") cases. Specifically, the AIAC administers domestic and international arbitration, adjudication, mediation, and domain name dispute resolution matters.

As part of this Newsletter, we present our preliminary ADR statistics for 1st April 2021 to 31st July 2021. The information presented here is the raw data only.

Please note that between 1st June 2021 and 20th July 2021, that AIAC was unable to operate from its premises due to the enactment of the Full Movement Control Order. This had an impact on the AIAC's registration of new adjudication and MYNIC domain name disputes. Since 21st July 2021, the AIAC has been able to re-open its premises with limited operating hours and has been able to accept all new ADR case registrations.

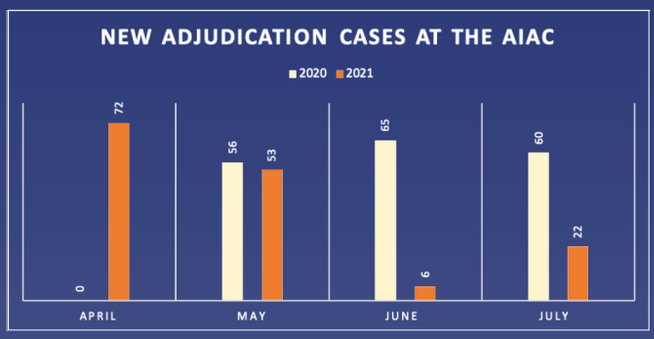
ARBITRATION

Between April 2021 and July 2021, the AIAC received sixty-one (61) new arbitration cases, fifty (50) of which were domestic arbitrations and eleven (11) of which were international arbitrations.



ADJUDICATION

Between April 2021 and July 2021, the AIAC received one hundred and fifty-three (153) new adjudication matters.



MEDIATION & DOMAIN NAME DISPUTE RESOLUTION

Between April 2021 and July 2021, the AIAC received one (1) new mediation matter and no new domain name dispute resolution matters.

For information on the AIAC's case management statistics for 2019 and 2020, please see the AIAC's Annual Report for 2019 & 2020 which is available under the publications section of our website, www.aiac.world.

ACCESS TO THE AIAC PREMISES DURING PHASE ONE OF THE NATIONAL RECOVERY PLAN

Following the recent guidelines by the Government of Malaysia, the Asian International Arbitration Centre ("AIAC") wishes to advise its users and members of the public, of the following which shall be implemented during Phase One of the National Recovery Plan ("Phase 1 Period"), effective **Wednesday, 21st July 2021**.

Access to the AIAC Premises in Bangunan Sulaiman

To contain the spread of COVID-19 and to minimise physical presence at Bangunan Sulaiman, the AIAC premises will only be open exclusively for the purposes of effecting physical service of documents. In addition to this, the AIAC premises will only be open for limited hours during the week, from **Monday to Friday** between **10:00 a.m. to 4:00 p.m.** with access confined to the front lobby i.e., the Business Centre / Reception located at the Ground Floor. An area has been designated for drop-off of all documents thereat.

When accessing the AIAC premises, dispatch officers are required to extend their co-operation in adhering to the following measures:

- 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.
- Use of MySejahtera to check-in, either by using the MySejahtera application or by scanning the MySejahtera QR Code using your phone's camera at the guard's station.
- Wearing of face masks and maintaining a physical distance of one (1) meter with others, at all times whilst at the AIAC premises.
- Use of sanitisers which have been placed at various locations within the AIAC.

Case Management

The AIAC will resume its acceptance of physical service of documents. As such, the AIAC will be able to register new matters and undertake appointment requests for adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA 2012") and MYNIC Domain Name Dispute during this period.

Registration and appointment requests for all other matters, including arbitration, mediation and non-MYNIC / UDRP Domain Name Disputes, remain unaffected.

Further, all existing and ongoing alternative dispute resolution ("ADR") matters including those requiring a decision, consideration and/or approval by the Director of the AIAC remain unaffected. In this respect, we encourage and remind all Arbitrators, Adjudicators, Mediators and Domain Name Dispute Resolution Panellists to exercise their discretion, in accordance with the relevant provisions under the governing laws and rules, in considering extensions to deadlines and ancillary matters. This will accommodate and ensure the continuity of ADR proceedings.

During this Phase 1 Period, the AIAC Secretariat will continue to work from home and are contactable remotely through the usual email channels and mobile numbers.

For 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, from 8:30 a.m. to 5:30 p.m. apply**.

Hearings, Meetings, Room Bookings and Events at the AIAC

Reservations and room bookings at the AIAC premises during the Phase 1 Period, including in-person or physical hearings, meetings, events, site visits, workshops, and conferences are not permitted. Please contact the AIAC's Reservations Team at reservations.team@aiac.world if it is necessary to modify your booking.

All AIAC webinars and workshops to be conducted virtually shall proceed as scheduled.

We also encourage and invite all users to explore the option of conducting a virtual hearing and/or 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.

As this is a rapidly evolving situation, the AIAC is closely monitoring the development and/or any further orders and/or directives that may be made by the Government of Malaysia. Updates and any additional information will be communicated via social media and our website.

Thank you.

Yours sincerely,

TAN SRI DATUK SURIYADI BIN HALIM OMAR
DIRECTOR
ASIAN INTERNATIONAL ARBITRATION CENTRE

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KEY INSIGHT

THE AIAC'S CAPACITY BUILDING AND OUTREACH INITIATIVES

As part of the AIAC's Capacity Building and Outreach Initiatives, the members of the AIAC Legal Services Team regularly present or moderate at conferences or deliver lectures to both students and experienced practitioners, both locally and internationally, on a broad range of topics. Due to the movement restrictions associated with the COVID-19 Pandemic, although physical talks were unable to be convened at the Bangunan Sulaiman, the AIAC's Legal Services Team participated in the following external webinars and/or training sessions between April 2021 and July 2021:

- Moderator, "Session 2: Effective and Efficient ADR in the time of COVID-19", *AIAC-MATRADE-Bar Council's Roundtable on International Arbitration and ADR in Malaysia* (6th April 2021)
- Speaker, "Alternative Dispute Resolution: How this Lifeline Handles Disputes for Cross-Border Corporations", *Malaysian-German Chamber of Commerce and Industry Tuesday Club Series* (11th May 2021)
- Speaker, "The Art of Advocacy", *Taylor's Law School Mooting Society* (2nd June 2021)
- Speaker, "CIPAA Simplified: A Practical Guide to Construction Adjudication", *Young Society of Construction Law Malaysia Classroom Series* (17th June 2021)
- Moderator, "Olympism in Life after Sports", *Sports Law Association of Malaysia (SLAM)* (22nd July 2021)
- Moderator, "Session 1 "Key Considerations in Commercial Litigation", *Multimedia University's Online Legal Forum "Understanding Commercial Litigation"* (24th July 2021)
- Speaker, "Fireside Chat on International Arbitration Past, Present and Future", *CIArb Young Members Group (Malaysia)* (29th July 2021)

Supported Events

The AIAC also supported the following webinars and/or events between April 2021 and July 2021:

- "*RICS - AIAC Online Mediation Training Programme*", Royal Institution of Chartered Surveyors (RICS) (31st May – 3rd June 2021 and 8th – 11th June 2021)
- "*MIARB (VIRTUAL) FIGHT CLUB: This House Believes That Artificial Intelligence Will Render Arbitrators and Lawyers Obsolete In 25 Years*", Malaysian Institute of Arbitrators (MIArb) (23rd June 2021)
- "*Enforcement of Arbitral Awards in Asia: Theory & Practice - Part 5: Malaysia (Virtual Edition)*", Singapore International Arbitration Centre Academy (24th June 2021)
- "*7th Annual Law Review 2021*", Malaysian Institute of Arbitrators (MIArb (22nd July 2021)
- "*The Making of an Advocate and an Arbitrator*", Singapore International Arbitration Centre South East Asia Academy (29th July 2021)
- "*GAR Connect: Singapore*" Global Arbitration Review (24th August 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

***Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd and Another Appeal* [2021] 1 MLJ 1 (FC)**

The appeal in this matter dealt with an arbitral award, in which the arbitrator, who is a professional engineer, relied on his own knowledge and industry experience to make certain factual findings to arrive at the decision that the contract had been unlawfully terminated and awarded the sum of RM2,351,264.27, comprising the cost of completed works amounting to RM1,409,154.75 and loss of profit amounting to RM942,109.52. Following such, the appellant had applied to the High Court to enforce the Award under section 38 of the Arbitration Act 2005 ("Act"). Simultaneously, the respondent had filed for a setting aside or a variation of the Award on the grounds that the arbitrator had breached the rules of natural justice in his 'loss of profit ruling' and a challenge on the three rulings made by the arbitrator: the termination ruling, the loss of profit ruling and the value of completed works ruling.

The High Court dismissed the application to enforce the Award, varied the Award by ruling that the contract was validly terminated, set aside the loss of profit ruling and affirmed the sum granted for the completed works. On appeal, the Court of Appeal set aside the entire arbitral Award under sections 37 and 42 of the Act on the grounds that there had been a breach of the rules of natural justice and the arbitrator had exceeded his jurisdiction by relying on extraneous evidence which he "invented" to determine the loss of profit payable – the correct course of action would have been for the parties have been given proper notice of that evidence or the opportunity to submit on the same. The appellant then filed an appeal to the Federal Court.

In allowing the appeal, the Federal Court, *inter alia*, noted that threshold requirement stipulated in section 37 of the Act to set aside an award is "very low" as opposed to the "very high" threshold in the former section 42. Nonetheless, it was held that a professional who relies on his own knowledge in arriving at a decision on the quantum of 'loss of profit' pursuant to section 21(3)(b) of the Act, which enables an arbitrator to draw on its own knowledge and expertise, cannot be said to be in breach of the rules of natural justice. This is particularly so where such a determination was based on the evidence before the arbitrator and the inferences that could be drawn therefrom, and there was nothing to demonstrate that the arbitrator's own knowledge or expertise on any fact in issue was plainly and unarguably wrong. In this instance, even though the parties were denied the opportunity to submit on the matter, the breach was not of such gravity or materiality as to affect the arbitrator's loss of profit ruling. It was further held that the arbitrator's ruling on the sum awarded for the completed works was a purely factual finding that did not involve any question of law.

***Kebabangan Petroleum Operation Co Sdn Bhd v Mikuni (M) Sdn Bhd & Ors* [2021] 1 MLJ 693 (CA)**

Despite numerous reminders, in an AIAC administered arbitration, the respondent failed to pay its share of the provisional advance deposit ("PAD"), which was requested on 8th November 2016. Following this, on 1st November 2017, the appellant filed a civil suit against the first respondent for, *inter alia*, breach of contractual obligations. The first respondent then applied to the High Court to stay the civil suit and for the matter to be referred to arbitration.

The appellant objected to the stay application on the grounds that the arbitration agreement had been rendered inoperative due to the respondent's refusal to pay for its share of the PAD. The respondent subsequently filed a notice of application to strike out the appellant's writ against them, and the appellant contended that such action amounted to taking steps in a civil suit, and by doing so meant they could no longer insist on arbitration. The High Court allowed the respondents' application for a stay of the appellant's civil suit pending the disposal of arbitration and dismissed the respondent's application to strike out the appellant's writ.

The Court of Appeal allowed the appeal and was unanimous in deciding that the stay ordered by the High Court was to be lifted and for the parties to proceed in court. The Court of Appeal further elaborated that the High Court had failed to appreciate that the first respondent had committed a repudiatory breach by repeatedly refusing to pay its portion of the PAD to the AIAC and that the High Court had erred in not holding that the filing of a striking out application demonstrated their intention to unequivocally abandon the matter to be referred to arbitration.

***Federal Land Development Authority & Anor v Tan Sri Hj Mohd Isa bin Dato' Hj Abdul Samad & Ors* [2021] 8 MLJ 214 (HC)**

On 14th November 2019, the plaintiffs commenced a court action in respect of alleged wrongdoing against the defendants. The plaintiffs sought to set aside, *inter alia*, the development agreement, power of attorney, lease agreement and sale and purchase agreement. On 25th November 2019, the defendant commenced an arbitration proceeding by way of notice of arbitration ("NoA") against the plaintiff at the AIAC. The defendant in its NoA was seeking, *inter alia*, a declaration that the development agreement was valid and binding and requested specific performance of the terms of the development agreement. Consequently, in these court proceedings, the plaintiffs sought an interim injunction restraining the defendant from taking further steps to continue with the arbitration proceeding pending disposal of the civil suit.

The Court allowed the plaintiff's prayers and granted an injunction against the defendant. The Court opined that since the issues in the arbitration and the court proceedings were not distinct, there was a risk of an inconsistent decision should the arbitration be allowed to proceed. In the interest of justice, the court proceedings should proceed first and should the Court decide that the development agreement was null and void, then there would not be a need for any further arbitration proceedings.

***Low Koh Hwa @ Low Kok Hwa (practising as sole chartered architect at Low & Associates) v Persatuan Kanak-Kanak Spastik Selangor & Wilayah Persekutuan and another case* [2021] 10 MLJ 262 (HC)**

In this decision, the High Court considered whether an arbitrator has a duty of disclosure and breached impartiality principles in failing to make a timely disclosure of a relationship with one of the parties during the course of an arbitral proceeding. The facts involved an unrepresented party who was informed on the first day of the hearing by the arbitrator that the arbitrator "knew" the Honorary Director of the Respondent. Aside from this remark, no meaningful disclosure was provided by the arbitrator to the parties regarding this relationship. Following the issuance of the Award, the plaintiff sought to set aside the Award under section 37 of the Act on various grounds, including that the Award was in conflict with Malaysian public policy given that the arbitrator had failed to provide a sufficient disclosure of his relationship with the Honorary Director to the parties.

The High Court emphasised that an arbitrator is under a continuing duty under Malaysian law to make a full and timeous disclosure of any facts or circumstances that would enable a fair-minded observer to objectively determine whether there are justifiable doubts as to the arbitrator's impartiality and independence. The facts on hand indicated that there were two pivotal occasions where the arbitrator should have made a proper disclosure about his relationship with the Honorary Director – the first being prior to the hearing where the arbitrator was provided with evidence that the Honorary Director would be the respondent's sole witness in the arbitration and the second being the day of the hearing where the Honorary Director was present when the appellant was giving his testimony. The details of the disclosure should have included information on how the arbitrator knew the Honorary Director, the nature of the relationship, and the duration and the proximity of the relationship.

Re-stating the "real possibility of bias" test in *Halliburton v Chubb*, the High Court set aside the Award on the grounds that there existed a reasonable suspicion that the arbitrator was partial towards the respondent. This was premised on the Honorary Director being a material witness to the dispute, the delay in the arbitrator's disclosure of the relationship, the lack of particulars in the arbitrator's disclosure and the fact that the Award addressed matters beyond the scope of the reference to arbitration and was ultimately unfavourable to the Plaintiff.

INTERNATIONAL ARBITRATION

***Betamax Ltd v State Trading Corp (Mauritius)* [2021] UKPC 14 (Supreme court of Mauritius)**

This matter related to a contract of affreightment ("COA") entered into by the appellant and the respondent, which is a public company operating as the trading arm of the Government of Mauritius ("GoM"). As part of their contract, the appellant was required to build and operate a tanker and make available the freight capacity of the vessel for the transport of petroleum products for a duration of fifteen (15) years. On 30th January 2015, the newly constituted Cabinet of the Government of Mauritius announced that it would terminate the COA in light of the alleged unlawful process regarding the allocation of the contract. In February 2015, the respondent gave notice that it was unable to use the appellant's services under the COA any longer. In April of the same year, the appellant terminated the COA under its default provision. The appellant brought an arbitration against the respondent for breach of the COA.

The arbitrator in his Award decided, *inter alia*, that the appellant was entitled to terminate the COA and that the COA was not illegal as it was exempt from certain statutory procurement requirements based on the arbitrator's statutory interpretation. Applications to the Supreme Court of Mauritius to set aside and enforce the Award were later made by the respondent and appellant, respectively. The Court held that the Award was in conflict with the public policy of Mauritius and set it aside under section 39(2)(b)(ii) of the International Arbitration Act on the grounds that the COA was not exempt from such statutory requirements based on the Supreme Court's interpretation of the statute and was consequently illegal.

The matter was brought on appeal to the Judicial Committee of the Privy Council where it was decided that the Supreme Court was in error in reviewing the decision of the arbitrator. The Privy Council decided that the COA was, in fact, exempt from such statutory requirements and consequently, was not in conflict with the public policy of Mauritius.

***Markel Bermuda Ltd v Caesars Entertainment Inc.* [2021] EWHC 1931 (Comm)**

The parties entered into two separate insurance policies, with the plaintiff being the insurer and the defendant being the policyholder in both contracts. The defendant made indemnity claims in respect of alleged property damage and business interruption losses arising out of the COVID-19 pandemic and sued the plaintiff in the State District Court of Clark County, Nevada, in relation to one of the insurance policies.

In the present case, the plaintiff applied for a permanent anti-suit injunction restraining the defendant from prosecuting proceedings commenced against the plaintiff, in breach of the allegedly valid and binding London arbitration agreement contained in the contract of insurance between the parties. The High Court decided that the arbitration agreement was valid and binding and saw it fit to grant the plaintiff's application for an anti-suit injunction against the defendant. The Court stated that there was neither strong cause nor strong reason shown on the part of the defendant as to why an anti-suit injunction should not be granted to the plaintiff and did not consider that any of the plaintiff's previous conduct would disentitle it from such.

***C v D* [2021] HKCFI 1474**

The parties in this matter had entered into a Co-operation Agreement ("Agreement"). The Agreement contained a condition precedent to arbitration that in the event of a dispute, the parties shall first attempt to negotiate the dispute.

A dispute arose between the parties, and on 24th December 2018, D's CEO issued a letter to C's Board of Directors stating that C's recent breach of the Agreement has amounted to a repudiatory breach. Following this, D initiated an arbitration. In its response, C claimed that the arbitral tribunal did not have the jurisdiction due to D's failure to fulfil the condition precedent of negotiation.

In a Partial Award, the arbitral tribunal decided that pursuant to the Agreement, the parties were mandatorily required, in good faith, to attempt to resolve any disputes by way of negotiation and that D fulfilled this requirement by issuing its letter dated 24th December 2018. In light of that, the tribunal rejected C's jurisdictional challenge and went on to find that C had breached the Agreement and was required to pay damages.

C then brought the matter to the High Court, seeking a declaration that the Partial Award was made without jurisdiction and applying for it to be set aside. D claimed that it was an issue of admissibility and not an issue of jurisdiction. The court, in its decision, discussed the distinctions between an issue of jurisdiction and an issue of admissibility. The Court went on to state that in observing international arbitration authorities and the jurisprudence in Hong Kong as well as other common law jurisdictions, the court must confine itself to true questions of jurisdictions. It highlighted that if a matter is determined to be an issue of admissibility, it is not unimportant, but rather means that the arbitral tribunal has the jurisdiction to deal with the issue as it deems fit. In the present case, the Court found that similar to issues of limitation, the interpretation of whether the condition precedent had been fulfilled was an issue of admissibility and not of jurisdiction. As such, C's applications were dismissed.

***Hub Street Equipment Ltd v Energy City Qatar Holding Company* [2021] FCAFC 110 (FC of Australia)**

In this decision, the Full Court of the Federal Court of Australia declined to enforce a foreign arbitral award due to a failure in validity constituting a Qatar-seated arbitral tribunal in accordance with the terms of the parties' arbitration agreement.

The contract was governed by the laws of Qatar and provided for the resolution of disputes in accordance with the Qatari Arbitration Rules. The contract also prescribed a procedure for the appointment of a three-member arbitral tribunal which required each party to nominate an arbitrator within 45 days of issuing a written notice to commence the arbitration, whereby the nominated arbitrators would thereafter select the president of the tribunal. The arbitration agreement also provided that any arbitration would be conducted in English. Contrary to the appointment procedure, the respondent filed a claim in the Plenary Court of First Instance of the State of Qatar seeking the court to appoint a three-member arbitral tribunal. Further, the respondent had sent a notice of the court proceeding to the appellant to the Qatari address of a related company instead of the appellant's primary address in Sydney. The notice was translated into English and brought to the attention of the appellant's directors. Once appointed, the Qatari tribunal conducted the arbitration in Arabic and sent the appellant six notices of arbitration to the address specified in the contract. An Award was eventually rendered in Arabic in the respondent's favour, with an English translation also provided. The appellant did not participate in either the court proceedings or the arbitration proceedings.

When the Award was sought to be enforced in Australia, the Federal Court in the First Instance entered judgment against the appellant for the full amount of the Award. On appeal, the Full Court of the Federal Court held that enforcement should be refused because the arbitral tribunal was not constituted in accordance with the proper procedure which enlivened the ground for non-enforcement in section 8(5)(e) of the International Arbitration Act 1974 (Cth) and Article V(1)(d) of the New York Convention. The Full Court noted that the Qatari Court had operated on the misapprehension that it had been asked to exercise its powers to appoint the arbitral tribunal in circumstances where the parties had not been able to agree – rather, what had happened was that the respondent had failed to follow the agreed procedure for the commencement of an arbitration against the appellant and the subsequent appointment of the arbitral tribunal. The Full Court noted that although the International Arbitration Act 1974 (Cth) has pro-enforcement bias, this does not extend to imposing a standard of proof of a party resisting enforcement which is higher than on the balance of probabilities.

***Republic of India v Vedanta Resources PLC* [2021] SGCA 50**

In this matter, the appellant and respondent were parties to an investment treaty arbitration seated in Singapore ("Vedanta arbitration"). The arbitration was commenced by the respondent against the appellant pursuant to the Agreement between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments ("the India-UK BIT"). The matter was administered by the Permanent Court of Arbitration and conducted pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law 1976 ("the UNCITRAL Rules"). Concurrent to the Vedanta arbitration, the appellant was also party to another arbitration seated in the Netherlands against the Cairn Group ("Cairn arbitration"). Both arbitrations were brought under the same investment treaty and arose from a set of tax assessment orders issued by the appellant. Given these facts and the potential for overlap in facts and material, the appellant sought to implement a regime to permit cross-disclosure of documents between the two arbitrations.

The arbitral tribunal in Procedure Order No. 3 of the Vedanta arbitration stated that parties are at liberty to apply to the tribunal for disclosure of any specific, identified document to the Cairn arbitration after consultation with the other party and upon reaching mutual agreement on such disclosure. Consequently, on 26th August 2018, the appellant had applied to disclose a portion of the transcript of the Vedanta arbitration proceedings, which included the parties' submission as to jurisdiction and the application was rejected by the tribunal in Procedural Order No. 7. Consequently, the appellant filed HC/OS 980/2018 in the High Court of Singapore seeking a declaration from the court that the documents disclosed or generated in the Vedanta arbitration are not confidential or private and that disclosure of such to the Cairn arbitration would not be in breach of any confidentiality or privacy. The respondent objected to the application on the grounds that it amounted to an abuse of process. The High Court rejected the respondent's objection and went on to state that the appellant's request was not in itself an abuse of process. The court had, however, declined to grant any declarations and dismissed the application.

The case was brought before the Court of Appeal. In this instance, the Court of Appeal had disposed of the appeal and decided that it did, in fact, amount to an abuse of process. The Court of Appeal held that the High Court erred in deciding that the original application did not amount to an abuse of process. The Court of Appeal additionally stated that the application was a blatant violation of the principle of minimal curial intervention since granting such declarations would have infringed on such principle.

ADJUDICATION

***HSL Ground Engineering Sdn Bhd v Civil Tech Resources Sdn Bhd and another case* [2021] 8 MLJ 347 (HC)**

In a construction project, the defendant appointed Civil Tech Sdn Bhd ("CTSB") as the sub-subcontractor, who in turn appointed the plaintiff to carry out and complete works described as the supply of skilled labour, machinery and equipment. On 19th December 2017, the defendant mutually terminated its contract with its principal. As a result, the contract between CTSB and the plaintiff was also terminated. At this time, CTSB had fully paid the plaintiff according to the terms of its contract. The plaintiff proceeded to initiate two adjudication proceedings against CTSB under CIPAA and succeeded in both proceedings. However, CTSB failed, refused or neglected to pay the amounts to the plaintiff.

Consequently, in the present case, the plaintiff filed for an application to seek direct payment from the principal under section 30 of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") based on both successful adjudication proceedings. The courts held that the plaintiff may seek direct payment from the defendant in respect of any money due or payable to the plaintiff by CTSB.

***ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* [2021] 8 MLJ 99**

The defendant appointed the plaintiff as the main contractor for a construction project. Disputes arose between the parties, and the defendant initiated an adjudication proceeding on 15th January 2019. Concurrent to the adjudication proceeding, on 18th March 2019, the defendant served a NoA on the plaintiff. On 17th May 2019, the plaintiff had also issued its own NoA on the defendant. In its NoA, the plaintiff additionally proposed for both arbitration proceedings to be consolidated.

In the adjudication decision dated 21st June 2019, the adjudicator found in favour of the defendant and decided that plaintiff was required to pay the defendant RM67,767,269.32 being the adjudicated sum, in addition to legal costs and costs of the adjudication. On 25th June 2019, only four days after the release of the adjudication decision, the defendant served a statutory demand for payment of sums owed under section 466(1)(a) of the Companies Act 2016. The plaintiff was additionally informed, by way of the same statutory demand, that failure to pay the demanded sum within 21 days would deem the plaintiff as unable to pay its debt as under section 465(1)(e) of the Companies Act 2016 and winding up proceedings would be instituted against the plaintiff.

On 9th July 2019, the plaintiff issued the originating summons for the case at hand, applying for an injunction to restrain the defendant from filing the winding-up proceedings. The court allowed the plaintiff's application, and an injunction was granted restraining the defendant from presenting any winding up petition against the plaintiff.

***MKP Builders Sdn Bhd v PC Geotechnic Sdn Bhd* [2021] MLJU 1061**

The plaintiff, in this case, appointed the defendant as a sub-subcontractor to do the bored piling works in a construction project. In April 2019, the principal terminated its contract with the plaintiff, and in May 2019, the plaintiff terminated its contract with the defendant. The defendant then brought a claim to adjudication due to non-payment by the plaintiff for works performed up to January 2019. The adjudicator in the matter decided that the plaintiff shall pay the defendant a sum of RM7,996,928.59 for the works done together with interest and costs. ("PCG-MKP AD")

Consequently, two originating summonses were filed to the High Court. The plaintiff filed an OS against the defendant requesting the High Court to set aside the PCG-MKP AD whilst the defendant filed an OS for leave to enforce the PCG-MKP AD. The court instructed the parties to file their submissions electronically. The defendant raised a preliminary objection that the plaintiff's first and second written submissions were e-filed and served on the defendant outside of the time stated in the Court Directions and requested the court to expunge the plaintiff's written submissions. The court, in this case, dismissed the defendant's preliminary objection since it was made outside of time. The court additionally allowed the plaintiff's written submissions on the grounds that if the court does not consider said written submission, then it would amount to a breach of natural justice. The court also allowed for the enforcement of the PCG-MKP AD, and in light of that, stated that it could not subsequently allow for a stay of enforcement.

***Maju Holdings Sdn Bhd v Spring Energy Sdn Bhd* [2021] 8 MLJ 275**

Following a successful CIPAA action, the defendant obtained a judgment enforcing the adjudication decision and later issued a statutory notice on the plaintiff claiming for the awarded sum. The plaintiff did not appeal the judgment enforcing the adjudication decision. Following this, the plaintiff filed an originating summons for a Fortuna injunction to restrain the defendant from commencing a winding-up petition against the plaintiff pursuant to the statutory notice.

In deciding whether a judgment enforcing an adjudication decision constituted an "undisputed debt", the High Court reasoned that in granting the court the power to order interest under Section 28(2) of the CIPAA, this points in favour of the judgement enforcing an adjudication decision is no different from any other judgment or order of the High Court. Furthermore, it reasoned that it would not make sense for a judgment enforcing an adjudication decision to be treated differently under Section 28 of the CIPAA and Section 466(1) of the Companies Act 2016. It also pointed out that nothing in the CIPAA stated that a judgment shall be treated as disputable for winding up. Therefore, the High Court found that as per the ordinary meaning of the power prescribed to the High Court in making a judgment or order, the "undisputed" nature of such judgment or order is maintained and found that a judgment enforcing an adjudication decision constitutes an "undisputed debt".

The High Court explained that the mere existence of concurrent arbitration or court proceedings does not go to the issue of whether a judgment enforcing an adjudication decision can be relied upon for a creditor to exercise its rights under the Companies Act 2016, but rather whether the debtor has a ground for challenging such debt as being disputed and/or it had a cross-claim or counterclaim for an amount equal to or more than the debt. To do so, the debtor must show that there is a bona fide cross-claim that is an answer to the statutory notice and that such cross-claim is established on substantial grounds.

***Tekun Cemerlang Sdn Bhd v Vinci Construction Grands Projets Sdn Bhd* [2021] 11 MLJ 50**

The issue raised in this case was whether it is permissible for Kuala Lumpur-based solicitors to represent a client, also based in Kuala Lumpur, in an adjudication proceeding against a Sabah-based company in which the project site location was in Sabah, or whether this would constitute the relevant solicitors "practising as advocates in Sabah", which is prohibited by the Sabah Advocates Ordinance. The plaintiff argued that since the Kuala Lumpur-based solicitors were not members of the Sabah Bar, they had no right to practice in Sabah and were therefore "unauthorised persons" under Section 15 of the Sabah Advocates Ordinance and therefore all documents filed and served by them were null and the adjudicator consequently had no jurisdiction. The defendant argued that none of the adjudication proceedings had physically taken place in Sabah, nor had the solicitors performed any task in Sabah, and therefore they were not "unauthorised persons". Furthermore, the defendant submitted that Section 8(3) of the CIPAA confers rights to the parties to freely appoint any representative

In deciding the dispute, the High Court referred to the prohibition of foreign or "unauthorised persons" from representing parties in arbitration proceedings seated in Sabah. The Court highlighted that in Samsuri bin Baharuddin & Ors v Mohamed Azahari bin Matiasin and another appeal [2017] 2 MLJ 141, before the Sabah Advocates Ordinance was amended to include arbitrations, the Federal Court upheld the ruling of the High Court that foreign lawyers were prohibited from representing parties to arbitration proceedings in Sabah finding that the categories stated as legal services in the Ordinance were not exhaustive. Accordingly, the High Court found that the Kuala Lumpur-based solicitors were indeed practising as advocates in Sabah because the case was put forth in Sabah, the contract was made in Sabah, the project was in Sabah, and the adjudicator was appointed in Sabah. Consequentially, the High Court found the Kuala Lumpur-based solicitors were prohibited from acting as advocates in the adjudication proceedings and stayed the proceedings.

SAVE THE DATE!

5 Sep	**AIAC September Sports Month 2021 -** Virtual Fitness Session 1: Beginner Yoga
7 Sep	**AIAC September Sports Month 2021 Webinar 1** - A Year Into COVID-19: The Strain on the Sports Industry and Athletes' Mental Health.
9 Sep	**AIAC September Sports Month 2021 Workshop 1** - Disputes to CAS: Understanding the Sports Arbitration Framework
11 Sep	**AIAC Arbitration-In-Practice ("AIP") Workshop** : Hearing and Witness Examination
12 Sep	**AIAC September Sports Month 2021 -** Virtual Fitness Session 2: Zumba
14 Sep	**AIAC September Sports Month 2021 Webinar 2** - The Sun Yang Case: The Implications of the Swiss Tribunal's Decisions.
19 Sep	**AIAC September Sports Month 2021 -** Virtual Fitness Session 3: Piloxing
21 Sep	**AIAC September Sports Month 2021 Webinar 3** - Women in sports: Above the Quota
23 Sep	**AIAC September Sports Month 2021 Workshop 2** - Becoming a CAS Mediator: An Asian Perspective
25 Sep	**AIAC Adjudicators Continuing Competency Development (CCD) Workshop Series** - Dealing with Claims involving Insurances, Performance Bonds, Retention Sums, Third Party Works, Design Issues, etc
26 Sep	**AIAC September Sports Month 2021 -** Virtual Fitness Session 4: Kpop Fitness
28 Sep	**AIAC September Sports Month 2021 Webinar 4** - The Standard of Proof in CAS Anti-Doping Arbitrations: Understanding Comfortable Satisfaction.
30 Sep	**AIAC September Sports Month 2021 -** The Great Sports Debate: The Sequel
9 Oct	**AIAC Arbitration-In-Practice ("AIP") Workshop** : Joinders, Consolidation & Interim Measures & Emergency Arbitrator
13 Oct	**ADGMAC - AIAC MESEA** : Renewable and Non-Renewable Energy Dispute Resolution in MESEA
26 Oct	**ADR Online: An AIAC Webinar Series** - Bridging Theory and Practice: the Footprint of Arbitration to Resolve Environmental Disputes in the Time of Decarbonization?
30 Oct	**AIAC Adjudicators Continuing Competency Development (CCD) Workshop Series** - AIAC's Administrative Procedures, Circulars, Regulations, etc.
8-15 Nov	AIAC Certificate in Adjudication
13 Nov	**AIAC Arbitration-In-Practice ("AIP") Workshop** : Awards
18 Nov	**ADR Online: An AIAC Webinar Series** - Exploring Art Disputes: Beyond Commercial Arbitration
22 Nov	**ADGMAC - AIAC MESEA** : Disputes in Fintech and Complex Technology Sectore in MESEA
9 Dec	**ADR Online: An AIAC Webinar Series** - Medical Mediation: Injecting Trust in the Industry
11 Dec	**AIAC Arbitration-In-Practice ("AIP") Workshop** : Case Law Update

SEPTEMBER

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