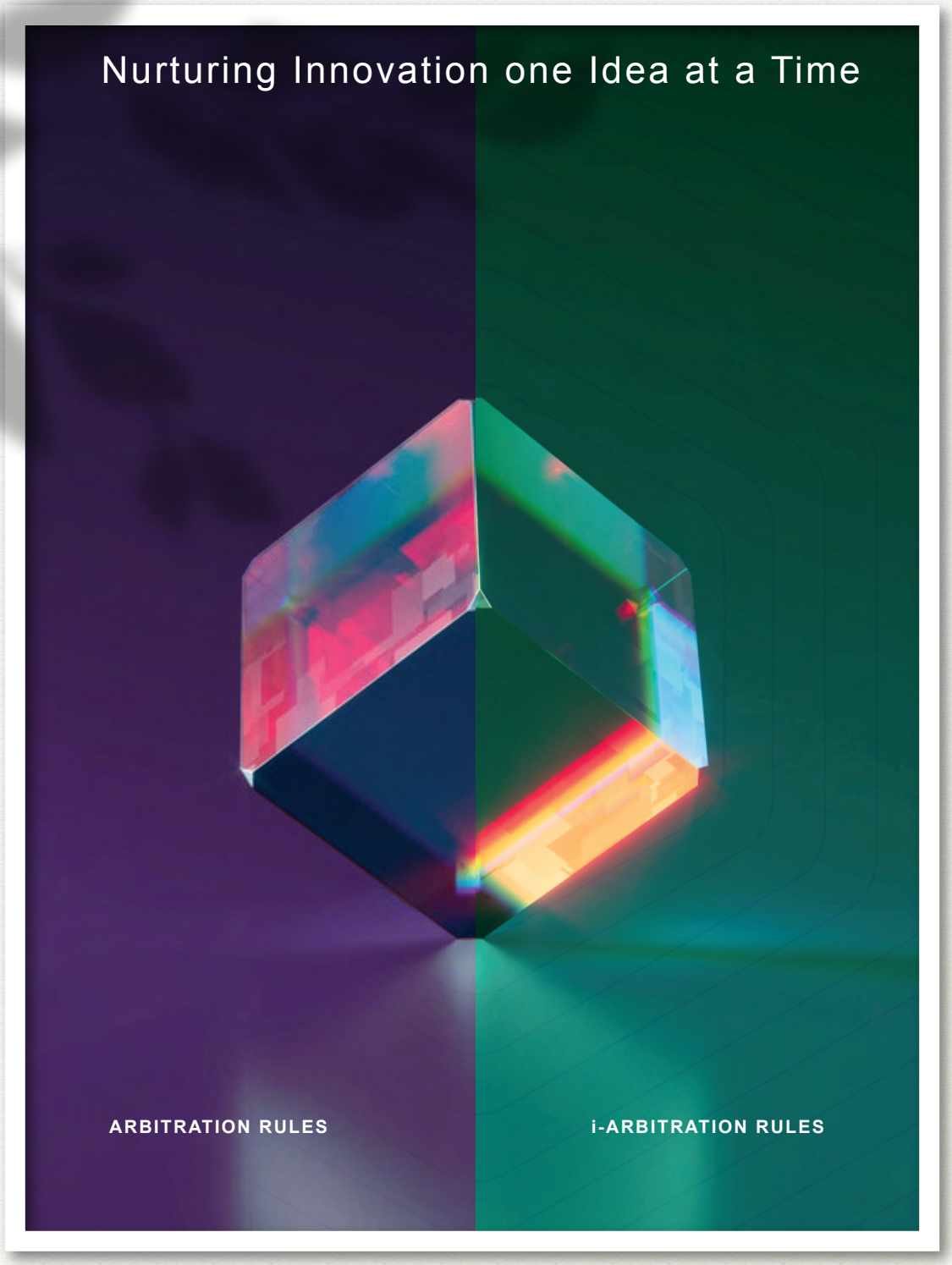
ASIAN INTERNATIONAL ARBITRATION CENTRE
(MALAYSIA)
NEWSLETTER #03
DECEMBER 2021

CATALYSTS FOR CHANGE




Merry
Christmas
&
HAPPY NEW YEAR 2022
AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE
(MALAYSIA)

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December 2021

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AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE (MALAYSIA)

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

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

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

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

DIRECTOR'S MESSAGE

Welcome to the December 2021 edition of the Asian International Arbitration Centre's ("AIAC's") Newsletter! Over the course of the past few months, Malaysia has slowly started to re-open its borders given the steady rate of vaccinations, with almost 78% of the population being fully vaccinated to date. This has evidently meant that the AIAC has also re-started operating at full capacity, including having our premises at Bangunan Sulaiman open for the conduct of hearings.

Indeed, between the months of August and November 2021, the AIAC organised and hosted a range of virtual events and launched a number of new projects as part of its continuous effort to lead and develop the alternative dispute resolution ("ADR") space both within Malaysia and globally.

In August 2021, the AIAC held its flagship event – Asia ADR Week 2021. This year's theme titled "*ADR in a Kaleidoscope: Beyond What Meets the Eyes*" was reflective of the AIAC's vision for the evolution of ADR and translated into a diverse line-up of panel discussions and networking sessions throughout the three (3)-day conference. Topics explored this year included the impact of sanctions on international arbitration, trends in energy-related disputes, insights from leading arbitral institutions worldwide on the importance of cross-border partnership and collaboration, the intersection between arbitration and the environment, animal conservation and climate change, and of course, the CIPAA Conference which dedicated a full day to discuss developments related to the *Construction Industry Payment and Adjudication Act 2012*. Asia ADR Week 2021 also boasted an impressive pre-event programme including Contracts Day, Diversity Day and AIAC Arbitration Rules 2021 Showcase Day, the highlights of which are captured in this newsletter.

Closely following the success of Asia ADR Week 2021 was the AIAC September Sports Month 2021, which took place throughout the month of September 2021. The theme for this year's sports month was "*Rolling with the Punches*", as a nod to the adaptability of the global sports industry despite the ongoing pandemic. The month-long event kicked off with a rare glimpse into the inner workings of the Olympics with the special panel session titled "*United by Sports Arbitration: A Reflection on the Tokyo Olympic 2020*". Other events included two (2) workshops, four (4) additional webinars, four (4) virtual fitness sessions and a debate showcase.

Over the past few months, the AIAC had also continued and concluded this year's edition of several of its ongoing webinar and workshop series including the Adjudicator's Continuing Competency Development (CCD) Workshop Series, the Arbitration-in-Practice (AIP) Workshop Series, the ADR Online Webinar Series and the Abu Dhabi Global Market Arbitration Centre (ADGMAC) & AIAC Middle East and Southeast Asia (MESEA) webinar series.

A number of poignant publications were also released during the course of October and November 2021.

On 25th October 2021, the AIAC published the two guidelines for the conduct of virtual proceedings, namely the AIAC Protocol on Virtual Arbitration Proceedings (VAP Protocol) and the AIAC Protocol on Virtual Mediation Proceedings (VMP Protocol), both of which were accompanied by their relevant guides. This initiative came a response to the growing use of virtual platforms in the conduct of arbitration and mediation proceedings and aligns with the AIAC's goal of providing a holistic approach to the conduct of arbitral proceedings.

November 2021 was also a big month for the AIAC with the launch of the AIAC i-Arbitration Rules 2021 as well as the launch of the AIAC Tech Expert Committee ("AIAC TEC") Standard Forms – Software Development Contract ("AIAC TEC SFs - SDC").

The launch of the newly revamped AIAC i-Arbitration Rules 2021 took place on 1st November 2021. The AIAC Legal Services Team had worked tirelessly on this project over the past five (5) months. As part of the revision process, the AIAC had conducted ten (10) i-Arbitration roundtables with the Rules Revision Committee (RRC) comprising of domestic and international industry experts as means of gaining feedback on the newly proposed amendments. The revisions also underwent a 7-day public consultation period wherein the AIAC accepted feedback from the general public. The AIAC i-Arbitration Rules 2021 continues to be a marker of AIAC's continuous innovation and firm foothold in the modernisation of the global ADR industry. This launch also marked the first physical event at the AIAC since the start of the COVID-19 pandemic in March 2020.

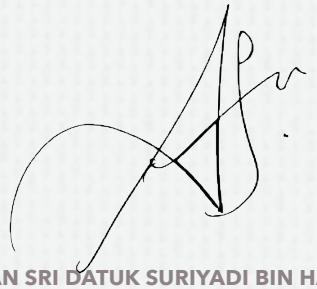
Besides the newly revamped i-Arbitration Rules, the AIAC had also launched the AIAC TEC SFs - SDC on 19th November 2021. The launch event featured a number of panel discussions with members of the TEC Expert Advisory Committee, including a thorough overview of the key features of the AIAC TEC SFs – SDC, a session on issues relevant to customising the same, as well as two (2) additional sessions on rights and obligations and disputes that could arise under the AIAC TEC SFs - SDC.

No newsletter would be complete without key industry contributions. As such, we would like to thank our Special Contributors – Dr. Gloria Alvarez, Christopher Campbell, Lim Teik Han, K. Shanti Mogan, Dr. Matthew Secomb and Svenja Wachtel – for their invaluable insights in this newsletter.

As we embark upon the year 2022, the AIAC has an impressive list of events and initiatives in the pipeline, including the launch of the Commentary to both the AIAC Arbitration Rules 2021 and the AIAC i-Arbitration Rules 2021, a new round of CCD workshops, virtual mooting workshops, and most excitingly the 6th AIAC Pre-Moot. Please keep an eye out for emails blasts and social media posts in these upcoming months for updates on these events and other AIAC initiatives.

As always, the AIAC is honoured to play a quintessential role in the development of the arbitration framework, not only in Malaysia but also globally. We remain committed to our goal of providing world class alternative dispute resolution products and services. As we come closer to the new year, it is our hope that the momentum we have all built during this past year blossoms into exciting new outcomes for the larger ADR industry.

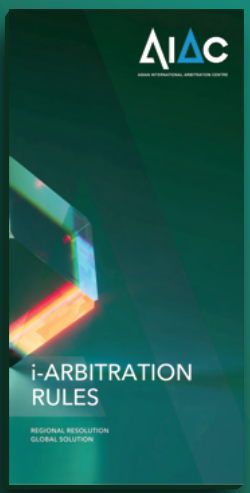
Till then, take care and stay safe!



TAN SRI DATUK SURIYADI BIN HALIM OMAR
DIRECTOR OF THE AIAC

KEY INSIGHT

LAUNCH OF AIAC i-ARBITRATION RULES 2021



One of the unique product offerings of the AIAC is the AIAC i-Arbitration Rules 2018 which exists to provide a procedural framework for disputes that are referred to arbitration and need to be Shariah-compliant. Such rules can also be opted into by parties who are driven by Shariah aspirations. The importance and availability of an Islamic arbitration framework not only effectively serves disputes related to the Islamic finance and banking, capital markets, Fintech and Halal industries, but such a framework can also be availed by those intending to amicably settle their disputes through an Islamic arbitration framework regardless of the contractual nature and circumstances – the only requirement is that the underlying contract shall not involve any forbidden (*haram*) aspects, including uncertainty (*gharar*), speculation or gambling (*maysir*) and interest (*riba*).

On 1st November 2021, the AIAC proudly launched the revamped AIAC i-Arbitration Rules 2021 ("i-Arbitration Rules"). The i-Arbitration Rules showcase significant departures from its predecessor and aims to provide greater clarity to its procedural functionalities. Several new provisions have also been incorporated to ensure that the i-Arbitration Rules are modernised and reflect international best practices and standards.

The official launch of the i-Arbitration Rules was officiated by the Honourable Minister in the Prime Minister's Department for Parliament and Law, YB. Dato Sri Dr. Haji Wan Junaidi bin Tuanku Jaafar. The event was graced and supported by the presence of YABhg. Tun Dato' Seri Zaki bin Tun Azmi, who is presently the Chief Justice of the Dubai International Financial Centre Courts and YABhg. Tun Arifin bin Zakaria, who sits as the Chairman of the AIAC's Advisory Council, alongside other esteemed representatives from the relevant industries. The launch, which happened to be the only physical event conducted at the AIAC in 2021, was a successful demonstration of the promotion of Islamic arbitration and the formation of a global network of Islamic arbitration advocates.

Similar to the launch and publication of the AIAC Arbitration Rules 2021, the publishing of the i-Arbitration Rules was timeous and imperative in a constantly changing world to extol the virtues of the AIAC. The AIAC has remained committed to advancing arbitration and other ADR mechanisms with focused efforts on supporting a sustained economic recovery and building social resilience through its various initiatives, including the i-Arbitration Rules.

The drafting of the i-Arbitration Rules was the product of an extensive review by an international external review committee that consisted of distinguished legal practitioners and industry experts, as well as a public consultation of the draft i-Arbitration Rules. It is worth noting that numerous Shariah scholars from the Shariah Advisory Council of the Securities Commission Malaysia, Bank Negara Malaysia and strategic financial institutions were also involved in the review of the i-Arbitration Rules, thus showcasing a truly comprehensive and collective initiative.

Key Features of the i-Arbitration Rules

The drafting of the i-Arbitration Rules not only ensures consistency with the key features of the recently launched AIAC Arbitration Rules 2021, but it also contains notable revisions and inclusions to strengthen its attractiveness as a Shariah-compliant product.

In providing a brief summary of the salient features of the i-Arbitration Rules, the following points are highlighted:

i) new provision for ***Shariah*-guided third-party funding** to facilitate financing of a party's share of the costs in arbitration;

In taking heed of the prevalent utilisation of third-party funding in international arbitration, Rule 1.4 and Rule 13.5(e) of the i-Arbitration Rules have been introduced to establish the permissibility of third-party funding in arbitrations administered by the AIAC, provided always that a relevant law does not provide otherwise – this is particularly so in jurisdictions where the doctrines of champerty and maintenance are recognised. Unlike the analogous provisions in Rule 1.4 and Rule 13.5(e) of the AIAC Arbitration Rules 2021, the i-Arbitration Rules extends the provision to include the requirement that such financing of the dispute shall be compatible with shariah principles, where relevant. A globally accepted framework for Shariah-compliant third-party funding is yet to be established, especially within the different sects in Islam; however, the i-Arbitration Rules facilitates the feasibility for parties to adopt the same in their arbitrations.

ii) revisions to the provision on Notice of Arbitration and Response to the Notice of Arbitration to **enable Parties to specify any preference on the application of shariah principles in the conduct of the proceedings**;

The i-Arbitration Rules seeks to recognise Islamic industries and the Shariah principles that apply in these industries. It also seeks to allow parties to specify any preference in applying Shariah principles in the conduct of their arbitrations. To that end, Rule 5.2(d) and Rule 6.2(e) of the i-Arbitration Rules reflect requirements that permit parties to specify their preference for the application of any specific Shariah principles in the notice of arbitration and registration request, as well as in the response to the notice of arbitration. The phrase "*preference on the application of Shariah principles*" permits the parties, where applicable, to state their preference for Shariah principles as recognised within specific Islamic sects or as established within any specific industry. This, among other things, would encourage parties to agree on the application of specific Shariah principles at the outset and may pre-emptively curb any future conflicts on the use of Shariah principles.

iii) revisions on registration of arbitration to **enable parties to accompany their registration request with any related *Shariah* certification or resolution of the contract**;

Rule 7.2 of the i-Arbitration Rules requires the party requesting for registration, to include any Shariah certification or resolution of the contract, should this be applicable to their respective contracts when submitting a Registration Request to the AIAC. The objective of this provision is to ease the registration process and to establish that a contract, product, service or agreement is *prima facie*, Shariah-compliant. This documentation can also be referred to by the arbitral tribunal in its proceedings should the validity of the contract come into question on the basis of any alleged Shariah non-compliance. This requirement does not suggest a mandatory requirement for the submission of such documents to accompany a Registration Request; rather, it merely facilitates circumstances where Shariah certification or resolution of the contract may be useful for the arbitral proceedings.

iv) revisions to the provision on **reference to a Shariah Council** to provide clarity on the procedural aspects involving a reference to such Council;

Rule 29 of the i-Arbitration Rules is a modification of Rule 11 of the AIAC i-Arbitration Rules 2018. It governs the procedures in circumstances where the arbitral tribunal requires guidance from an external authoritative Shariah body, known as a Shariah Council, to determine an undefined point or matter under Shariah principles. The definition of a "Shariah Council" has been revamped to mean any established and recognised council of accepted Islamic scholars or experts that are qualified to issue Shariah rulings pursuant to Rule 2 of the i-Arbitration Rules. On a local standpoint, the i-Arbitration Rules maintains a similar approach to that of the AIAC i-Arbitration Rules 2018 in facilitating a reference mechanism as provided for under Section 51 and 56 of the Central Bank of Malaysia Act 2009. The structure and wording of the relevant provisions in the i-Arbitration Rules are not restrictive to be applicable only to the local legislation but accommodate other prevailing reference mechanisms which may be adopted or introduced by other jurisdictions and regulatory bodies. As the interest of the disputing parties and party autonomy will always prevail, Rule 29 of the i-Arbitration Rules was crafted to ensure that enforceability of the arbitral award, despite the reference to a Shariah Council, is at the forefront with the provisions requiring that the arbitral tribunal shall determine the applicability of the ruling and state the reasons for its application or non-application. Further, the parties are accorded with the right to make submissions on the arbitral tribunal's determination of the applicability of the ruling.

v) new provision empowering the arbitral tribunal to **appoint Shariah Experts** to assist the arbitral tribunal in determining the dispute;

The reference mechanism to a Shariah Council and Shariah Expert under the AIAC i-Arbitration Rules 2018 has been significantly revised to ensure that any references, where applicable, shall be directed to a Shariah Council being an established and recognised authoritative body. The second

route that has been availed is then the appointment of a Shariah Expert by the arbitral tribunal. Rule 2 of the i-Arbitration Rules provides an amended definition of a Shariah Expert to refer to *"a qualified expert in the field of Shariah"*. Such expert may also be one that is empanelled pursuant to the Circular on the Empanelment Standards of i-Arbitrator and Shariah Experts issued on 27th October 2021. The goal of Rule 30 of the i-Arbitration Rules is to govern the appointment procedures and relevant requirements in connection with the functions of a Shariah Expert when providing an expert opinion.

vi) revision on the arbitral tribunal's powers to **award Ta'widh and Gharamah** as a form of compensation and penalty for late payment charges in line with the principles of Shariah;

Rule 13.5(o) of the i-Arbitration Rules is an enhancement of Rule 6(g) of the AIAC i-Arbitration Rules 2018 to provide clarity on the arbitral tribunal's power to impose Ta'widh and Gharamah, where so determined. The AIAC intends for this provision to remain broad without detailing the specific operational matters relevant to the imposition of these late payment charges as it would be within the jurisdiction of the arbitral tribunal to determine the application of the same. However, Rule 2 of the i-Arbitration Rules extends to include definitions for the terms Ta'widh and Gharamah which are not presently available under the 2018 iteration of the same.

vii) Shariah-compliant guidelines for **cost and expenses of an arbitrator** (Schedule 2).

In line with the mission of providing an Islamic arbitration framework, the i-Arbitration Rules govern the expenses for which an arbitrator may claim in administered arbitrations to ensure that Shariah values are upheld. Clause 1.2 of Schedule 2 of the i-Arbitration Rules provides that an arbitrator is entitled to claim reasonable out-of-pocket expenses and any per diem or other miscellaneous expenses incurred during the arbitral proceedings, provided always that such expenses, where incurred and claimed, are guided by Shariah principles. An example of such is per Clause 1.2(f)(ii) of Schedule 2 of the i-Arbitration Rules, where the per diem for beverages may be expenses, however, such beverage must not be alcoholic. This in turn is expected to ensure that the AIAC offers a holistic Islamic arbitration framework.

It is also worth noting that the i-Arbitration Rules now has a new streamlined structure as it consolidates into its main body, the UNCITRAL Arbitration Rules (as revised in 2013) and the AIAC's standalone expedited arbitration procedure (formerly contained in the AIAC Fast Track Arbitration Rules 2018). Effectively, this provides a more streamlined document for users that dispenses with the previous practice of referring to the UNCITRAL Arbitration Rules (previously Part II of the AIAC i-Arbitration Rules 2018) or requiring a separate submission for an expedited arbitration pursuant to the AIAC Fast Track Arbitration Rules.

Access to well-versed and authoritative arbitrators and Shariah Experts

The primary advantage of the i-Arbitration Rules for the global audience is premised on the fact that the i-Arbitration Rules facilitates a comprehensive framework which allows disputing parties, access to arbitrators, Shariah Experts and Shariah Councils who are well-versed and authoritative in Shariah. To that end, the AIAC already has a framework for the empanelment of arbitrators and Shariah Experts in place under the i-Arbitration Rules, which sees ADR practitioners possessing expertise in Islamic finance and related areas, as well as Shariah experts from around the world being a part of this i-Arbitration family. In reviewing applications for empanelment, the AIAC takes pride in ensuring that our panellists are well experienced and competent to serve as i-Arbitrators and Shariah Experts. On that note, the AIAC had on 27th October 2021, issued the Circular on the Empanelment Standards of i-Arbitrator and Shariah Experts which continues to witness a spike in interest in applications for empanelment.

The AIAC also observed that the i-Arbitration Rules is gaining traction and it is this evolving demand that has led the AIAC to initiate the publication of a Commentary to the i-Arbitration Rules which will be published in 2022. This Commentary is expected to provide a guide from the AIAC Secretariat on the drafting history and goal of each provision in the i-Arbitration Rules. The Commentary promises to be yet another groundbreaking initiative of the AIAC and it is anticipated that such will offer the AIAC's users and stakeholders with the requisite understanding and rationale of each provision.

Conclusion

The AIAC is proud of facilitating an Islamic arbitration framework through its i-Arbitration Rules, which serves as a unique ADR avenue catered to a niche segment of the commercial market. The introduction of the new i-Arbitration Rules ensures the modernisation of administered Islamic arbitrations that reflects international best practices and standards. The AIAC extends its utmost appreciation to the members of the Rules Revision Committee for the i-Arbitration Rules for their continuous support and contribution of drafting the i-Arbitration Rules, namely Dr. Thomas R. Klotzel, Prof. Dr. Mohamed S. Abdel Wahab, Prof. Dr. Georges Affaki, Prof. Andrew White, Prof. Dr. Nayla Comair Obeid, Mr. Megat Hizani Hassan, Mr. Abdullah Abdul Rahman, Mr. Mohamed Ridza Abdullah, Mr. Ahmed Butt, Ms. Aisha Nadar, Prof. Dr. Mohd. Akram Laldin, Dr. Mohd. Zakhiri Md Nor, Assoc. Prof. Dr. Aznan Hasan, Assoc. Prof. Dr. Shafaai Musa, Sheikh Dr. Nizam Yaquby, Dr. Muhd. Syahmi Mohd Karim, Prof Dr. Younes Soualhi, Ms. Yasmin Mohammad, Mr. Nik Shahrizal Sulaiman and Assoc. Prof. Datin Dr. Rusnah Muhamad.

ELEMENTS OF AGREEMENT:

UNPACKING THE ESSENCE OF THE AIAC TEC STANDARD FORMS – SOFTWARE DEVELOPMENT CONTRACT

On 19th November 2021, the AIAC's Tech Expert Committee ("AIAC TEC") launched its Standard Forms – Software Development Contract ("SFs – SDC"). The AIAC TEC SFs – SDC aims to provide an easy-to-use and helpful template, encompassing the best industry practices and ensuring that the rights and obligations of the stakeholders involved are balanced. End-users and industry stakeholders were provided with the opportunity to hear from the TEC Members and ask questions at the Launch Event, the videos of which can be found on the AIAC TEC webpage.[1] In addition, we caught up with TEC Members K. Shanti Mogan ("SM")[2] of Shearn Delamore & Co. and Lim Teik Han ("LTH")[3] of ZHTECH in a written interview on the key features and how to customise the SFs – SDC. Their responses to our interview can be found below.

INTRODUCTION

1. In your opinion, what is the significance of the SFs – SDC in the software development industry?

SM: As software is widely used and required in business, SDCs take on added significance; they are required to protect the software owners rights, particularly intellectual property rights, regulate the licensing of the software, provide a framework which allows the respective parties' rights and liabilities, and limitations on those rights and liabilities, to be carefully circumscribed and to regulate the smooth exit from such agreements. Parameters on inspection and acceptance testing and software maintenance and updates are also provided for. This results in a comprehensive contract for both owner and licensee to provide a conducive environment for businesses to do what they do best, the business of making money.

LTH: SDC creates awareness that disputes arising out of software development undertaking could be resolved via arbitration apart from litigation. Given the complexity and variability of the software development lifecycle, arbitration is likely to be a better choice over litigation because arbitration proceeding displays more flexibility than litigation proceeding.

Among others, what I like most is that, for the litigation proceedings involving legal entity, a litigant must be represented by a practising lawyer to conduct examination-in-chief, cross-examination and re-examination, if needed, of a witness, but the arbitration proceeding is not bound to this mandatory requirement, anyone who obtains the authorisation from the disputant can conduct these examinations of a witness, particularly at the stage of cross-examination.

Having said that, the facts could be relatively easier to be established and testified, and subsequently, the practising lawyer could apply relevant laws to those facts.

Of course, if these examinations are conducted by a non-lawyer, he should have been skilled with the art of cross-examination as well as software development lifecycle body of knowledge and relevant technologies.

ARTICLES OF AGREEMENT

2. What are the critical elements in the articles of agreement that are important for parties to pay attention to and fill in when entering into a contract using the SFs – SDC?

SM: The critical elements to consider include the project's scope, the specifications of the software (including functionalities, interoperability and integrations), the timeline for each deliverable and completion of works, the documents which make up the entirety of the contract between parties (parties may wish to consider if any other documents should form part of the SDC, such as letters of offer, technical proposals etc.), the respective parties' officers in charge for the particular project and the timeline and parameters for inspection and acceptance tests.

K. Shanti Mogan

Lim Teik Han

[1] http://sfc.aiac.world/TEC

[2] K. Shanti Mogan has 30 years of experience in a broad practice, representing domestic and international clients in commercial litigation and arbitration. Acting as both counsel and arbitrator, she is Head of the Arbitration Practice and Personal Data Protection & Privacy Laws Practice and Co-Head of the Competition Law Practice at Shearn Delamore & Co.. A Member of the Court of Arbitration (SIAC), Ms. Mogan is a recognised and recommended dispute resolution lawyer (Chambers, Legal 500, Asialaw). Her experience ranges from banking and commercial/corporate to technology disputes. She advises on consumer protection, data protection, defamation, entertainment and multimedia issues.

Ms. Mogan also offers advisory services, compliance audits and legal representation in competition law investigations and disputes. Specific industries represented in her competition practice include pharmaceutical, insurance, energy, travel, automotive, entertainment and retail. Ms. Mogan advises on regulatory compliance and activities coming under the purview of authorities, such as the Securities Commission, the Anti-Corruption Commission and the Communications and Multimedia Commission.

Ms. Mogan would like to acknowledge the assistance of Ms. Denise Choo Pao Yi of Shearn Delamore & Co. in putting together these responses.

[3] Lim Teik Han has spent 30 years on practicing manufacturing-based business process software development and deployment in Malaysia, Singapore and China since he graduated with a BSc in MIS from Southern Illinois University. He is a business-IT alignment advocate and believed to be the first Malaysian to bring "Made in China 2025" policy to Malaysian government agencies and discussed with them in 2015. Mr. Lim closely continues observing the development of the Fourth Industrial Revolution in Malaysia as well as in China.

In 1999, Mr. Lim started his software consultancy boutique firm and in 2011 he was named the recipient of Asia Pacific Entrepreneurship Award. He is now spearheading a mega software development and deployment solution known as iRIMAU – Industrial Revolutionary Intelligent Manufacturing Agility and Unification, the first-of-its-kind Supply Chain 4.0.

Mr. Lim was called to Chartered Institute of Arbitrators (CIArb) and Malaysian Institute of Arbitrators (MIArb) respectively in 2008 and 2010. He was co-opted as a committee member of CIArb for the 2009/2010 session and endeavoring towards introducing ADR modes to Malaysian software industry through CIArb, MDEC and MMU Law Faculty.

LTH: Most of the disputes arising out of software development involve the lack of concrete requirements along the course of development. Unless the scope of the requirements is small enough to be articulate, it is not uncommon that the customer would ask the Developer to proceed with development first and let them to verify if that could meet the requirements or otherwise.

Hence, while the project scope could be loosely defined, the documentation of specifications could rarely be actualised in detail prior to the entering of the contract.

As a matter of reality, it is relatively common to fill up the specifications after (emphasis added) the development works to fulfil the management requirements

Despite this being the reality, it is of my view that the number one critical element is to structure the specifications to the best possible using known facts and speculation by experience.

It has always been my practice to highlight three general principles to the customer before I consider providing my service:

Principle #1: *Balancing Responsibility and Power*. The person being tasked to take responsibility must equally be empowered to make a decision at the equivalence. Without which, confrontational organisational culture will soon surface and thus defeat the effort of a software development undertaking.

Principle #2: *Software Development is a Conscience Undertaking*. Software undertaking could be easily be distorted along the course of development if without upholding a strong sense of conscience. Conscience, in this context, could be viewed as bona fide give-and-take between developer and customer in the big picture.

Principle #3: *One-to-One Mechanism*. This principle could be found in SDC. Adopting one-to-one, but not one-to-many, is crucially important to assure accountability.

CONDITIONS OF CONTRACT

3. Which clauses are vital for parties to review and fill in when executing the SFs - SDC?

SM: Parties should review the Recitals of the SDC. This briefly spells out the nature of the software and the contract sum.

They should consider if the warranties and indemnification clauses provided for in the SDC are sufficient to address their specific needs. The clauses addressing both the customer's and developer's obligations should be evaluated and carefully completed dealing with the specific needs of the parties. It is generally lack of clarity in the client's needs or the software development product that results in numerous variations and time slippages, causing disputes and losses. Appendix 1, therefore, takes on significance.

The parties should consider the clauses governing inspection testing, acceptance testing, obligation to rectify defects, use of third party software and materials and length of the warranty to ensure their specific requirements are addressed. The requirement of confidentiality and data protection should also be considered to ensure that the software adequately conforms with required safety and security standards.

In respect of the issue of delay and liquidated damages, the SDC proposes a rate of 0.1%, payable by the developer to the customer if the developer fails to provide a deliverable by the agreed-upon deadline. The customer must consider the adequacy of the stipulated penalty for its purposes. The customer should consider what it envisages in terms of a "material delay" as the right to terminate is linked to material delay. The post-termination consequences should be evaluated; the parties should consider the steps that should be taken upon the termination of the SDC, vis-a-vis, the existing work product.

Parties should consider the seat of arbitration, the governing law of the arbitration clause and the number of arbitrators required.

One key consideration would be the issue of data protection. Data privacy laws vary from country to country, and parties should take care to ensure that the SDC addresses the relevant privacy laws in their country and any applicable regulations.

LTH: Clause 1.4 appears to be a deterrent factor to the developer. The developer may consider rewording and rephrasing it to relieve strict binding and open-ended penalties.

The developer has to pay an extraordinary assessment on the percentage as stipulated in Clause 10.1 of the liquidated and ascertained damages (LAD), taking into account that delay commonly results from various reasons. In calculating the resource and schedule, it is common for the software industry to multiply by 2 or 2.5; some even multiply by 3 before negotiating with the customer. Clause 10.2, 10.3 and 10.4 are equally severe to the developer.

4. What are the primary duties, obligations, and rights of the developer under the SFs - SDC? And for the customer?

SM: To understand the customer's requirements and to address the same timeously without the need for costly and time consuming work arounds. My experience in disputes on SDCs arises typically from the fact that the software developer has failed to take into account the environment the software is being introduced into, or has not fully considered the business needs of the customer or simply does not have the requisite expertise to deliver on the promised software. Delays are also typically a cause for disputes, as are omissions with respect to service level agreements. From the customers, disputes arise because of change requests which arise from business needs and the changing requirements of the customer.

The primary rights and obligations of the developer under the SDC would include certain key considerations; carrying out the development in accordance with the customer's specifications and timeously, meeting the requirements of the acceptance and inspection tests, adequacy of security measures, maintenance and upgrades required. The developer also has the duty to cooperate with third parties as and where necessary.

The developer should ensure open source software of materials used or included in the software are compatible. The developer should also ensure the software is royalty-free or royalties are provided for. The licensing considerations are important, as the developer can only contract what it has; a perpetual licence or a license compatible with the licence terms governing any other software that forms part of its deliverables is essential.

The customer should adequately and clearly specify the nature of its business requirements in a practical and comprehensive manner and its requirements and expectations in respect of the software to be developed.

The customer will have to facilitate the performance of the developer's obligations by cooperating in respect of the business/commercial needs of the business vis-a-vis the software. The customer will have to ensure its requirements do not change, that change orders are kept to a minimum, and that all conforming deliverables are accepted and payment made to the developer.

Both parties should discuss the parameters of the inspection and acceptance testing and when acceptance is deemed to take place, including the time provided to the developer to rectify any defects. Quite apart from this, it is also an obligation on parties to maintain confidence, secure any confidential information and ensure compliance with privacy laws.

The customer is required to observe the licence conditions and not attempt to outsource the software to unlicensed third parties or use it for unlicensed purposes.

LTH: Generally speaking, delivered as committed. If one party cannot deliver, frank disclosure must be made to another party as early as possible, and alternatives may be identified to mitigate damage.

5. **Should a defect be discovered in the software, how can the customer deal with such under the SFs – SDC during the various stages of the contract, i.e., during the inspection test, acceptance test, warranty period, or maintenance agreement period?**

SM: Inspection testing is carried out by the developer. The onus is on the developer to notify the customer that the software has undergone inspection testing and is now ready for the acceptance testing. Any defects that are discovered by the developer should be informed to the customer, and the developer should advise the customer if the software would be ready to proceed to acceptance testing. If not, the developer should explain the steps and the time it requires to rectify the defects.

During acceptance testing, the customer is to promptly inform the developer of any defects discovered. This is to avoid deemed acceptance of the software, notwithstanding any existing defects, due to the effluxion of time. The SDC currently envisages that notice of defects ought to be given within fourteen (14) days from discovery. Appendix 4 of the SDC provides a helpful categorisation of the category of defects, e.g., critical error, serious error and minor error.

During the warranty period, the developer is to remedy the defects at no additional charge, conditional upon the normal, diligent use on the part of the customer. The warranty is also conditional on notice of the defect being provided before the expiry of the warranty period. The scope of the warranty may be specific, and as such, the customer should ensure that the defect is covered under the warranty.

In the event the warranty does not cover the specific defect, a separate maintenance agreement may address this. This will be subject to additional costs, and similar to the above, a notice of defects should be provided expeditiously to the developer.

LTH: At the customer's end, there should have at least one superuser. A superuser is an employee of the customer who possesses an in-depth and in-breadth understanding of the application of the designated software from the perspective of end-users. The superuser should play the role of frontliner to solve the problem first. Only when the problem cannot be solved by the superuser, it may then escalate to the developer.

Customer and developer can now jointly examine its validity and severity. A claimed defect is not a real defect if it is attributed to a change impacting business process and/or invalid data to be manually controlled or other sources beyond the control of this designated software development project specifications. Only when all these possible attributes are excluded from being a "fake" defect shall then both parties look into SDC as to the time the defect is reported. Different time has different contractual obligation and duty. For instance, if the defect is reported after the warranty period, the Developer has no obligation to debug it without imposing an additional fee, unless a waiver is given by the developer or a maintenance agreement is entered into.

6. **In the event of a delay, how does the liquidated and ascertained damages ("LAD") work under the SFs – SDC?**

SM: Under the SDC, liquidated and ascertained damages are losses that the SDC deems the customer suffers as a result of the developer's failure to provide the deliverables pursuant to the timelines agreed upon.

The SDC incorporates such a clause typically because it is notoriously difficult to assess the damage to the business as a result of the failure to meet the agreed timelines. The LAD clause provides a ready basis for the customer to be compensated for delays that have caused loss but when it is unable to readily establish the quantum of that loss. If LAD clauses are omitted, it may be difficult to enforce the timelines as the developer will be well aware the quantum of damages for the delay may not be readily ascertainable.

LTH: As mentioned earlier in Principle #2 that software development is a *Conscience Undertaking*. Conscience, in this context, could be viewed as a bona fide give-and-take between developer and customer in the big picture.

I am pretty sure that the developer will encounter the requirements change request from the customer in one or another way before coming to the stage of LAD. The nature of LAD is a penalty clause imposed on the developer, and I feel it is unfair to the developer if the customer insists on invoking Clause 10.0 in relating to LAD.

Notwithstanding that, I also have a certain reservation as to the workability of Clause 10.3 in connection with restraining the developer from instituting legal challenge as this would construe as a deprivation of constitutional rights and against the doctrine of natural justice.

7. In developing the software, what should the developer keep in mind to ensure it does not breach any of its confidentiality or data protection requirements?

SM: The developer should ensure that its staff members and sub-contractors are given access to confidential information and personal data on a need to know basis. Non-disclosure agreements may be entered into with staff members and/or third-party contractors and/or suppliers who are required to have access to the customer's data as part of the performance of their tasks.

Further, care should be taken to adhere to industry standards on security and the Personal Data Protection Act, alongside its regulations, codes, and standards should be taken into account.

For added security, the inspection testing and acceptance testing may utilise "dummy" or anonymised personal data to reduce security risks.

LTH: In Malaysia, software falls under artistic works and is normally protected by copyright law. One of the requirements for copyright protection is publication. But what if the work has not come to the stage of publication, and what protection can the developer be entitled to?

The answer lies in the law of confidence. Notwithstanding that, the law of confidence does not come automatically without a prerequisite. One of the prerequisites is that the developer must implement a confidential information protection mechanism within its own organisation. The best is that such mechanism is internationally recognised, such as relevant ISO[4] series, although it is not mandatory.

My experience dealing with some large customers is that, apart from entering NDA at the company level, each of my staff involved in the project must also enter separate NDAs with my customers. Upon completion and delivery, a statutory declaration would be signed to declare that none of any part of the software is cloned from other organisations.

8. If either the developer or the customer wants to terminate the contract, may they do so and under what circumstances?

SM: Broadly speaking, termination can be (i) without cause, (ii) for breach, (iii) due to insolvency, liquidation or cessation of business and (iv) force majeure.

In certain cases, termination may also be carried out for national security or public interest concerns. Such termination rights are typically only found in contracts between government bodies and/or regulatory bodies.

For termination for breach, generally, termination may only take place upon a material breach, which should be defined in the contract to avoid ambiguity as to what constitutes a material breach. Such a definition should provide for breaches which materially affect the performance of the contract. Circumscribing the breach too narrowly runs the risk of rendering a termination for material breach inapplicable where it should be available.

Termination without cause is generally based on the provision of notice without the need for a fault on the part of either party.

LTH: The issue of termination is well structured and covered from Clause 12.1 to Clause 12.12.

Clause 12.1 stipulates that either party may terminate the contract without cause by giving the other party ninety (90) days notice in writing. This construes the freedom to contract and to terminate with the predefined mechanism to handle such termination as spelt out from Clause 12.9 to Clause 12.12.

Apart from unilateral termination, SDC also spells out termination for breach by the customer, due to title, by developer, insolvency, liquidation, or ceasing to carry on business.

9. If a dispute arises between the customer and the developer, what are the key provisions under the SFs – SDC they should keep in mind?

SM: Parties should pay heed to the agreed-upon dispute resolution mechanism in the SDC, which may set out an escalation process for matters to be referred to arbitration, typically negotiation between the parties with a view to settling ahead of a reference to arbitration.

They should also be aware of the arbitral agreement contained in the SDC, which in Malaysia would result in any suit filed in Court being stayed pending reference to arbitration. The seat of arbitration, governing laws and forum conveniens as stipulated in the SDC should also be considered.

Quite apart from considering the dispute resolution clauses, parties should also consider any clauses which address post-termination conduct and be mindful of the fact that confidentiality clauses and/or agreements typically remain in effect even upon termination.

LTH: Both parties should negotiate first as spelt out in provision 13.1 and shall refer to arbitration thereafter if negotiations do not succeed within 14 days.

We must encourage disputes arising out of software development and implementation to adopt arbitration as the mode of dispute resolution rather than litigation. Generally speaking, arbitration possesses the following advantages over litigation:

- Flexibility in handling procedural matters
- Quality of delivering justice
- Less time consuming and potentially less costly
- Greater level of delivering expertise
- Arbitration hearing is held in private as compared to an open courtroom hearing in litigation

APPENDICES

10. Which of the appendices should the parties execute at the time of entering into a contract using the SFs – SDC?

SM: At the time of entering into a contract using the SDC, parties should execute the following appendices:

(a) Appendix 1 – Project Scope and Specifications
(b) Appendix 2 – Project Schedule
(c) Appendix 3 – Inspection Test
(d) Appendix 4 – Acceptance Test
(e) Appendix 10 – Non-Disclosure Agreement (NDA)
(f) Appendix 11 – Data Protection Security Standards

[4] International organisation for standardisation.

LTH: It really depends on case-to-case and the adopted software development lifecycle methodology. If at one extreme where a "Waterfall" methodology is adopted, then Appendix 1 and 2 are mandatory, and at another extreme where an "Agile" methodology is adopted, perhaps, Appendix 1 is sufficient.

My view on Appendix 2 – Project Schedule may be excluded because the nature of "Agile" methodology is established on the ground of trial-and-error. Hence, it is impossible to draw up a reasonable project schedule.

It is very common to include a maintenance agreement on an annual basis.

11. When and how should the parties use the following Appendices

a. Appendix 5 – Upgrade Agreement

SM: The Upgrade Agreement should be utilised if the customer is of the opinion that the specification of the software it requires would require upgrades.

LTH: When new features or redesign due to change of user requirements after delivery.

b. Appendix 6 – Maintenance Agreement

SM: If the customer is keen for the developer to provide ongoing support or periodic maintenance for the software, then the Maintenance Agreement should be executed. This may be beneficial for customers who do not have dedicated IT staff and/or if the software is to perform highly specific functions.

LTH: Can be together with SDC or entered separately.

c. Appendix 7 – Extension of Time

SM: The Extension of Time should be utilised by the developer when it finds itself requiring more time to comply with the agreed-upon timelines.

LTH: When new requirement, change of requirement, miscommunication or misinterpretation of requirement before acceptance test starts.

d. Appendix 8 – Cost Claim

SM: Appendix 8 may be availed of by the developer in the event it finds that additional costs are necessitated, with justification for the additional costs. Appendix 8 is distinct from the provision relating to costs arising from a variation; such costs may be dealt with under the Variation Agreement (Appendix 9).

LTH: Out-of-pocket expenses. This is very common.

e. Appendix 9 – Variation Agreement

SM: The Variation Agreement is used when a party is of the opinion that certain aspects of the contract and/or specification of the software ought to be varied. The Variation Agreement will also address any issues of additional time or costs caused by such variation.

LTH: Personally, I would only put concerns on major changes of user requirements and the fee chargeable to the customer.

f. Appendix 10 – Non-Disclosure Agreement

SM: A Non-Disclosure Agreement safeguards the confidentiality of information and/or data. Both the customer and the developer and their staff, sub-contractors or associate third parties may be requested to execute a Non-Disclosure Agreement, depending on the nature of information shared between parties.

LTH: As early as possible, and the NDA should be extended to between the developer's staff and the customer.

g. Appendix 11 – Data Protection Security Standards

SM: The Data Protection Security Standards provide a guideline as to the security standards that may be imposed on the developer. This is of importance. If the developer is utilising any of the customer's personal data (or the personal data of its clients), the developer may be considered a data processor under the Personal Data Protection Act, and as such, the onus is on the customer to ensure that it obtains sufficient guarantees vis-a-vis security from the developer.

LTH: As early as possible, and it should be extended to between the developer's staff and the customer.

APPLICATION OF THE SFS – SDC

12. How do you see the future of the software development industry and the use of standards forms within the industry?

SM: The software development industry is slated for growth, with the increased digitalisation and use of technological solutions. The use of standard form contracts such as the SDC becomes that much more important to provide parties with the key material terms they should have in any software development contract. Such standard form contracts also assist the parties to address their minds to key considerations in the negotiation process and the respective rights and obligations they should take cognisance of in entering into such an arrangement.

Parties should, however, be cautious, and refrain from the wholesale adoption of a standard form contract, regardless of the specific needs of each of the parties in a given situation.

LTH: The lengthiness of SDC may create reluctance to the software development industry because software developers could rarely understand the substantive and procedural meaning of SDC, which lawyers have gotten used to. The software development industry certainly needs to grow a greater awareness about legal aspects surrounding them and do not feel hesitation in instituting legal proceedings when their rights are being deprived, even if they are small.

Given that an opinion of an expert witness could become admissible evidence, perhaps bundling the arbitration clause with the use of an expert witness could substantially reduce the lengthiness of SDC and thus improve psychological acceptance to adopt a simplified version of SDC.

It is my humble view that a simplified version of SDC could be quickly adopted by the software development industry. I look forward to jointly drafting it together with AIAC and relevant lawyers.

ADR IN A KALEIDOSCOPE
BEYOND WHAT MEETS THE EYE

The month of August 2021 was a momentous one for the AIAC! Between 16th and 21st August 2021, the AIAC was proud to host its 3rd Asia ADR Week themed "ADR in a Kaleidoscope: Beyond What Meets the Eye". This year's theme was reflective of the plethora for choices available in ADR for the resolution of the diverse range of disputes encountered in the commercial space.

In a first, this year's event was conducted fully virtually on the Brella platform, with behind-the-scenes support from Team Grey Group. The week's activities also included three (3) themed pre-event days held between 16th August 2021 and 18th August 2021.

The first pre-event day was titled "Contracts Day" and focussed on the draft AIAC TEC Standard Forms – Software Development Contract and the launch of the Manual to the Standard Form of Building Contracts. The second pre-event day focussed on the topic of diversity with a number of engaging sessions that explored different facets of diversity in international arbitration and the way forward. The third pre-event day was aptly titled "AIAC Arbitration Rules 2021 Showcase Day" to explore the key features of the AIAC's recently launched arbitration rules.

The main event was held between 19th August 2021 and 21st August 2021.

The first day explored matters relating to the imposition of sanctions and their impact on international arbitration; breakout sessions relating to capital markets, hybrid and pathological arbitration clauses, and third-party funding; and a pertinent discussion on environment, animal conservation and climate change disputes.

The second day featured a scintillating session on the importance of cross-border collaboration and partnerships between different arbitral institutions; an engaging session on the selection of legally trained versus non-legally trained arbitrators to preside over disputes; a thorough overview of the key developments in energy arbitrations; and a thought-provoking selection of rapid fire debates on six (6) different topics.

The third and final day was dedicated solely to matters pertaining to the *Construction Industry Payment and Adjudication Act 2012* ("CIPAA"), including an overview of the AIAC's adjudication case statistics for 2018-2020; a detailed discussion on topical judicial decisions; a panel session regarding the rights and duties of adjudicators; breakout sessions on the intricacies of the adjudication process, the powers of an adjudicator under Section 25 of the CIPAA and forum shopping for adjudicators; and, last but not least, a comparative cross-border analysis of the jurisdiction of an adjudicator.

All in all, despite not being able to host Asia ADR Week 2021 in person, this year's event was undoubtedly a resounding success. On that note, the AIAC would like to thank the speakers, moderators, users, stakeholders, supporting organisations and sponsors without whose support this event would not have been a success! The following pages provide a brief snapshot of the week's events for your perusal.

CONTRACTS DAY

Opening remarks were provided by Tan Sri Datuk Suriyadi bin Halim Omar, Director of the AIAC, highlighted the AIAC's commitment to holistic dispute management. The AIAC's Standard Form of Building Contracts Expert Advisory Committee ("SFC EAC") and Technology Expert Committee ("TEC") both embody this commitment. These Committees aim to engage in capacity building initiatives and provide standard form contracts for the construction and technology industries.

1st Live Stream

SESSION 1

Launch of the Draft AIAC TEC Standard Forms – Software Development Contract

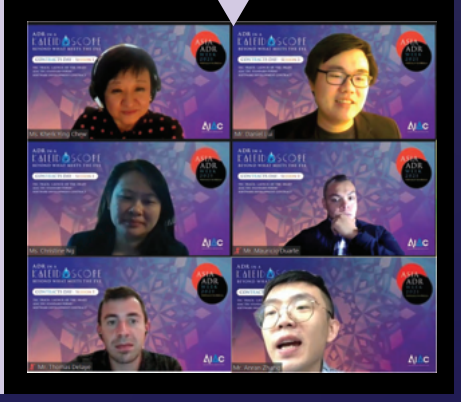
Moderated by Mr. Daniel Lui of LawTech Malaysia and featured several drafters of the inaugural draft TEC standard form contract namely, Mr. Thomas Delaye-Fortin of Badminton World Federation, Mr. Mauricio D. of A2J Tech, Ms. Kherk Ying Chew of Wong & Partners, a member firm of Baker McKenzie International and Ms. Christine Ng of Adastra IP and Business Valuers Association Malaysia (BVAM).

2nd Live Stream

SESSION 1

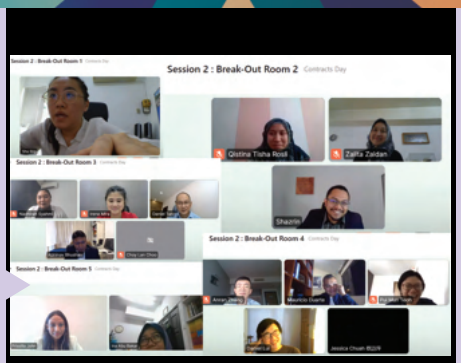
Launch of the AIAC 2019 Standard Form of Building Contract Manual

Moderated by Mr. Wilfred Abraham of Zul Rafique & Partners and featured Mr. Wai Loon Lam of Harold & Lam Partnership, Sr. Sr. Isacc Sunder Rajan Packianathan of Pro Consort Pte Ltd, Mr. Kevin Prakash of Kevin Prakash Advocates & Solicitors, Mr. Ratnalingam Vijayaratnam_ of KPK Quantity Surveyors (Singapore) Pte Ltd and Ms. Swee Im Tan of 39 Essex Chambers.



SESSION 2

Session 2 of Contracts Day has just concluded with our 1st Roundtable Discussion themed "Developments in the Technology and Construction Sectors". In this session, attendees, speakers, and moderators participated in lively roundtable discussions on Legal Tech – Modernising Legal Practice; Construction Tech – Advancements in the Construction Industry; Manufacturing and Supply Chain Issues; Dip, Duck, Dive, and Delay – How to Handle issues of Delay; Best ADR Mechanisms; Jurisdictional Updates; TEC Standard Forms – Software Development Contract; and 2019 Standard Form of Building Contracts Manual.



Workshop 5-8

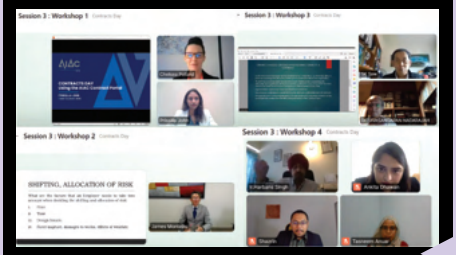
SESSION 3

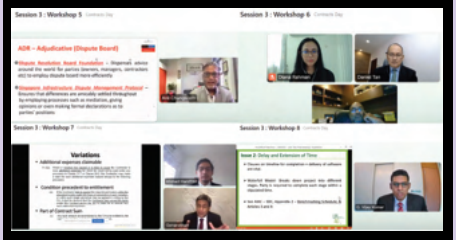
Workshop 5 titled "Choosing the Right Arbitrator/Mediator for your Dispute" saw Mr. Anil Changaroth (Changaroth Chambers LLC) explore the differences between mediation, adjudication and arbitration and how best to utilise each mechanism. The important factors in choosing neutrals in such disputes was also discussed.

Workshop 6 titled "Knowing your ADR Mechanisms Toolkit" featured Mr. Daniel Tan Chun Hao (Messrs. Tan Chun Hao) who provided a cursory overview of the various ADR mechanisms contained in the different AIAC SFCs whilst touching on the pros and cons of these mechanisms.

Workshop 7 titled "Disputes under the AIAC SFC" featured Mr. Gananathan Pathmanathan (Gananathan Loh) who discussed the broad range of disputes that could arise under the AIAC SFCs, including variation, extensions of time, delay, liquidated damages and loss and expense disputes.

Lastly, Workshop 8 titled "Disputes under the AIAC TEC SDC" saw Mr. G. Vijay Kumar (Lee Hishammuddin Allen & Gledhill) explore rising trends in the technology industry whilst canvassing common disputes that could arise under the AIAC TEC SDC, including breach of confidentiality, delay, extension of time, breach of contract and force majeure disputes.





Workshop 1-4

SESSION 3

The first workshop titled "Using the AIAC Contract Portal" was conducted by Ms. Prissilla John (AIAC) who walked the attendees through how to navigate the AIAC's Contracts Portal which presently allows users to customise and finalise the AIAC SFCs digitally.

The second workshop titled "Contract Drafting: Ensuring Your Bases are Covered" was conducted by Mr. James Patrick Monteiro (JamesMonteiro) who canvassed the essential principles of contract drafting and risk allocation, including the need for broad force majeure clauses to cover events such as the pandemic.

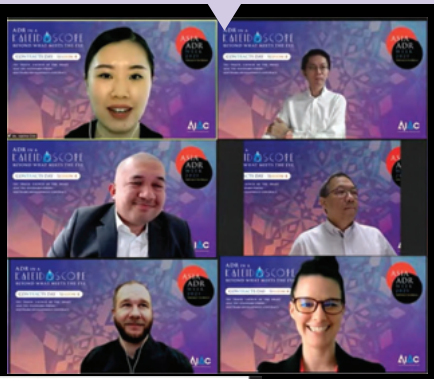
The third workshop titled "Contract Negotiation Skills" was conducted jointly by Ms. Jenna Huey Ching (FortNynja) and Sr. Saw Soon Kooi (Kuantibina Sdn Bhd) and discussed the factors that should be considered in negotiating technology and construction contracts, respectively.

The fourth workshop titled "Formulating the Best ADR Clause" was jointly conducted by Ms. Ankita Dhawan (ex-Trilegal) and Ir Harbans Singh (HSH CONSULT Sdn Bhd and HSKS Dispute Resolution Chambers) and explored the importance of incorporating an ADR clause into construction and technology contracts as well as the need for simple drafting.

SESSION 4

Launch of the Draft AIAC TEC Standard Forms – Software Development Contract

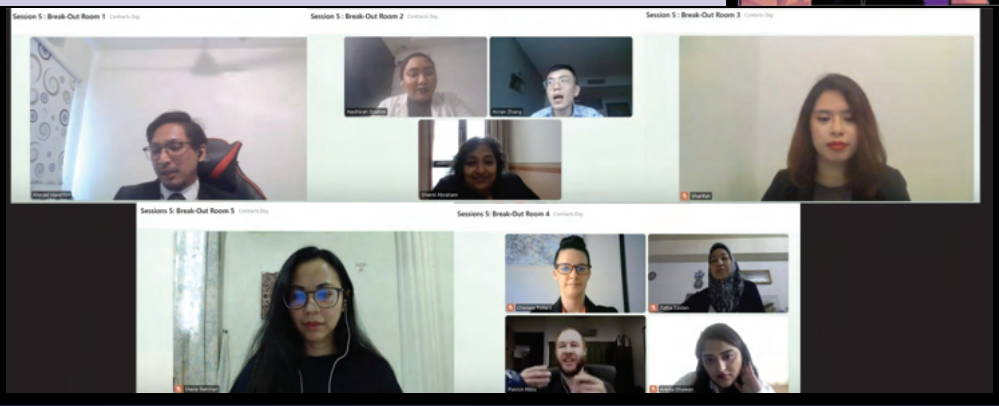
Moderated by Ms. Adeline Chin YF (Law Asia 365) and featured Mr. Tien-Soon Law (Innov8tif), Mr. Izwan Zakaria (Izwan & Partners), Mr. Patrick Klotz (Mindset Sdn Bhd) and Mr. Mark Ooi (ZHTECH Asia Sdn Bhd).



Breakout Room

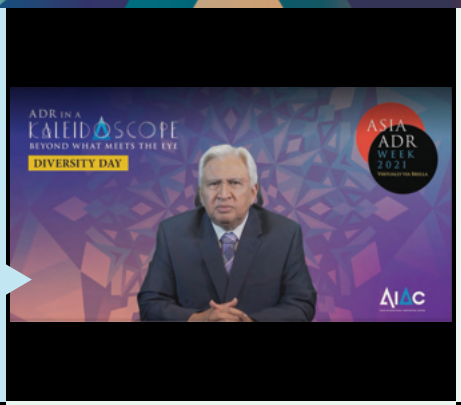
SESSION 3

In the last session, attendees, speakers, and moderators participated in lively roundtable discussions on Legal Tech – Modernising Legal Practice; Construction Tech – Advancements in the Construction Industry; Manufacturing and Supply Chain Issues; Dip, Duck, Dive, and Delay – How to Handle issues of Delay; Best ADR Mechanisms; Jurisdictional Updates; TEC Standard Forms – Software Development Contract; and 2019 Standard Form of Building Contracts Manual.



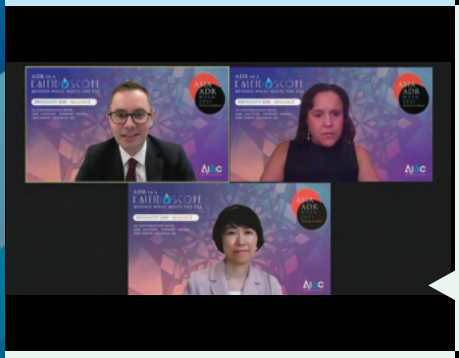
DIVERSITY DAY

Tan Sri Datuk Suriyadi bin Halim Omar, Director of the AIAC, opened the Diversity Day by delivering his opening remarks.



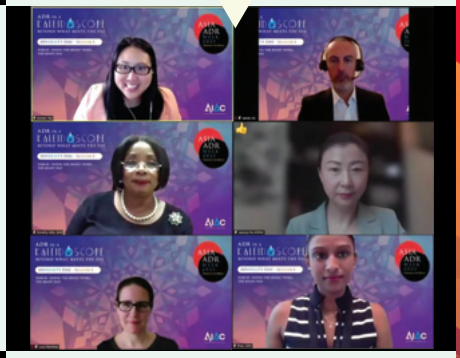
SESSION 1

Doing the Right Thing, the Right Way
Moderated by Ms. Kirsten Teo (Arbitrator Intelligence), the forum featured Ms. Lucy Martinez (Martinez Arbitration), Mr. Sameer Abou Said (The Firm), Ms. Dorothy Ufot, SAN (Dorothy Ufot & Co.) and Ms. Jessica Fei (King & Wood Mallesons).



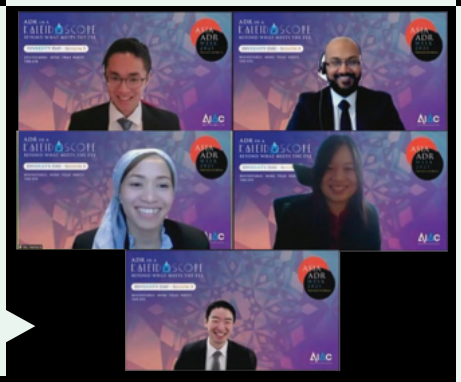
SESSION 2

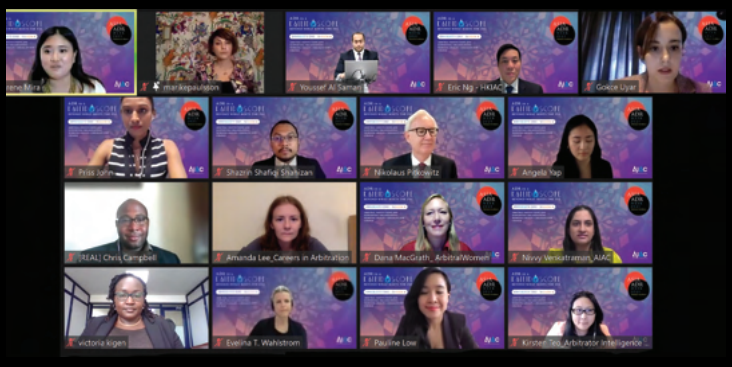
In Conversation with Ank Santens, Yoshimi Ohara, and Simon Chapman QC
An engaging conversation expertly moderated by Mr. Simon Chapman QC (Herbert Smith Freehills), featuring Ms. Yoshimi Ohara (Nagashima Ohno & Tsunematsu) and Ms. Ank Santens (White & Case LLP).



SESSION 3

Roundtable: More Than Meets the Eyes
Moderated by Ms. Hanna Azkiya, FCIArb (King & Spalding), the roundtable featured Mr. Jeff Yiu (Three Crowns LLP), Mr. Mino Han (Peter & Kim), Ms. Kwong Chiew Ee (Rahmat Lim & Partners) and Mr. Ashique Rahman (Fietta LLP).





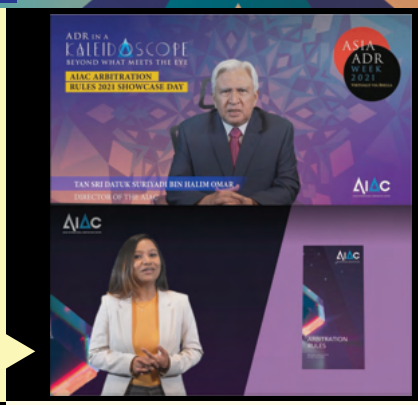
SESSION 3

Checklist for Change
The working group featured 15 diverse individuals from around the world, namely, Ms. Angela Yap (SIAC), Ms. Pauline Low (SIAC), Mr. Eric Ng (HKIAC), Ms. Gokce Uyar (HKIAC), Evelina T. Wahlström (Arbitration Institute of the Stockholm Chamber of Commerce), Ms. Victoria Kigen (NCIA and RAI), Mr. Youssef Al-Saman (Zulficar & Partners and RAI), Ms. Amanda Lee (Careers in Arbitration), Prof. Catherine Rogers (Arbitrator Intelligence), Ms. Kirsten Teo (Arbitrator Intelligence), Mr. Nikolaus Pitkowitz (VIAC), Mr. Christopher Campbell of (REAL), Ms. Dana MacGrath of (ArbitralWomen), Ms. Nivvy Venkatraman (AIAC) and Mr. Shazrin Shafiqi Shahizan (AIAC), all of whom represented a range of arbitral institutions and organisations that are diversity champions.

AIAC ARBITRATION RULES 2021 SHOWCASE DAY

Tan Sri Datuk Suriyadi bin Halim Omar, Director of the AIAC, opened AIAC Arbitration Rules 2021 Showcase Day ("Rules Showcase Day").

Ms. Michelle Sunita Kummar, Head of Legal, presented the key features of the 2021 Rules.

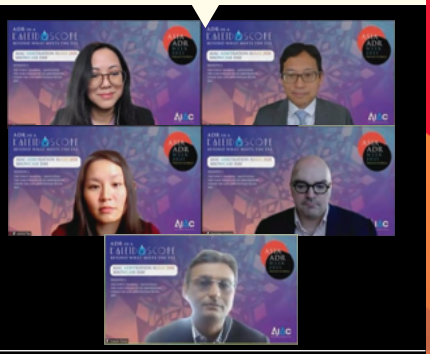


SESSION 1

The Force Awakens – Early Stages of the Rules
Moderated by Ms. Diana Rahman (AIAC). The session featured Mr. Vyapak Desai (Nishith Desai Associates), Mr. Nicholas Lingard (Freshfields Bruckhaus Deringer), Ms. Janice Tay (Wong & Partners, a member firm of Baker McKenzie International) and Mr. Joon Liang Foo (Gan Partnership).

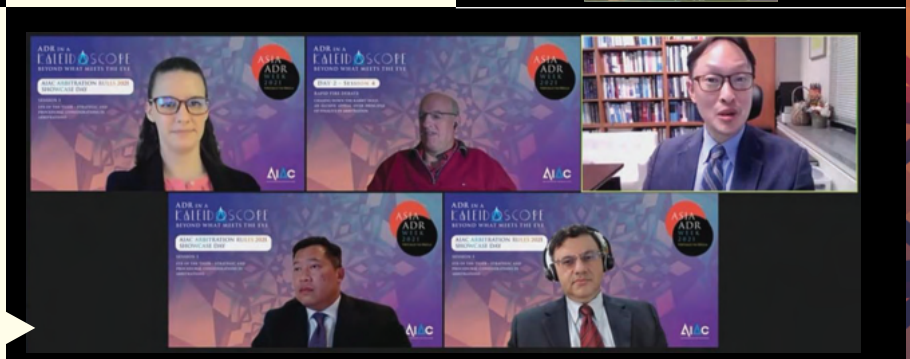
SESSION 2

Fast but Not Furious – Unpacking the Fast Track and Emergency Arbitration Provisions
Moderated Ms. Nivvy Venkatraman (AIAC). The panel featured Mr. Rajendra Navaratnam (Azman, Davidson & Co.), Dr. Dr Crina Baltag, FCIArb (Stockholms universitet), Ms. Erin Miller Rankin (Freshfields Bruckhaus Deringer) and Ms. Swee Im Tan (39 Essex Chambers).



SESSION 3

Eye of the Tiger – Strategic and Procedural Considerations in Arbitration
The session was expertly moderated by Ms. Chelsea Pollard (AIAC) and featured global thought leaders, namely Prof. Joongi KIM (Yonsei University), Mr. Yu-Jin Tay (Mayer Brown), Nitin Nadkarni (LHAG) and Mr. Peter Godwin (Herbert Smith Freehills). The panel discussion commenced with a brief overview of several key topics such as summary determination, deposits, hearings, decision-making and forms of awards, additional awards and interest.



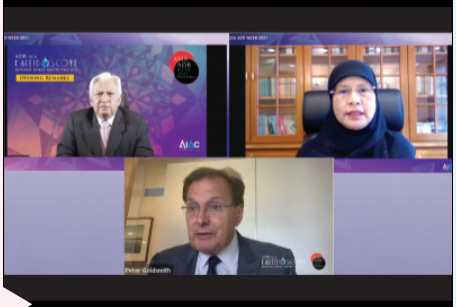
ASIA ADR WEEK 2021 - DAY 1

ADR in a Kaleidoscope: Beyond What Meets the Eye

Opening remarks were provided by Tan Sri Datuk Suriyadi bin Halim Omar, Director of the AIAC.

A special address delivered by Right Honourable Chief Justice Tun Tengku Maimun binti Tuan Mat, Chief Justice of Malaysia.

Keynote speech by Lord Peter Goldsmith QC (Debevoise & Plimpton).

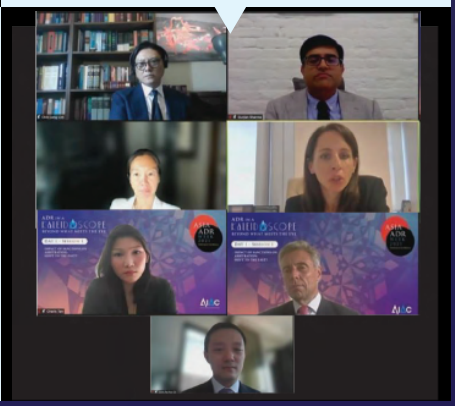


SESSION 1

Impact of Sanctions on Arbitration: Shift to the East
This intriguing session was expertly moderated by Prof. Chin Leng Lim (Keating Chambers) and featured distinguished speakers from across the globe, namely, Mr. Jern-Fei Ng QC (7BR), Mr. Gunjan Sharma (Volterra Fietta), Ms. Julie Raneda (Schellenberg Wittmer), Ms. Chiann Bao (Arbitration Chambers), Mr. Gareth Hughes (Debevoise & Plimpton) and Ms. Charis Tan (Peter & Kim).

SESSION 2

Starting In-House: The Role of General Counsel of Multinational Corporations in ADR
Moderated by Prof. Luke Nottage (Williams Trade Law and The University of Sydney Law School), the panel featured Ms. Esther Chow Ruen Xin (KONE Elevator Sdn. Bhd.), Mr. Nick Longley (HFW), Ms. debolina partap (Wockhardt Ltd.), Mr. Raymond Min-Yaw Goh (China Tourism Group Corporation Limited), and Mr. Cameron Ford (Squire Patton Boggs).

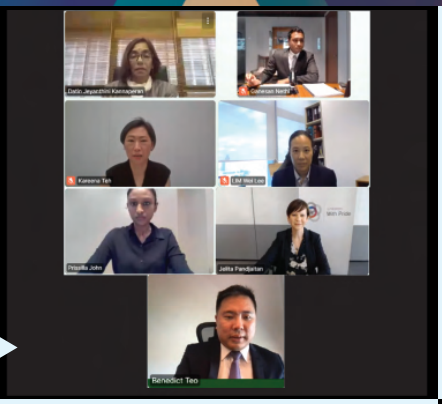


Breakout Room 1

SESSION 3

Alternative Dispute Resolution: A Creative Resolution Tool for Capital Markets

Moderated by Datin Jeyanthini Kannaperan (Shearn Delamore & Co.) and featured Ms. Lim Wei Lee (WongPartnership LLP), Ms. Kareena Teh (LC Lawyer LLP), Mr. Benedict Teo (Drew & Napier LLC), Mr. Ganesan Nethi (Tommy Thomas Advocates and Solicitors) and Ms. Jelita Pandjaitan (Linklaters).



Breakout Room 2

SESSION 3

Preconditions to Arbitration: Potential Concerns of Hybrid and Pathological Clauses

Featuring Ms. Brenda Horrigan (Independent Arbitrator), Ms. Cheryl Teo (Allen & Overy), Mr. Jainil Bhandari (Rajah & Tann Asia), Mr. Leng Sun Chan, SC (Duxton Hill Chambers (Singapore Group Practice) and Mr. Hee Theng Fong (Harry Elias Partnership LLP), the session was swimmingly moderated by Ms. Sitpah Selvaratnam (Tommy Thomas Advocates and Solicitors).

Breakout Room 3

SESSION 3

Quo Vadis, Malaysia? Revisiting Third Party Funding

Moderated by Dato' Nitin Nadkarni (LHAG), this session also featured a stellar line up of panellists, namely, Ms. Briana Young (Herbert Smith Freehills), Ms. Anne K. Hoffmann (Hoffmann Arbitration), Ms. Bronwyn Lincoln (Corrs Chambers Westgarth), Ms. Marjolein van den Bosch-Broeren (Omni Bridgeway) and Mr. Mohanadass Kanagasabai (Mohanadass Partnership).

SESSION 4

Extending the Roots of Arbitration: Environment, Animal Conservation, and Climate Crisis

Moderated by Prof. Janet Walker (Atkin Chambers), the panel featured Ms. Asya Jamaludin (CMS UK), Mr. Shannon Rajan (Skrine), Ms. Annette Magnusson (Climate Change Counsel), Mr. Timothy Smyth (Arnold & Porter Kaye Scholer LLP), Ms. Monica Feria-Tinta (Twenty Essex) and Mr. Manish Aggarwal (Three Crowns LLP), all of whom are involved in environmental disputes and raising environmental awareness as part of the Sustainable Development Goals.

ASIA ADR WEEK 2021- DAY 2

SESSION 1

Cross-Border Collaboration and Partnership of Different Arbitration Institutions Worldwide

Moderated by Ms. Swee Im Tan (39 Essex Chambers), the session featured representatives from leading regional arbitral institutions, namely, Ms. Michelle Sunita Kummar (AIAC), Mr. Kevin Nash (Singapore International Arbitration Centre), Ms. Kiran Sanghera (HKIAC), Mr. Heehwan Kwon (KCAB INTERNATIONAL), Ms. Allison Goh (Permanent Court of Arbitration) and Ms. FEI LU (China International Economic and Trade Arbitration Commission (CIETAC).

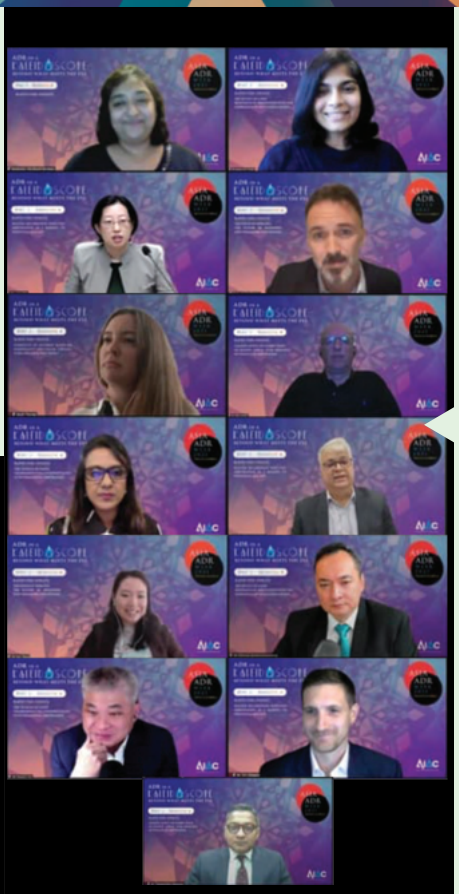
SESSION 2

Propria Persona in International Commercial Arbitration: Does the Robe Matter?

Moderated by Prof. Douglas Jones AO (Sydney Arbitration Chambers, Atkin Chambers, Toronto Arbitration Chambers). The panel featured eminent figures in the region, namely Hon. Rimsky Yuen GBM, SC, JP (Temple Chambers), Hon Mr. Justice Arjan Kumar Sikri (Singapore International Commercial Court, Former Judge of Supreme Court of India), Hon. Roger Gyles QC, AO (Maxwell 42 - International Arbitration Chambers Singapore), Tan Sri Dato' Cecil Abraham (Cecil Abraham & Partners), Datuk Dr. Prasad Sandosham Abraham (AIAC, Former Judge of Federal Court of Malaysia) and Yang Arif Dato' Mary Lim Thiam Suan (Federal Court of Malaysia).

SESSION 3

Watts in Arbitration? The Development of Energy Arbitration
Moderated by Mr. Allen Choong (Rahmat Lim & Partners), the panel featured an impressive lineup, namely Mr. Aaron Howell (Berkeley Research Group LLC), Mr. Paul Aston (HFW), Mr. Steven Finizio (WILMER CUTLER PICKERING HALE AND DORR LLP), Mr. Nareg Sinenian (Exponent), Ms. Sapna Jhangiani QC (Clyde & Co.) and Ms. Sheila Ahuja (Allen & Overy).



Rapid Fire Debates
The first debate featured Dr. Fan Yang (Stephenson Harwood LLP) and Prof. James Claxton (Waseda University) on a motion relating to the utility of the Singapore Mediation Convention in legitimising mediation as an effective and enforceable ADR mechanism.

The second debate featured Ms. Nereen Kaur Veriah (Christopher & Lee Ong) and Mr. Edmund Jerome Kronenburg (Braddell Brothers LLP) on the relevance of ADR against the emergence of specialised courts, that also provide time and cost efficiencies.

The third debate featured Mr. Peter Godwin (Herbert Smith Freehills) and Mr. Thayananthan Baskaran (Baskaran) on the necessity of appeal mechanisms and their impact on the finality of arbitral awards.

The fourth debate featured Mr. Tom Glasgow (Omni Bridgeway) and Mr. Steven Lim (39 Essex Chambers) on a motion concerning the tension between the need for transparency and the maintenance of confidentiality in arbitral proceedings.

The fifth debate featured Mr. Ravi Singhania (Singhania & Partners LLP) and Ms. Sarah Thomas (Morrison & Foerster LLP) on the interesting topic of whether an arbitrator's nationality and social circle, including their social media presence, should have any bearing on their independence and confidentiality.

The sixth and final debate featured Ms. Una Cho (Kim & Chang) and Ms. Karen Abraham (Shearn Delamore & Co.) on the inculcation of arbitration in the entertainment industry.

ASIA ADR WEEK 2021- CIPAA CONFERENCE

Tan Sri Datuk Suriyadi bin Halim Omar, Director of the AIAC, opened the CIPAA Conference by delivering his opening remarks.

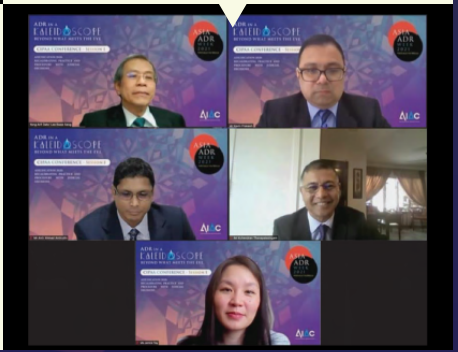
The Keynote Address was delivered by Mr. John Tackaberry QC (39 Essex Chambers).

SESSION 1

Recalibrating Practice and Procedure with Judicial Decisions
Moderated by Yang Arif Dato' Lee Swee Seng (Court of Appeal Judge, Malaysia), the panel featured Ms. Janice Tay(Wong & Partners, a member firm of Baker McKenzie International), Mr. Kuhendran Thanapalasingam (Zul Rafique & Partners), Mr. Kevin Prakash (KEVIN PRAKASH) and Mr. Aniz Ahmad Amirudin (Cecil Abraham & Partners).

SESSION 2

Right and Duties of Adjudicator: Remedies Available for a Challenge
Moderated by Mr. James Patrick Monteiro (JamesMonteiro) and featured Mr. Darshendev Singh (Lee Hishammudin Allen & Gledhill), Mr. John Eric Cock (27 Projects), Ms. Serene Mun Yi Hew (Harold & Lam Partnership), Mr. Ho Chien Mien (Allen & Gledhill) and Ms. Janet Chai (Chooi & Company + Cheang & Ariff).



Breakout Room 1

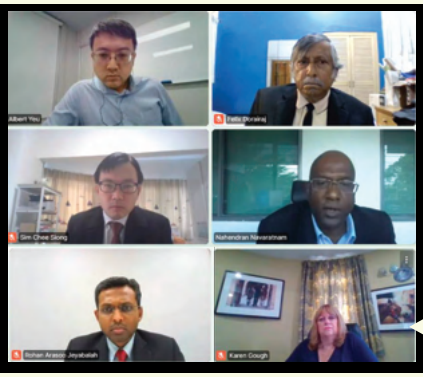
SESSION 3

CIPAA: Matter, Manner and Method
Moderated by Mr. James Patrick Monteiro (JamesMonteiro) and featured Mr. Darshendev Singh (Lee Hishammudin Allen & Gledhill), Mr. John Eric Cock (27 Projects), Ms. Serene Mun Yi Hew (Harold & Lam Partnership), Mr. Ho Chien Mien (Allen & Gledhill) and Ms. Janet Chai (Chooi & Company + Cheang & Ariff).

Breakout Room 2

SESSION 3

Interpreting Section 25 of CIPAA: Are the Parameters Undefined?
Moderated by Ms. Celine Chelladurai (Celine & Oommen). The panel comprised Mr. Huey Miin Ooi (Raja, Darryl & Loh), Mr. Rajendra Navaratnam (Azman, Davidson & Co), Dato' Ricky Tan (Ricky Tan & Co.), Ms. Victoria Tien Fen Loi (Shook Lin & Bok Malaysia) and Mr. Nadesh Ganabaskaran (Malek, Gan & Partners, Advocates & Solicitors).



Breakout Room 3

SESSION 3

Shopping for Adjudicators: A Search for More Favourable Decision
Moderated by Mr. Nahendran Navaratnam (Navaratnam Chambers). The panel featured Mr. Rohan Arasoo Jeyabalah (Harold & Lam Partnership), Ir Albert YEU FCIArb MRICS MICE (AECOM), Ms. KAREN GOUGH (39 Essex Chambers), Mr. Donatian Felix Dorairaj (Dorairaj, Low & Teh) and Mr. Sim Chee Siong (Rajah & Tann Asia).

SESSION 4

A Voyage around an Adjudicator's Jurisdiction
Moderated by Mr. Wilfred Abraham (Zul Rafique & Partners). The panel featured Mr. NARESH MAHTANI (Adelphi Law Chambers LLC), Ms. Chu Ai Li (Azman, Davidson & Co), Mr. Chang Wei Mun (Independent Arbitrator), Mr. Deepak Mahadevan (Azmi Fadzly Maha & Sim) and Mr. Wai Loon Lam (Harold & Lam Partnership).

AIAC SEPTEMBER SPORTS MONTH 2021

Throughout the month of September 2021, the AIAC once again successfully held its annual flagship event, the AIAC September Sports Month 2021. The September Sports Month initiative was introduced in 2018, where the AIAC would dedicate the entire month of September to sports law-related events as part of our efforts to increase public awareness of sporting disputes and to promote the development of sports dispute resolution in the region and beyond. This year's month of webinars and workshops could not have come at a more opportune time following the much anticipated Tokyo Olympics 2020. In total, the AIAC hosted five (5) webinars, four (4) virtual fitness sessions, two (2) workshops, and one (1) virtual mock arbitration debate. Below are some of the highlights of the events which took place in September 2021.

AIAC SEPTEMBER SPORTS MONTH WEBINAR SERIES

Following on from last year, the AIAC continued with the AIAC September Sports Month Series (the "Webinar Series") where thought-provoking panel discussions were held on key topics in sports dispute resolution every week.

Special Webinar: United by Sports Arbitration: A Reflection on the Tokyo Olympic 2020

To kickstart the AIAC September Sports Month 2021, on 2nd September 2021, the AIAC launched the Webinar Series with a special webinar titled, "*United by Sports Arbitration: A Reflection on the Tokyo Olympic 2020*". This webinar featured a special appearance from Mr. Michael Lenard OLY, Vice President of the International Council of Arbitration for Sport ("ICAS") and President of the Court of Arbitration for Sport (CAS) Ad Hoc Division at the Tokyo 2020 Olympic Games. In his special recorded address, Mr. Lenard gave an overview of the CAS Ad Hoc Division and the decisions of same in the recently concluded Tokyo Olympics 2020. This was followed by a brief sharing on the AIAC's role as a cost-effective alternative hearing venue within the CAS infrastructure by Ms. Michelle Sunita Kummar, AIAC's Head of Legal.

Following this, the webinar progressed with a riveting and engaging interview featuring two (2) renowned CAS Arbitrators, Dr. Ismail Selim and The Honourable Dr. Annabelle Bennett, both sharing insights from their stints in serving as Ad Hoc arbitrators in the Tokyo Olympics 2020, with Ms. Chiann Bao expertly sitting as an interviewer. The audience had the privilege of listening to their experience on being part of the Olympics amidst the COVID-19 experience on being part of the Olympics amidst the COVID-19 restrictions as well as some insights into the cases where they have sat as arbitrators. A key difference between CAS Ad Hoc arbitrations at the Olympics and ordinary sports arbitrations is the timeline and speed at which an award is rendered. Due to the time-sensitive nature of most sporting events, an Ad Hoc Tribunal is required to expediently produce the award in the shortest possible amount of time. One might come to think of this as its own sport considering the challenges it poses. Dr. Annabelle Bennett also shared with the audience her experience of acting as an Ad Hoc arbitrator virtually due to the travel restrictions in place. All in all, the panel concluded that despite its challenges, the Tokyo Olympics 2020 demonstrated how the world community can adapt and evolve to rise up in these unprecedented times and how the sports arbitration mechanisms under CAS complements this in making the Tokyo Olympic 2020 a success.

A Year into COVID-19 – The Strain on the Sports Industry and Athletes' Mental Health

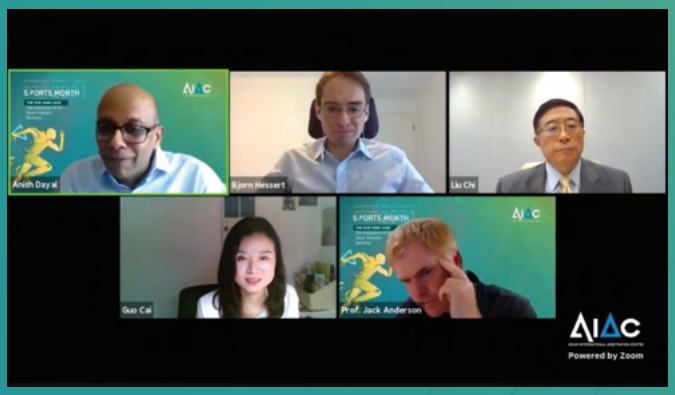
The second episode of the Webinar Series was held on 7th September 2021 and discussed the topic "*A Year into COVID-19 – The Strain on the Sports Industry and Athletes' Mental Health*". This webinar was brilliantly moderated by Mr. Bryan Boo (Bryan & Co)

and featured Ms. Lesley Lim (MahWengKwai & Associates), Mr. Steve Bainbridge (Squire Patton Boggs), and Mr. Takuya Yamazaki (Field-R Law Offices).

The webinar explored the different stakeholders that were impacted by the COVID-19 pandemic as well as the role of technology as a modern solution to the unprecedented problems arising from the pandemic. The panellists agreed that a comprehensive framework and model of care are required to support and respond to athletes' mental health needs. They additionally emphasised the importance of empathy and inclusivity as the world navigates through new mechanisms on how best to accommodate athletes in these trying times. The panel also shared their views on the vital role that sports lawyers play in assisting athletes in addressing the problems.

The panel also shared their views on the effects of press, social media and contractual obligations on an athlete's performance and mental health and thereafter discussed the multidisciplinary approach needed to address these issues. They stressed that some important considerations in contractual drafting include the extent of the duty of care, COVID-19 protocols, human rights as well as insurance coverage. The panel also highlighted the potential for the sports industry to evolve into becoming more empathetic, inclusive and athlete-oriented as the world progresses through the pandemic.

The Sun Yang Case – The Implications of the Swiss Tribunal's Decisions



The third episode of the Webinar Series titled "*The Sun Yang Case – The Implications of the Swiss Tribunal's Decisions*" took place on 14th September 2021. The session was moderated by Mr. Anish Dayal (Anish Dayal Chambers) and the audience had the opportunity to hear from Prof. Jack Anderson (University of Melbourne), Ms. Guo Cai (Jin Mao Law Firm), Mr. Liu Chi (Jun Ze Jun Law Offices), as well as Mr. Bjorn Hessert (Tashkent State University).

The session kicked off with the moderator highlighting the myriad of issues that were discussed in the Sun Yang case. The panel thereafter shared their views on the case, from the fact that the case actually concerned a tampering violation as opposed to an anti-doping violation, to dissecting the arbitral tribunal's determination that there was no issue in the sample collection procedure. The panel additionally spoke on the interesting ways culture influences the behaviour, conduct and style of an arbitral proceeding and how the Eurocentric and patriarchal nature of the CAS closed list of arbitrators does not lend itself to the appointment of diverse arbitral tribunals.

The panel also highlighted and distinguished the three (3) distinct proceedings that took place throughout Sun Yang's dispute, namely the first arbitral proceeding, the Swiss Federal Tribunal proceeding and the second arbitral proceeding. It was highlighted that the first arbitral proceeding was the second ever CAS dispute to have been made open for public viewing. The panel thereafter shared their perspective on how this may have impacted the performance of the witnesses and the outcome of the proceedings. Overall, the panel analysed the unique circumstances surrounding what was seemingly a run-of-the-mill tampering violation dispute and brought to light many of its nuances, the lessons from which the sports arbitration industry can learn much from.

Women in Sports: Above the Quota

On 21st September 2021, the AIAC conducted its fourth episode featuring the topic "*Women in Sports: Above the Quota*". Moderated by Ms. Samrith Kaur (Samrith Sanjiv & Partners), the panellists comprised Dr. Seema Patel (Nottingham Trent University), Ms. Aahna Mehrotra (TMT Law Practice) and Ms. Khayran Noor (SportsLegal).

The session commenced with the panellists sharing how their passion for sports sparked their involvement in sports law. The panel shared that although they were all fairly athletic in their early days, the lack of sports programs and professional women in sports made it so that a professional sporting career was not a viable option. However, the panel highlighted that the competitive sports industry has definitely broadened to include more women-involvement in the past years; however, despite this, gender and cultural stereotypes persist in certain sectors.

One key point highlighted by the panel is the role of the media in shaping the public perception of women in sports. Ms. Mehrotra shared that even though 40% of all sports participants are women, sports media coverage of women's sports events receives only 4% of total sports media coverage. This then begs the question of what can be done to improve these statistics. The panel concurred that all media stakeholders play an important role in shaping public perception, from broadcasting the right mix of events involving women as well as using media languages that are sensitised towards the promotion of diversity and neutrality.

The panel also discussed issues of human rights and the *Caster Semenya* case. In addressing gender inequalities, the panel concluded that efforts in addressing this should start at the grassroots level, where governments can start by providing equal access to sports at all levels to diversify the playing field.

The Standard of Proof in Anti-Doping Arbitration: Understanding Comfortable Satisfaction

The fifth episode of the Webinar Series titled "*The Standard of Proof in Anti-Doping Arbitration: Understanding Comfortable Satisfaction*" was held on 28th September 2021. The session was moderated by AIAC's Senior Case Counsel, Ms. Diana Rahman. The speakers of the session were Ms. Brianna Quinn (Lévy Kaufmann-Kohler), Ms Catherine Pitre (Sport Resolutions) and Prof. Michael Geistlinger (Paris London University of Salzburg).

The session commenced with a survey poll to gauge the audience's familiarity with the concept of comfortable satisfaction. The panel then began the discussion by delving into what is comfortable satisfaction and how it functions in anti-doping proceedings. Ms. Pitre shared how in jurisdictions where anti-doping violations are criminalised, the lower standard of comfortable satisfaction provides for a higher possibility of success where parties fail to meet the standard of beyond reasonable doubt. Ms. Quinn thereafter shared the perspectives of international federations and associations before describing various examples of non-traditional cases that would potentially give rise to disputes on the standards applicable. Prof. Geistlinger also provided an overview of how CAS arbitrators approach the standard of comfortable satisfaction and further shared his view on the adoption of this standard and how it affects the production of evidence in the conduct of anti-doping arbitral proceedings.

The panel further discussed how the outbreak of the pandemic has affected anti-doping testing as well as access to testing labs, and shared their thoughts on the usefulness of the World Anti-Doping Agency (WADA)'s testing guidelines that were introduced as a result of the COVID-19 pandemic. The panel concluded with a discussion on how this standard of proof should be maintained and fine-tuned in order to ensure that a uniformed anti-doping framework is in place to combat doping in sports across the board.

SPORTS MONTH WORKSHOP SERIES

Workshop 1: Disputes to CAS: Understanding the Sports Arbitration Framework

With the aim to provide an affordable and accessible platform for sports law education in Malaysia, the AIAC kept the ball rolling with its third edition of the Sports Month Workshop Series. The first in a series of two (2) virtual workshops as part of the AIAC September Sports Month 2021 entitled, "*Disputes to CAS – Understanding the Sports Arbitration Framework*", was held on 9th September 2021. The workshop featured two (2) renowned speakers Mr. Paul Hayes QC (39 Essex Chambers) and Mr. Clifford J. Hendel (Hendel IDR) and was moderated by Ms. Diana Rahman (AIAC).

The workshop started with an introduction to sports dispute resolution, with a discussion of the types of sports disputes, which ranged from commercial and eligibility disputes to anti-doping violations. The speakers then went into describing the potential parties likely to be involved in those disputes, which may be athletes, sports federations, media companies as well as other stakeholders. Thereafter, the speakers delved into CAS governance and structure as well as the history behind its formation. The participants were given insight into the origins of the Olympics and how it evolved into the event as we know it today, which inevitably led to a rise of sporting disputes and a need for a uniformed dispute resolution mechanism, leading to the formation of the CAS.

The speakers then touched on CAS arbitration procedure and the methods for the enforcement of CAS awards. Emphasis was placed on the seat of a CAS arbitration being set in Lausanne, and how this is a distinguishing factor from traditional commercial arbitration. Crucially, the seat of arbitration determines the place of enforcement of an award, which means that all CAS awards could only be enforced by the Swiss courts. It was also pointed out that compliance with the timeline to bring a dispute is crucial since the tribunal's jurisdiction is at stake. The session ended with valuable insight on the confidentiality, or lack thereof, of CAS awards and the effects of arbitral awards being published, and how an arbitration practitioner can go about joining the CAS' list of arbitrators.

Workshop 2: Becoming a CAS Mediator: An Asian Perspective

The second workshop of the AIAC September Sports Month 2021 was held on 23rd September 2021, where Mr. Abdul Salim Ahmed Ibrahim (CIVIC Legal LLC) and Dr. Christopher To (Gilt Chambers) were invited to share their experience and views in a session titled "*Becoming a CAS Mediator: An Asian Perspective*". This workshop was also moderated by Ms. Diana Rahman (AIAC).

The speakers commenced the workshop with a brief overview of mediation in general, from the procedural steps in initiating a mediation as well as the importance of appointing the right mediator for the dispute. The speakers explained that particular emphasis should be given to the expertise of the mediator to ensure the effectiveness of the process. The panel deliberated how mediators are needed to narrow the differences between the disputing parties so that practical communication and negotiation between them becomes achievable. The speakers also went over the types of sports disputes that would benefit from being brought to mediation as opposed to other forms of ADR before delving into other key considerations in mediation.

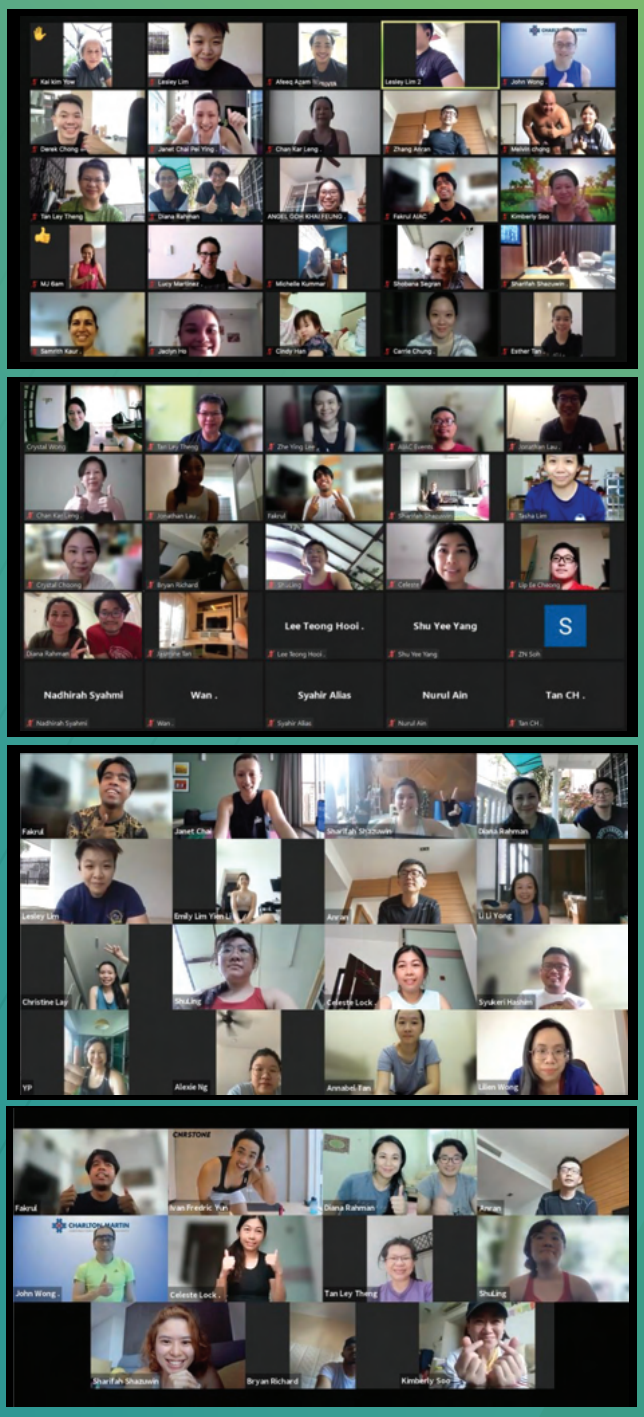
The workshop also drew attention to mediation at CAS and the speakers provided an overview of registered cases with data showing a relative increase in the number of cases recorded over the past five (5) years. The session concluded with a discussion with the participants where the speakers touched on the Singapore Convention on Mediation which was seen as an indirect contributor in promoting mediation as a viable option for disputes settlement.

VIRTUAL FITNESS SESSIONS

For the first time in AIAC history, this year's AIAC September Sports Month also featured a new series called the "Virtual Fitness Sessions". Every Sunday throughout September 2021, the AIAC hosted a forty-five (45) minute virtual workout session with several fitness enthusiasts (who also happen to be practicing lawyers!) via Zoom. Overall, a total of four (4) fitness sessions took place in September 2021.

The first session was held on 5th September 2021 where Ms. Lesley Lim (MahWengKwai & Associates) guided everyone through a Crossfit workout. Ms Lesley took great care to ensure that everyone was executing the moves at their own pace and with the correct technique. The second session was a Total Body Workout session conducted by Ms. Janet Chai (Chooi & Company + Cheang & Ariff) on 12th September 2021, who introduced the participants to a twelve (12) move Tabata-style workout. The session was packed with high energy and the participants were left with a serotonin boost to start their day. On 19th September 2021, Ms. Crystal Wong Wai Chin (Lee Hishammuddin Allen & Gledhill) led everyone in the third session of the month called Yoga: Align + Flow. The session encouraged participants to really engage their muscles in complex stretches to better regain their energy flow. Ms. Wong also provided various variations to cater to both beginners and seasoned practitioners so that all the participants were able to participate in the session. The final session of the month was a High-Intensity Interval Training (HIIT) session held on 26th September 2021 and led by Mr. Ivan Fredric (Chooi & Company + Cheang & Ariff). Mr. Fredric led the participants through a high energy workout with upbeat music to start off their Sunday.

Overall, the Virtual Fitness Sessions were a resounding success towards the promotion of a healthy lifestyle amongst ADR practitioners.



THE GREAT DEBATE: THE SEQUEL

To mark the closing of the AIAC September Sports Month, on 30th September 2021, a live mock sports arbitration debate was hosted with the objective of increasing awareness on the issue of doping in sports and the resolution of sporting disputes through arbitration, emulating the dispute resolution mechanism of CAS. Tan Sri Dato' Cecil Abraham (Cecil Abraham & Partners) and Ms. Susan Ahern (33 Bedford Row) sat as the panel of arbitrators in the debate titled, "*The Great Debate: The Sequel*". The debaters comprised Mr. Darren Lai (Richard Wee Chambers) and Mr. Chew Zhen Tao (Richard Wee Chambers) appearing on behalf of the Appellant, and Mr. Jagshey Pipariya (Thomas Philip) and Mr. Danesh Thiagarajah (SLAM) appearing on behalf of the Respondent.

In the fictitious dispute, Rebeka Tarkhan, Tanbari's national archer, had tested positive for Propranolol during a routine doping test conducted at a test event, following which the World Archery Federation (WAF) had imposed a four (4) year ban on her. As part of the ban, Rebeka's medal, which she had won at the test event, would be revoked and she would not be allowed to participate in any events within those four (4) years. This, in part, meant that Rebeka would not have been able to compete at the Tokyo Olympics 2020.

The Counsels present for the debate deliberated on the facts of the case before presenting their arguments around the key issues. To note, the debate touched on the issues of intentionality, significant fault and proportionality. For intentionality, the Counsels highlighted the fact that Rebeka had been suffering from a migraine and had consumed the medication that was shared with her by a fellow athlete for the purposes of abating the migraine. That was elaborated by the fact that Rebeka was not aware of the contents of the drug and did not have access to appropriate medical assistance.

For the issue of no significant fault, the Counsels raised the fact that this test event was Rebeka's first international event and that she had not been provided with the necessary anti-doping education back in Tanbari. Conversely, the Respondent was firm on their stand that she should be subject to the test of strict liability. So long as the substance is found in her body, Rebeka should be subject to the relevant sanctions. The Counsels also went into the issue of proportionality, where they had discussed the circumstances of the case in its entirety to justify the four (4) year ban. The session ended with feedback from the arbitrators on the merits of the case and potential published CAS decisions that may have been good precedent for reference.

The debate also officially marked the end of the AIAC September Sports Month 2021.

#HOWIBUILTTHIS

DISCOVERING THE JOURNEY OF DIGITAL COFFEE BREAK AND TALES OF THE TRIBUNAL

One of the most fascinating attributes about arbitration practitioners is that many of them are involved in side projects that are very close to their hearts, despite having thriving and demanding arbitration careers. An example of this would be the numerous initiatives that gained traction throughout the COVID-19 pandemic, primarily due to our enhanced reliance on technology to maintain connectivity across borders and time zones in both our personal and professional lives. Two such initiatives which have come into the limelight in recent times are the digital platforms commonly known as Digital Coffee Break and Tales of the Tribunal. The AIAC recently had the opportunity to interview the masterminds behind these initiatives – namely, Svenja Wachtel ("SW")[1] and Christopher Campbell ("CC")[2] – who shared their invaluable insights on the creation of these initiatives and what to look out for in the future. Their responses can be found below.

1. **What inspired you to pursue a career in international arbitration and how would you describe your journey to date?**

SW: Initially, I did not start my legal career in international arbitration. It was never on my radar to be honest. Arbitration is not really a topic that is covered in law school in Germany and at the time, my law school did not even have a Vis Moot team – nowadays they do have a team – which means that there was never any awareness for arbitration as a career option.

After law school, I worked in-house in the area of brand protection, i.e., competition law and trademark law. Here, I got the first glimpse of what it could mean to work in an international environment because we partnered with law firms and lawyers from all over the world, but arbitration was still not the focus of my day-to-day business. The very first contact with arbitration was when I started working in a law firm. My focus switched to commercial disputes, mainly litigation but also a few arbitration issues and this was when I realized that arbitration is something that could be more interesting than anticipated because of the very highly international type of work with people from different legal, cultural and educational backgrounds. Arbitration also offers more flexibility than litigation and allows for a more individual approach, so for me, international arbitration is the field I like the most.

CC: Like many people that find their way into international arbitration, it was a matter of happenstance. From my time in business school at the Darla Moore School of Business, I knew I wanted to work in an international field and I knew that I wanted to couple that business career with my interest in practicing law. In studying both, I became more and more intrigued with how commercial entities work together and resolve disputes across borders.

Around the conclusion of my first year of law school, I did a visiting study at the Gray's Inn of Court in London, where I took a course on international dispute resolution, which was my first real experience with international arbitration. From there I was hooked, I continued to study the subject, ultimately culminating in pursuing a LLM at Tsinghua University where I studied international arbitration and participated in the Vis Moot, and the rest, as they say, is history!

The next phase of this journey is about continuing to improve my knowledge and expertise in the field and creating and cultivating spaces and pathway for underrepresented minorities, economically disenfranchised, and young practitioners. It's a community effort!

Svenja Wachtel

Christopher Campbell

[1] Svenja Wachtel is an attorney in the Frankfurt office of Willkie Farr & Gallagher LLP in the disputes team. Her practice concentrates on arbitration and complex commercial litigation with a particular focus on multi-jurisdictional legal actions with an emphasis on commercial questions as well as post-M&A disputes. The cases are usually subject to many different systems of law and under several institutional rules, in particular under the arbitration rules of the DIS and ICC. She regularly speaks on panels and webinars and publishes articles in the field of international arbitration. Ms. Wachtel is particularly interested in the changes and challenges digitalization and digital transformation mean for the legal industry in general and for international arbitration in particular. She is a committee member of the Young Thailand Arbitration Center and Ambassador for R.E.A.L. – Racial Equality for Arbitration Lawyers and generally raises her voice for diversity in the legal field.

[2] Christopher ("Chris") Campbell is a Senior Litigation Counsel for Baker Hughes and advises on commercial dispute resolution matters in the Oil & Gas, Energy & Technology sectors. During his career, Mr. Campbell attained an LL.M Tsinghua University studying Chinese Law and international dispute resolution, and has worked on commercial & legal matters across multiple continents. Prior to joining Baker Hughes, Mr. Campbell litigated a number of matters, specializing Eminent Domain disputes in the state of South Carolina and advising the Charleston Port Authority on various matters related to trade law and international commercial arbitration. He also served as the inaugural law clerk to the honorable Jocelyn T. Newman of the South Carolina 5th Judicial Circuit. Mr. Campbell currently serves as a Co-Chair for the ABA International Arbitration Committee, the Steering Committee for the Silicon Valley Arbitration and Mediation Center's Young Practitioners group (SVAMC-YP) and is a founding member of Racial Equality for Arbitration Lawyers (R.E.A.L.). He also hosts a podcast, "Tales of the Tribunal", which profiles the dynamic and interest backgrounds of figures in international law and business.

2. **You are both the creative minds behind your respective initiatives – Digital Coffee Break and Tales of the Tribunal. What is the story behind the creation of these initiatives and how do these digital platforms work?**

SW: I did and still do litigation and arbitration and I quickly realized that arbitrators are way more open to adjust to the parties' needs and wishes and to try out new technologies compared to most judges in ordinary court proceedings. When researching this topic, I learned that there was no general approach and everyone seemed to know a bit here and there, but it was rather the individual who actually uses technology. I was looking for a platform that combines this information in one place and gives food for thought for further research and ideas.

Based on this, the idea was to talk to the people in this field and interviewing them to foster awareness for technology and the use of technology in international arbitration. Basically, my plan was to show the different approaches and possibilities digital transformation means for arbitration practitioners. The interviews, as the starting point of Digital Coffee Break in Arbitration ("**DCBA**") are being published on the LinkedIn page and on the Homepage every quarter. The platform does not offer legal advice but is merely a source for information related to arbitration and technology. The majority of the posts are in English, but I also promote (and have posted) articles and webinars targeted at Latin America in Spanish.

CC: Two-fold inspiration–

First, the great work of the folks over at the Arbitration Station as well of the podcasting antics of Michael Mcilwrath and his arbitration podcast from some years ago. They were the pioneers and were putting out content that was unique, informative and helpful to the field.

So, I literally grabbed my laptop and iPhone, headed to the 2019 Vis Moot and started recording everyone that I could book an interview with. That first season especially allowed us to trumpet one of core values – diversity (in that case, gender diversity) and throwing the door open to anyone who wants to be part of the field. We talk to business people, lawyers, academics and everyone in between.

Its as simple as getting in touch. We spend a great deal of time thinking about topics and guests for the show, but love to get suggestions or even self-nominations. Just drop us a line at TalesOfTheTribunal@Gmail.com, visit the site TalesOfTheTribunal.com.

3. **You are both the creative minds behind your respective initiatives – Digital Coffee Break and Tales of the Tribunal. What is the story behind the creation of these initiatives and how do these digital platforms work?**

SW: I am not sure if there is a need in the market, but definitely an interest. When I started the DCBA it was the general idea of sipping a coffee and reading something about arbitration and the use of technology. The feedback I got was very positive – credits to my amazing interview partners and their valuable insights. After having started the series, I decided to promote other articles that are related to the same broad topic of international arbitration and digitalisation all which could be enjoyed while having a coffee. Soon, I gave shout-outs to conferences with the same focus. Then, the pandemic happened and all of a sudden technology became the hot topic.

Digital transformation was relevant before the pandemic but became immensely important during the pandemic: travelling was – at a minimum – very restricted but the cases nonetheless required attention. While virtual hearings were generally possible, they became the only option to keep the case going. Video-conferencing, webinars, online hearings, digital networking and all of these changes happened basically overnight and the demand to understand all of these options grew. With that grew also the interest for the DCBA and its content and I hope that the DCBA can play a little part in giving access to the relevant information.

CC: While going to the many conferences and arbitration events around the globe I realized that the people that work in his field have really interesting backgrounds and lives outside of arbitration and the practice of law. I wanted to tell those stories, and give a glimpse into their interesting and captivating lives. I think we've done that!

In particular, I think we make the conversations going on in and around international dispute resolution more informal, approachable and show that there is a space for every voice from around the world.

4. **What were some of the challenges you encountered when you first started Digital Coffee Break and Tales of the Tribunal and how did you overcome these challenges?**

SW: One challenge for me was my fear that nobody would care at all or, even worse, that my idea would be a total failure. All of the "but, what if…" moments can easily slow you down (at least I can be slowed down) but in the end I just decided to go with it and give it a try. I assume that my approach was easier than Chris' for example. A podcast requires technical equipment etc. and is much more work than a written interview.

Another challenge was to find my own style when posting on LinkedIn. The first post took me probably three days. Starting the post, deleting it, re-writing it, sending it to friends, waiting for their feedback, re-writing it again. Researching how the algorithm works, thinking about the perfect day and time, realizing that hashtags and pictures are helpful to gain attention and so on. I remember how nervous I was and how uncomfortable I felt but these negative feelings are entirely gone by now. It seems that I am not alone with these questions when it comes to posting on LinkedIn but I can promise that it gets easier every single time.

CC: When we first started–probably letting people know we exist! And then getting them to use podcasts–that second one has gotten a bit easier in the age of the pandemic. But there is an on-going challenge of picking *who* to interview *when* to create and release new content. There are so many stories to tell, and things are always happening, finding that right balance is difficult.

Also, having a full-time job makes it tricky staying on schedule and running a weekly show!

5. **How do you go about selecting which practitioner or topic to feature in each session of your relevant platforms? Is there anything in particular you look for?**

SW: It depends: Regarding the interview series, I intend to publish four interviews each year. When choosing my interview partner, the topic is the key element of what I am looking for. My goal is to pick topics that are sometimes more general, such as Raising your profile and developing your career – lessons learned (and learning) during the pandemic with Lizzy Chan and sometimes more specific, such as the interview with Lucy Greenwood and the environmental impact of international arbitrations in order to have a good mix and match and variety.

I also want to reflect different perspectives, and interview a broad variety of practitioners, which – of course – includes arbitrators, and counsel, but also legal scholars, general counsel, service providers for international arbitration, students, etc., and not solely one group of practitioners. For the other initiatives, which we address later, it is similar to some extent. For the Arbitration Happy Hour, if Sneha Ashtikar and I come across a topic we are interested in and want it to be covered in one of our episodes, we try to find the ideal speaker for this particular topic. However, we are also more than happy if someone approaches us and suggests a topic he/she would like to talk about. For Arbitration Idol the focus shifts a bit: one crucial aspect is to have a diverse group of "Arbitration Idols" to showcase the full spectrum and not to focus on the UK/US for example. Here, diversity is key!

CC: Every season we have themes – Season 1, we wanted to feature talented voices of women from across the field – Season 2, was the pandemic season and we talked with a lot of people who were doing things that would prepare them for a post-pandemic world – Season 3, was probably the broadest theme as we talked to content creators and others active in producing things in the field.

So, in a nutshell, we come up with a theme or several themes and then we slide in people's LinkedIn DMs, send emails, call them, see if there is a connection and see if we can get them on the show.

As a side note, under the "Tales of the Tribunal" brand, we have "Dispute Digest" a weekly show where we cover news, events and goings-on around the international business and legal field. We are revamping the format of DD right now, but plan to return in Early 2022!

6. **Both of you are known for being diversity champions given the various diversity-related organisations and initiatives you are associated with. How do Digital Coffee Break and Tales of the Tribunal resonate with your ideals of enhancing diversity in international arbitration?**

SW: The DCBA allowed me to be in contact with a variety of fabulous people. Two of these great people are Mandy Lee and Chris Campbell and together we started the charity initiative called "Arbitration Idol" in 2020. Arbitration Idol is an initiative connecting experienced leaders in the field of international arbitration with lucky individuals from around the world for a digital coffee break, while collecting money for UNICEF. Every person can donate any amount and gets the chance of talking to one of our "Arbitration Idols", for example, Gabrielle Kaufmann-Kohler, during a one-on-one digital coffee break. When approaching the "Arbitration Idols" and asking them if they would be interested in participating, we want to show the broad range of arbitration practitioners from all over the world and therefore we cover different regions. We have the identical number of female and male practitioners (being aware of course that there are people who do not define as either male or female) and have two people from the African continent, two from Latin America, two from Asia, etc. And we successfully concluded Season 2 this summer, having raised EUR 2,322.00.

Another way is to support other organizations that are committed to diversity, such as R.E.A.L. - Racial Equality for Arbitration Lawyers, an initiative to achieve racial diversity and inclusion, and to combine forces with these initiatives. During the DCBA, I am also in the position to promote articles, webinars other and other initiatives.

CC: Like Nike, we just do it.

Diversity is the default–the world in which we live is diverse. Made up of all types of people, identities, ethnicities, cultures, backgrounds and more. So, while we talk about the importance of pushing for diversity, we will always endeavour to make sure that we are giving a platform for different voices to weave a tapestry as rich and full as the world around us.

Besides that, we will partner with organizations and initiatives that align with our values such as Jus Mundi, Racial Equality for Arbitration Lawyer (R.E.A.L.), Careers in Arbitration, Digital Coffee Break in Arbitration – it's been fulfilling to watch and be a part of this community growing and impacting the field!

7. **What bearing, if any, did the COVID-19 pandemic have on the reach of your initiatives?**

SW: It seems that while the pandemic accelerated, so did the acceptance and use of technology in international arbitration. This resulted in the DCBA becoming more interesting for many people. The pandemic basically gave my initiative an additional push to gain more attention. I, myself, looked into more online opportunities to network, to educate myself and to stay informed. Conferences I never imagined I could attend were open all of a sudden, because they took place via Zoom or any other platform for that matter.

Although separated, I connected with various people through the initiative DCBA because people reached out to me to collaborate on a project, or asked for media support, or asked for advice. I made new friends in the field, one of them my dear Chris Campbell and we never even managed to meet in person yet. Maybe Chris and I would have met without the pandemic but I doubt that we both would have started Arbitration Idol together or recorded a podcast (thanks again Chris for having me next to these amazing and brilliant practitioners).

CC: In some ways none, and in other ways a ton! The first season was done wholly in person, and the second two seasons have been done remotely. This changes the dynamic of talking with the guests – but also, I've been able to connect with and feature more speakers without having to be in the same room as them, and that's been great!

Even when things are "back to normal" we'll continue featuring guests in a digital fashion and we look forward to being in-person again one day, hopefully soon!

8. **Svenja, Digital Coffee Break has a number of innovative offshoot initiatives that have gained significant traction on social media. Could you describe these additional initiatives and explore the role social media marketing has played in the expansion of Digital Coffee Break?**

SW: As of today, the DCBA became much more than the quarterly published interviews. For example, I have the homepage Digital Arbitration where I publish all Interviews but also details about the Arbitration Happy Hour which I host with Sneha Ashtikar from Jus Mundi. The Arbitration Happy Hour was a weekly and is now a monthly recorded discussion with an expert about a certain topic and everyone is invited to participate. Usually, we have a discussion with the expert before opening for the audience and the Q&A part. We switched to the recorded version just recently and make a podcast out of it, so that the content is not lost. The setting is still very informal and invites juniors as well as seniors to participate.

With all of these initiatives, social media plays an important role in the expansion of the DCBA. Through social media, I am able to connect with people and see what other initiatives/people are doing. In the end, the content is what matters, but to get the content out there, social media is really relevant. One might discuss the platform and the pros and cons of each platform, of course, but it seems that LinkedIn is still the most important. I am also trying out new platforms, for example Clubhouse, which we used for the Arbitration Happy Hour in beginning of 2021 but it seems that Clubhouse lost its momentum, so I am moving on and check out other social media platforms.

9. Chris, given that Tales of the Tribunal is now in its 3rd season, can you tell us about an episode that was most positively received and what do you think led to the success?

CC: There are MANY episodes and they have all had huge and positive receptions, but our top five most highly viewed episodes (as of writing, and in no particular order);

- Janet Walker – Season 1
- Catherine Rogers – Season 1
- Meg Kinnear – Season 2
- Colin Rule – Season 3
- The Arbitration Station – Season 3

Each of these episodes came with great marketing from both Tales of the Tribunal and the guest – as each guest also had their own following. We were honoured to have each of them and look forward to having them back another time!

10. What value can students and young practitioners derive by tuning into Digital Coffee Break and Tales of the Tribunal?

SW: Hopefully, everyone reading the interviews, tuning in the Arbitration Happy Hour or clicking through the LinkedIn page finds something he/she is interested in. The interviews usually address a very specific topic and the views of one expert on this topic. For example, the interview in the first quarter of 2022 will cover "Recording and Transcribing Hearings", and questions around this topic, so if this is something one is particularly interested in, I suggest to grab a coffee and enjoy the short break while reading the interview. On the other hand, I am promoting articles/books related to international arbitration which also give an overview of what is out there. If something else pops up that is interesting, such a webinar or a new podcast, I happily put the word out there. If you see something that should be promoted, I encourage everyone to drop me a line!

While reading the interviews is more on the passive side of consuming the content, I love when people get active and comment on a specific post or engage in a discussion during the Arbitration Happy Hour and become an active member of the community.

CC: Stop waiting for someone to give you permission to be active in the field! With the power of the internet, you can be a content creator – whether it is a podcast, articles or maybe even aggregating useful information on a topic – your skills and perspective provide value. So just start, and if you fail, try again – you'll learn much more that way than waiting for the perfect idea or moment.

11. What vision do you have for the future of Digital Coffee Break and Tales of the Tribunal?

SW: The DCBA – and the additional initiatives and side-projects as part of Digital Arbitration – shall open the possibility to network and exchange thoughts, learn new things, meet new people and do this in an easy and relaxed way with lots of fun.

I hope for a growing and active community and that the DCBA and the related initiatives will continue to thrive and do their part in achieving equality, offering networking opportunities, giving room for a dialogue and of course more interviews, more episodes of Arbitration Happy Hour, many more espresso, coffee and tea breaks, while reading an interview, listening to a podcast or attending a webinar. I am already excited for the future and I am sure that additional side-initiatives will follow.

CC: For Tales of the Tribunal, we'd like to create more regular news/topics show. We experimented heavily with that during 2021 in the form of Disputes Digest, but we think we can do something even better. We'll keep working on that. We'll probably also add some new faces to the team so we can continue to grow and reach an even larger audience! As for the main Seasons of the show? We'll keep bringing great content season after season.

With so much great video, audio and written content, maybe we'll team up with an initiative like Digital Coffee Break in Arbitration and create a network?

The best is yet to come!

KEY INSIGHT

ARBITRATION-IN-PRACTICE WORKSHOP SERIES 2021

Between June 2021 and December 2021, the AIAC collaborated with the Chartered Institute of Arbitrators (Malaysia Branch) ("CIArb Malaysia") and unveiled its inaugural Arbitration-in-Practice ("AIP") Workshop series for the year 2021.

In line with the AIAC's commitment to provide continuous practical and professional development training to certified arbitrators, this series served as a refresher course and provided practical insights into the conduct of arbitration proceedings to both senior and young arbitrators.

A total of seven (7) workshops were conducted over the span of seven (7) months with prominent arbitration practitioners from across the globe, as well as members of the judiciary, who came together as a joint force to provide some great insights based on their respective personal and professional experiences as arbitrators.

AIP Workshop 1: Basic Principles & Obligations as Arbitrator

On 12th June 2021, the first of the seven (7) AIP Workshops took the participants back to basics on the topic of "*Basic Principles and Obligations as Arbitrator*". This workshop kickstarted with Mr. Foo Joon Liang (Gan Partnership) serving as the moderator and featured Dato' Nitin Nadkarni (Lee Hishammuddin Allen & Gledhill) and Ms. Tan Swee Im (39 Essex Chambers) as the speakers.

The first part of the panel discussion focused on the area of conflict of interest where the panel went through some of the basic requirements for proper disclosure. Emphasis was placed on the importance of proper disclosure post the landmark cases of *Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 and *Loh Kok Hwa v Persatuan Kanak-Kanak Spastik Selangor & Wilayah Persekutuan* [Shah Alam Originating Summons No: BA-24C(ARB)-4-05/2020], where it was highlighted that disclosure is a legal duty. The panel then took the participants through the IBA Guidelines on Conflicts of Interest in International Arbitration and provided a detailed explanation on the differences between the lists. In putting things into perspective, the panel then went through a couple of case scenarios pertaining to disclosure with reference made to the IBA Guidelines.

The second part of the workshop focused on the importance of observing natural justice in a broader sense. Here, the panel debunked the myth that arbitrations have become slower and take longer than civil court proceedings by providing some insights and suggestions on how can an arbitrator draw the balance between procedural fairness and efficiency without compromising natural justice.

The panel then concluded the workshop by delving into some of the characteristics of a "good arbitrator" where they shared some key "dos and don'ts" for an arbitral tribunal to consider to adopt when accepting an appointment, be it from arbitral institutions or otherwise.

AIP Workshop 2: Due Diligence Prior to and Post First Preliminary Meeting

On 10th July 2021, Dato' Varghese George (VarghArb Chambers) and Mr. Nahendran Navaratnam (Navaratnam Chambers) joined the second AIP Workshop on the topic of "*Due Diligence Prior to and Post First Preliminary Meeting*" as lecturers, with Mr. Foo Joon Liang (Gan Partnership) once again excellently moderating the session. This workshop also featured Mr. Shanta Mohan (Chambers of Shanta Mohan) and Ms. Catherine Chau (Catherine Chau & Associates) serving as the tutors for the participants.

Dato' Varghese kickstarted the panel discussion on how an individual should approach their role as an arbitrator, where particular reference was made to provisions contained in the Arbitration Act 2005 and the AIAC Arbitration Rules. The panel also briefly discussed the issues revolving around waiver of conflicts and went on to cover issues that may arise in the early stages of hearings. The importance of identifying and familiarising one's self with the applicable rules at the outset of the appointment was also heavily emphasised.

In the later part of the discussion, the panel provided some key points for an arbitrator to consider when setting out his/her terms of appointment. When asked on subject matter availability, Mr. Navaratnam emphasised the need to conduct a personal and honest assessment to determine if one has acquired the necessary expertise on the subject matter in order to do justice to the parties and the dispute.

Dato' Varghese then spoke on the preparation of a draft agenda for the preliminary meeting where he clarified that arbitrators are entitled to ask for a copy of contract or any other relevant documentation with respect to the dispute to prepare a draft agenda. Mr. Navaratnam concluded the lecture by giving the participants some insights and tips on how to conduct and control a preliminary meeting.

Upon the conclusion of the lecture, the participants were then directed to their respective breakout rooms for about ninety (90) minutes to undertake an exercise on drafting procedural orders and directions. This was then followed by feedback from Mr. Mohan and Ms. Chau.

AIP Workshop 3: Determination of Jurisdictional Issues/Challenges and Pre-Hearing

On 14th August 2021, Mr. Foo Joon Liang (Gan Partnership) once again moderated the third AIP workshop titled, *"Determination of Jurisdictional Issues/Challenges and Pre-hearing"*. This panel discussion featured Tan Sri Dato' Cecil Abraham (Cecil Abraham & Partners), Mr. Rajendra Navaratnam (Azman Davidson & Co) and Mr. Francis Xavier (Rajah & Tann).

Tan Sri Dato' Abraham kickstarted the session by dealing with issues on jurisdiction, largely from the Malaysian perspective, where he stressed that jurisdictional objections should be raised in a timely manner as provided for in Section 18 of the Arbitration Act 2005.

Thereafter, Mr. Navaratnam canvassed some practical aspects of jurisdictional challenges where he also addressed certain matters the drafters of an arbitration clause to look out for to avoid jurisdictional issues being raised at a later stage.

Mr. Xavier then discussed the case of *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and anor appeal* (2014) 1 SLR 372; (2013) SGCA 57 in length and touched on the active and passive remedies available on a jurisdictional challenge. He too agreed with Tan Sri Dato' Abraham and encouraged counsel to raise their jurisdictional objections at the earliest possible stage and urged the tribunal to hear these types of objections as a preliminary issue.

The panel discussion also included jurisdictional issues raised in the context of the separability of arbitration agreement.

Following from Tan Sri Dato' Abraham's comment on having confidence in the tribunal, the panel then provided their respective views on how to deal with the issues raised in the case of Browne v Dunn in the context of arbitration. In addition to that, the panel also addressed the consequences of an arbitrator making a mistake on jurisdictional issue.

Prior to sharing some of the best practices in arbitration, the panel addressed some of their observations and preferences with respect to virtual and in-person proceedings and further provided some of their input on improvements to the conduct of virtual hearings.

AIP Workshop 4: Hearing and Witness Examination

On 11th September 2021, Mr. Foo Joon Liang (Gan Partnership) once again aptly moderated the fourth AIP Workshop titled, *"Hearing and Witness Examination"*. This workshop featured Mr. Chang Wei Mun (Independent Arbitrator) and Ms. May Tai (Herbert Smith Freehills) as lecturers during the first half of the workshop. The session also saw Mr. Kevin Prakash (Kevin Prakash) and Mr. Lam Ko Luen (Shook Lin & Bok) as the tutors.

Ms. Tai opened the session with a broad overview on expert evidence in arbitration and covered some of the types of expertise one would normally come across in arbitrations.

Mr. Chang then provided some of his views on the features and importance of effective expert evidence. The panel discussion also included some of the common pitfalls of an expert witness and suggestions were provided by the panel based on their personal experience on how to deal with competing expert opinions.

Both Ms. Tai and Mr. Chang also pointed out the shortfalls from the adversarial approach adopted in common law jurisdiction when it comes to witness examination and how the inquisitorial approach adopted in civil law jurisdiction may work better and more efficiently, especially in proceedings involving parties and witnesses from different backgrounds and jurisdictions.

During the second part of the session, the panel discussed the effectiveness of the CIArb's Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration where they had shared their thoughts on whether the protocol has a structured approach towards ensuring that the experts address common issues.

The panel also identified some of the traditional evidence-taking procedures in court which seemed to be unnecessary and inefficient. In addition to that, the panel also spoke on "hot tubbing" and how it can be utilised to assist a tribunal in a proceeding. Prior to concluding the session, the panel shared some of their war stories and experiences on chess clock hearings.

During the tutorial, the participants were provided with a couple of case scenarios and were then invited to provide their respective views on the scenarios, followed by some constructive feedback from the tutors.

AIP Workshop 5: Joinders, Consolidation and Interim Measures & Emergency Arbitrator

The fifth AIP workshop series was held on 9th October 2021 on the topic of "*Joinders, Consolidation and Interim Measures & Emergency Arbitrator*". This session was moderated by Ms. Serene Hiew (Harold & Lam Partnersip) and saw Mr. Mohanadass Kanagasabai (Mohanadass Partnership) and Ms. Shanti Mogan (Shearn Delamore & Co.) serve as the lecturers.

The panel discussion begun with Mr. Kanagasabai's comprehensive overview of joinders and consolidations in an arbitration proceeding followed by a brief comparison of considerations for such applications in an arbitration as opposed to an application made in a court litigation in Malaysia. The panel also addressed some of the disadvantages of permitting consolidation and joinder requests in a proceeding and, thereafter, highlighted that adopting institutional rules as the rules governing the procedure would certainly provide a solution for the potential issues that may arise out of consolidation and joinders requests. The panel then concluded the first part of the session with some directions and steps for an arbitral tribunal to consider when dealing with such applications.

During the second part of the session, Ms. Mogan provided a comprehensive overview on interim measures where she also covered the types of interim measures that can be applied and/or granted by the courts pursuant to Section 11 of the Arbitration Act 2005, as well as the interim measures that can be granted by the arbitral tribunal pursuant to Section 19 of the Arbitration Act 2005. The common interim measures often sought by parties in the context of an arbitration were also discussed in this session.

In the third and final part of the session, Mr. Kanagasabai spoke on emergency arbitration procedures where he had also walked the participants through the emergency arbitrator procedures under the AIAC Arbitration Rules 2018 and 2021. Some of the advantages and disadvantages of an emergency arbitrator procedure were also discussed in this session. Prior to concluding the session, Mr.Kanagasabai shared his personal experience sitting as an emergency arbitrator.

AIP Workshop 6: Awards

On 13th November 2021, the penultimate AIP workshop centered on the topic of "*Awards*" was held. This workshop featured Mr. Belden Premaraj (Belden), Mr. Peter Godwin (Herbert Smith Freehills) and Ms. Brenda Horrigan (Brenda Horrigan) as the lecturers, with Ms. Crystal Wong Wai Chin (Lee Hishammuddin Allen & Gledhill) brilliantly moderating the session.

Mr. Premaraj kickstarted the session on arbitral awards where he laid down some of the general requirements in an award. He then explained the different types of awards before walking the participants through how to draft a good arbitration award. He highly encouraged arbitrators to create a checklist on the format and structure of the award at a very early stage and be attentive when proofreading their draft award to ensure that the draft is free of inconsistencies in the positions and rationale taken.

Following from that, Ms. Horrigan then gave a comprehensive overview of the New York Convention and focused on the recognition and enforcement of arbitral awards. She also touched upon some of the common grounds for the refusal of enforcement.

Mr. Godwin then concluded the lecture with a thorough explanation on some of the grounds for setting aside arbitration awards in Malaysia and Singapore. Apart from providing the participants with some great lessons from practice to avoid having awards being set aside, he also provided some key tips to the participants on how to deal with an award that has been set aside.

The panel then discussed the process by which tribunals engaged in deliberations and decision-making, particularly in the context of a 3-member tribunal with differing opinions, and allocation of drafting awards. The panel also emphasised the need to have an early discussion between the tribunal members to ensure the seamless management of the proceedings.

As the topic on awards would be incomplete without addressing the AIAC's technical review process, this session also saw the AIAC's very own Mr. Abinash Barik who shed some light on how the AIAC conducts its technical review process before the final award is signed by the arbitrators. He also shared some of the recommended practices for the conduct of proceedings and drafting of awards.

The tutorials were then conducted in an interactive manner where Mr. Daniel Tan Chun Hao (Tan Chun Hao), Dato' Mureli Navaratnam (Mureli Navaratnam) and Mr. Choon Hon Leng (Raja, Darryl & Loh) provided the participants with a draft award and required the participants to identify the mistakes and errors in the draft award, followed by their respective constructive feedback.

AIP Workshop 7: Case Law Update

The final AIP Workshop took place on the 4th December 2021 on the pertinent topic of "*Case Law Update*". It featured members of the Judiciary namely YA Datuk Nallini Pathmanathan (Federal Court), YA Dato' Mary Lim Thiam Suan (Federal Court), YA Dato' Lee Swee Seng (Court of Appeal), YA Datuk Nantha Balan (Court of Appeal) and YA Dato' Lim Chong Fong (High Court), with Mr. Robert Lazar (Robert Lazar) aptly moderating the session.

The session was kickstarted with YA Dato' Lim's presentation which was centred on the interim measures relating to arbitration proceedings, particularly the interplay of Section 11 and Sections 19 - 19E of the Arbitration Act 2005. YA Dato' Lim focussed on the case of *MCC Overseas Sdn Bhd v Damai City Sdn Bhd* [2021] 1 LNS 160 relating to usage of temporary plant and equipment as well as *MCC Overseas Sdn Bhd v Malayan Banking Berhad & Ors* [2020] 1 LNS 2019 and [2021] 1 LNS 851 relating to a restrain on call against a performance bond.

YA Datuk Nantha then presented on the case of *Sigur Ros Sdn Bhd v Master Mulia Sdn Bhd* [2015] 1 LNS 1094, [2018] 8 CLJ 291 CA and [2020] 9 CLJ 213 FC. His presentation was heavily centred on the setting aside of an arbitral award. Emphasis was also made to the susceptibility of an arbitral award from being set aside if it is found that the rules of natural justice have been breached. In his presentation, YA Datuk Nantha also addressed some of the guiding principles in a setting aside application on the grounds of a breach of natural justice and discussed topical issues such as: (a) whether an arbitrator is entitled to rely on extraneous evidence in rendering his award; and (b) whether a party seeking to challenge an award on the grounds of a breach of natural justice must establish actual or real prejudice.

YA Dato' Lee expanded the topic of setting aside when he presented on the case of *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd* [2016] 1 LNS 1820, [2018] 1 LNS 2053 CA and [2020] 9 CLJ 466 FC and *Garden Bay Sdn Bhd v Sime Darby Property Bhd* [2021] 3 CLJ 751 CA. His presentation was centred on the power on the arbitral tribunal, including the power to draw on its own knowledge and expertise, and how this power can be harnessed without breaching natural justice principles.

YA Dato' Mary Lim presented on the cases of *Protasco Sdn Bhd v Tey Por Yee & Another Appeal* [2018] 5 CLJ 299 FC and *Sudhir Jayaram v Nautical Supreme Sdn Bhd & Ors* [2019] 7 CLJ 395 FC where she discussed the inherent jurisdiction of the court vis-à-vis Section 8 of the Arbitration Act 2005, and the approach in respect of multiple and non-contracting parties. The cases of *Kembang Serantau Sdn Bhd v Jeks Engineering Sdn Bhd* [2016] 2 CLJ 467 and *Orang Business Services (Network) Sdn Bhd v Dealtel (Malaysia) Sdn Bhd* [2019] 1 LNS 771, followed by *BXS v BXT* [2019] SGHC(I) 10, were also discussed to distinguished the court's scope of intervention.

YA Datuk Nallini then closed the session by presenting on the recent Federal Court decision of *Masenang Sdn Bhd v Sabanilam Enterprise Sdn Bhd* [2021] 9 CLJ 1 FC where the issue of the seat of an arbitration was considered in the context of the domestic jurisdiction of the Malaysian courts. She also briefly discussed the issues on the enforcement of arbitral awards which have been set aside at the seat of arbitration as well as the powers of the court when adjudicating on a civil action where two of the parties are privy to a binding arbitration agreement as illustrated in *Protasco Sdn Bhd v Tey Por Yee & Another Appeal* [2018] 5 CLJ 299 FC.

In conclusion, given the great turnout and feedback the AIAC received at the end of every workshop, it is safe to say that the inaugural AIP Workshop Series 2021 has been a tremendous success. This, of course, would not have been possible without the support of all the lecturers and tutors who took the time to share their passion and knowledge on arbitration to practising and aspiring arbitrators in the ADR industry, for which the AIAC is grateful.

CPD POINTS AVAILABLE

AIAC CERTIFICATE IN ADJUDICATION

ASIAN INTERNATIONAL ARBITRATION CENTRE

SAVE THE DATE!

26th MARCH - 2nd APRIL 2022

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

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

UNIT 1

THE APPLICATION OF STATUTORY ADJUDICATION TO THE CONSTRUCTION INDUSTRY

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

UNIT 2

PRACTICE & PROCEDURE OF ADJUDICATION UNDER THE CIPAA

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

UNIT 2A

CIPA REGULATIONS

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

UNIT 3

FUNDAMENTALS OF CONSTRUCTION LAW

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

UNIT 4

THE CONSTRUCTION PROCESS

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

UNIT 5

WRITING ADJUDICATION DECISIONS

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

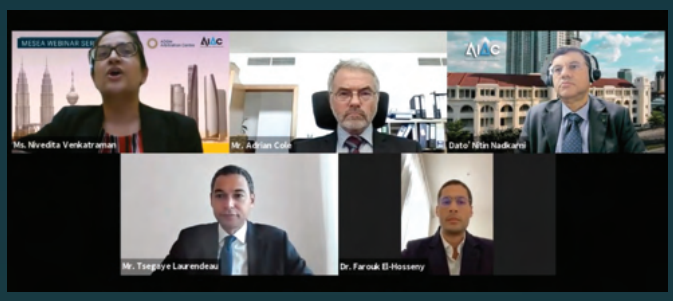
ADGM Arbitration Centre

AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE (MALAYSIA)

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 from May 2021 till November 2021. Under this initiative, five (5) webinars were conducted, focusing on topics that are specific to these regions. A re-cap of the first three (3) webinars was featured in the August 2021 edition of the AIAC Newsletter. A summary of the final two (2) webinars held in October 2021 and November 2021 is below.

Renewable and Non-Renewable Energy Dispute Resolution in MESEA



The fourth webinar of the MESEA Webinar Series 2021 was held on 27th October 2021 on the topic *"Renewable and Non-Renewable Energy Dispute Resolution in MESEA"*. This webinar was moderated by Ms. Nivedita Venkatraman (AIAC) and featured Mr. Adrian Cole (Adrian Cole FZ LLE), Dato' Nitin Nadkarni (Lee Hishammuddin Allen & Gledhill, Malaysia), Dr. Farouk El-Hosseny (Three Crowns) and Mr. Tsegaye Laurendeau (Gaillard Banifatemi Shelbaya Disputes).

This webinar explored the broad definition and general frameworks that exist in energy disputes and provided the arbitrator's and practitioners' perspectives on managing and resolving energy disputes involving both the renewable and non-renewable sectors in MESEA region. The panellists highlighted the duties of an arbitral tribunal in an energy arbitration and elaborated on the distinct features of the tribunal in a commercial arbitration vis-à-vis an investor-state dispute settlement (ISDS) energy dispute. The panellists also provided insights on the different approaches towards managing expert witnesses in an energy dispute given the complexity of such disputes.

The panellists also highlighted the growth of disputes arising in nuclear power and oil and gas projects in various jurisdictions. A comprehensive overview regarding risk strategies and risk management in oil and gas disputes was examined in light of many oil and gas fields reaching their end of life in their respective regions. A discussion on the assessment of damages and the discrepancies between the amount claimed and the amounts awarded in energy disputes was also canvassed. Lastly, the

panellists provided insights regarding the disputes relating to the supply of electricity from renewable and non-renewable sources in Malaysia and Southeast Asia and, in addition, highlighted the significant impact the Belt and Road Initiative has had in the SEA region's electricity supply industry.

On that note, the panellists shared energy industry insights, contemporary legal principles in energy disputes, practical insights and their individual regional experiences in the energy sector. They further highlighted the collective role of disputes practitioners and arbitral tribunals in maintaining business continuity in energy projects which attract significant international and regional investments.

Disputes in Fintech and Complex Technology Sector in MESEA

The fifth and final webinar in the MESEA Webinar Series 2021 was held on 22nd November 2021 on the topic, "*Disputes in Fintech and Complex Technology Sector in MESEA*". The Registrar and the Chief Executive of the ADGM Courts, Ms. Linda Fitz-Alan, together with the Deputy Director of the AIAC, Datuk Dr. Prasad Sandosham Abraham (on behalf of Director of the AIAC, Tan Sri Datuk Suriyadi Bin Halim Omar), delivered the opening remarks for this final session and recognised the strong partnership developed between the ADGMAC and the AIAC in 2021 with a positive view for 2022 joint initiatives.

The webinar was moderated by Ms. Chelsea Pollard (AIAC) and featured Ms. Antonia Birt (Curtis, Mallet-Prevost, Colt & Mosle LLP), Mr. Mark Mangan (Dechert LLP), Mr. Arun Visweswaran (Clifford Chance) and Mr. Jonathan Lim Hon Kiat (Fintech Association of Malaysia).

This webinar first explored the origins and sources of Fintech Disputes in the MESEA region as tech disputes cannot be boxed into a one-size-fits-all categorisation. The panellists highlighted the essential role of intellectual property and related ownership of technology by various parties that has the strongest potential for future disputes, as well as elaborating on the regulatory, legal status and cyber breach risks.

Moving forward and interestingly, the panellists discussed the various types of crypto and artificial intelligence (AI) disputes (almost unlimited in application) and highlighted the five reasons that are catalysts to significant future disputes in this sector: rapid change of technology affecting codes, regulatory oversights, lack of precedence on rights and obligations, vast moving markets with a huge swing in value, and consequences of smart contracts due to lack of clarity in situations of market volatility.

The panellists also highlighted the scope of complex technology disputes in the UAE and the Middle East, which commonly includes, licensing agreements, corporate acquisition of intellectual property rights, and distribution arrangement disputes in the dealings in the complex technology market. Most importantly, the panellists highlighted the mitigation steps that parties may adopt, namely, providing for an arbitration agreement that adopts a 3-member arbitral tribunal appointment, preferably with one arbitrator having necessary technical experience, and providing for a strong confidentiality infrastructure given the fast-moving nature of the technology sector and company secrets' protection.

Lastly, the panellists highlighted the recent Fintech developments since 2017 in Malaysia and Southeast Asia, with new regulatory frameworks in digital banking, cashless payments with respect to digitisation of banking services, and also the regulations of securities, such as digital assets. They also elaborated on the regional strategies and challenges affecting Fintech players, for example, startups and new players, to understand the underlying regulations and engage with the relevant agencies in Malaysia.

On that note, the panellists concluded the session, with shared insights on the risk of multiple forums having jurisdiction over blockchain-based disputes, elements of arbitration as a preferred ADR mechanism, courts having jurisdictions to provide for interim relief in intellectual property and technology disputes and the establishment of future Malaysian ADR framework for Fintech disputes similar to that of Indonesia.

TRENDS IN ARBITRATING ENERGY 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 are publishing a three-part special where leading practitioners will share their insights on trends in arbitrating disputes across a range of industries. Part III of this special publication showcases insights from Dr. Matthew Secomb[1] on trends in arbitrating energy disputes. The excerpts of this interview are below.

1. ***How would you describe your first experience working on an energy dispute and how has the field developed in your region since that time?***

   My first energy dispute was a complex upstream arbitration that I started working on soon after joining White & Case in Paris in 2006. I remember having no idea what was going on. I didn't even know the vocabulary! That seems like a lifetime ago now.

   Over the following decade, I did lots of energy disputes, principally in Eastern Europe and the Middle East (from my Paris base). Then, in 2015, I moved to Singapore and have since then focused on Asia-Pac work.

   The energy disputes field has changed quite a lot in that time. The main change has been the move toward renewables. When I started, it was all oil & gas, along with other traditional energy sources such as nuclear. Wind and solar were very much on the fringes.

   Now, the world has turned 180° – much of the energy disputes work now is renewables of all different types.

2. ***How would you describe your first experience working on an energy dispute and how has the field developed in your region since that time?***

   A good question – Singapore, like everywhere else, has certification standards. But those definitions are highly technical, and more for engineers than lawyers.

   What I think is most interesting are brewing disputes about whether something is 'clean' or 'green'. Being carbon neutral, or otherwise environmentally friendly has itself become a commercial currency. You see this in things like green bonds.

   What we are seeing is commercial disputes based on allegations of 'greenwashing'. That is, disputes about whether ventures are as green as they were represented. This is certainly something new.

[1] Dr. Matthew Secomb is a partner in White & Case's International Arbitration Group in Singapore and heads the group in the Asia-Pacific. He spent ten (10) years in White & Case's Paris office before moving to Singapore in 2015. Dr. Secomb focuses on energy-related and construction disputes and has particular expertise in gas/LNG price reviews, having advised on some twenty (20) reviews in the past five (5) years. He also has significant experience in the renewables space. Dr. Secomb has been involved in arbitrations under most of the major institutional rules, as well as in ad hoc arbitrations. He also acts frequently as arbitrator, having chaired or sat as sole-, co- or emergency arbitrator under various rules (ICC, HKIAC, LCIA, SIAC, UNCITRAL, etc). Dr. Secomb is an Adjunct Associate Professor at the National University of Singapore, where he teaches a course on energy arbitration. Before joining White & Case, he was Counsel to the ICC Court of Arbitration (2001-2005). Dr. Secomb is an avocat at the Paris bar, a solicitor-advocate in England & Wales and a barrister and solicitor in Victoria, Australia.

3. ***Could you describe the main participants in renewable and non-renewable energy disputes and the specific issues each participant faces in such disputes?***

Broadly speaking, we see three main participants in the renewables space.

The first is obviously governments. Each government, in one way or another, is pushing for an expansion of renewables. Some are pushing aggressively for the phasing out of non-renewable energy sources; others are taking a more gradual approach. The main issue they face is finding the right solutions to achieve their Paris Agreement goals with the fewest possible negative externalities, including disputes.

The second is traditional oil & gas and other energy companies. Those companies are in an evolving position. They need to deal with their legacy oil & gas businesses, which are still often fantastically profitable. However, they also acknowledge – and some indeed embrace – the inevitable march toward renewables. Long-term, they aim to compete profitably in the renewables space against the more nimble newcomers. They face disputes on both fronts, although perhaps principally in dealing with their legacy businesses. A good example is the arbitrations arising out of the Dutch government's phasing out of coal-fired power plants.

Finally, you have the more 'pure' renewables investors. The challenge they face is making money in a very crowded space, dealing with constantly evolving regulatory environments.

4. ***What are the common and most contentious claims in relation to renewable and non-renewable energy disputes that are referred to arbitration in your region?***

In the renewables space, we're seeing a broad variety of disputes. Most are driven by the relative novelty of the field. For example, developments often take place under recently drafted and developing regulatory regimes. Equally, renewables technology is constantly changing, which can itself cause disputes.

In the non-renewables space, we're seeing a lot of classic, core, oil & gas disputes. That includes upstream disputes under PSCs, JOAs etc, through to mid-stream pricing and delivery disputes. The rollercoaster commodity prices over the last two years in particular has been a source of many disputes.

5. ***In your experience, are the majority of renewable and non-renewable energy disputes arising in your jurisdiction resolved as investment arbitrations or commercial arbitrations and why? What arbitration frameworks are such disputes typically conducted under?***

Most of the arbitrations that we see are commercial rather than investment. That's not unusual because most energy ventures are governed by long-term contracts with arbitration clauses. That's frequently the case, even if a state or state owned-company is involved.

Generally, investment arbitration is a limited option because you need to meet very specific conditions to make a claim (i.e., state action, a treaty in place etc.).

The data available suggests that the major arbitral institutions still tend to do quite well in administering energy disputes.

6. ***How do you go about selecting which practitioner or topic to feature in each session of your relevant platforms? Is there anything in particular you look for?***

This is hard to say with much certainty. Many disputes are 'direct' COVID-19 disputes (i.e., directly related to the pandemic). Force majeure claims are the best example. Another example is claims dealing with the contractual responsibility for projects delayed by anti-COVID-19 measures.

However, disputes caused indirectly by COVID-19 are harder to determine. It's difficult to filter out pandemic-related issues from the normal chaos of the world business community.

7. ***As a large energy project involves several participants and is often monitored by public interest groups, NGOs and other community stakeholders, what are the procurement, design and engineering issues one should be mindful of to mitigate disputes arising from such projects?***

Good question, but a tough one for a lawyer even if I do a lot of projects disputes. I suppose that generally from a *trend* perspective, ESG is becoming a key part of every business. Good ESG practice should certainly filter through to things like procurement and design.

8. ***How has the role of experts in energy disputes evolved? Is there now a need to engage experts early-on during the dispute resolution process?***

I'm not sure that the role of experts in energy disputes has evolved much, but they are absolutely critical! Most energy disputes turn on their facts and the parties' contract rather than any legal niceties (although legal points can be critical in some cases). Experts can be key in both developing and presenting your case.

And certainly, the earlier experts are retained the better. Experts can play a key role in the client understanding the strengths and – critically – weakness in their case at an early stage. That can be very important in the client taking a realistic 'Goldilocks' approach to settlement discussions (ie, not too bullish, not too bearish – just clear-eyed).

9. *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 renewable and non-renewable energy disputes in your jurisdictions?*

Not exactly my jurisdiction (although I have done a number of Dutch-seated arbitrations), but I think that the Dutch Shell decision has to be the most impactful decision of 2021. That case could be the harbinger of further direct actions against companies around the world (although it may be a false start).

Of course, the Shell decision is public law litigation and not a commercial energy dispute.

10. *What are your thoughts on the modernisation of the Energy Charter Treaty?*

The Energy Charter Treaty was a bold and unique experiment and it has had a large measure of success.

But progress comes through hard work and a desire to constantly improve, and the Energy Charter Treaty is no different; it could definitely benefit from some cleaning up. That is both updating it to take into account new developments, most notably the Paris Agreement, and refining principles based on recent events and experiences.

In my mind, the question is not if, but how, and that's where things get really complicated.

11. *What trends do you anticipate in the coming years in energy arbitrations in your regions? Do you consider there will be an increased uptake of third-party funding for such disputes?*

Certainly, the coming years will see a significant increase in renewables disputes. That's inevitable. And this is not because renewables projects are inherently more disputes prone than traditional oil & gas projects – I don't think that's the case. It's just the level of investment into renewables that will make the difference.

And the role of third-party funding? I certainly see third-party funding increasing in the coming years, and the market for third party funding maturing. However, I don't think that it's a game changer. Disputes are driven by the fundamentals of the economic sector, among other things. Third-party funding doesn't change that.

12. *What advice would you give to those interested in specialising in energy arbitrations in your jurisdictions?*

Spend more time with energy people – particularly commercial people and engineers – and less time with arbitration lawyers!

The trick to working in the energy disputes space is to be an energy lawyer who does disputes, rather than a disputes lawyer who does energy. Thus, you really need to immerse yourself in the energy industry. That can be reading about developments in the industry, attending conferences etc.

KEY INSIGHT

AIAC ADJUDICATORS CONTINUING COMPETENCY DEVELOPMENT (CCD) WORKSHOP SERIES 2021

The AIAC, as the sole administrative authority under the *Construction Industry Payment and Adjudication Act 2012* ("CIPAA"), bears the responsibility of ensuring the competency standard and criteria of adjudicators pursuant to Section 32(a) of the CIPAA. As part of the AIAC's effort to ensure continuous learning and maintaining a competency standard for AIAC-empanelled adjudicators, the AIAC had, at the start of 2021, initiated a new series of workshops entitled "*AIAC Adjudicators Continuing Competency Development (CCD) Workshop Series*". The workshop series was announced by way of the AIAC CIPAA Circular 10 dated 1st January 2021.

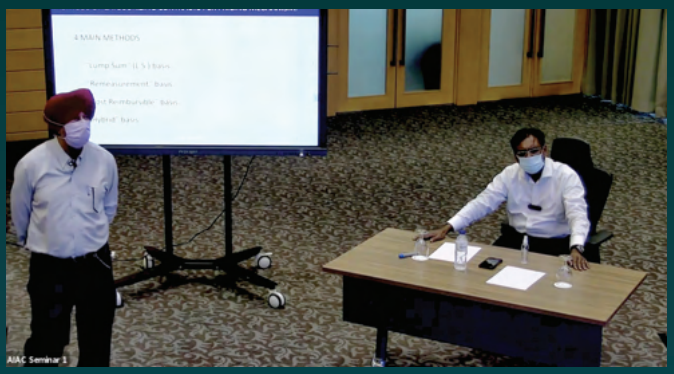
The series comprised of ten (10) lectures taking place throughout the span of ten (10) months from January 2021 to October 2021. These workshops provided the participants, both legally and non-legally trained, the opportunity to engage and participate with the speakers on each of the relevant topics. The workshops also took place virtually in order to follow Malaysia's social distancing efforts while still ensuring that the content was delivered in the most effective way possible.

CCD Workshop 1 - Adjudication Case Law Update

Kickstarting the very first session of the virtual CCD Workshop series, a half-day lecture titled "*Adjudication Case Law Update*" took place on 30th January 2021. Mr. Kevin Prakash (Kevin Prakash Advocates & Solicitors) and Mr. Daniel Tan (Messrs. Tan Chun Hao) participated as Speakers. Ms. Tharshini Sivadass (AIAC) skilfully moderated this session. Both Mr. Prakash and Mr. Tan provided recent updates in respect of case law concerning construction disputes that took place between 2018 to 2020.

As befit the anticipation of the inaugural CCD Workshop series, there were a total of notable thirty-three (33) case law covered in this session, such as, the Federal Court decisions in *Jack-in-Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd* [2020] 1 MLJ 174 on the prospective application of the CIPAA and *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd* [2019] MLJU 742, where the Federal Court decided that a CIPAA claim would survive the termination of a construction contract, to name but a few. The session concluded with lively and engaging question and answer session.

CCD Workshop 2 - Understanding Financial/Payment Documentations in Adjudication



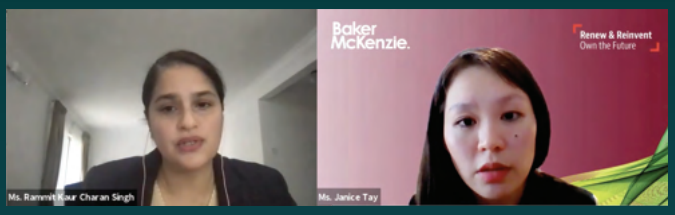
Ir. Harbans Singh (HSKS Dispute Resolution Chambers) and Mr. Ratnalingam Vijayaratnam (KPK Quantity Surveyors (Semenanjung) Sdn Bhd) joined us as Speakers for the second CCD workshop on 27th February 2021 on the topic "*Understanding Financial/Payment Documentations in Adjudication*". The workshop started off with overviews of different categorisations of contracts based on different pricing mechanisms. The speakers then further explained four primary categorisations, namely – lump sum, remeasurement, cost reimbursable and hybrid basis – before they covered the more extensive topics on pricing mechanisms and explained the purpose of bills of quantities and the varying types of bills of quantities.

The speakers then took the opportunity to explain different consultancy contracts and modes of payments vis-a-vis interim valuations and payments that may need to be made for work done. They noted that particular standard form contracts will usually contain a specifically drafted clause governing all aspects of payment in the contract, including interim payment. The speakers also elaborated on the contractual mechanisms of a variation, including the necessary elements such as measurements, timing and the parties to the variations, as well as the computation methods, such as any relevant pricing rates. The substantive portion of the workshop concluded with an explanation about final account and the matters that should typically be addressed in a final account, including any deliverables and any consequences to any default by either party especially in CIPAA adjudication proceedings. The session ended with a short question and answer session where the participants were given the opportunity to raise questions relevant to the topic at hand.

CCD Workshop 3 – Effective Adjudication Decision Writing Skills

The third CCD Workshop was led by Mr. Raymond Boo (Raymond Boo & Co) and Mr. Chong Thaw Sing (3EQ ADR Chambers Sdn Bhd) who presented their lectures on *"Effective Adjudication Decision Writing Skills"*. This workshop took place on 27th March 2021 and delved into the legal and technical aspects of drafting a CIPAA adjudication decision. An effective decision is a decision that is valid and enforceable. First, the speakers went over what constitutes a valid and enforceable adjudication decision. This includes, but is not limited to, procedural compliance with CIPAA from the initiation of the adjudication proceedings until the rendering of the adjudication decision. The speakers also provided a checklist that adjudicators could use as a point of reference when drafting an adjudication decision. Part Two (2) of the workshop focused on practical tips for the drafting of adjudication decisions. The speakers explained that adjudicators should strive for clarity, cogency and certainty.

CCD Workshop 4 – Practical Tips on Handling Particular Procedural Issues in Adjudication



The fourth workshop took place on 24th April 2021 with Ms. Rammit Kaur Charan Singh (Victorious Vie PLT) and Ms. Janice Tay (Wong & Partners) as the speakers. This session was titled *"Practical Tips on Handling Particular Procedural Issues in Adjudication"*. The session started off with an introduction of the adjudicator's powers as provided for under Section 25 of the CIPAA. This was of particular importance since an adjudicator's powers would determine their jurisdiction when handling procedural issues in CIPAA adjudication proceedings. The speakers discussed relevant case law relating to major procedural issues and challenges, and then went into extracting key considerations for an adjudicator to take into account when exercising his or her powers, such as the principle of natural justice, statutory procedures and time limits pursuant to the CIPAA. Procedural points such as conflict checks, exercising and expanding the adjudicator's scope of jurisdiction, and compliance to CIPAA were some of the key discussions during the workshop.

CCD Workshop 5 – Dealing with Loss and Expense Claims in Adjudication

On 29th May 2021, the AIAC conducted the fifth CCD workshop on the topic of *"Dealing with Loss and Expense Claims in Adjudication"* where Mr. Rodney Martin (Charlton Martin Consultants Sdn Bhd) and Mr. John Wong (Charlton Martin Consultants Sdn Bhd) participated as speakers for the session. The session kicked off with an explanation on what accounts for loss and expense are. The speakers then explained different categories of loss and expense in a contract as being actual loss and expense incurred as a result of a breach and agreed rates as compensation for a party's breach. In order to understand the rights to claim for loss and expense under CIPAA, the speakers then went into payment rights under CIPAA and discussed the types of payments and payment disputes that would give someone the locus to adjudicate under CIPAA.

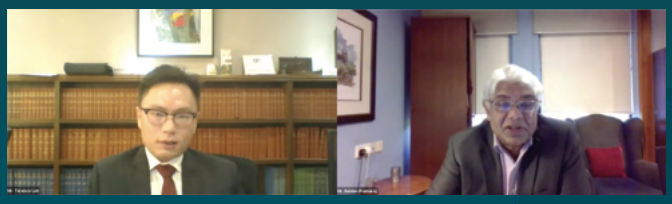
The speakers then went into the ways in which a loss and expense claim may be presented, such as with the use of a "Scott Schedule", the types of contract provisions that detail for loss and expense claims, and the evaluation of loss and expense claims. In general, the speakers explained that the key for a successful loss and expense claim would be dependent on the records that the parties have on hand. The second part of the session also covered how parties and adjudicators should approach the matter of prolongation claims, disruption claims, financing claims and claims for head office overheads.

CCD Workshop 6 - Addressing Completion, Handing Over and Defective Issues

For the sixth CCD workshop, Ir. Leon Weng Seng (Perunding Majucipta Sdn Bhd) and Ar. David Cheah (DCDA Architect) joined us in a session on 26th June 2021 to speak on the topic of *"Addressing Completion, Handing Over and Defective Issues"*. In the first half of the workshop, they presented the cycle of completion of construction works occurring in different stages which include practical completion, sectional completion or partial completion and completion of making good defects.

In the second half of the workshop, the speakers covered the topic of non-completion of works and briefly touched on the issuance of a certificate of non-completion ("CNC") and any claims for liquidated damages. They also went into the ways in which the parties and adjudicator could handle defects in adjudication proceedings, the various types of defects that typically occur in construction work and the legal definition for what amounts to a defect. The session closed off with a short summary of the session's topics and a succinct list of tips for adjudicators handling issues of completion and defects.

CCD Workshop 7 – Handling Jurisdiction and Natural Justice Challenges/Issues



Mr. Belden Premaraj (Belden Advocates and Solicitors) and Mr. Terence Loh (Belden Advocates and Solicitors) joined us as speakers for the seventh CCD workshop on 31st July 2021 titled *"Handling Jurisdiction and Natural Justice Challenges/Issues"*. The speakers opened the session with an introduction on Section 15 of the CIPAA. Section 15 specifically sets out the four grounds that parties may use to apply for a setting aside application at the High Court, including where the adjudication decision has been improperly procured through fraud or bribery, where there has been denial of natural justice, where the adjudicator has not acted

independently or impartially or where the adjudicator has acted in excess of his jurisdiction. The speakers then went into examples of instances where the adjudicator's jurisdiction may be challenged, including where any condition precedent with regards to the adjudication proceedings has not yet been fulfilled.

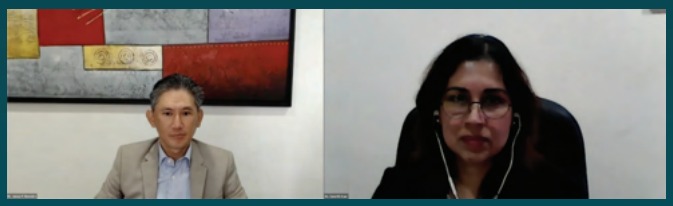
The second half of the workshop focused more on the topic of natural justice. The speakers explained what may be considered as a breach of natural justice and provided examples for conduct that may amount to a breach throughout the course of the arbitral proceedings, including issues during the appointment process and issues that may arise from the adjudication decision itself. The session closed off with practical tips for the conduct of the adjudicator before the speakers took on some questions and engaged with the participants.

CCD Workshop 8 – Addressing Set-off Claims for LAD, Non-completion and EOT in Adjudications

On 28th August 2021, we were joined by Ms. Lynnda Lim Mee Wan (Contract Solutions-i Group) and Mr. Soh Lieh Sieng (Contract Solutions-i Group) who spoke on the topic of "*Addressing Set-off Claims for LAD, Non-completion and EOT in Adjudications*". The session started off with some examples of common issues that are often raised by adjudicators when having to address a set-off claim. In determining whether an adjudicator has the jurisdiction to address such a claim, the first course of action would be to look into Section 25 of the CIPAA and relevant case law. The speakers then shared what in their views are considered to be important considerations when evaluating a set-off claim.

The speakers also then explained any challenges to liquidated damages. It was explained that a challenge of that nature may arise due to several causes, including where time is at large, where no rate has been explicitly stated and where the contractor has failed to observe any timescale already provided.

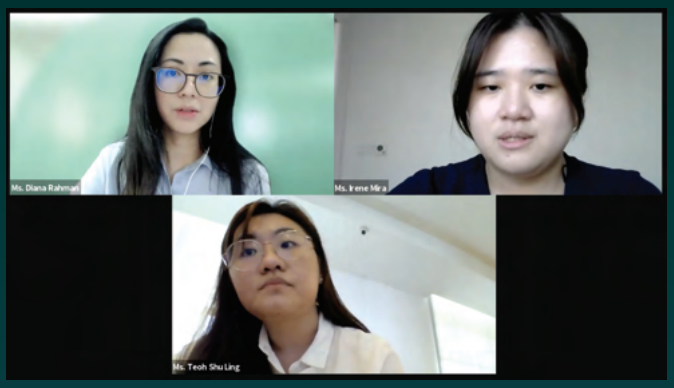
CCD Workshop 9 - Dealing with Claims Involving Insurances, Performance Bonds, Retention Sums, Third Party Works and Design Issues



The ninth CCD workshop for 2021 took place on 25th September 2021 and we were joined by Ms. Samrith Kaur (Samrith Sanjiv & Partners) and Mr. James Patrick Monteiro (James Monteiro). For this session, the speakers tackled the topic of "*Dealing with Claims Involving Insurances, Performance Bonds, Retention Sums, Third Party Works and Design Issues*". The speakers kicked off the session with a general overview of the general provisions under CIPAA, including touching on the scope of CIPAA and the sections that pertain to each submission. Understanding the ambit of CIPAA is necessary in order to understand whether specific claims involving insurance, performance bonds or design issues would have a valid action under CIPAA.

The workshop continued with the speakers going over examples of landmark case law, such as *Syarikat Bina Darul Aman Bhd & Pembinaan Kerry Sdn Bhd v Government of Malaysia* [2018] 4 CLJ 248, where the court ruled that the purpose of the CIPAA cannot only be limited to claims for physical work done, but should include costs which inevitably arise from carrying out the work. The session then moved on to an engaging poll session where the speakers engaged with the participants on questions concerning insurance claims and third party works for the participants to answer. The answers to each question were then discussed, with participants being invited to present their perspectives and reasonings for why they believe a particular answer to be as such.

CCD Workshop 10 – Understanding AIAC's Administrative Procedures, Circulars, and Regulations in Adjudication



The final CCD Workshop conducted on 30th October 2021 was aptly titled, "*Understanding AIAC's Administrative Procedures, Circulars, and Regulations in Adjudication*". This workshop featured the Ms. Diana Rahman (Deputy Head of Legal, AIAC), as well as Ms. Irene Mira (Senior International Case Counsel, AIAC) and Ms. Teoh Shu Ling (Case Counsel, AIAC), all of whom explained the administrative steps from the beginning to the end of an adjudication proceeding under the CIPAA. The speakers also went through the AIAC's internal procedure on matters relating to registration, the appointment of adjudicators, withdrawals, and other ancillary issues to ensure procedural compliance with the CIPAA. The speakers also explained and clarified the contents of the AIAC CIPAA Circulars for the benefit of the parties and adjudicators.

Conclusion

As a whole, the AIAC Adjudicators Continuing Competency Development (CCD) Workshop Series 2021 was a resounding success! It is clear from the attendance rates at these monthly workshops that they were beneficial not just as refresher courses to our users and empanelled adjudicators, but they were provided an excellent platform to gain more knowledge and exchange practical views on matters relating to construction disputes in Malaysia, in general.

EMBRACING INNOVATION
SHAPING EXCELLENCE

ASIAN INTERNATIONAL ARBITRATION CENTRE

The Asian International Arbitration Centre (AIAC) was established under the auspices of the Asian-African Legal Consultative Organization (AALCO) in 1978. The AIAC has a proven track record of 43 years of excellence for the provision of world-class institutional support as a neutral and independent venue for the conduct of domestic and international arbitration and other alternative dispute resolution (ADR) proceedings. Over the last 20 years, the AIAC has actively developed and expanded its products and services for arbitration, adjudication, mediation, and domain name dispute resolution. Known for its efficiency and affordability of its services and facilities amongst users, the AIAC continuously improves its products in order to meet the changing needs of disputing parties. The most recent suite of rules include: -

- AIAC Arbitration Rules 2021;
- AIAC i-Arbitration Rules 2021;
- AIAC Mediation Rules 2018; and
- AIAC Adjudication Rules & Procedure.

AIAC's Rules

WHY AIAC?

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

OUR STATE-OF-THE-ART FACILITIES

A combination of modern innovation and classic heritage, the AIAC is situated in one of Malaysia's most iconic and recently-designated heritage buildings, Bangunan Sulaiman. The AIAC provides a variety of virtual and hybrid hearing solutions where the parties, arbitral tribunals, representatives, experts, witnesses or observers can attend via video conference, from anywhere in the world. Apart from its virtual capabilities, the AIAC also caters to a variety of set-ups for physical and hybrid hearings as well as external corporate events. The AIAC has one of the largest hearing venues internationally and is able to provide these state-of-the-art facilities and services at competitive market rates. AIAC currently offers: -

- Sapphire Extra Large Rooms (with seating capacity between 50 to 100 pax)
- Emerald Series Large Rooms (with seating capacity of 22 pax)
- Lotus Series Medium Rooms (with seating capacity of 14 pax)
- Jasmine Series Small Rooms (with seating capacity between 8 to 10 pax)
- Regent Auditorium (with seating capacity of 200 pax)
- Sutera Medium Seminar Rooms (with seating capacity of 50 pax)
- Rafflesia VIP Lounge (with seating capacity of 80 pax)
- Pavilion Outdoor Foyer
- Lavender Café (with seating capacity of 100 pax).

The venue is also inclusive of high-speed WiFi internet access, audio-visual technical support, free-of-charge parking, free Electric Vehicle (EV) charging stations, secured rooms, and complimentary coffee and tea.

ASIAN INTERNATIONAL ARBITRATION CENTRE

Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia | **T** +603 2271 1000 | **F** +603 2271 1010 | **E** enquiry@aiac.world

SUMMARY OF AIAC'S UPCOMING INITIATIVES IN 2022

Throughout 2021, the AIAC has successfully organised a number of events and launched numerous initiatives, many of which go towards its mission of being an effective provider of capacity building and knowledge dissemination services. In 2022, the AIAC intends to build on this momentum by rolling out a number of new initiatives and events, some of which are described below.

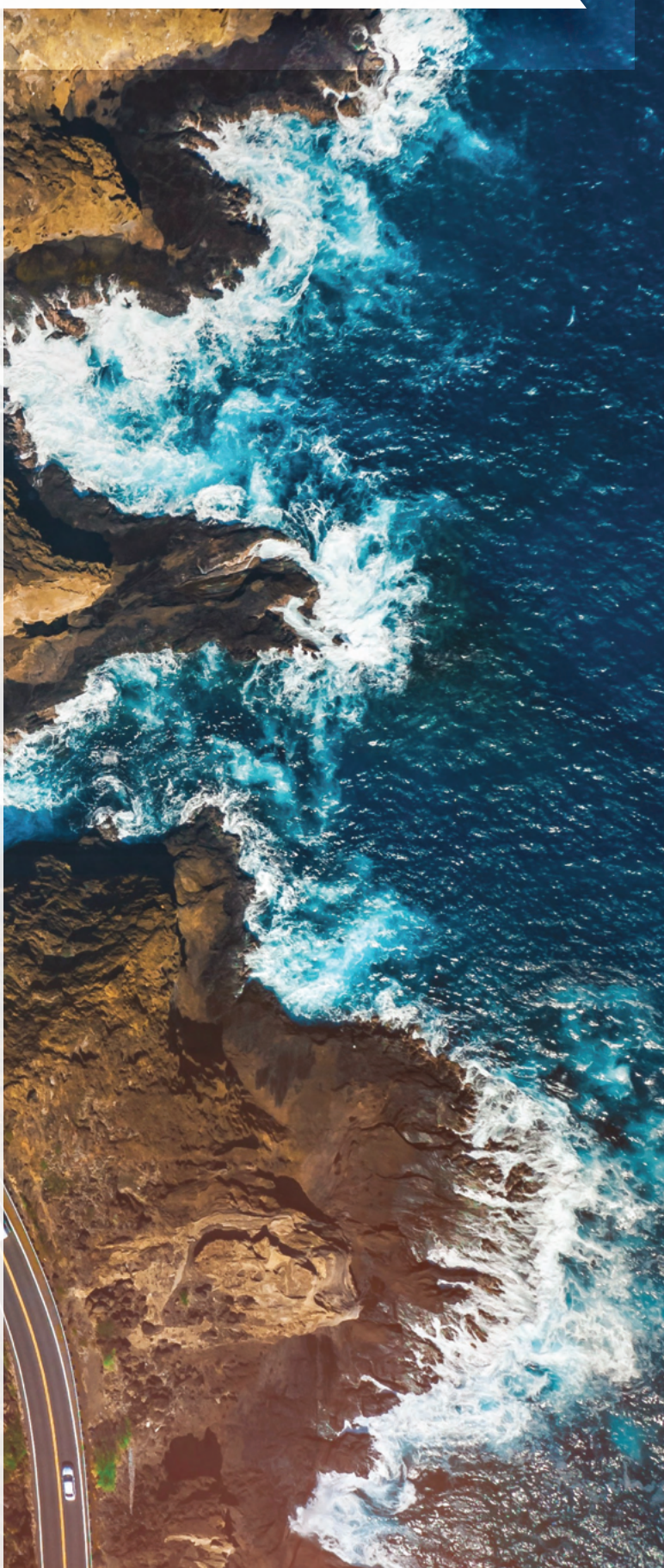
The first of these initiatives is the launch of the "AIAC Academy" which is set to take place in January 2022. The AIAC Academy is poised to provide a platform through its training programs, seminars, workshops, and events with various players to educate, engage in discussions, and exchange ideas, covering a wide range of ADR fields, including international and domestic arbitration, adjudication, mediation, and domain name dispute resolution, as well as other specialised and emerging ADR practices. These programs will be conducted not only at the AIAC's Bangunan Sulaiman, but also in other locations including Sabah and Sarawak, and virtually. Through the AIAC Academy, the AIAC hopes to provide affordable and accessible access to ADR education which in time will be able to positively impact the growth of ADR in the region.

Early 2022 will also see the launch of the Commentaries to the AIAC Arbitration Rules 2021 and the AIAC i-Arbitration Rules 2022. The Commentaries essentially provide background to the relevant amendments that have been made to the rules and the rationale for the same, all from the perspective of the AIAC Secretariat. The Commentaries will also feature checklists on key procedural features of the rules from members of the relevant Rules Revision Committees to ensure that the readers are informed of best practices in the conduct of their proceedings.

On that note, 2022 will also see the AIAC Arbitration Rules 2021 being used for the first time in the 29th Willem C. Vis International Commercial Arbitration Moot in Vienna, Austria and the 19th Willem C. Vis (East) International Commercial Arbitration Moot in Hong Kong SAR. In line with previous years, the AIAC will also be hosting the 6th AIAC Pre-Moot virtually between 18th and 20th March 2022 which is sure to be a spectacular event.

Finally, in May 2022, the AIAC will also be publishing its inaugural AIAC Alternative Dispute Resolution Journal ("AIAC ADR Journal"). The AIAC ADR Journal aims to publish a wide range of pertinent and contemporary issues through the interdisciplinary field of ADR including domestic and international arbitration and other forms of ADR. With a vision to foster a multifaceted platform for abundant discourse on the ADR, the AIAC opens its floor to ADR practitioners, academicians, jurists, and young practitioners to contribute their articles to the AIAC ADR Journal Editorial Team before the 28th February 2022 to be featured in the upcoming editions of the AIAC ADR Journal. To ensure the quality of its publication, the AIAC has set up a Peer Review Board consisting of experienced ADR practitioners where a double-blinded process will take place before the release of its publications. Submission guidelines are available on the AIAC's website.

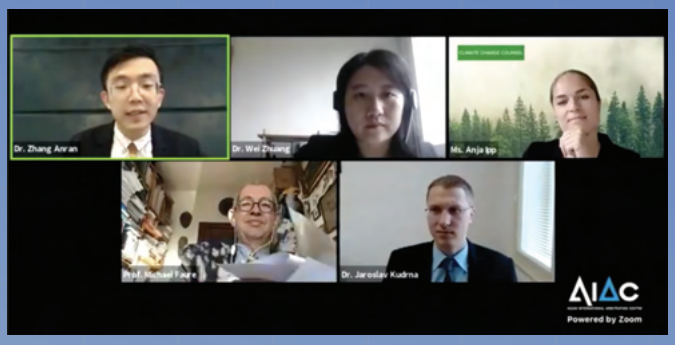
All in all, the first half of 2022 is sure to be action-packed with a number of exciting and thought-provoking initiatives in the pipeline for the AIAC. Please stay tuned to our email blasts and social media updates for further details.



ADR ONLINE
AN AIAC WEBINAR SERIES

The ADR Online – An AIAC Webinar Series was launched during the height of the pandemic in 2020 and spanned over the course of 2020 and 2021. As 2021 comes to a close, the AIAC has decided to end this series in light of the public's interest in coming back together in person as we move into the endemic phase. The final instalments of the series featured pertinent topics, including arbitration's environmental footprint and the use of arbitration to resolve environmental disputes, disputes in the art realm, and finally, closing with the use of mediation in the medical sphere. While the AIAC brings an end to ADR Online, it will ensure that the lessons learned from providing online content, which has allowed us to grow our network exponentially, will remain in our programming. In the coming months and kick-off to 2022, the AIAC hopes to restart its evening talks series at the AIAC's iconic building, Bangunan Sulaiman, and will allow attendees to join in person, as well as virtually. Below is a recap of our final programmes of ADR Online, which are still accessible on the AIAC's Facebook page.

Bridging Theory and Practice: The Footprint of Arbitration to Resolve Environmental Disputes in the Time of Decarbonisation? (26th October 2021)



This webinar was moderated by Dr. Zhang Anran (AIAC), who was joined by prominent speakers including Prof. Michael Faure (Maastricht University & Erasmus University Rotterdam), Dr. Wei Zhuang (United Nations), Dr. Jaroslav Kudrna (Ministry of Finance of Czech Republic) and Ms. Anja Ipp (Climate Change Counsel).

The discussion started with dispute resolution, the various mechanisms available to parties, and the impact of these mechanisms on resolving environmental disputes. The panellists highlighted that obviously, where parties can avoid disputes in the first place, that is ideal; however, disputes are inevitable. Therefore, the mechanism chosen should be not only efficient but also effective in both time and cost. Accordingly, the first attempt should be to try and settle the dispute either informally or through negotiations, which of course, would also be the more environmentally friendly method. Should negotiations fail, then arbitration is the favoured mechanism due to its confidential nature and being able to choose an expert in certain fields pertaining to the dispute and, thus, contribute to a faster dispute settlement, which helps the environment in the long run.

The panellists also discussed the impact of using various dispute resolution mechanisms on the climate. The panellists encouraged law firms to sign and implement the Campaign for Greener Arbitrations. The Campaign is said to categorise environmental impact into procedural impacts and the substance or material impacts. The procedural impact is where all the procedures leading to the arbitration would impact the climate, *inter alia*, transportation to the hearing venue and carbon emission from the printing, light, and air conditioning in the office and hearing venue. An example of substance impact is where deforestation is the outcome of the construction contract. The panellist added that there should be three (3) stakeholders, *i.e.*, the counsels, clients, and climate itself, and all three (3) should always choose to resolve a dispute in a way that is climate-friendly.

The panellists then provided examples of disputes that arise out of decarbonisation from all over the world. The panellists stated that numerous investor-state disputes have arisen from the withdrawal incentives and other regulatory changes in the renewable energy sectors, as demonstrated by solar disputes. There is a significant potential for bringing investor-state disputes against states for their policies to phase out fossil fuels. In addition, the panellists also discussed the US and EU trade remedy measures on Chinese solar panels, WTO disputes, trade remedy disputes and disputes relating to biofuels, and land-use change. According to the panellists, there is also a potential for intellectual property-related issues in such disputes, such as alleged forced technology transfer.

The panellists went on to discuss the Czech Republic experience in investment arbitration concerning investment in the renewal energy sector. The Czech Republic's cases show the underlying tension between legitimate expectations of investors and the State's right to regulate the public interest present in most environmental disputes. Also discussed were the seven (7) Czech Republic's arbitration cases where six (6) have been concluded in favour of Czech and one (1) is still pending. The panellists also suggested that there should be a more comprehensive reform of the current investment protection system to include, *inter alia*, an appeal so that uniform decisions could be made in the arbitration proceedings.

Exploring Art Disputes: Beyond Commercial Arbitration (25th November 2021)

The webinar was moderated by Ms. Nadhirah Syahmi (AIAC), who then introduced the prominent speakers, namely Ms. Noor Kadhim (Armstrong Teasdale LLP) and Ms. Hetty de Rooij (Leiden University), as they explored the new areas of law involving art disputes.

The definition of art law according to the panellists is like art itself – there are various definitions or interpretations. The panellists then proceeded to discuss on various laws are involved in settling art disputes, *inter alia*, tax law, property law, insurance law and other areas of the law depending on the legal system. As art law is a new law, it is rare to see a country to have its own art law. In fact, New York is one of the few countries who have its own laws to cater for art-related disputes.

The panellists also discussed the differences between commercial arbitration and art related arbitration. The major difference lies in the remedy sought by the claimant which usually involves specific performance, restitution and acknowledgement, aside from the ordinary monetary compensation. Art disputes rely heavily on the art experts and, as such, the evidence gathering trajectory is different in art arbitrations than in commercial arbitrations. For the above reasons, the parties would prefer to settle their art disputes by way of negotiation, mediation and arbitration rather than by court proceedings.

The panellists then explored the procedure in the Court of Arbitration for Art (CAfA). The procedures are more or less the same as in any arbitration proceedings except for the fact that in art disputes arbitration, the arbitrator is chosen from a pool of certified arbitrators in the exclusive list which are experts in art law as compared to commercial disputes where the parties are able to choose their arbitrators from a non-exclusive list. Also discussed were various interesting cases involving art disputes such as the fraud case of Angela Gulbenkian.

Medical Mediation: Injecting Trust in the Industry (9th December 2021)

This webinar heavily discussed the use of mediation in the medical field. The panel comprised Ms. Mary Walker OAM (9 Wentworth Chambers), Mr. Oscar Mathew (Medical Mediation Foundation), Dr. Esse Menson (Medical Mediation Foundation) and Ms. Nurulhuda Mansor (Shearn Delamore & Co), with the Ms. Prissilla John (AIAC) moderating the session.

Ms. Walker walked the participants through the medical negligence claims in the litigation arena and the process of medical mediation in Australia. She then shared how mediation in Australia has grown in the last 10 years and what the future of mediation in Australia looks like. A noteworthy point of discussion involved the application of the therapeutic jurisprudence which focuses on problem solving in the context of mediation involving, inter alia, listening and empathy, which had helped parties to resolve disputes in a way that monetary damages would not have been able to achieve. Parties were encouraged to consider opting for mediation in medical negligence claims to cover all aspects, *inter alia*, liability and expert evidence.

The panel then shifted their discussion to mediation in Malaysia where the court in a medical negligence claim would prefer the parties to settle the dispute via mediation at the early stage of the proceedings. This is mostly applicable in cases related to personal injury or tortious acts where monetary claim is involved. It was discussed as well that the success rate of mediation in Malaysia is higher for simpler cases rather than that of complex cases.

The panellists also discussed the benefits of mediation where, in most cases, mediation is able to offer a win-win solution for the parties. Court proceedings, on the other hand, are confrontational in nature and most likely will resolve in one party being the aggrieved one. The creativity of the remedy achieved through mediation is also a plus point for parties when considering mediation in medical negligence cases. Last but not least, and the most important thing, is that mediation is cost effective – parties would enjoy a dispute resolved by way of mediation at a much lower rate than court proceedings.

The panellists highlighted that the most commonly cited causes of conflict in United Kingdom is communication breakdown between the parties, disagreements over treatment prescribed by the doctors, parents "micro" managing their children, and unrealistic demands and expectations from the health care teams. One of the frameworks introduced to resolve conflicts in health and social care is the formal conflict management framework from the Medical Mediation Foundation which aims to de-escalate any conflict, especially in difficult situations.

KEY INSIGHT

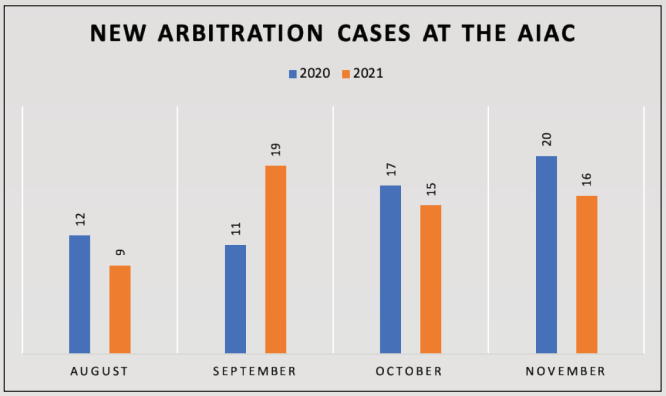
PRELIMINARY CASE MANAGEMENT STATISTICS

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 August 2021 to 30th November 2021. The information presented here is the raw data only.

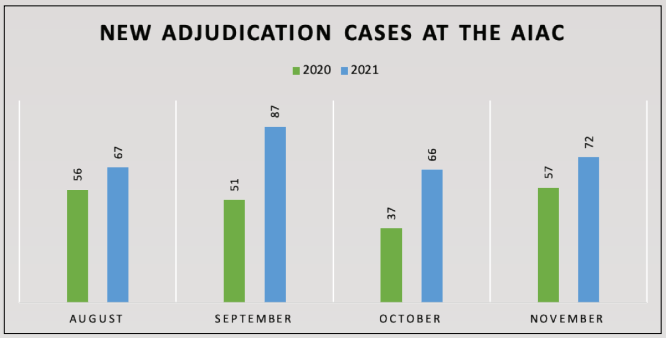
ARBITRATION

Between August 2021 and November 2021, the AIAC received fifty-nine (59) new arbitration cases, fifty-eight (58) of which were domestic arbitrations and one (1) of which was an international arbitration.



ADJUDICATION

Between August 2021 and November 2021, the AIAC received two hundred and ninety-two (292) new adjudication matters.



MEDIATION & DOMAIN NAME DISPUTE RESOLUTION

Between August 2021 and November 2021, the AIAC received no new mediation matters and three (3) 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.

ASIAN INTERNATIONAL ARBITRATION CENTRE

ANNOUNCEMENT
13TH SEPTEMBER 2021

AIAC STANDARD FOR EMPANELMENT AS PANELLISTS

The AIAC Panel consists of diverse alternative dispute resolution professionals from various jurisdictions and backgrounds across the globe.

Admission to the AIAC Panel is by invitation from the Director of the AIAC or by application subject to the consideration and approval of the Director.

If you wish to make an application, please submit the same via our online portal. No fees are payable for empanelment application.

The AIAC's standard requirements for a successful application is set-out below:

For empanelment as an arbitrator:

- aged between 30 to 70 years old;
  tertiary education;
- a minimum of 10 years Post-Qualified Experience in the field of arbitration. In their applications, the applicants must demonstrate their ongoing experience in arbitration whether in their
- capacity as arbitrator and/or counsel. Other relevant experience such as those acquired as tribunal secretary, expert witnesses and other professional undertakings in arbitration practice may be considered by the Director of the AIAC on a case-by-case basis;
- Fellowship or similar accreditations from professional membership organisations in arbitration such as the Chartered Institute of Arbitrators or other organisations akin to such; and
- is not a bankrupt nor convicted of any criminal offence within or outside Malaysia.

For empanelment as an adjudicator:

As the adjudication authority under the Construction Industry Payment and Adjudication Act 2012 (the "CIPAA"), the AIAC is, amongst others responsible for setting the competency standard and criteria of adjudicators, maintaining a register of the AIAC's Panel of Adjudicators and providing training and conducting examinations for an adjudicator.

Empanelment as an adjudicator with the AIAC is subject to Regulation 4 of the Construction Industry Payment & Adjudication Regulations 2014 which states the following:

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

As such, to be empanelled as an adjudicator with the AIAC, the applicants must first fulfil the following criteria:

- participating in AIAC Certificate in Adjudication programme and/or the CIPAA Refresher Course, where applicable and passing the written examination thereafter.
- possessing at least 7 years of working experience in the construction and building industry in Malaysia.

In assessing whether an applicant possesses at least 7 years of working experience in the construction and building industry in Malaysia, consideration will be given to the applicant's experience in the building and construction industry acquired both within Malaysia and overseas over at least seven years. This means that applicants can be considered for empanelment and appointment as adjudicator where they possess fewer than 7 years' experience in the building and construction industry in Malaysia but their cumulative experience in this industry, both within Malaysia and overseas, must total at least 7 years.

In interpreting the phrase, "or any other fields recognized by the AIAC", applicants will be considered for empanelment even where they predominately work in a field other than building and construction, provided they can demonstrate having acquired practical or theoretical experience related to the building and construction industry to some degree of significance. Adjudicators who fall within this category are not exempt from the requirement to have acquired at least seven years of experience in Malaysia as defined above.

The duration and nature of an adjudicator's experience in Malaysia and in the field of building and construction cannot be insignificant. The Director of the AIAC retains the discretion to refuse the empanelment of applicants who fail to demonstrate such sufficient experience.

For empanelment as a mediator:

- aged between 30 to 70 years old;
- tertiary education;
- accreditation as a mediator from recognised professional organisations of global standing; and
- is not a bankrupt nor convicted of any criminal offence within or outside Malaysia.

For empanelment as a domain name dispute resolution (DNDR) Panellist:

- aged between 30 to 70 years old;
- tertiary education;
- a minimum of 10 years Post-Qualified Experience in the field of intellectual property and/or technology law;
- practical experience in domain name dispute resolution, arbitration or other dispute resolution mechanisms; and
- is not a bankrupt nor convicted of any criminal offence within or outside Malaysia.

Applicants may refer to AIAC's Policy on Appointment of Panellists (the "Policy") for further information with regard to empanelment with AIAC.

The Director of the AIAC reserves the right in his/her absolute discretion to admit or refuse the admission of any person to the Panel. In exercising his/her discretion, the

Director of the AIAC will have regard to, inter alia, the qualifications, experience and standing of an applicant. The Director of the AIAC also reserves the right, in his/her absolute discretion, to remove any person from the Panel at any time.

Once appointed, Panellists are bound by the Policy and the following Codes of Conduct:

- AIAC's Code of Conduct for Arbitrators
- AIAC's Code of Conduct for Mediators
- AIAC's Code of Conduct for DNDR Panellists

Absent any further clarifications required, the AIAC Panellist Admin Team will endeavour to communicate the Director's decision on the empanelment application within six (6) weeks from the date of submission of the online empanelment application.

The above information and requirements are in force with effect from 13th September 2021 until the AIAC formally notifies otherwise.

Thank you.

Yours sincerely,

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

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

ASIAN INTERNATIONAL ARBITRATION CENTRE

ANNOUNCEMENT
13TH OCTOBER 2021

CALL FOR PAPERS: AIAC ADR JOURNAL

The Asian International Arbitration Centre ("AIAC") is pleased to announce its proposed publication of the AIAC Alternative Dispute Resolution Journal ("AIAC ADR Journal"). With a vision to foster a multifaceted platform for abundant discourse on Alternative Dispute Resolution ("ADR"), the AIAC ADR Journal invites novel and innovative insights from ADR practitioners, academicians, jurists and young practitioners.

Publications in the AIAC ADR Journal will be subject through a thorough double-blinded peer-review process and is published bi-annually in May and October each year. The members of our Peer Review Board comprises accomplished ADR practitioners as well as academicians with an in-depth understanding and expertise across the field of ADR and the multifaceted and multidisciplinary industries within it.

The AIAC ADR Journal will cover a wide range of pertinent and contemporary issues through the interdisciplinary field of ADR, including amongst others, international and domestic arbitration, mediation, construction adjudication as well as domain name dispute resolution.

The AIAC invites submissions for the inaugural issue of the AIAC ADR Journal from academicians, practitioners, research scholars, and experts from within and outside of the legal community for manuscripts relating to ADR or any other themes relating to the practice, development and enhancement of ADR.

Interested contributors are required to submit abstracts by **30th November 2021**, on the acceptance of which, full papers shall be submitted by **28th February 2022**.

The AIAC ADR Journal Guidelines for Paper Submissions may be accessed here.

For further information regarding the AIAC ADR Journal, please contact the Editorial Team at journal@aiac.world.

Yours sincerely,

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

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

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

***Masenang Sdn Bhd v Sabanilam Enterprise Sdn Bhd* [2021] 6 MLJ 255**

Following the rendering of an arbitral award, the Appellant applied to the Kuala Lumpur High Court for the recognition and enforcement of the award as a judgment pursuant to Section 38 of the Arbitration Act 2005 ("AA 2005"). Unbeknownst to the Appellant, the Respondent had also applied to the Kota Kinabalu High Court to have the award set aside pursuant to Section 37 of the AA 2005. The Appellant subsequently sought to have the application before the Kota Kinabalu High Court set aside on the grounds that the Kuala Lumpur High Court had sole supervisory jurisdiction over the proceeding since the arbitration took place in Kuala Lumpur and the award was made in Kuala Lumpur. The Respondent considered otherwise on the grounds that the cause of action had a nexus to Sabah (the State where Kota Kinabalu is located). At first instance, the Kota Kinabalu High Court found in favour of the Appellant and struck out the Respondent's setting aside application before it. This was reversed by the Court of Appeal which emphasised that the since both the Kota Kinabalu High Court and the Kuala Lumpur High Court had supervisory jurisdiction over the arbitral proceedings, on the grounds that the AA 2005 applied throughout Malaysia, the Kota Kinabalu High Court should have considered the setting aside application before it. Thereafter, the Kota Kinabalu High Court set aside certain portions of the arbitral award and remitted the same to the arbitrator for reconsideration. This decision was then appealed to the Federal Court. The question before the Federal Court was whether the theory of juridical seat is applicable in domestic arbitrations, as it is in international arbitrations, or whether both the Kuala Lumpur High Court and the Kota Kinabalu High Court could exercise separate supervisory jurisdiction over the arbitral proceedings. The Federal Court held that it is the court at the seat of the domestic arbitration that enjoys exclusive supervisory jurisdiction over an arbitral proceeding. Consideration of where the cause of action arose, although relevant to determining jurisdiction in a civil proceeding, is irrelevant in an arbitral proceeding, since such is subject to party autonomy and is also captured in Section 22 of the AA 2005 which prescribes a seat that is neutral to the cause of action.

***Extra Excel (M) Sdn Bhd v Quek Peck Keow* [2021] MLJU 2367**

This decision concerned an appeal against the dismissal of the Appellant's application for a stay of proceedings pending arbitration pursuant to Section 10 of the AA 2005. The main issue concerned a clause in the contract which required the parties to refer any dispute with respect to a suspension under the contract to arbitration within one hundred and fifty (150) days. It was contended that since such a provision contravenes Section 29 of the Contracts Act 1950, which voids any agreement that imposes a time limit after which the parties are restricted from enforcing their rights under the contract "*by the usual legal proceedings in the ordinary tribunals*", the arbitration agreement was null and void. The High Court reinforced that the doctrine of separability is paramount and that the arbitration clause needs to be read separately from other terms in a contract. Since the Sessions Court judge had not turned their mind to the doctrine of separability and given that previous decisions had held that any abridgement of time to refer a dispute to arbitration in an arbitration clause is valid pursuant to the exception in Section 29(2) of the Contracts Act 1950, the High Court held that the appeal should be allowed.

***Vertex Superieur Sdn Bhd & Anor v Shell Malaysia Trading Sdn Bhd* [2021] MLJU 1531**

The Plaintiffs in this case had overlapping claims with regard to the documents to be adduced as evidence and the witnesses to be called to testify. In this case, the 1st Plaintiff and 2nd Plaintiff had separate agreements with the Defendant. The former contained an arbitration clause while the latter did not. Subsequently, the Defendant had applied to stay the proceedings against the 1st Plaintiff pursuant to the arbitration clause and against the 2nd Defendant until final disposal of the arbitration. There was also an alleged corruption offence committed by the 1st Plaintiff against the Defendant. If the arbitration and the trial ran concurrently, the parties would have risked having conflicting judgments. In the interests of the public, the High Court held that for expeditious and economical reasons, the 1st Plaintiff is allowed to circumvent the arbitration clause and be tried together with the 2nd Plaintiff.

***Viridis Engineering Sdn Bhd v RP Chemicals (Malaysia) Sdn Bhd* [2021] MLJU 1914**

The Plaintiff's claim was premised on a breach of contract entered into between the parties wherein at the Plaintiff was to construct a cooling tower basin and also for the supply, installation and commissioning of a cooling tower for the sum of RM3,660,000.00. The Plaintiff claimed that it had duly carried out works in accordance with the contract. On the other hand, the Defendant applied for a stay of the proceedings pending reference to arbitration pursuant to Section 10 of the AA 2005. Given that the arbitration agreement was contained in a separate unexecuted contract, the General Conditions of Purchase, that was subject to a negotiation and the executed contract was the Letter of Intent, the validity of the arbitration agreement was contested. The High Court held that there was no valid and binding arbitration agreement as the Letter of Intent was concluded prior to the General Conditions of Purchase and no intention was manifested to incorporate the arbitration agreement in the latter into the former.

***Lineclear Motion Pictures Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd* [2021] MLJU 1826**

This case concerns the Appellant's/Defendant's appeal to the Court of Appeal against part of the High Court's decision in setting aside an order of the Sessions Court. Specifically, the High Court allowed an appeal, in part, for a stay of proceedings against the Appellant in the Sessions Court, pending arbitration, with the condition that the Appellant shall be precluded from raising the defence of limitation in the arbitration against the Respondent. When the Respondent filed its suit in September 2020 after receiving no response to its' solicitor's letter of demand, it was well within the limitation period. However, time was taken in the setting aside of an application for Judgment in Default ("JID"). To compound matters, by the time the stay application in the Sessions Court was disposed of, by sheer effluxion of time, the matter became time barred if it was to be referred to arbitration. The High Court held that it was apt to impose the condition when exercising its discretion whilst granting the stay of proceedings and no indemnity costs granted as the Appellant only expressed an intention to arbitrate after JID was entered.

***Tanjung Bin Energy Sdn Bhd v Tenaga Nasional Bhd* [2021] MLJU 1691**

In this case, the Plaintiff sought an injunction pursuant to Section 11 of the AA 2005. The injunction concerned a sum of RM191,624,300.74 as Availability Target Payment ("ATP") that the Defendant sought to set off against amounts payable by it to the Plaintiff. Issues arose on whether the court had the power to grant the injunction restraining the Defendant from setting off the relevant sum until such a time as the arbitral tribunal is in a position to determine the matter, and if so, whether the injunction should be granted in all the circumstances. In doing so, the High Court considered if there was a valid arbitration agreement pursuant to Section 2(1) and Sections 9(1) to (5) of the AA. The High Court concluded that the arbitration agreement is valid and binding on the parties and is sufficient to grant the injunction as an interim measure before commencement of the arbitral proceedings. In so much as whether or not the Plaintiff will succeed in its claim, it was held that the question of whether the Defendant is right in postulating that it is entitled to immediate payment and deduct the ATP amount is a matter for the arbitral tribunal's determination.

INTERNATIONAL ARBITRATION

***Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48**

In 2001, the Appellant entered into franchise agreements with Al Homaizi Foodstuff Company ("Al Homaizi"). The Respondent was a holding company that was established in 2005 pursuant to a corporate restructuring – this resulted in Al Homaizi becoming a subsidiary of the Respondent. When a dispute arose under the franchise agreements, the Appellant commenced arbitration proceedings against the Respondent, as opposed to Al Homaizi. The Respondent took part in the arbitration under protest and maintained that it was neither a party to the franchise agreements nor the arbitration agreements contained in them. In the final award, a key question was whether the applicable law to determining whether the Respondent was bound by the arbitration agreements was French law or English law. Simplistically, under French law, the Respondent would be considered as a party to the arbitration agreements; however, under English law, there would have been a "novation by addition" whereby the Respondent would have become an additional party to the franchise agreements, alongside Al Homaizi, by reason of the parties' conduct. By majority, the arbitral tribunal determined that French law applied and that the Respondent was in breach of the franchise agreements. In dissent, one member of the arbitral tribunal considered that English law applied and, in this instance, the Respondent could not be considered a party of the franchise agreements as any novation involving the replacement of Al Homaizi by the Respondent was specifically precluded by strict wording in the agreements. Thereafter, the Respondent sought to have the final award annulled in the French courts whilst the Appellant sought to have the final award enforced through the English courts. In unanimously dismissing the appeal, the UK Supreme Court held that the parties' choice of English law as the governing law also extended to the law governing the validity of the arbitration agreement. Under English law, the Respondent was not a party to the arbitration agreement and thus the arbitration agreement was invalid. As such, the UK Supreme Court refused the recognition and enforcement of the final award pursuant to Section 103 of the English Arbitration Act 1996.

***NWA and others v NVF and others* [2021] EWHC 2666**

The issue in this case was whether the parties' failure to comply with the pre-arbitral conditions would result in the arbitral tribunal not having the jurisdiction to hear the matter, or whether it was a challenge to the admissibility of the matter. In delivering the final award, the sole arbitrator concluded that the agreement between the parties did not make mediation a pre-condition to the arbitration. The Claimants in this case applied to set aside the award. The UK High Court dismissed the enforcement of the award on the basis that the challenge rests with the arbitrator and is not about jurisdiction pursuant to Section 67 of the Arbitration Act 1996.

***Sime Darby Energy Solution Sdn Bhd (sebelum ini dikenali sebagai Sime Darby Offshore Engineering Sdn Bhd) v RZH Setia Jaya Sdn Bhd* [2021] MLJU 1494**

The Respondent was the main contractor appointed by Malaysian Department of Irrigation and Drainage to execute construction works for a project at the Melaka River. In turn, the Respondent appointed the Appellant as a subcontractor to execute certain parts of the works. The Appellant was in the midst of enforcing an adjudication decision against the Respondent when the Respondent had taken steps to refer the dispute to arbitration. Concurrently, the Appellant had also served a statutory notice on the Respondent under Section 466(1)(a) of the Companies Act 2016. In return, the Respondent filed an injunction against the Appellant to restrain the Appellant from winding up the Respondent based on the statutory notice. The Court of Appeal concluded that a just and equitable balance ought to be struck between the rights of a successful litigant in adjudication proceeding in collecting his cashflow expeditiously pursuant to Sections 28 to 31 of the *Construction Industry Payment and Adjudication Act 2012* ("CIPAA") and the rights of the unsuccessful party in the adjudication proceeding to pursue arbitration or court action for a final decision. In this regard, the Court of Appeal held that the lower court should not have granted a Fortuna Injunction in the matter given that the relevant grounds for the same had not been satisfied.

***Puncak Niaga Construction Sdn Bhd v Mersing Construction & Engineering Sdn Bhd and other cases* [2021] MLJU 1824**

The Plaintiff in this case filed applications to set aside an adjudication decision and a stay application pending final determination of the dispute in arbitration. Specifically, the Plaintiff contended that the adjudicator had considered matters in excess of his jurisdiction as the adjudicator had relied upon additional documents that were submitted by the Defendant in the adjudication proceedings – such documents had not previously been sighted by the Plaintiff prior to the Defendant's issuance of the Payment Claim. The High Court held that there is no provision in the CIPAA which expressly prohibits one party from producing any supporting documents which have never been submitted to the other party at the time of filing the Payment Claim. Further, the adjudicator is empowered to order the discovery and production of documents and there is no definition in the CIPAA on what constitutes a "supporting document". As such, even if the adjudicator had placed some degree of reliance on the additional documents, the Plaintiff had not shown that this is tantamount to the adjudicator having considered a premature claim. As such, the applications for setting aside the adjudication decision and staying the enforcement of the same were dismissed and the enforcement of the adjudication decision was allowed.

***Tan Sri Dato' Yap Suan Chee v CLT Contract Sdn Bhd* [2021] MLJU 1964**

In this matter, the High Court was required to consider whether the construction contract entered into by the Plaintiff for the construction work was in respect of a building which is less than four (4) storeys high and wholly intended for the Plaintiff's occupation, within the meaning of Section 3 of the CIPAA. The High Court held that the level of a building is counted as floors and each floor has a plan including the basement. The plans and project description in this matter clearly indicated that the building would have two (2) basements and three (3) floors – this renders the building a five (5) storeys building. Thus, since the Plaintiff was unable to satisfy one (1) of the cumulative elements in Section 3 of the CIPAA, the application was dismissed.

***MRCB Builders Sdn Bhd v SMM Resources Sdn Bhd and another case* [2021] MLJU 1856**

The High Court concluded that the CIPAA does not make a provision allowing the court to vary, alter or sever parts of the adjudication decision. However, in the interests of upholding the intent and purpose behind the CIPAA in facilitating regular and timely payment and to provide a mechanism for speedy dispute resolution through adjudication, the severance of an adjudication decision may be permissible on a case-by-case basis in the interest of justice.

***Integral Acres Sdn Bhd v BCEG International (M) Sdn Bhd and other cases* [2021] MLJU 1889**

The High Court detailed that pursuant to Section 12(9) of the CIPAA, the Evidence Act 1950 does not apply to adjudication proceedings to avoid undue delay as it was the clear intention of Parliament to create an efficient and speedy mechanism to resolve payment claims. In addition, the CIPAA does not require an adjudicator to be legally qualified and have legal practice experience in construction matters. As such, adjudicators may have difficulties in conducting adjudication proceedings which are legalistic in nature. It follows that the adjudication proceedings are not expected to be legalistic, technical and costly. In addition, the High Court held that the adjudicator's powers are conferred upon him by CIPAA. Therefore, an adjudicator is not empowered to adjudicate costs and fees of previous adjudications conducted by the adjudicator who resigned.

***Casinos Austria International Gmbh and Casinos Austria Aktiengesellschaft v Argentine Republic* (ICSID Case No. ARB/14/32)**

The dispute arose out of a revocation of a 30-year gaming license, in the province of Salta, Argentina, granted in 1999 by an Argentine company. It follows that the Argentine company became a subsidiary of the 1st Claimant, which is a subsidiary of the 2nd Claimant. The Claimants established under Austrian laws, brought the claim under the Austria-Argentina treaty. An ICSID Tribunal found in favour of the Claimants that the Respondent was liable for unlawful expropriation. The unlawful expropriation stemmed from regulator's decision to revoke the license on the basis of violations of anti-money laundering laws and arbitrarily transfer the business to new owners. The Tribunal found that the revocation did not comply with the requirements international law sets for an internationally lawful exercise of the host state's police power.

***Pawlowski Ag and Projekt Sever s.r.o. v Czech Republic* (ICSID Case No. ARB/17/11)**

The Claimant commenced arbitration under the Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments. The 1st Claimant is a company established under the laws of Switzerland and the 2nd Claimant is a company incorporated under the laws of Czech Republic. Disputes arose when the Respondent commenced legal proceedings in court against the Claimants regarding density coefficients which was later dismissed on appeal. The Claimant attempted to seek damages on loss of land to develop for a housing complex as the Respondent had destroyed the Claimants' investment by leaving them with agricultural, forest, and recreational lands. An ICSID Tribunal held in favour of the Claimants as the Respondent committed an internationally wrongful act violating Article 4 of the treaty by denying justice claims and fair and equitable treatment.

SAVE THE DATE 2022

11 Jan	Official Launch of the AIAC Academy
29 Jan	AIAC Adjudicators CCD Workshop Series 1
4 Feb	Virtual Mooting Workshop: Procedural Issues
11 Feb	Virtual Mooting Workshop : Substantive Issues
12 Feb	Mediation Workshop 1
18 Feb	Virtual Mooting Workshop : Oral Advocacy Skills
22-28 Feb	RICS AIAC Mediation Online Training
25 Feb	Workshop on the Conduct of AIAC Arbitration
26 Feb	AIAC Adjudicators CCD Workshop Series 2
1-3 Mar	RICS AIAC Mediation Online Training
12 Mar	Arbitration-in-Practice Workshop 1
18-20 Mar	6th AIAC Pre-Moot
19 Mar	CIPAA Refresher Course
26 Mar	AIAC Adjudicators CCD Workshop Series 3
26-30 Mar	AIAC Certificate in Adjudication
2 Apr	AIAC Certificate in Adjudication (Examination)
5-7 Apr	i-Arb Moot Training Workshop (Tentative)
16 Apr	Arbitration-in-Practice Workshop 2
23-27 Apr	Certification Programme in Commercial Mediation
30 Apr	AIAC Adjudicators CCD Workshop Series 4
14 May	Arbitration-in-Practice Workshop 3
21 May	AIAC Open Day
21 May	Mediation Workshop 2
24-26 May	i - Arb Pre Moot (Tentative)
28 May	AIAC Adjudicators CCD Workshop Series 5
31 May	Workshop on the Drafting of Awards in Arbitration
8-15 June	East Malaysia CIPAA Course
11 June	Arbitration-in-Practice Workshop 4
13-17 June	East Malaysia Roadshow
18-22 June	Certificate Programme in Maritime and Shipping Arbitration
25 June	Adjudication CCD Workshop 6

JANUARY

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ASIAN INTERNATIONAL ARBITRATION CENTRE

BANGUNAN SULAIMAN,
JALAN SULTAN HISHAMUDDIN,
50000 KUALA LUMPUR

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

www.aiac.world