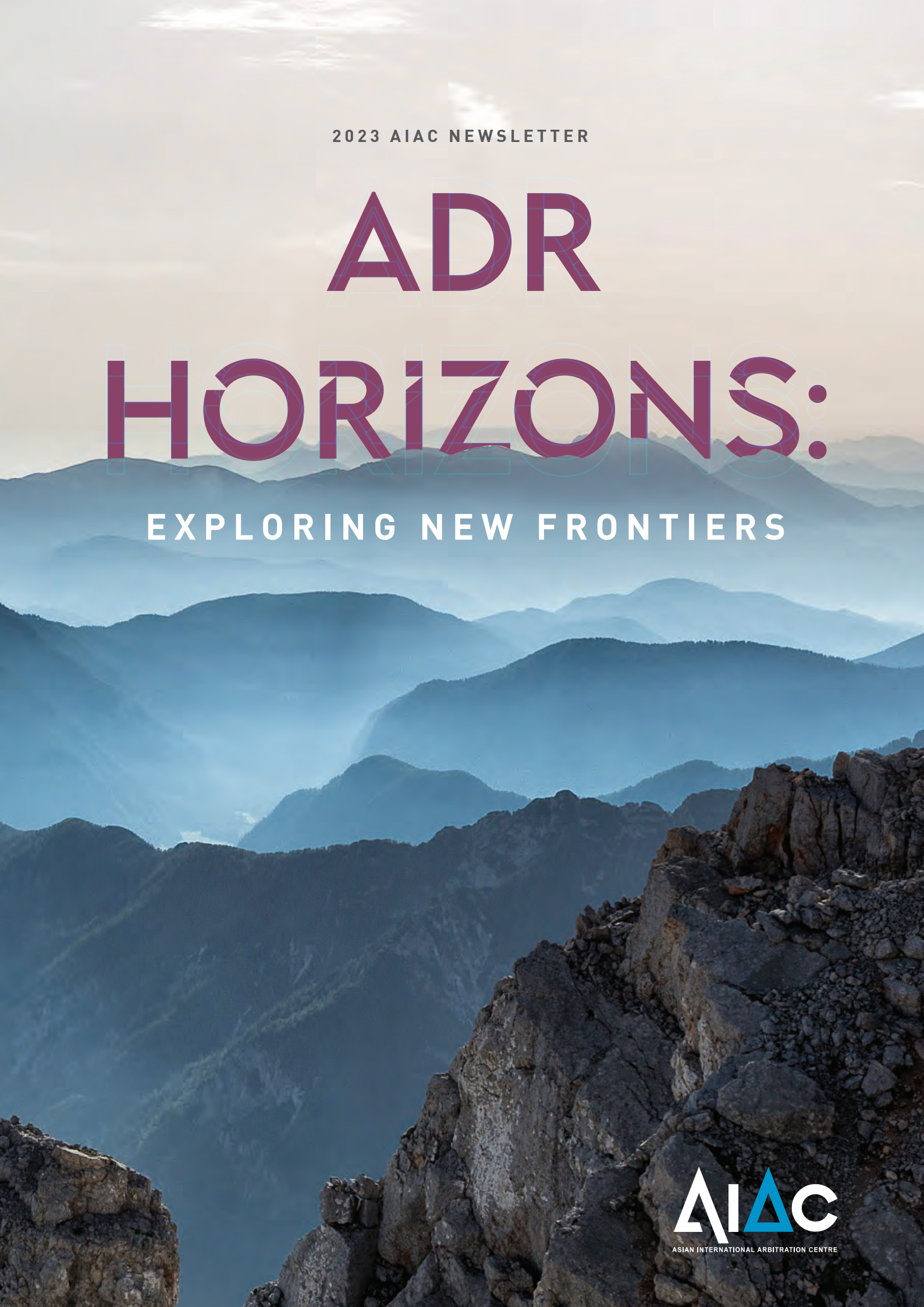
2023 AIAC NEWSLETTER

ADR HORIZONS:

EXPLORING NEW FRONTIERS



AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE

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NEWSLETTER #01

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DIRECTOR'S MESSAGE

It is with great honour that I present to you the May Edition of our Newsletter, which you will find most engaging and illuminating. I am gratified to be at the helm of the AIAC once more, to showcase the full potential of excellence and leadership that the AIAC can provide both locally and on the international stage.

I would like to avail myself of this occasion, to thank the former Director of the AIAC and the AIAC Advisory Council for their devoted service and contribution to the AIAC and its work. Particularly, they have commenced the initiatives towards the second half of 2022 as will be covered in the present Newsletter.

As I step into this role, I am dedicated to building upon the legacy that the AIAC has amassed through its 45 years of existence. By upholding an unwavering commitment to excellence, accomplishment and progress, the Centre will aim to continue to thrive and achieve greater accomplishments.

It must not forget that the AIAC Academy sprung into action after its establishment, by partnering with the Chartered Institute of Arbitrators (Malaysia Branch) to launch the second instalment of its Arbitration-In-Practice (AIP) Workshop Series.

These workshop series, which occurred on a monthly basis from April to November 2022, aimed to provide training for accredited arbitrators, practitioners, and construction

industry players seeking continuous professional development in arbitration. The participation in the AIP Workshop Series from professionals and students of various backgrounds showcased the significant demand for the workshops.

In addition, the AIAC continues its efforts in capacity building in the ADR community also includes organizing informative events, such as the annual AIAC Pre-Moot competition.

Additionally, to ensure ongoing professional development in the construction industry, the AIAC provided the Adjudicators Continuing Competency Development (CCD) Workshop Series. The 2022 series covered crucial issues impacting the construction industry, such as set-off claims, payment documentation, and challenges faced by adjudicators in CIPAA proceedings.

The AIAC will continue to organise multiple roadshows to explore opportunities and re-establish ties with its international stakeholders.

Further, on behalf of AIAC, I would like to express my gratitude to the former Director of the AIAC to lead AIAC in participating in the Dubai Arbitration Week. Attesting that, the AIAC i-Arbitration Rules 2021 will continue to gain traction in the MENA region.

Closer to home, the AIAC has dedicated itself to understanding and promoting ADR in East Malaysia through roadshows in Sabah and Sarawak. Our engagements received strong participation from lawyers, ADR practitioners, and corporate professionals. I look forward to continue working with our partners to provide greater accessibility, training, and practical opportunities for the development of ADR in this region, and further expand our presence globally.

In the upcoming months, the AIAC aims to revitalize itself and become one of the leading Arbitral Institutes in the Asia Pacific region, and becoming the primary ADR hub in Asia. To achieve this goal, the Centre aims to introduce new initiatives such as assisting in reforming the current adjudication scheme, reviewing the current position of the Arbitration Act 2005, AIAC Arbitration Rules 2021 and AIAC i-Arbitration Rules 2021.

Through engagement with stakeholders, the Centre intends to improve accessibility and effectiveness in serving the industry. The AIAC also plans to open a satellite office in Sarawak to better serve the East Malaysia ADR community.

Additionally, the AIAC aims to also expand its commitment beyond Arbitration and Adjudication by establishing itself as an International Mediation Centre that provides training, administration, and certification. The Centre has also been appointed by MYNIC to enhance Malaysia's standing in administering Domain Name Dispute Resolution internationally.

In the upcoming term, I am eager to collaborate with all parties to position Malaysia vide AIAC as premier arbitration destination. This vision can only be achieved with cooperation with the Malaysian Government, local stakeholders as well as the international stakeholders. It is also crucial to establish a solid network between the AIAC and other AALCO centres.

Let's keep an eye out on the opportunities that lie beyond the horizons and forge new paths together as a community.

Till the next issue, happy reading.

Datuk Sundra Rajoo

ROADSHOWS:

SABAH, SARAWAK, PERAK, PENANG

Bridging the East and the West: The AIAC Roadshows in Sabah & Sarawak.

As the world gradually returns to normalcy post the COVID-19 pandemic, the AIAC continued its pursuit of raising awareness on the potential of Alternative Dispute Resolution ("ADR") mechanisms to benefit the communities of Sabah and Sarawak. To realise the AIAC's vision, roadshows were conducted to form strategic relationships with ADR stakeholders in East Malaysia.

Sabah – The AIAC Journey at the Land Below the Wind

The AIAC Roadshow kickstarted in Sabah on 22nd January 2022 in tandem with the Malaysian Judiciary's Opening of the Legal Year at the Promenade Hotel, Kota Kinabalu, The AIAC Roadshow was a joint initiative with the Sabah Law Society.

The Roadshow began with a presentation from Ms. Nivvy Venkatraman, former Senior International Case Counsel of AIAC, on the key features of the recently amended AIAC Arbitration Rules 2021.

Additionally, the showcase highlighted, the AIAC's role and commitment in providing effective administrative support for the various ADR processes. From the capacity building front, the AIAC's continuous effort in empowering arbitrators to reach new levels of excellence through the establishment of the AIAC Academy, a hub for continuing development programs was also highlighted. This phenomenal initiative, combined with a range of cutting-edge products and services, opens up exciting career opportunities for Sabahans in the ADR industry.

The roadshow continued its vigor as what followed thereafter was an open forum, featuring Tan Sri Datuk Suriyadi Bin Halim Omar, (former Director of AIAC) and Datuk Dr. Prasad Sandosham Abraham (former Deputy Director of the AIAC).

The Sabah roadshow serves as a testament to AIAC's commitment in strengthening the ADR ecosystem in East Malaysia.

Sarawak – the AIAC Roadshow at the Land of the Hornbills.

The second roadshow was held in Sarawak, and was officiated by Yang Berhormat Datuk Hajah Sharifah Hasidah Binti Sayeed Aman Ghazali, Deputy Minister in the Premier's Department. The theme of the roadshow was "*The Future of Alternative Dispute Resolution in Sarawak*", and it saw the participation of more than 100 local professionals from various backgrounds, including registered adjudicators and arbitrators with the AIAC. During her keynote speech YB Datuk Hajah Sharifah Hasidah emphasised the importance of minimising legal risks through the adoption of ADR clauses in contracts. The event was also graced by an expert panel of distinguished speakers, including Mr. George A.W Chapman (Sarawak Energy Berhad), Mr. Alex Ngu Sze Shae (Alex, Jason & Co.) and Mr. Satinder Singh Sandhu (Sandhu & Co.).

The Roadshows in Sabah and Sarawak were a resounding success, and the AIAC looks forward to further opportunities to connect and engage with the ADR community in Sabah and Sarawak.

Reassuring the Future: The AIAC Roadshows in the Historical Hubs of Perak and Penang.

Perak – The AIAC Voyage to the Land of Grace

On September 2022, the AIAC Team engaged stakeholders from the city of Ipoh with an interactive knowledge-sharing session at the ballroom of WEIL Hotel. The day-long affair featured the AIAC's recently launched AIAC Arbitration Rules 2021 and AIAC i-Arbitration Rules 2021 (collectively the "Rules"). During the event, members of the audience had the opportunity to ask questions and receive feedback from the AIAC Team on the functionality of the Rules.

This was followed by presentations of our key products, comprising of the AIAC's Standard Form of Building Contracts ("SFC") and Adjudication Rules and Procedures, which were crafted to foster best practices in the evolving construction industry. In February 2023, the Department of Statistics Malaysia reported that the domestic construction sector continues to show steady growth, as much as 15.7%, after two years of incessant decline.[1] Our series of roadshows in turn help supplement this growth by streamlining dispute resolution mechanisms, as provided for under our SFC, to close the gaps in existing building contracts. At the end of the Ipoh roadshow, the AIAC managed to gather valuable feedback for the continuous improvement of our services from more than 50 industry leaders and professionals.

[1] "Quarterly Construction Statistics, Fourth Quarter 2022" (Department of Statistics Malaysia, February 2023) <https://www.dosm.gov.my/v1/index.php?r=column%2FcthemeByCat&cat=77&bul_id=U2JlOStjQWluQitxSnlEYTZ1WFZadz09&menu_id=OEY5SWtFSVVFVUpmUXEyaHppMVhEdz09>

Penang – The AIAC stop at the Pearl of the Orient

Similarly, the reception of the AIAC Roadshow 2022 in Penang on December 2022, was a resounding success. The AIAC Team was joined by more than 120 participants from the northern region of the Peninsula with one goal in mind, to promote and discuss issues concerning the advancement of Alternative Dispute Resolution ("**ADR**").

In appreciation of the groundwork that went into the organisation of the AIAC Roadshow 2022 in Penang, the AIAC also paid courtesy visits to stakeholders whom were integral to the success of the Penang roadshow, including the Penang Bar and the law practices of Messrs Presgrave & Matthews, Ghazi & Lim, Ong & Manecksha and Rosli Dahlan Saravana Partnership. The exemplary hospitality of Penangites facilitated an effective exchange of information in relation to the practicability of our products in the modern-day commercial context. These commercial indicators are pivotal to the development of the AIAC's role in further supporting our stakeholders by providing world-class solutions.

The AIAC recognises the potential for increased inward investments in Malaysia and consistently endeavours to tackle issues faced by users of ADR in resolving disputes from the grassroots level. In doing so, we believe that outreach programmes such as the AIAC Roadshow series will benefit users in utilising the dispute resolution mechanisms to their fullest potential. We take this opportunity to convey our utmost gratitude to you, our supporters, for putting your trust in us.

AIAC IN DUBAI ARBITRATION WEEK 2022

On November 2022, the AIAC had promoted and highlighted the key features of the AIAC Arbitration Rules 2021 and AIAC i-Arbitration Rules 2021 (Islamic Arbitration) to the Middle East region via a roadshow initiative. The roadshow was a successful precursor to the AIAC's presentation on 18th November 2022 for the Dubai Arbitration Week ('DAW') 2022.

His Excellency, Justice Shamlan Al Sawalehi, Court of Appeal Judge & Chair of Arbitration Division of the Dubai International Financial Centre ('DIFC') Courts delivered the Opening Remarks for the DAW 2022. Joining us virtually was the Chief Justice of the DIFC Courts, His Excellency Justice Tun Dato' Seri Zaki bin Tun Azmi. As the Keynote Speaker, His Excellency addressed the benefits of a centralised Shariah Councils or Shariah Advisory Councils. This would be a significant innovation in the development of arbitral rules and procedures as parties will be in a position to elect any centralised Shariah authority to ascertain issues which have not been decided upon – therein reinforcing party autonomy.

The event was held in a 2-pronged structure whereby the first session, *Rethinking Islamic Arbitration: Cohesion of Shariah Principles in AIAC i-Arbitration Rules 2021*, was moderated by Prof. Dr. Georges Affaki (AFFAKI) and featured a panel of esteemed speakers, namely Prof. Dr. Mohamed S. Abdel Wahab (Zulficar & Partners), Mr. Richard Little (Eversheds Sutherland), and Ms. Sharifah Shazuwin (AIAC). The panel expanded upon the Chief Justice's points and illuminated the audience on the benefits of adopting the AIAC i-Arbitration Rules 2021 from the perspective of Rules Revision Committee members and practitioners in the field.

The morning continued with a second session, *A Sign of the Times: Bringing Expediency Back to International Arbitration*, which saw the benefits of expediency through the use of Fast Track Procedures, Summary Determination, and Emergency Arbitration via the recently reinvigorated AIAC Arbitration Rules 2021. The discussion was kicked off with the views of the former Director of the AIAC, Tan Sri Datuk Suriyadi bin Halim Omar, and this was followed by a dialogue between Dr. Hassan Arab (Al-Tamimi & Co.), Mr. Gretchen Siow (AIAC), and Mr. Sayf Eddine Essadik (AIAC) on the potential of the AIAC Arbitration Rules 2021 in reconciling issues on delays and costs in international arbitrations, as well as an analysis on the strengths of Malaysia and the UAE as conducive seats for arbitration from various socio-economic angles. The AIAC is sure to return for more visits to the MENA region as the candle of ADR's future continues to burn a promising light.

AIAC SEPTEMBER SPORTS WEEK 2022

5TH - 9TH SEPTEMBER 2022

FEEL THE FREEDOM

A SPORTS CELEBRATION LIKE NO OTHER!

The AIAC Sports Week 2022 held on September 2022 was a unique event, with a theme that truly embodied the spirit of athletic freedom - "*Feel the Freedom*". As borders re-open and sporting events recommenced, this celebration highlighted some of the most exciting and unique accomplishments of Malaysian athletes in the past year.

The AIAC Sports Week 2022 comprised of three (3) insightful webinars, one (1) live conference, two (2) fitness sessions, and the first-ever AIAC Sports Trivia Night.

The event officially kickstarted with Special Remarks by Tan Sri Suriyadi bin Halim Omar, the former Director of the AIAC with the Keynote Address given by Mr. Abdul Salim Ahmed Ibrahim, the Chairman of WADA's Continental Results Management Panel for Asia & Oceania.

National Heroes Take the Stage!

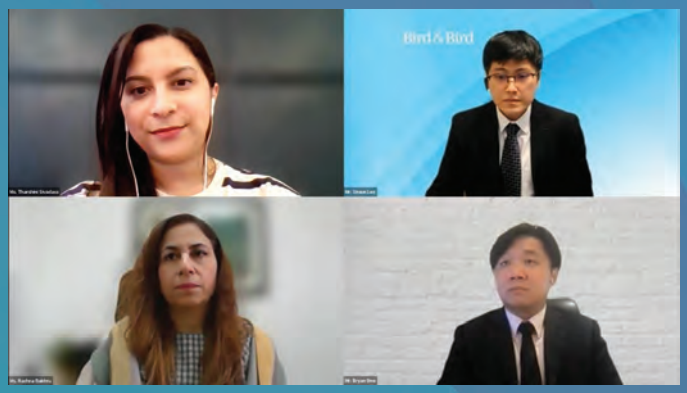
Events then began with a 'Meet the Athletes' session which saw an intimate interview featuring two National athletes, Mr. Harinder Singh Sekhon (National Cricket Player, the current World record holder in Highest Standing Jump) and Mr. R. Shamendran (National Karate Athlete, Gold Medallist at the SEA Games) featuring Astro Arena's Football Presenter, Ms. Elli Famira who led a lively conversation with the athletes on their incredible stories while competing at the pinnacle stage of world sports.

AIAC September Sports Week Webinar Series

Building on the success of last year's AIAC September Sports Week Series, also known as the "Webinar Series", the AIAC continued with thought-provoking panel discussions on key topics in sports dispute resolution. The series included the introduction of the metaverse in sports, a recap of the 2022 Beijing Winter Olympics, a discussion on pro-bono sports counsels, and a special live conference titled "An Ecosystem of Sports: Organising an International Sporting Event" in collaboration with the Olympic Council of Malaysia.

AIAC September Sports Week 2022 - A 'Metaverse' of Madness: A Virtual Parallel World that Will Change the Future of Sports

During this segment, Mr. Bryan Boo of Bryan & Co, Ms. Rachna Bakhru of RNA, Technology and IP Attorney, and Mr. Shaun Lee of Bird & Bird shared their insightful views on the use of technology in sports. The trio discussed the recent advancements in virtual spaces and the potential regulatory issues that come with the sale of non-fungible tokens. The webinar also addressed the pressing concerns of sports tech disputes and the role of technology in the conduct of sports arbitration.



AIAC September Sports Week 2022 - Olympic Recap: 2022 Beijing Winter Olympics

In a historic collaboration, the AIAC and the CAS Ad Hoc Division teamed up to shed light on the disputed competitions at the Beijing Games. The webinar was a first-of-its-kind event that offered an exclusive look into the challenges faced by the panel in providing swift resolution to disputes related to the Winter Olympic Games.

With a line-up of expert speakers, including The Honourable Dr. Tricia Kavanagh (Governor, University of Notre Dame Australia), Mr. Fabio Iudica (Partner, Studio Legale Associato Iudica), and Mr. Simon Xianyue Bai (Managing Partner, Grandall Law), moderated by Mr. Benoît Pasquier (Attorney at Law, BP Sports Law), this webinar was a true powerhouse of legal expertise and insight. These experts shared their insights on the current and future state of sports disputes and the importance of technology in sports arbitration.

AIAC September Sports Week 2022 - In Conversation with Pro Bono Sports Counsels

Mr. Richard Wee (Richard Wee Chambers) and Ms. Susanah Ng (Susanah Ng & Associates), sports law practitioners, took the stage to share their expertise on the pivotal role of Pro-Bono Counsels in the sports industry. With their wealth of knowledge and practical experience, they provided an in-depth analysis of the challenges faced by sports personnel and the importance of having legal representation in the specialised field of sports law. These seasoned speakers shed light on the rights and interests of athletes, as well as the impact that Pro-Bono Counsels have on ensuring their rights are upheld and protected. By providing first-hand insight on their experiences, Mr. Richard and Ms. Ng left the audience inspired and motivated to make a positive impact in the world of sports. The session was an eye-opener on the importance of legal representation and the positive impact it can have on athletes and on the sports industry as a whole.

Special Live Conference

AIAC September Sports Week 2022 - An Ecosystem of Sports: Organising an International Sporting Event

The AIAC Sports Week 2022 in collaboration with the Olympic Council of Malaysia brought together an all-star line-up of trailblazers in the world of sports. This thought-provoking session titled, "An Ecosystem of Sports: Organising an International Sporting Event," moderated by Lesley Lim (Mah Weng Kwai), was a power-hour of expert insights, valuable lessons and exclusive perspectives on the current and future landscape of sports. The session began with Tan Sri Tunku Imran Tuanku Ja'afar, who shared his vision of a sporting nation that is driven by will and mindset, rather than just monetary gains. Members of the panel then added their own unique perspectives and experiences in organizing international sporting events.

AIAC Sports Trivia Night

The AIAC September Sports Week 2022 came to a close with a thrilling sports trivia night, where the sports community came together to put their knowledge to the test. The "AIAC Sports Trivia Night: How Well Do You Know Sports?" was a hit, with sports arbitration practitioners, legal practitioners, sports lovers, and students all joining in on the fun.

With a diverse range of questions covering sports history, sports law, and legendary athletes, the competition was intense, but the atmosphere was light-hearted and filled with laughter. The night was a true celebration of sports, and everyone who participated came away with a greater appreciation of the exciting world of sports.

ASIA ADR WEEK 2022

COMPASSUS

THE ODYSSEAN COURSE TO MODERN ADR

3RD - 8TH OCTOBER 2022

Between 3rd and 9th October 2022, the AIAC held its fourth edition of the Asia ADR Week centered on the theme "*Compassus: The Odyssean Course to Modern ADR*". The theme was a product of an amalgamation of the AIAC's role as a "*Compassus*" - a symbol of finding the right path in navigating through the uncharted terrains of ADR as well as an inspiration from *Homer's Odyssey*, chronicling the adventures of Odysseus, who embarked on a decade long journey to reunite with his kingdom and family. Similar to his journey, the AIAC viewed that the ADR landscape has faced several uncertainties and challenges particularly in recent years.

Holding true to the theme throughout the conference, the AIAC showcased the strides made in its own Odyssean journey and how in facing new challenges, the AIAC continued to serve its mandated role as a compass in guiding practitioners, stakeholders and business in finding their way through conflict resolution.

For the first time ever, the AIAC was proud to feature it's the annual flagship event in a hybrid setting with more than 100 speakers and over 400 participants attending both in person as well as virtually via the Brella platform. The ADR Team also received behind-the-scenes support from the Team Grey Group.

The six (6) day-long conference comprised of three (3) pre-conference days held between 3rd to 5th October 2022. The first pre-event day was titled "Rules Day" where an entire day was dedicated to explore the AIAC i-Arbitration Rules 2021 as well as AIAC Arbitration Rules 2021. The second pre-event day was titled "Contracts Day" and focused on the further development of the Technology Expert Committee Standard Forms as well as the AIAC Standard Form of Building Contracts. The final pre-event day, titled "International Day" where the AIAC had collaborated with several international law firms and organizations to discuss the key distinctive features and commonalities of various region's arbitration procedure with an aim to discover sustainable futuristic outcomes in the ADR landscape.

On 6th October 2022, the AIAC was honoured to be graced with the presence of His Royal Highness Sultan Nazrin Muizzuddin Shah Ibni Al-Marhum Sultan Azlan Muhibbuddin Shah Al-Maghfur-Lah, the Sultan of Perak Darul Ridzuan to deliver His Keynote Address and The Right Honourable Chief Justice of Malaysia, Tun Tengku Maimun binti Tuan Mat whom delivered her special address during the opening ceremony of the Asia ADR Week 2022.

The panel of speakers on the first day of the Asia ADR Week 2022 discussed matters relating to, amongst others, the dichotomy of International Humanitarian Law and International Investment Law following the legal repercussions of armed conflicts towards current international arbitrations; the arbitrability of blockchain related disputes alongside the role of arbitral institutions in reaching its full potential as an administrative body into the cryptosphere; the AIAC's role as an administrative body of Domain Name disputes under MYNIC and ADNDRC; the integration of Artificial Intelligence (AI) into arbitral practice in amplifying the efficiencies of ADR proceedings.

The penultimate session of the first day featured a unique two-pronged session on intricacies of fast fashion and space commerce as well as how its stakeholders could utilise ADR as an efficient and cost saving means to safeguard their businesses whilst retaining their vision and goodwill. The first day was then concluded with a roundtable discussion on Malaysia's strengths as a safe and competent commercial ecosystem.

The second day explored amongst others, a panel session on the deficiencies in the present Arbitration Act 2005 alongside proposed changes in keeping with the development with the world today; a thorough discussion on the various frameworks of Conditional Fee Agreements (CFAs) from different countries perspective; a panel discussion on the possible measures to anticipate and mitigate the risks of parallel proceedings; an discussion on the distinction between Summary Judgement and Summary Determination procedure under the AIAC Arbitration Rules 2021; and a panel discussion on arbitration in the context of human rights, ESG and employment disputes.

The final day of the Asia ADR Week 2022, also known as the CIPAA Conference Day was dedicated to issues pertaining to the *Construction Industry Payment and Adjudication Act 2012* ("CIPAA 2012") featured various sessions including a showcase of the AIAC's adjudication case statistics for April 2021 to April 2022; a stimulating rapid fire debates on three (3) different topics; a panel discussion on the necessary amendments to the CIPAA 2012 and a detailed discussion on the current inflation affecting the construction industry.

With that said, the Asia ADR Week 2022 was once again a remarkable success and on that note, the AIAC wishes to take this opportunity to thank the speakers, moderators, participants, stakeholders, sponsors and supporting organisations without whose support the event would not have been a success!

AIAC YPG CONFERENCE

To Kingdom Come:

DRAWING THE LINE IN DISPUTE RESOLUTION

On 9th March 2023, the AIAC has successfully hosted the annual AIAC YPG Conference 2023 entitled "*To Kingdom Come: Drawing the Line in Dispute Resolution*". The AIAC was graced with the presence of Dr Túlio Di Giacomo Toledo, the representative from the Permanent Court of Arbitration in Singapore, to deliver the keynote address for this Conference. Dr Túlio's keynote remark has offered much insights particularly in respect of the current arbitration landscape *vis-à-vis* the increasing reliance on the automated generated answer from the ChatGPT.

The keynote remark was followed by the first panel discussion entitled "*Sweet Success: Is This Reality or Just Fantasy?*". The first session drew much attention to the enforcement of arbitral awards and its challenges across different countries i.e., Malaysia, Mexico, and civil law jurisdiction. This session comprised of Ms. Kwong Chiew Ee (Rahmat Lim & Partners), Mr. Luis Alberto King Martinez (Angkor Legal), and Mr. Daniel Allen (Mori Hamada & Matsumoto) was moderated by Mr. Naveen Sri Kantha (Lavania & Balan Chambers). The audience was further enlightened when the panel explored various issues pertaining to preserving assets of the other party, *inter alia*, the importance of freezing order, application for interim measures, cross border insolvency, and many more.

The second session entitled "*Your Next Investment in Construction Projects*" witnessed an interesting discourse with respect to the various possible methods in managing disputes with the aim to avoid arbitration or litigation in construction projects. Ms. Janice Tay (Wong & Partners), as the moderator, successfully engaged Mr. Jonathan Lim (Wilmerhale), Ms. Loshini Ramarmuty (Skrine) and Mr. Sam Song (Squire Patton Boggs) to exchange their views and practical experience in maximising the role of Conflict Avoidance Boards, the Construction Industry Payment and Adjudication Act 2012 (CIPAA) and many other ways to prevent the escalation of construction related disputes.

7th AIAC PRE-MOOT

FOR THE WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

10TH - 12TH MARCH 2023

The AIAC had the pleasure to be joined by 26 teams reflecting over 121 participants from 12 countries in our seventh edition of the AIAC Pre-Moot between 10th to 12th March 2023. This year's Pre-Moot marked a significant milestone achieved by the AIAC as we have taken the lead to resume a full-fledge physical hearing in line with our commitment to reconnect with the ADR community post pandemic. Utmost appreciation must be conveyed to our sponsors, supporting organisations, volunteer arbitrators, participants, and the global ADR community for their unwavering supports in bringing to the success of this flagship event.

Sponsors

Platinum Sponsor: Mohanadass Partnership
Gold Sponsors: Ankura
Silver Sponsors:
1. Shearn Delamore & Co.
2. Lee Hishammuddin Allen & Gledhill
3. vargharbChambers

Bronze Sponsors:
1. Chong + Kheng Hoe
2. Tuang, Chu & Co
3. Hanscomb Intercontinental

Supporting Organisations
1. UNCITRAL Regional Centre for Asia and the Pacific
2. Careers in Arbitration
3. China Forum of Financial & Investment Disputes
4. Equal Representation in Arbitration (ERA)
5. Moot Alumni Association (MAA)
6. Transnational Dispute Management (TDM – OGEMID)

Knowledge Partner
1. SCC Online

The first day of Pre-Moot itself witnessed four general rounds of intense and high-spirited oratory battle among these 26 teams in their quests to advance to the Top 16 on 11th March 2023. We wish to congratulate the following teams for the victories in breaking through to the Top 16:

1. Singapore Management University
2. Johannes Gutenberg-Universität Mainz
3. National University of Singapore
4. Handong International Law School
5. National Law School of India University
6. Pontifical Catholic University of Sao Paulo
7. Rajiv Gandhi National University of Law, Punjab
8. Instituto Tecnológico Autónomo de México
9. West Bengal National University of Juridical Sciences
10. The University of Hong Kong
11. Multimedia University
12. San Beda University
13. Universiti Teknologi MARA
14. Universitas Padjadjaran
15. National Law University Delhi
16. Universiti Malaya

The Organising Committee whole-heartedly congratulates the following winners of the 7th edition of the AIAC Pre-Moot:

Teams
1. Champion of the 7th AIAC Pre-Moot: National Law School of India University
2. Runner-up (Mohanadass Partnership Award): Instituto Tecnológico Autónomo de México
3. Third Place (Ankura Award): Rajiv Gandhi National University of Law, Punjab
4. Fourth Place: Universiti Teknologi MARA
5. Winner of the Malaysian Final: Multimedia University
6. Runner-up of the Malaysian Final: Universiti Malaya

Individual Oralists
1. Best Oralist of the Final: Ananya Tangri (National Law School of India University)
2. Best Oralist of the Malaysian Final: Aaron Abishai Andrew (Multimedia University)
3. Best Oralist of the Elimination Rounds (vargharbChambers Award): TONG Hana Hannah Pui Ling (Homma) (The University of Hong Kong)
4. Best Oralist of the General Rounds (Lee Hishammuddin Allen & Gledhill Award): Sebastian Günther Tapiwa Rheinwald (Johannes Gutenberg-Universität Mainz)
5. Runner-up for the Best Oralist of the General Rounds (Shearn Delamore & Co. Award): Sarah Sophie Fait (Johannes Gutenberg-Universität Mainz)
6. 3rd Best Speaker of the General Rounds: Zheng Junxi (Singapore Management University)

Best Memorandum
1. Best Memorandum on behalf of the Claimant (Hanscomb Intercontinental Award): Doshisha University
2. Honourable Mention for Best Memorandum on behalf of the Claimant (Tuang, Chu & Co Award): Rajiv Gandhi National University of Law, Punjab
3. Best Memorandum on behalf of the Respondent (Chong + Kheng Hoe Award): Johannes Gutenberg-Universität Mainz
4. Honourable Mention for Best Memorandum on behalf of the Respondent: Institute of Law, Nirma University

Non-Academic Awards
1. Spirit of the 7th AIAC Pre-Moot: National University of Management
2. Social Media Diva: Universiti Sains Islam Malaysia
3. The Early Bird Team: Rajiv Gandhi National University of Law, Punjab

AIAC ADR ODR Executive Negotiation and Conflict Management Course

The AIAC was excited to host ADR ODR International ("AOI") on the 6th to 8th of March at Bangunan Sulaiman. For the first time out of Dubai, AOI held their Executive Negotiation and Conflict Management Course with both international and local participants. The ability to negotiate can change how one perceives conflict; how you deal with it and can help you resolve the conflicts which arise across all areas of your life. Conducted by Rahim Shamji from the United Kingdom and Dr. Zoe Giannopoulou from Greece. AOI trains both students and professionals in a range of sectors and countries with Civil/Commercial Mediation in U.K. universities.

The first day of the course focused on the Theory of Conflict Management. The participants were taught the correlation between Negotiation and Conflict management, how they supported one another and the examination of several issues which affect negotiations globally. Held interactively, the session saw Rahim and Zoe both internationally accredited Mediators and Negotiators share their experiences and move the participants to think about current events. Also explored was the way to approach negotiations and how to read the parties at the negotiating table. Participants were then provided with a Case Study followed by discussions which saw a diverse range of opinions from the international participants and local participants. Social sessions were organized on each day of the event with participants encouraged to lean on their varied professional experiences and learn about the various negotiating skills and cultures of their counterparts

The following day, the course continued centering on Negotiation Theory and Practice. Here, Rahim and Zoe guided the participants through three different international case studies based on real events. Roleplays for each of the case studies put the participants in the hot seat under the guidance of both Rahim and Zoe who pointed out negotiating tactics, style and pre-negotiation preparation. Through the grueling rounds, the participants were reminded that the approach to a negotiation was different from that of an adversarial system and different approaches were to be taken in negotiating with each individual and entity they represented. A large-scale negotiation roleplay involving cross border issues and multiple parties also forced the participants to think outside of the box and rely on the skills they have learned to ensure that their team successfully obtained all their objectives. Starting off with a rush of offers and uncertainty, the teams gradually found their footing and began proposing effective offers and coming to common ground. The session albeit tiring was one that the participants enjoyed the most.

Concluding the course on its final day, the participants undertook an examination for the accreditation. The examination pitted the participants against each other in pairs requiring them to draw upon all that they had learned over the duration of the course. The examination brief, prepared by Zoe, had also been used by the ICC Paris for their International Negotiation Competition, highlighting the standard the participants were held at. The results of the examination were sent to the AOI Team in the United Kingdom for the assessment and accreditation.

All in all, the Negotiation Course being a relatively new in its kind in Malaysia was a success with participants taking with them essential skills to their respective jobs and delighted that there were now avenues for non-legal methods of dispute resolution available for them. By the end of the course, AOI had crafted the peacemakers of tomorrow having a basic understanding of how conflicts arise, able to critically analyse the use of conflict resolution methods and approaches, understand the cross-cultural issues that can occur during negotiations and familiarization with e-negotiations.

AIAC's Insurance Arbitration Workshop 2023

On 21st March 2023, the AIAC was proud to open the inaugural AIAC Insurance Arbitration Workshop. The workshop was introduced to provide opportunities for participants who are involved in insurance claims or are interested on the mechanics and workings of insurance arbitrations. The workshop caters to insurance professionals, lawyers, arbitrators and even students intending on broadening their knowledge on insurance and reinsurance matters. The workshop saw over 80 participants, of both legally and non-legally trained individuals from various industries.

The Workshop also marked the first official engagement of Datuk Sundra Rajoo as the Director of the AIAC. In his opening remarks, Datuk Sundra quoted the illustrious Professor Ray Turner, who remarked that "*arbitration is not a process frozen in time; it is a living, continually evolving and developing process, which has to keep pace with commercial and other changes.*" Datuk Sundra acknowledged the evolution of arbitration in the ADR industry over the years, recognizing the growing importance and relevance in global commerce. He further stated that the AIAC will focus on establishing an international presence and encouraged everyone to keep a lookout for our exciting upcoming initiatives by the Centre.

The workshop featured 3 informative sessions and brought together prominent industry players and experts in the insurance arbitration field as panellists and moderators.

The 1st Session entitled "*The Nature of Insurance and Re-insurance in Arbitration*" saw a panel of experts composed by Mr. Nagarajah Muttiah (Rosli Dahlan Saravana Partnership), Mr. Sanjay Mohanasundram (Sanjay Mohan), Mr. James Premkumar David (Shaikh David & Co) and moderated by YM Tunku Farik Bin Tunku Ismail (Azim, Tunku Farik & Wong and Malaysian Covener of ARIAS Asia). The panellists covered the vital elements of Insurance and Re-Insurance in Arbitration, including the guidelines on insurance claims to promote a more sustainable approach for disputants to resolve their disputes. The panellists also navigated through the common disputes, issues and pitfalls faced in the field.

Participants learnt about the various aspects of the arbitration process, including how to prepare for an arbitration hearing and how to present evidence. The panel also stressed about the role of the arbitrator and the importance of selecting an arbitrator who is experienced in insurance disputes.

The Session saw a lively participation from the audience with questions posed from both legal practitioners and industry professionals alike. Interestingly, the panel themselves posed a question to the audience of which began a healthy dialogue between the panellists and an arbitrator in the audience.

Following a short tea break a 2nd Session was followed with a deeper dive into more specialised sectors within the field and entitled "*Different Coverage of Insurance (General, Construction, Professional Indemnity/Medical and Maritime) and How Arbitration Comes into Place to Address These Insurance Claims*". This Session saw a panel comprised of Mr. Allister Tan (Drew & Nappier LLC) covering General Insurance, Mr. Phillip Teoh (Azmi & Associates) covering Maritime Insurance, Mr. Lam Ko Luen (Shook Lin & Bok) who spoke on Construction Insurance, Ms. Maidzuara Mohamed (Azim, Tunku Farik & Wong) who covered Medical Insurance and Professional Indemnity and was moderated by Ms. Sharon Chong (Skrine).

The panellists discussed on the existence of arbitration clauses in insurance and re-insurance contracts, standard arbitration clauses, and international insurance contracts. The Panel also followed up on the discussion in the first session on the landmark case of ***Best Re (L) Limited v Ace Jerneh Insurance Berhad (formerly known as Jerneh Insurance Bhd) [2015] 5 MLJ 513.***

The 3rd Session was entitled "*The Key to Drafting Good Insurance Arbitration Decision and Open Forum Discussion on the Insurance Arbitration Scene in Malaysia*" saw a three-person panel comprised of Mr. Sudharsanan Thillainathan (Steven Thiru & Sudhar), Ms. Sitpah Selvaratnam (Tommy Thomas), Mr. Foo Joon Liang (Gan Partnership) and moderated by Mr. Shannon Rajan (Skrine). This session saw the panellists engaged in an interactive dialogue, providing insights on the do's and don'ts in drafting awards in insurance arbitration claims. The session ended with the exchange of views, updates and concerns on the future of insurance arbitration among the panellists and participants.

A key takeaway from the 3rd Session was the importance of understanding one's insurance policy and its specific terms and conditions that are relevant to the dispute. The aim was for the participants to learn how to interpret and apply these terms, as well as how to identify potential areas of disagreement between the insurer and the policyholder.

The workshop ushers in a strong start to the year and AIAC's goal of providing a platform for attendees to interact with experts in the field and learn from their experience and knowledge. Similar enthusiasm was on display throughout the lively Q&A Sessions and the Networking Session that followed the event.

KEEPING UP THE GOOD WORK:

The Exploration of Arbitration in Employment Disputes

The workplace is a venue where lots of things meet – people, ideas, and, unfortunately, conflict. How things are done and how professional grievances are addressed are only a few questions that come into mind when employment dispute resolution is discussed among legal practitioners. Traditionally, these issues were addressed with a straightforward response: "see you in Court!"

However, the legal profession has adapted to the evolving complexities of employment and labor disagreements. Other modes of dispute resolution, such as arbitration, have expanded their reach to fields that have been reserved for more traditional forms of litigation. In this special contribution, the AIAC interviewed Prof. Alexander Colvin,[1] and asked his views on various issues surrounding the unique combination of arbitration and employment disputes.

1. What inspired you to pursue your research on employment arbitration and a cross-national study of workplace dispute resolution systems?

I am Canadian and was trained as a lawyer in Canada, but went to the U.S. to do my Ph.D. I became interested in the American employment law and dispute resolution system because of the striking ways in which it was different from its counterpart in Canada despite the many similarities between the two countries.

At that time, in the mid-1990s, mandatory employment arbitration was becoming a major new workplace dispute resolution practice in non-union workplaces in the U.S. I was particularly interested in developments in non-union workplaces as union representation was suffering continuing declines and it was unclear what might replace its functions in the workplace.

This was an area that spoke to my dual interests as a social scientist specializing in industrial relations and as a labor and employment law scholar. In my subsequent work I have focused on using empirical methods of social science to better understand the function of law and dispute resolution procedures in the workplace.

2. What are your thoughts on the arbitrability of employment disputes and the impact of arbitration on dispute resolution in employment relations?

In the U.S. workplace, arbitration traditionally has come in the form of labor arbitration procedures negotiated by unions and management in collectively represented workplaces. It has served as a very effective alternative to either strikes or going to the courts for enforcing the terms of collective bargaining agreements ("CBA"). Under American legal doctrines there is strong deferral to labor arbitration and a presumption of arbitrability of disputes that are covered by CBA.

Employment arbitration arose more recently and in a very different context. The U.S. Supreme Court in the 1980s had developed new doctrines supportive of arbitration in a wide range of settings including statutory claims. In its key 1991 decision in *Gilmer v Interstate Johnson-Lane*, it extended these doctrines to hold that disputes involving employment law statutes were arbitrable.

[1]Alexander Colvin is the Kenneth F. Kahn '69 Dean and the Martin F. Scheinman '75, 'M.S. '76, Professor of Conflict Resolution at Cornell University's ILR School. Professor Colvin's research and teaching focuses on employment dispute resolution, with a particular emphasis on procedures in non-union workplaces and the impact of the legal environment on organizations. His current research projects include empirical investigations of employment arbitration and cross-national analysis of labor law and dispute resolution. He has published articles in journals such as Industrial & Labor Relations Review, Industrial Relations, British Journal of Industrial Relations, Personnel Psychology, Academy of Management Journal, and Journal of Empirical Legal Studies. He is the co-author of *An Introduction to U.S. Collective Bargaining and Labor Relations* (w/T. Kochan and H. Katz) and of *Arbitration Law* (w/K. Stone and R. Bales). He is an academic fellow of the Labor and Employment Relations Association.

Employers began imposing arbitration agreements on employees as a mandatory term and condition of employment. What became known as mandatory arbitration provided employers with a way to avoid the risk of large damage awards, negative publicity, and high attorney's fees associated with litigation in the courts. The rules of arbitration, such as more limited pre-hearing discovery, also tended to disadvantage employee claimants.

My empirical research has found that employees win less often and recovery fewer damages in mandatory arbitration than they do in court. Plaintiff attorneys are less willing to pursue cases where there is a mandatory arbitration agreement, resulting in fewer cases being brought and less enforcement of employment laws.

The advent of mandatory employment arbitration has been to the advantage of employers and disadvantage of employees, undermining the effectiveness of U.S. employment laws. In my view, the U.S. Supreme Court made a mistake when it held that statutory claims were arbitrable under mandatory employment arbitration agreements.

3. Considering that the subject matter of this field of arbitration involves labor law, is it "preferable" for proceedings to be limited to a domestic setting (whereby the employer and employee are in one jurisdiction) or is it extensive enough to accommodate a dispute of an international nature?

Labor and employment laws tend to vary a lot between countries and there is often a lot of country-specific context to workplace disputes. In general, I think it is preferable that procedures be domestic in their focus.

However, where we have cross-national employment relations, it may be inevitable that international disputes arise and need to be resolved. There have been some international labor agreements negotiated, and it is important that there be mechanisms in place to resolve disputes under them. In my view, arbitration has been most successful in the labor context where workers are represented by a union that negotiates with the employer. Having two sophisticated parties with adequate resources to pursue their cases is critical to the bilateral and party-controlled nature of arbitration.

One of the areas of challenge going forward is issues of labor rights in global supply chains. For these to be protected, we need effective dispute resolution procedures. Arbitration could play a role here, but the involvement of unions that provide collective representation for the workers in the process is essential.

4. What are the necessary skills that an arbitrator specializing in employment law should possess? Does this field demand a particular (or even peculiar) skill set for practitioners?

In the traditional field of labor arbitration, the arbitrator needed to have good judgement and understanding of the industrial relations context. The arbitrator needed to be able to interpret the CBA in a way that reflected the parties' understanding in negotiating the document and also the practices and realities of the workplace. Labor arbitrators in the U.S. have generally been very successful in doing this, resulting in a cadre of trusted neutrals who both labor and management respected and would turn to for help resolving disputes.

Mandatory employment arbitration is very different because it is focused on the resolution of claims of violation of statutory employment laws. A good arbitrator in this area needs to have expertise in understanding the relevant statutes and how the courts have interpreted and applied them. Ideally, a good employment arbitrator would have sound judgement and the ability to produce findings and outcomes similar to what would obtain in the courts.

However, our research results have found that there is a lot of variation in the quality of employment arbitrators. There is evidence that employers are able to gain an advantage in the system by repeatedly having their cases heard by the same arbitrators. Many of the employment arbitrators have backgrounds as management-side attorneys, and they tend to be more likely to rule in favour of employers.

5. What are the most common disputes in employment arbitration (e.g. money claims, misconduct, etc.)? Is there a rising trend of employers and/or employees that resort to arbitration?

Most disputes in mandatory employment arbitration involve statutory claims. The largest group of these are claims of employment discrimination, which constitute about half of all claims in arbitration. A growing group of claims involve wage and hour disputes, either under the federal Fair Labor Standards Act or the various state wage and hour laws.

In the unionized setting, disputes brought through labor arbitration are very different, involving application of the CBA. Many claims involve issues of discipline and discharge, which are generally resolved under the "just cause" standard typically included in the labor contract.

By contrast, in non-union workplaces in the U.S., the standard legal rule is employment at-will, so claims of wrongful discharge cannot succeed unless there is evidence of discrimination or other statutory exceptions to the at-will rule.

6. Do trade unions play a significant role in negotiating arbitration clauses?

Yes, trade unions negotiate arbitration clauses in almost all CBA in the U.S.

Unions like these clauses because they provide a means to effectively enforce the agreement that has been negotiated. Management likes these clauses because they avoid job actions like strikes disrupting production and provides a faster and less costly method of dispute resolution than the courts. Labor arbitration of workplace disputes has proven to be one of the most durable and successful parts of the American industrial relations system.

7. Do you think that an arbitration clause in the employment contract prevents or delays the parties from utilizing judicial relief?

The arbitration clause does prevent the parties utilizing judicial relief under current American law. That was a foundational feature of the system of labor arbitration established by the Supreme Courts 1960 Steelworkers trilogy of cases.

It has also been the general rule for mandatory employment arbitration, with only very limited grounds to be able to obtain judicial review or relief where an arbitration clause is in place.

8. What are the existing advantages that other forms of conventional and alternative dispute resolution ("ADR") possess in terms of employment relations? Are these compatible with the process of arbitration? If yes, should they be incorporated?

There is a lot of consistent evidence that mediation is a very effective ADR process in the employment relations context. It

produces faster, cheaper, and more consensual resolution of employment disputes. If used promptly it can hold the potential to reach a resolution involving a continuation of the employment relationship, something that very rarely happens if the dispute proceeds to arbitration or litigation. Mediation is fully compatible with arbitration and my research indicates that arbitration procedures operate better if mediation is used as a step before arbitration.

Organizations should also consider using in-house grievance procedures before arbitration. If there is a mechanism to get internal review of a decision before it escalates to arbitration, there is greater potential for a positive resolution of the situation involving continuation of the employment relationship. Peer review panels are one type of procedure that is particularly effective. In the most common type of peer review procedure, a panel of three workers and two managers sits together as a panel to decide disputes over disciplinary and discharge decisions. This can have employment relations benefits of involving the workers in decision-making.

9. At this stage of employment arbitration's development, should there already be specialized tribunals dealing with this matter?

Labor and employment laws tend to vary a lot between countries and there is often a lot of country-specific context to workplace disputes. In general, I think it is preferable that procedures be domestic in their focus.

In some countries, there are specialized tribunals that function as a type of public employment arbitration system. The Canadian Human Rights Tribunals are an example of a system that looks a lot like employment arbitration, except that it is established by the government and publicly administered. Similarly, the U.K.'s employment tribunal system is, in many ways, like a public employment arbitration system.

The involvement of the state in establishing these systems results in more of a balance between employer and employee interests compared to the management domination mandatory employment arbitration system in the U.S. In my view, the U.S. would be well served by establishing a public employment tribunal system that replicated some of the strengths we see in the bilateral labor arbitration system while avoiding the dangers of a private employer dominated system like mandatory arbitration.

10. What would be your advice to practitioners who are interested in this field?

For any dispute resolution system to work well, it requires capable and responsible practitioners, in particular professional neutrals who are trusted and respected by the parties. For practitioners interested in becoming arbitrators and mediators, it is important to have expertise and knowledge of the area of practice, but also to develop a reputation for neutrality, good judgement, and fair-mindedness.

For ADR procedures to be effective having the trust of the parties is essential. A reputation for professionalism and neutrality takes time to build, but can be lost quickly from a poor decision or one that indicates bias. Employment disputes are challenging to resolve because they can involve complex relationships, economic pressures, and power imbalances. Becoming an effective neutral skilled in resolving these disputes is challenging and requires dedication, but can be very rewarding if the parties come to trust your expertise and integrity.

FROM THE OPERATING ROOM TO THE HEARING ROOM:
Dissecting Healthcare and Medical Law in Arbitration

1. What are the common subject matters of disputes brought to arbitration concerning healthcare and medical law? Has there been a change in trend as of late, especially with the advent of the COVID-19 pandemic?

Charlaine: The vast majority of medico-legal disputes in Malaysia concern allegations of (i) negligence, (ii) breach of contract and/or (iii) breach of statutory duties. Whilst the Covid-19 pandemic does not seem to have changed the nature of the disputes, there was a slight lull during the initial phases of the national quarantine as a result of the Movement Control Orders in Malaysia.

Romany: Medical disputes often result from a lack of effective communication. There is always a knowledge gradient between a medical practitioner and their patient (the one knowing much more about the subject matter than the other). If the patient feels that they have not received an explanation or assistance after an adverse event, there is a break in trust and this fuels patients to seek legal advice. A doctor who caused quite a severe problem as a result of performing surgery from an incision made in the wrong area confirms that he should have known better but at every step of the way he has been totally transparent, shown humility and done everything in his power to assist his patient to get the requisite treatment needed as a result of his actions. This patient will not feel that it is necessary to resort to litigation.

2. Do you think the existing ADR mechanisms (i.e. mediation and arbitration) in your jurisdiction are sufficient to effectively resolve modern-day medical disputes, in view of the continuous rise of medical technology?

Charlaine: In the 'Access to Justice Final Report' which was published in 1996, Lord Woolf singled out medical negligence as the area which the civil justice system "was failing most conspicuously to meet the needs of litigants". For clarity, the term 'medical negligence' refers to any litigation involving allegations of negligence in the delivery of healthcare, whether by doctors, nurses or other health professionals.

In some jurisdictions like the United States of America and Canada, arbitration has long been recommended as a means to resolve medical negligence (or malpractice) disputes and to unclog crowded court dockets.

However, in jurisdictions such as the United Kingdom, Singapore and Malaysia, there appears to be a preference for mediation compared to arbitration. It is precisely for the reasons adumbrated above that medico-legal disputes are moving towards mediation.

From our experience, claimants yearn for a candid explanation from the healthcare provider on what transpired during the course of the patient's treatment and management. To this end, mediation may be preferred over arbitration given that it affords a certain level of informality and provides the opportunity for the parties to engage in a session of information-sharing – both of which are absent in the courtroom due to its adversarial nature.

In respect of the rapid advancement of technology within the healthcare landscape, my prediction is that whilst it is likely to give rise to a different set of medico-legal disputes, it is unlikely to have significant bearing on the type of dispute resolution mechanisms that are deployed to resolve such disputes.

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3. What is one issue in the medical arbitration realm that you believe is not getting enough attention, and why?

Nurulhuda: Claims by aggrieved patients against doctors and hospitals are usually not brought to arbitration. This could be due to multiple factors such as the absence of arbitration clauses in the contractual framework, lack of awareness, lack of willingness to arbitrate, and the higher costs of arbitration. Further, arbitration may also not be readily accessible by all, especially by aggrieved patients in smaller towns and more remote parts of Malaysia.

Romany: Finding out what the claimant wants and needs from the process is important, rather than simply telling them what they can claim in terms of the law. Mediation, a process where the two disputing parties can come to an agreement on the manner in which their dispute is resolved, including the manner of compensation should be made, makes this more appropriate to their needs (and not the needs of their lawyers). This can serve to preserve the relationship.

I was involved in a mediation once where the patient simply needed to hear the surgeon admit that he had not done a good job in reporting back to his GP and that the surgeon had put measures in place to make sure that this did not happen again. The surgeon, without further prompting of any sort then offered his holiday home for two weeks to the patient and their family as a symbol of good will which was very appreciated by the patient as it made the patient feel that they were considered on equal footing to the surgeon and this approach went a long way to resolve the dispute completely, no payment for damages were need be paid. I do understand that this is difficult for some litigators to comprehend, but we may sometimes forget that our duty to the client is to assist them in resolving their dispute. As practitioners we need to advise them on all the possible ways that this can be done.

4. What are some legal considerations that parties often overlook in medical disputes when resorting to arbitration? How would this affect their case?

Nurulhuda: Parties may overlook the unpredictability of arbitration awards in medical disputes.

In litigation, judgments are based on precedents which are previously decided cases of a similar nature. For example, if a patient suffers from permanent brain injury, the general damages for pain and suffering would be similar to other decisions involving patients with permanent brain injury. Therefore, in the event of liability, there is usually broad consistency in the amount of damages awarded to aggrieved patients in litigation involving similar type cases or injuries.

In arbitration, the arbitrator is not bound by court precedents or other decisions and this could result in unexpected outcomes. However, this is not necessarily a bad thing. Arbitrators may have more flexibility and discretion in making appropriate awards based on the individual needs of aggrieved patients which can benefit these patients, instead of being bound by past decisions.

5. "Some arbitrators are more concerned with politics than justice. These arbitrators are likely to split an award down the middle, no matter how one-sided the evidence may be, so that neither side will be too unhappy."

Do you agree that this is one of the factors that is preventing aggrieved patients from resorting to arbitration? In such a scenario, would litigation be the best avenue to protect the patients' interest?

Romany: The more facts you have as to exactly what led up to and caused an adverse event, the more weighted the sliding scale of negligence is in both directions. I am sure there are times when both parties did something which increased the risk of an adverse event, the question is then, do you decrease the claimant's claim by 50% or do both parties contribution to the adverse event cancel each other out? I guess that depends on whether you are litigating or mediating.

Unfortunately, litigation costs are high and sometimes these costs can equate to the sums claimed and there needs to be a balance commercially in this regard. Mediation costs vastly less than litigation if the proper preparations are done and parties are set up to understand the process completely.

Nurulhuda: In the event of an unsatisfactory outcome, the main difference between arbitration and litigation would be the avenues to challenge the award or decision. Litigation offers an appeal process (of up to 2 tiers), while arbitration awards are generally final and can only be set aside in exceptional circumstances. In this sense, litigation may protect the patient's interest as it offers an opportunity to appeal a "bad" judgment.

6. From your experience, do you think patients are generally well-informed to make their own decision when entering into arbitration agreements with their healthcare providers?

Nurulhuda: There is a diverse range of patients within the community. Whilst some patients are well-informed and can make decisions to enter into arbitration agreements with their healthcare providers, there are many patients who are unable to make such decisions.

Romany: Basic training in mediation skills should start at school level. Unfortunately much time needs to be spent in teaching both the medical practitioners and their patients about how mediation works. I do believe that not knowing and understanding the basics of this tool of dispute resolution, even amongst lawyers themselves who are supposed to be advising their clients on this, is the largest constraint to ADR.

7. The importance of discovery in medico-legal proceedings continues to be a heavily discussed topic. What do you think is the significance of an extended discovery process in medical legal proceedings and how does that affect medical arbitration?

Romany: The process of discovery is required after the close of pleadings and is a process whereby each party lists all the documents that they intend to rely on to prove/defend their case. This also ensures that each party has had sight of the information/documentation which their opponent has so that no one if caught off-guard. Having all the facts is extremely important in medical matters. This usually includes all medical records which necessitate the need to obtain the patient's consent. Historical medical records are needed to negate a pre-existing problem. You also need to know the damages suffered and the extent of them. This means that before you really get stuck into investigating a matter you should really have all the information which would in any event be contained in the discovery document. I personally believe that all parties need all the information available to be able to assess where their respective risks lie. After that, an open, without-prejudice discussion wherein these risks are aired should happen which will serve to both narrow the issues so that the parties can proceed to the argument at trial, or start the settlement negotiations, again, asking the claimant what they actually need and want from this process.

8. In situations where the party to an arbitration agreement dies as a result of medical malpractice, should the arbitration agreement be extended to their family and/or guardian for proper recourse?

Nurulhuda: In the event a party to an arbitration agreement dies as a result of medical malpractice, the estate would normally be entitled to commence or continue the arbitration on his/her behalf. Therefore, it would not be necessary to extend the arbitration agreement to cover the family or guardian of the patient.

Romany: If this is what the family needs, yes. The loss of a breadwinner would be an important claim to a deceased's dependants. If there is an adverse event causing death, this is usually automatically investigated by way of an inquest. The fact that these remedies exist legally should not differ simply because ADR is underway.

9. Do you think arbitration helps promote trust and healthier relationships between patients and healthcare providers? How can the ADR mechanism be improved to support this objective?

Nurulhuda: Any ADR mechanism such as arbitration and mediation generally promote healthier relationships between aggrieved patients and healthcare providers, as the litigation process is more adversarial and public. There is often a breakdown in relationship between patients and healthcare providers both during and after litigation. Often, the reputation of healthcare providers is also tarnished irrespective of the outcome.

There is no "one-size-fits-all" dispute resolution mechanism. There are clearly advantages and disadvantages of both ADR and litigation. Many have heard of arbitration and mediation, but do not know what each entail. Education and creating public awareness of ADR will allow patients to make informed choices on their preferred dispute resolution mechanism.

10. To conclude our discussion, could you share with our interested readers some wisdoms you were imparted with that you continue to apply in building a successful career in medical law?

Charlaine:

(i) Be consistent in keeping legal and technical knowledge up to date.
(ii) Be bold in developing the law in respect of new and upcoming areas.
(iii) Be resourceful in identifying and generating new areas of work.
(iv) Be mindful of our role as an advocate. We are to facilitate, and not frustrate, the administration of justice.

Romany: In the book: "The Psychology of Conflict" by Paul Randolph, it says that only when a party to a dispute feels fully heard can they move to a place where they can contemplate resolution. I think that as a lawyer this is important to know and to be aware of when your client is telling you their story. Ensuring that your client feels heard can make it much easier to assess what it is they actually require.

Nurulhuda: Never stop learning. I continue to apply this in my daily life both inside and outside of work. You can learn in big or small ways. For example, I have always wanted to pursue a postgraduate LLM in Medical Law and Ethics and I am blessed with the opportunity to finally start doing so this year on a part-time basis whilst working full time. In smaller but more practical ways, there are a lot of opportunities to learn - affordable conferences, seminars and free webinars are plentiful and easily accessible. Many legal firms also regularly share legal updates on medical law and other areas of law on social media. I would encourage everyone who has an interest in medical law to take advantage of technology and information available out there to continue learning, always.

CASE SUMMARIES

ADNDRC

Woori Bank Co., Ltd v hys **[Case No.: KR-2200238]**

In this case, the Panel ordered that the disputed domain name to be transferred to the Complainant based on the following reasons. Firstly, the Panel determined that the disputed domain name <woorifinancecoin.com> is identical or confusingly similar to the Complainant's mark <WOORI Finance>. The addition of other terms, "coin" in this case, would not prevent a finding of confusing similarity. Secondly, as the Respondent does not own the relevant trademark in relation to the disputed domain name and has not properly used the disputed domain name, the Panel satisfied that the Respondent has no rights or legitimate interest in the disputed domain name. Thirdly, the Panel found that the Respondent, through the disputed domain name, provided similar services and used the same logo as the Complainant. Thus, the Panel concluded that the disputed domain name has been registered and used by the Respondent in bad faith.

ADJUDICATION

JKP Sdn Bhd v Anas Construction Sdn Bhd and another appeal **[2022] 6 MLJ 503, Court of Appeal**

The present case concerned two appeals against the decisions of the High Court in dismissing the Appellant's applications to set aside the adjudication decision ("**AD**") and allowing the Respondent's application to enforce the AD. The Court of Appeal held that under section 5(2)(b) of the CIPAA 2012, it is mandatory for the Respondent to state in the Payment Claim ("**PC**") the details which identify the cause of action, including the provision in the construction contract to which the payment relates. Thus, the Respondent's failure to state that it was relying on a particular clause of the contract in the PC was a clear manifestation of statutory non-compliance. As a result, the adjudicator has no jurisdiction to adjudicate on the said clause.

Further, the adjudicator had breached the principles of natural justice by unilaterally relying on the unpleaded clause of the contract in making out a case for the Respondent. The adjudicator also committed a material breach of the rules of natural justice by failing to notify or bring to the attention of the parties that he was relying on the unpleaded clause of the contract, which was the basis of his decision to allow the Respondent's claim, without first allowing the parties the opportunity to comment or to take their respective stands.

The Court of Appeal further held that section 25(i) of the CIPAA 2012 does not provide the adjudicator with inquisitorial powers to unilaterally cherry-pick a specific clause of the underlying contract to make out a cause of action for the Respondent. Thus, the Appellant's appeals are allowed with costs.

ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd and other appeals **[2022] 6 MLJ 392, Court of Appeal**

The Appellant had appointed the Respondent as its main contractor to carry out piling works for a project. Disputes arose between parties. The Respondent initiated an adjudication proceeding against the Appellant. Concurrently, the Respondent referred the subject matter of its adjudication to arbitration. The Respondent obtained an adjudication decision ("**AD**") in its favour. The Respondent then applied to the High Court for an order to enforce the AD. It also commenced execution proceedings and served the Appellant a statutory demand under section 466 of the Companies Act 2016. The Appellant therefore applied for a Fortuna Injunction to prevent winding-up petition which it obtained in its favour. The Appellant also applied to set aside and to stay the AD. The High Court allowed the Respondent's enforcement application and dismissed the Appellant's setting aside and stay applications. The Court of Appeal affirmed the decisions in respect of the enforcement and setting aside applications. Nevertheless, the Court of Appeal unanimously granted the Appellant a stay of the AD. It was held that CIPAA 2012 did not prohibit the court from granting a stay of the AD even though it had granted an application to enforce the AD. Requests for stay could be made, and granted, provided the requirements under sections 16(1)(a) and (b) of the CIPAA 2012 were satisfied. The Court of Appeal found that the Appellant, through the combination and cumulative effect of the various considerations, has succeeded in establishing special circumstances in this instant case to warrant a stay.

***Lion Pacific Sdn Bhd v Pestech Technology Sdn Bhd and another appeal* [2022] 6 MLJ 967, Court of Appeal.**

The present case concerned two appeals against the decisions of the High Court in dismissing the Appellant's applications to set aside the adjudication decision ("**AD**") and allowing the Respondent's application to enforce the AD. One of the issues raised before the Court of Appeal was whether CIPAA 2012 has an application to a subcontract whereby its main contract, that was entered into prior to CIPAA 2012 coming into force, formed an integral part of the subcontract. The Court of Appeal held that notwithstanding the nexus between the two contracts, they were still separate contracts with only one common party. The Respondent's claim was based on the subcontract which was concluded after the enactment of the CIPAA 2012. All the rights and obligations of parties arose solely from the subcontract. Thus, both parties could only enforce the subcontract and not the main contract.

The Court of Appeal further dealt with the issue on whether the adjudicator wrongly found that the terms of the subcontract which required the certification of the Respondent's work by the Project Director ("**PD**") of the Ministry of Transportation ("**MOT**") fell within section 35 of the CIPAA 2012. In this regard, the Court of Appeal found that the adjudicator had clearly misconstrued the term 'pay when certified' as being 'pay when paid' in which the latter is prohibited as a conditional payment under section 35 of the CIPAA 2012. Clause 4.1 of the subcontract cannot be construed as a conditional payment clause as the mutual agreement of the parties was that the Appellant's obligation to make payment would only arise upon certification of the works done by the PD of the MOT failing which, the works cannot be considered as having been carried out. The Court of Appeal concurred that CIPAA 2012's prohibition against conditional payment was not intended to replace the certification or valuation to assess the progress of works carried out by the relevant authority for payment to be affected. Thus, the Appellant's appeals are allowed with costs.

DOMESTIC ARBITRATION

***Cockett Marine Oil (Asia) Pte Ltd v MISC Bhd and another appeal* [2022] 6 MLJ 786, Court of Appeal**

The present Court of Appeal case addressed the scope of the court's jurisdiction in an arbitration agreement pursuant to section 10 of the Arbitration Act 2005 ("**the Act**"). The Appellant in this case (Cockett Marine Oil (Asia Pte Ltd)) applied for a stay of proceeding pending arbitration citing that the arbitration agreement has been incorporated by way of a hyperlinked in their contract. In response, the Respondent (MISC Bhd) sought for an anti-arbitration injunction against the Appellant pursuant to Order 29 Rule 1 of the Rules of Court 2012.

The core issues requiring the appellate court's determination were (a) whether there exists an arbitration agreement which sets stage for the operation of section 10 of the Act, and (b) whether it is within the court or tribunal's jurisdiction to determine the existence of an arbitration agreement. Similarly, the Court of Appeal is obliged to ascertain whether there is a *prima facie* case with respect to the existence of the arbitration agreement. If this is answered in affirmative, the court will have to decide whether a stay of civil proceeding ought to be granted.

The Court of Appeal, in relying on the principle propounded in *Ajwa For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625 (Federal Court), affirmed that reference to a document is sufficient to incorporate and create a validly binding arbitration agreement under Section 9 of the Act. In fact, the language of section 18 of the Act is clear in the sense that the court is only entrusted to undertake a *prima facie* assessment in determining the existence of an arbitration agreement. As explained, section 18, in its essence, upholds the cardinal principle of *kompetenz-kompetenz* in which it confers a broad power to the arbitral tribunal in dealing with any objections as to its jurisdiction. Once a *prima facie* determination is made, the matter ought to be stayed and thereafter be referred to arbitration for an in-depth scrutiny to ascertain the actual existence of the arbitration agreement by the arbitral tribunal. The appellate court further opined that it is indisputable that section 10 of the Act imposes a mandatory obligation on the court to stay a proceeding which was found to be within the ambit of an arbitration agreement.

***Ketua Setiausaha Kementerian Dalam Negeri & Anor v Salconmas Sdn Bhd* [2022] 6 MLJ 836, Court of Appeal**

The present case concerns an appeal against the High Court decision in dismissing the appellants' application to set aside the Final Award which was issued by the arbitral tribunal. The appellant substantiated its appeal with three grounds namely, (a) whether the appointment of the arbitrator was res judicata, (b) whether the High Court has erred in holding that the appellants waived their rights to challenge the arbitral tribunal's composition under section 18 of the Arbitration Act 2005 ("**the Act**"), and (c) whether the appellants had failed to satisfy the court that the Final Award should be set aside for violating the public policy of Malaysia.

With regards to the first ground relied by the appellants, the Court of Appeal affirmed the trite position that any objection as to the appointment and composition of the arbitral tribunal must be raised before the arbitrator concerned. In fact, the competency of the arbitral tribunal in determining its jurisdiction and any challenge thereof is expressly enunciated in section 18(1) of the Act (affirmed by the Federal Court in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417). Reiterating the High Court's position, the appellate court held that any objection pertaining to the appointment of an arbitrator and his jurisdiction must be raised before the arbitrator in accordance with section 18 of the Act. Hence, the Appellants' omission in raising such objection constituted a waiver of rights to object under section 7 of the Act. Premised on the reasonings above, the High Court Judge did not err in its finding that the non-compliance with these provisions amounted to a waiver of right to object on the part of the Appellants.

Whilst the Appellants contended that the Final Award is manifestly erroneous as the arbitrator had misconstrued the factual circumstances of this case, the Court of Appeal drew much emphasis on the absence of its jurisdiction to intervene and set

aside the arbitral award on the ground of error of fact or law. As propounded by the Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1, the Act does not prescribe any room for judicial intervention in setting aside the Final Award on the ground of error of fact or law on the face of the award. The arbitrator, ultimately, remains as the master of facts and the court ought to decide any question of law arising from the award with an unqualified acceptance of the finding of facts by the arbitrators.

Taking into consideration of the submissions by both parties, the appellate court found that the Appellants have failed to prove in what way the Final Award is said to create patent or substantial injustice or is manifestly unlawful and unconscionable to the extent of conflicting against the public policy in Malaysia. As such, the application to set aside the Final Award is devoid of merit and hence dismissed by the court.

***Malaysia Resources Corporation Bhd v Desaru Peace Holdings Club Sdn Bhd* [2022] MLJU 3355, High Court**

In a situation where parties have chosen arbitration as their preferred dispute resolution mechanism, should an application for interim measures in relation to the arbitration proceeding be determined by the arbitral tribunal or by the court? Secondly, does the existence of concurrent jurisdiction of the Court and arbitral tribunal to grant interim measure reflect the party's liberty in choosing the forum of their choice when making such application?

At the outset, the High Court acknowledged that both sections 11(1) and 19(1) of the Arbitration Act ("**the Act**") prescribed the court and arbitral tribunal with the jurisdiction to grant interim measures in an arbitration proceeding. With that being said, it appeared that the Act is silent as to which provision ought to prevail over another when it comes to an application for interim measure in relation to arbitration proceeding. If liberal interpretation were to be adopted, both sections 11(1) and 19(1) appeared to confer concurrent jurisdiction to the court and arbitral tribunal in dealing with applications for interim measure. Nonetheless, it is in the present court's position that affirming concurrent jurisdiction would run afoul of the bedrock principles of party autonomy and minimal judicial intervention in an arbitration setting. Under such circumstances, it triggers a need for proper coordination between the court and arbitral tribunal to avoid any undesirable abuse of process and forum shopping by the parties. Hence, it is natural that when parties have adopted arbitration as the primary dispute resolution mechanism, all applications including those pertaining to interim measures should be presented and heard by the tribunal. In short, section 19(1) ought to take precedence over another in situation where arbitration has been chosen as the mode of dispute resolution.

In line with the statutory position in section 8 of the Act, judicial intervention will only take place in most exceptional circumstances to support the arbitration mechanism as a whole. In the absence of any consensus to the contrary, any application for interim measures i.e., security for costs should, by default, be referred to the arbitral tribunal in accordance with section 19(1) of the Act. Premised on the above position, the plaintiff's application for security for cost is dismissed and all cause papers are ordered to be filed before the arbitral tribunal.

INTERNATIONAL ARBITRATION

***Soleymani v Nifty Gateway LLC (Competition and Markets Authority intervening)* [2022] EWCA Civ 1297**

The England & Wales Court of Appeal ("**EWCA**") elucidated the extent to which consumer protection laws, under domestic English law, ought to limit the applicability of arbitration clauses. In this case, the Appellant, Mr Soleymani, appealed against the stay of applications order granted in favour of the Respondent, Nifty. The appeal was granted on the ground that the stay of proceedings, by the lower court, did not determine "the fairness question". Furthermore, the lower court has not, alternatively, directed a trial before the English Court to look into the issues of fairness.

Based on the aforesaid ground, the Court overturned the first instance judge's decision and held that there shall be a trial of the issue of whether the arbitration agreement is null and void in respect of the Governing Law and Gambling Act Claims.

In the context of consumer protection, it is ruled that any arbitration clause incorporated in the consumer contract is generally regarded as unfair due to its detrimental effects on the legal recourse and remedy accessible by the consumers. From a public policy standpoint, the Court emphasised that any decision involving consumers' rights should be disseminated to the public as the outcome of a case often dictates the rights of consumer as a class. Hence, to leave the matter to be decided by arbitration which prides itself in its confidentiality would pose adverse implications towards the consumer protection regime in the UK. In supporting its decision, the appellate court also maintained that the domestic courts stand in a better position to undertake the fairness assessment of the domestic legislations than a foreign arbitrator, albeit acknowledging the *kompetenz-kompetenz* of the arbitral tribunal.

This decision, in essence, affirmed the jurisdictional protection afforded to the consumers in UK, especially in cases where arbitration clause is incorporated to form an integral part of the consumer contracts. With this ruling in place, the consumer's right in having their disputes to be heard by the court would prevail over the jurisdiction of the arbitral tribunal.

***Cour de Cassation,* Appeal No. 20-20.260, 28th September 2022 (Published in the Bulletin of the Court)**

The French highest judicial court, the Court of Cassation, has reaffirmed the independence of the arbitration clause from the rest of the contract. The main issue that the Court of Cassation had to resolve is that in the absence of the law governing the validity of the arbitration agreement, should the arbitration agreement be subject to the *lex arbitri* (law of the seat) or the *lex contractus* (substantive law).

This award was subject to applications before two national courts simultaneously i.e., the French and English. Thus, this conflicted question resulted in two different legal opinions. One from the Court de Cassation in France, which is the case before us, and a second from the United Kingdom Supreme Court in *Kabab-Ji SAL (Lebanon) (Appellant) v Kout Food Group (Kuwait) (Respondent)* [2021] UKSC 48, which will not be referred to in this summary.

The facts of the matter revolved around a Lebanese company which has entered into a Franchise Agreement ("**contract**") with a Kuwaiti company for the duration of 10 years to use and cater for the brand of "Kabab-Ji" in Kuwait. This contract provided for arbitration administered by the International Chamber of Commerce (ICC) and seated in Paris, France, and subjected the contract to English law. After 10 years have elapsed, the contract expired without renewal. Due to restructuring, the Kuwaiti company became part of a new holding subject to Kuwaiti law named Gulf & World Restaurants & Food, which then changed names to Kout Food Group (Kuwaiti Holding). The Lebanese company then initiated arbitration proceeding against the Kuwaiti holding, resulting in an award in the favour of the Claimant i.e., Lebanese company.

Ultimately, the French Court of Cassation in this matter held that the common will of the parties bound the arbitral tribunal unless such will contradicts an imperative rule of French law or French international public order. In this case, the common will of the Parties was apparent through the choice of English law to govern the contract. Nevertheless, the Court held this common will could not reasonably extend to the arbitration agreement, considering the latter is independent of the rest of the contract.

As such, the French law position is clear in this question, the default position in the absence of a common will of the party designating a law to govern the validity of the arbitration agreement is the law of the seat. Consequently, it is incumbent upon either party of the arbitration agreement to prove the contrary if they wish to subject the arbitration agreement to the substantive law of the contract.

COURT OF ARBITRATION FOR SPORT

***Maxim Agapitov v. International Olympic Committee* (CAS OG 20/04)**

The case of *Maxim Agapitov v. International Olympic Committee* was a dispute between a Russian cross-country skier, Maxim Agapitov, and the International Olympic Committee (IOC). The legal issue was whether the IOC was justified in imposing a ban on Agapitov from participating in the Olympic Games in connection with the Russian doping scandal. The ban was based on the IOC's findings that the Russian cross-country skiing and biathlon teams had been involved in systematic doping at the 2014 Winter Olympic Games in Sochi. The IOC had imposed sanctions on the Russian Olympic Committee and banned several Russian athletes, including Agapitov, from participating in the Olympic Games. Agapitov challenged the ban before the Court of Arbitration for Sport (CAS), arguing that he was an individual athlete who had never been found to have committed a doping offence and that the ban violated his right to participate in the Olympic Games. The CAS initially ruled in favour of the IOC, finding that the ban was justified.

Agapitov then filed an application with the CAS's Ad hoc Division in July 2021. The Panel found that the evidence submitted by the parties was sufficient to demonstrate that Agapitov met the criteria established by the IOC to receive an accreditation (in the sport of weightlifting) in the Olympic Games Tokyo 2020, despite an anti-doping rule violation (ADRV) was committed in 1994, at the time of his athlete's career. The Panel considered that the criteria in case of any ADRV committed at any time in an athlete's life was clearly disproportionate. As a result, the Panel ruled in favour of Agapitov, affirming his eligibility to participate in the Olympic Games and ordering the IOC to reinstate his accreditation for the Games.

***Manchester City F.C v. UEFA* (CAS 2020/A/6785)**

Manchester City Football Club (Manchester City FC) brought a case against the Union of European Football Associations (UEFA) before the Court of Arbitration for Sport (CAS) regarding a ban imposed by UEFA for violating financial fair play (FFP) rules. Manchester City FC argued that the UEFA's decision was arbitrary and that the club had not been provided with a fair trial. UEFA banned Manchester City FC from participating in the Champions League for two seasons and fined the club 30 million Euros. The CAS ruled that Manchester City's appeal was inadmissible, which meant that the club could not challenge UEFA's decision before the CAS. The CAS determined that Manchester City FC has not exhausted all the remedies available to it before the UEFA body responsible for enforcing the FFP rules. As a result, the ban and the fine imposed by UEFA stood, and Manchester City FC was unable to participate in the Champions League for two seasons. The case highlights the importance of complying with procedures in sports disputes and the limitations on the jurisdiction of the CAS.

A year later, CAS overturned the ban with respect to the breach of the UEFA's Financial Fair Play (FFP) regulations and failure to cooperate with an investigation by the governing body of European football's Club Financial Control Body (CFCB). As a result, the club were free to compete in UEFA competitions, but were fined €10m for failing to cooperate.

***Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India,* PCA Case No. 2016-07 (updated in 2022)**

Cairn Energy v. India involved a long-running dispute between the Scottish oil and gas company, Cairn Energy and the Indian government over the imposition of a retrospective capital gains tax on the former's 2006-07 restructuring. In 2006-07, Cairn Energy transferred the assets of its Indian subsidiary to a new company, Cairn India Limited, in order to list the subsidiary on the Indian stock exchange. The Indian government later imposed a retrospective capital gains tax on the transfer, arguing that it was a disguised sale of shares that should have been taxed as income.

Cairn Energy challenged the retroactive application of the tax, arguing that it violated the principles of certainty, predictability, and consistency in tax law. The case was initially heard in Indian courts, but Cairn Energy later initiated international arbitration proceedings under the India-UK bilateral investment treaty. In December 2020, the international arbitral tribunal ruled in favour of Cairn Energy and ordered the Indian government to pay the company damages of over $1 billion. The tribunal found that the retrospective tax was discriminatory and in breach of the bilateral investment treaty. The Indian government has refused to comply with the award and has taken measures to prevent the enforcement of the award in India and abroad.

However, in 2022, Cairn Energy announced that it had withdrawn all lawsuits against India in order to receive a tax refund of INR 7,900 crore (approximately USD 1.06 billion). The withdrawal of the lawsuits by Cairn Energy marks a resolution of the long-running dispute and highlights the challenges faced by foreign investors in navigating India's tax regime. The case had attracted significant international attention as a test of India's commitment to international investment rules and the enforceability of investment treaty awards.

***Alejandro Diego Díaz Gaspar v. Republic of Costa Rica* (ICSID Case No. ARB/19/13)**

Alejandro Díaz Gaspar v. Costa was a case filed by the Claimant, Ibérico, a company incorporated in Costa Rica to purchase a poultry processing plant, against the government of Costa Rica at the International Centre for Settlement of Investment Disputes (ICSID). The claims in the case arose from allegations that the actions of Costa Rica's health agencies led to the closure of the Claimant's food processing facilities and consequent complete loss of the value of the Claimant's company. The conflict arose due to repeated complaints from the neighbours regarding bad odours and health concerns from the plant's increased production capacity without obtaining proper authorizations. The health authorities ordered the technical closure of the plant's wastewater treatment system and suspended its veterinary operation certificate. The San José administrative court issued an interim measure in favour of Ibérico, but the plant remains suspended for a few days and later had to cease operations. The case was filed in 2019, alleging expropriation of the investment, breach of favourable conditions, fair and equitable treatment, and national treatment obligation.

The Tribunal formed a majority to find that Costa Rica's suspension of the wastewater facilities in the wake of the inspection carried out by the health ministry was reasonable. The core of the case was the fair and equitable treatment (FET) standard and the Tribunal determined that a state act that is arbitrary, unjust, unlawful, discriminatory, lacking in transparency, or a serious breach of administrative due process is contrary to the minimum standard of treatment under customary international law. However, the Tribunal concluded that (i) the Claimant did not prove that it had legitimate expectations that could be relevant towards a breach of the FET standard and (ii) that the breach must be considered in light of the state's legal system as a whole and not isolated incidents. As such, the Tribunal ultimately declined Díaz's application for a declaration that Costa Rica had acted in breach of the BIT and international law. The parties were ordered to pay their own costs and an equal share of the arbitration costs.

VISION: What's Next In 2023?

In the upcoming months, the AIAC shall pivot its focus towards establishing the AIAC as a leading, global institution for alternative dispute resolution in the Asia-Pacific region and deepen its ties to the international ADR community.

To achieve this vision, the AIAC will endeavour to review, analyse and improve our products in line with international practices. This is also the Centre's initiative to meet the demands and the challenges in international arbitration. One of the many initiatives in the pipeline includes legislative reforms to the ADR framework in Malaysia, which will reaffirm Malaysia's position as a safe and leading seat for ADR disputes.

As part of the AIAC's work on diversity and inclusivity, the Centre aims to attract arbitrators and mediators from different jurisdictions with diverse cultures, expertise and backgrounds. Furthermore, the Centre will keep promoting diversity and inclusion in all forms of ADR mechanisms.

On a particular note, marketing efforts will be streamlined to attract ADR stakeholders from China, India, and Southeast Asia. By highlighting the benefits of arbitration and mediation services offered by the AIAC, the Centre aims to position itself as a trusted and reliable service provider for dispute resolution in the above-mentioned jurisdictions.

To revisit some of our pre-COVID efforts, the AIAC seeks to leverage its expertise in dispute resolution for the success of China's Belt and Road Initiative ("CBR"). By promoting its services and capabilities to the Chinese business community, the AIAC will further attract commercial disputes from CBR Member States and play a vital role in the initiative's success.

One of the vital reasons that qualify this vision to be an attainable one is Malaysia's positioning at the heart of the primary trade route. Due to this geographical advantage, the AIAC will take benefit of this feature by ensuring that international stakeholders are made aware of the benefits of conducting ADR processes in Malaysia – or more specifically, at the AIAC.

The AIAC's vision reflects a commitment to excellence in dispute resolution, promoting effective and efficient dispute resolution in the Asia-Pacific region; while embodying the values of the Centre's commitment to providing world-class products and solutions to a diverse range of users from around the world.

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