2023 AIAC NEWSLETTER

PULSE:

AT THE HEART OF ADR

AIAC

ASIAN INTERNATIONAL ARBITRATION CENTRE

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*The AIAC invites readers to contribute articles and materials of interest for publication in future issues. Readers interested in contributing to future editions of the Newsletter, or who have any queries in relation to the Newsletter, should email newsletter@aiac.world.

DIRECTOR'S MESSAGE

Greetings from the AIAC!

I am proud to present to you the October Edition of our Newsletter. As we get closer to the end of the year, I am pleased to share with you some of the milestones achieved by the Centre during the last months. The AIAC team has been working hard to provide our stakeholders with world-class services and optimisation of our products to guarantee the best user experience for the ADR Community. I would like to extend my gratitude to the AIAC Advisory Council who have been instrumental in helping me revitalise the Centre.

Since the publication of the previous edition of the Newsletter, the Centre has already seen an upward trend in its journey to reaffirm itself within the ADR Landscape in both the region and globally. This edition of the Newsletter is a departure from our previous editions as we have now includes more external contributions. These contributions from experts and participants of our events will undoubtedly provide a new perspective to the questions discussed in our Newsletter.

I am proud to announce that during our flagship event, AIAC Asia ADR Week 2023, the AIAC has unveiled the new suite of AIAC Rules 2023 (AIAC Arbitration Rules 2023, AIAC Islamic Arbitration Rules 2023 and the AIAC Mediation Rules 2023). Taking into account the feedback from the industry, the AIAC worked tirelessly to ensure that the new Rules achieve our aim of clarity, simplicity, and autonomy in the arbitration process. The AIAC considers this to be a significant and pioneering change in the 2023 Rules is the re-adoption of the UNCITRAL Arbitration Rules, making us one of the first major arbitration institution in Asia to align itself with this well-established and dependable UNCITRAL model.

Moreover, the AIAC produced the Asian Sports Arbitration Rules 2023 to answer the growing need for a concise and efficient set of rules to govern sport-related disputes. These Rules, launched on 6th October 2023, are an initiative by the AIAC to promote the use and development of alternative dispute resolution mechanisms, particularly arbitration, in the field of sports. The

Rules effectively establish the Asian Sports Tribunal, an independent panel of trained industry experts, to hear all sports-related disputes referred to arbitration under the Rules. Parties will also be able to avail of the AIAC's cost-effective venue, facilities and services in having their sports arbitrations administered in Kuala Lumpur, Malaysia.

We at the AIAC remain committed to the ongoing training of the professionals in the ADR Community. This year, the AIAC continued with our well-received Adjudicators Continuing Competency Development (CCD) Workshop Series. This year, the construction industry was provided with workshops on the recent updates on Adjudication Case Law, Analysis on Claims Arising in proceedings and the Practical Approach on Handling Procedural, Factual, Legal Issues in Adjudication and Advancing Adjudication Decision Writing Skills. Further, the AIAC Arbitration-in-Practice (AIP) Workshop Series 2023 has started strong for the year with the first of two planned sessions having positive feedback.

The AIAC has consistently attended and organised workshops and events, in and outside Malaysia, engaging with international stakeholders remaining steadfast to our goal to revitalise the Centre. The International Arbitration Colloquium 2023 co-organised by the AIAC, Malaysia's Legal Affairs Division (BHEUU) and the University of Malaya held in Kuala Lumpur highlighted the commitment of the Centre to enrich the international arbitration scholarship and bring awareness about the Sulu Matter. This colloquium was followed by two others taking place in Kota Kinabalu and London, which were lauded by academicians and practitioners alike.

Looking ahead to the year of 2024, we wish to continue building on the strong foundation laid this year. These strong steps we are taking are testament to the work of the team at the AIAC in close collaboration with our stakeholders in the government, locally and internationally. Let us grow stronger together. Till the next issue, happy reading.

DATUK SUNDRA RAJOO
Director of the Asian International
Arbitration Centre (AIAC)

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ISLAMIC ARBITRATION CONFERENCE 2023: EVOLVING STANDARDS OF THE GLOBAL WORLD

Associate Professor Dr. Ziyaad Mahomed
INCEIF University

The recent Islamic Arbitration Conference 2023 (IAC23) that took place on the 20th of June 2023 provided an invaluable platform for experts and practitioners to gain exposure to and exchange ideas on Islamic arbitration. The Conference also announced the formation of a Steering Committee on Islamic Standard Form Contracts, chaired by His Excellency, Tun Zaki Azmi (currently sitting as the Chief Justice of the Dubai International Financial Centre Courts). The Conference panellists covered topics focused on arbitration in Islamic contracts, the pros and cons of Islamic Standard Form Contracts, and the application of AIAC i-Arbitration Rules 2021 in international transactions. The future of standard-form Islamic construction contracts issued by the AIAC was also discussed, highlighting potential applications for projects in the Middle East.

The theme of the IAC23, "Evolving Standards of the Global World", effectively highlighted global practices and brought forth opportunities for understanding international experience. The first panel discussion on the advent of standard form contracts introduced examples from Mr. Iqbal Alvi of Islamic hedging contracts (tahawwut), Islamic trade finance, Sukuk templates, and liquidity management contracts issued by the management contracts issued by the International Islamic Financial Market (IIFM) based in Bahrain. These standard contracts have been used by the Islamic finance market to facilitate transactions with Shariah acceptance oversight from Islamic scholars internationally. Arbitration provisions can also be found in the agreements (for example, Section 13(c) of the ISDA/IIFM Tahawwut Master Agreement), providing insight into Islamic contractual arbitration approaches internationally. In global practice, Shariah contracts tend to include arbitration clauses as the first resort, saving time and cost in dispute resolution. In addition, approaches to differences in Islamic jurisprudential schools were also discussed, stressing the need for further harmonisation of dispute resolution and standardisation of mass market Islamic finance contracts used for housing and consumer asset financing going forward.

Islamic arbitration is unique in its practice, possessing a rich history of dispute resolution since the time of the Prophet Muhammad (peace be upon him). In contemporary practice, efforts to standardise arbitration methods have been made

by international standard setters including AAOIFI (Shariah Standard No 32 on Arbitration) in Bahrain, and IICRA based in Dubai. Although exemplary efforts, AAOIFI provides guidance for only the essential Shariah aspects of arbitration, whereas IICRA rules are more aligned to UAE disputes. The i-Arbitration Rules published by the AIAC in 2021 are apparently the only rules catering to both Shariah principles and international standards like the UNCITRAL Rules. This provides an avenue for Islamic financial institutions and parties involved in Shariah-compliant transactions to seek resolutions more quickly, without compromising neutral and expert arbitration. The specific contribution of the i-Arbitration Rules to dispute resolution is the recognition of Islamic commercial rulings that prohibit riba (interest) and gharar (excessive uncertainty). Furthermore, the i-Rules allow for Islamic dispute resolution to rely on the expertise of Shariah experts to provide evidence for cases allowing the procedural process to be more consistent with international practice. However, to apply these rules, contracts must include arbitration provisions (Section 24 (4) of the Courts of Judicature Act 1964, Malaysia and Section 30 of the Arbitration Act 2005).

Going forward, the AIAC's newly appointed Steering Committee has proceeded with Islamic Standard Form Contracts in Construction first. The Islamic finance industry may also benefit from standardised contract templates. For this, the Committee would need to consider the differences that exist between some unique decisions made by the Shariah Advisory Councils of Bank Negara Malaysia and the Malaysian Securities Commission when compared to AAOIFI jurisdictions. For example, dealing with penalty and early settlement, the sale of debt, and the use of dual agency in Tawarruq (monetization contracts) epitomise some of the few differences between local and international practice. Cognisance of the differences in practice should be considered to broaden the use cases of the contracts. Overall, the outcomes of IAC23 can be seen as an admirable initiative in alternative dispute resolution and industry harmonisation.

AIAC'S CIPAA CONFERENCE 2023

A COMPREHENSIVE REVIEW

Deepak Mahadevan
Partner, Messrs Azmi Fadzly Maha & Sim

The Asian International Arbitration Centre (AIAC) recently hosted its annual event on the Construction Industry Payment & Adjudication Act 2012 (CIPAA), offering practitioners and stakeholders in the construction industry a platform to engage on this pivotal legislation. This flagship annual event, which took place on 22nd June 2023, continued it tradition of providing invaluable insights and exchange of information between practitioners and stakeholders of the construction industry.

A standout addition to this year's event was the involvement of both current and former construction court judges. Their contributions provided a unique dimension to the discussions, offering important insights into their experiences with disputes that escalate to court. These Judges shared with the participants on the practical issues faced by the Construction Court as well as statistics on cases filed in Court pertaining to enforcement, setting aside, stay and direct payment applications including the outcome of such applications in the past years, thereby enriching attendees' understanding on the effectiveness of CIPAA and how the adjudication process interfaces with the judicial system.

Another standout feature of the event was the participation of speakers from various countries who shared their experiences with similar adjudication legislation in "Session 1: Study of Construction Adjudication from around the globe". The inclusion of international speakers enhanced the event's global outlook, giving attendees the opportunity to gain insights into adjudication practices beyond Malaysia. While the exchange of information from these speakers was informative and enlightening, it also unveiled a potential shortcoming. Although discussions centered around challenges and best practices, time constraints hindered thorough explorations of how other jurisdictions address these challenges. For example, it would have been enlightening to hear how jurisdictions like Singapore and Victoria, Australia handle review procedures for adjudication decisions in comparison to Malaysia's non-existent review mechanism. The event could have benefited from discussions on the efficacy of these review

procedures in promoting effective dispute resolution and in reducing the number of cases that reach the courts for setting aside. Equally, examining the practice of requiring payments into the Adjudication Authority or the court as prerequisites for review or setting aside applications could have provided valuable insights into enhancing Malaysia's adjudication regime.

Another notable drawback was the time constraint for each session, with only one hour allocated for each session, including both presentations and the subsequent Q&A session. This compressed time frame limited the depth of discussion on substantive issues and prevented exploration of certain topics. For example, much of the time was spent focusing on identifying problems associated with CIPAA, leaving insufficient time to delve into potential solutions and lessons from other jurisdictions on similar issues. Unfortunately, the limited time for Q&A prevented attendees from engaging in meaningful discussions about these solutions, leaving some queries unanswered.

In conclusion, AIAC's annual event on CIPAA continues to serve as a commendable platform for practitioners seeking to deepen their understanding of this significant legislation. Nevertheless, improvements could be made to the event format, particularly with regard to allowing more time for substantive discussions and fostering in-depth conversations about potential solutions to the challenges discussed. With these adjustments, the event could further solidify its status as an indispensable knowledge-sharing platform for the industry's professionals.

INTERNATIONAL ARBITRATION COLLOQUIUM 2023:
STATE SOVEREIGNTY AND IMMUNITY IN COMMERCIAL ARBITRATION

Professor Dr. Jason Chuah FRS
Dean of Law, Universiti Malaya

Back during the dark days of uncertainty surrounding the litigation in Europe over the actions pursued by the self-declared Sulu heirs against Malaysia to enforce a dubious arbitral award, the Asian International Arbitration Centre (AIAC), Legal Affairs Division in the Prime Minister's Department (BHEUU, JPM) and Universiti Malaya jointly held an important Colloquium. The rationale was to thrash out the issues and educate and inform the wider communities, in Malaysia and globally, about the ins and outs of the now infamous Sulu case. It was also needful to cut through the heavy miasma of false claims and biased reporting.

The presentations, delivered by eminent experts from Malaysia and abroad, were organised to provide, first, a historical perspective of the assertions made by the Sulu claimants (and their lawyers) followed by an account of the Malaysian government's position and finally, a series of presentations casting light on the legal issues.

Judging from the numbers who attended in person and online, it was obvious to this reviewer that the subject matter clearly had strong resonance with Malaysians and also many from outside Malaysia who were concerned about how commercial arbitration might be manipulated for huge financial gains over issues dating back 150 years.

It probably is trite to say that there were many interesting takeaways from the Colloquium. It is difficult to do justice to manifold propositions and points made by the speakers in this short commentary. *For this reviewer*, there are three key lessons – now seen in the light of the recent victories for Malaysia before the French Cour d'Appel and the Hague Court of Appeal.

The first is how to many Malaysian lawyers trained in the common law tradition, the clause in question could not conceivably be construed as an arbitration clause. This reviewer, during his

presentation covering the fundamentals of the case, made the point that it might not be as ludicrous as many Malaysian lawyers might imagine. For civil lawyers, often as long as the intention was clear that disputes should be resolved by a neutral third party that would suffice as an arbitration clause. Indeed, that was the view of the Cour d'Appel, despite the court's proceeding to hold that as the British Consul-General (to whom disputes should be referred) was specifically chosen for his qualities as being a neutral third party who had taken part in the negotiations, his capacity could not simply be replaced by an arbitrator unilaterally chosen by the claimants. The identity and special characteristics of the British Consul-General were especially key to the meaning of the arbitration clause.

The second is how several speakers observed that state immunity must necessarily be applied and there was simply no jurisdiction that the arbitrator could assume over Malaysia. Here a couple of speakers were cautious in reminding the audience that state immunity is not absolute. Much thus depended on whether the agreement in question was rightfully deemed a lease or cession. If the latter, the case for state immunity naturally becomes stronger.

The third takeaway for this reviewer was how much consternation there was at how the international commercial arbitration system was being exploited for financial gain. There was the fact that the arbitration was funded by third party litigation funders whose role in the system of international dispute resolution is highly unregulated. Moreover, in international commercial arbitration, some arbitrators are to be paid, directly or indirectly, from litigation funds. Questions about fairness, neutrality and professionalism naturally arise. There was the issue of the quantum of the claim and the award – the eye watering sum to many reasonable persons is simply indefensible. However, the quantum of the award is virtually unchallengeable when judicial assistance is sought to recognise and enforce the award (under the New York Convention).

The issues raised and discussed at the Colloquium may yet return as we anticipate the next steps to be taken by the claimants and their supporters. But one thing is clear, through the colloquium many more in the country and elsewhere are now better apprised of the facts.

INTERNATIONAL ARBITRATION COLLOQUIUM 2023 (SABAH EDITION)

300 YEARS OF MISLEADING HISTORICAL NARRATIVES OF THE SULU SULTANATE

Avtar Singh Sandhu,
Private Historical Researcher & Author

The Sulu arguments are based on false historical narratives that include a pattern of denialism, falsification, or distortions of the history and events surrounding the claim over Sabah. In attempting to revise the past, they have invented ingenious but implausible reasons for distrusting genuine documents such as treaties, agreements, and grants.

They have also manipulated storylines to present fictious and misleading history as fact. They plead ignorance with regards to the historical raiding, kidnapping of North Borneo coastal natives who were sold as slaves in slave markets in the islands of the Sulu Archipelago for 300 years. Which ruler who claimed to rule over a domain would kidnap their own peoples to sell into slavery?

The Sulu Sultanate did not establish any palaces or towns in North Borneo, nor did they establish a system of administration existed on the East Coast unlike the Brunei Sultanate who did so for centuries. They may have established pirate bases along the East Coast of North Borneo which in time, became small villages but there certainly was no system of government nor administration on their part.

In every argument made by the heirs of the defunct Sulu Sultanate, there is a blatant disregard for the Grant of 1877, signed between Baron Von Overbeck, Alfred Dent and the Sultanate of Brunei which gave the Europeans ownership over all of Sabah. You never see the Grant of 1877 ever mentioned. They do not want that Grant ever discussed in court or in public for good reason.

This is significant because of the fine details contained in the Grants of 1877 and 1878. Whilst the Grant of 1877 clearly states the sphere of Brunei influence over all the coastlines of North Borneo and the surrounding islands, the Sulu Grant of 1878 is limited to a very small region on the east coast of North Borneo, and not, as many have been led to believe, the entire region of North Borneo.

The Grants are very clear on who has and claims ownership over which areas of Sabah.

The other confusing narrative relates to the Grants of 1877 and 1878 - was it a lease or a total cessation of the territory to the Europeans? Unlike a traditional acquisition of territory or property or land, where the buyer typically pays for the purchase in full and a transfer of ownership is then completed through legal means, the acquisition of North Borneo by Overbeck and Dent was done via staggered, yearly payments; everyone agreed to the terms of the agreements as they all signed the agreements. North Borneo was, at the time, undeveloped and in need of great investment and investors, and so Overbeck and the Dent brothers went in search for these investors immediately after their acquisition of North Borneo. Records exist in our files of such endeavours to attract investors.

What is obvious when we look at the precedence of these claimants is that it is always about money and a familiar narrative of "*.....pay us or else we will keep disturbing you.*" We have the documents to support this argument going back to 1946 and these narratives are consistent. This narrative has not changed, only the personalities making these demands have.

AIAC ARBITRATION-IN-PRACTICE ("AIP") WORKSHOP SERIES 2023: THE FUNDAMENTALS AND THE RISE OF THIRD-PARTY FUNDING IN ARBITRATION

DATO' MALIK IMTIAZ SARWAR
Malik Imtiaz Sarwar Advocates & Solicitors

The first AIP Workshop was held on 15th September 2023 in a hybrid format, with a line-up of expert speakers including Mr Falco Kreis (Nivallion AG), Ms Teresa Cheng (Asia Academy of International Law), Dato' Malik Imtiaz Sarwar (Malik Imtiaz Sarwar) and Mr Philip Koh Tong-Ngee (Mah-Kamariyah & Philip Koh). The session was moderated by Tan Sri Dato' Mohamad Ariff bin Md Yusof (Former Judge of the Court of Appeal Malaysia and Consultant, Cheang & Ariff).

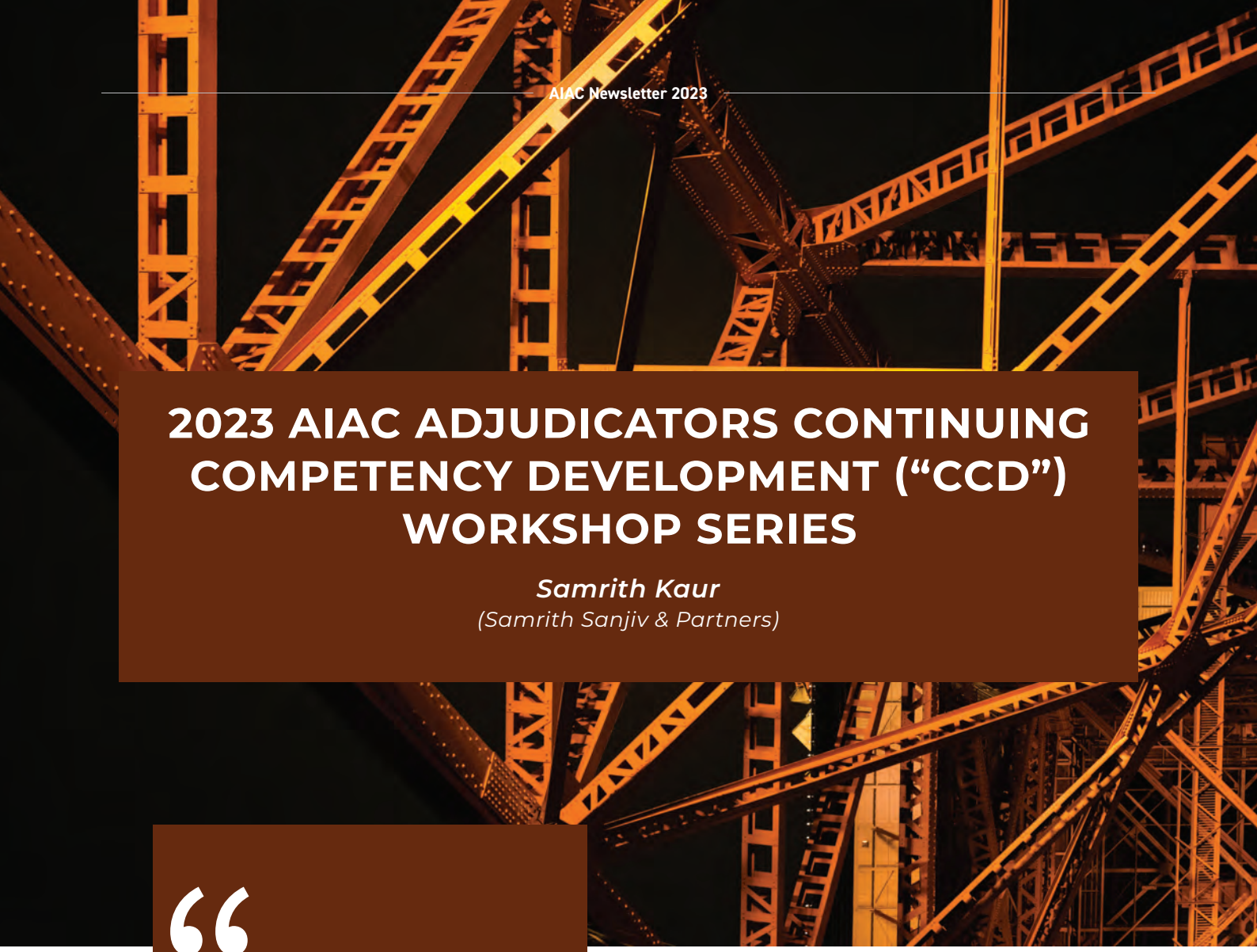
The over-arching theme of the Workshop involved a consideration of the need, for third-party funding in arbitration and the legal framework for such. The workshop commenced with a presentation by Falco Kreis, Senior Case Manager and Head of the Munich branch of Nivalion, a leading litigation funder in Europe. He outlined key aspects and considerations in funding arrangements. Broadly, the funder would assess the dispute and the prospect of it being determined in favour of the funded party, and on that basis would take a calculated risk for an agreed return on the investment it makes in providing funding. Parties seeking such funding could be in need of funds to pursue a claim, or merely seeking to mitigate or spread the financial risk. The funder has no say in the dispute resolution process, it being left to the funded party to decide the course of the proceedings. Such funding is used more widely in civil law jurisdictions, where the rules against champerty and maintenance (the "Champerty Rule") do not operate.

That then set the stage for a presentation by Ms Theresa Cheng, senior counsel and former Secretary for Justice of Hong Kong on the availability of such funding in common law jurisdictions by reference to developments in that country. Broadly, she explained that the Champerty Rule was a bar to such funding, and that continued application of the rule had impacted access to justice as well as Hong Kong's development as a seat of arbitration. The government thus decided to relax the rule, specifically for arbitration and mediation. This required legislative intervention in the form of the

Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance Order No. 6 of 2017, which permitted funders to receive a pre-agreed portion of the proceeds of an award. To ensure that such arrangements were not misused, a Code of Practice for Third Party Funding of Arbitration was subsequently introduced to set minimum standards of good practice by third party funders and to lay down safeguards for funded parties. With the enactment of the Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Ordinance 2022, under which the Arbitration (Outcome Related Fee Structures for Arbitration) Rules were made, it was made clear that arbitral parties were permitted to enter into the following types of fee arrangements with their legal representatives: conditional fee agreements (no win no fee), damages-based agreements (a percentage of sum awarded or recovered), and hybrid DBAs (a fixed fee together with a percentage of sum awarded or recovered) without offending the Champerty Rule.

Mr Philip Koh and I then, respectively, discussed the Malaysian position. Broadly, by virtue of section 3(1)(a), Civil Law Act 1956, the Champerty Rule is still applicable. With respect to Malaysian lawyers, this is underscored by section 112 of the Legal Profession Act 1976. Thus, there is a need for legislative intervention like such in Hong Kong and Singapore, where the Civil Law Act was amended in 2017 to abolish the common law torts of champerty and maintenance. While acknowledging the underlying policy considerations in favour of the Champerty Rule, we were of the view that there is sufficient justification for the Government to relax the rule where arbitral proceedings are concerned. Firstly, arbitration, both domestic and international, can be costly and it is not unusual for claims to be stifled by the expense of such proceedings. Such funding would, in cases of need, facilitate access to justice. Secondly, parties to an arbitration agreement make informed decisions when entering into such agreements, and the risks associated with the Champerty Rule are thus ameliorated. Thirdly, arbitration agreements are a common feature of contracts entered into by Malaysian parties when contracting with both local and foreign parties. The relaxation of the rule would thus be beneficial for Malaysian based parties and would potentially make Malaysia more appealing as a seat of arbitration.

This was a very useful workshop on a subject of great importance, and warrants further consideration. The approach taken in Hong Kong and Singapore, amongst others, makes it clear that Malaysia must follow suit as a matter of urgency if it does not want to be left behind in this area.



2023 AIAC ADJUDICATORS CONTINUING COMPETENCY DEVELOPMENT ("CCD") WORKSHOP SERIES

Samrith Kaur
(Samrith Sanjiv & Partners)

> *Education is not the learning of facts, but the training of the mind to think*
>
> *Albert Einstein*

On 1st January 2021, AIAC issued the *AIAC CIPAA CIRCULAR 10*, introducing the Continuing Competency Development (CCD) Workshop Series as part of its mandate to regulate the standards of competency among the pool of adjudicators. The CCD Workshop Series was launched *with the aim to equip the adjudicators with the necessary know-how to confidently navigate through the various legal, technical, and procedural issues that may manifest in the course of an adjudication proceedings*. The first CCD Workshop was held on 30th January 2021 and since then, there have been a total of 22 CCD Workshop Series.

This year, the AIAC organised three series of well-crafted CCD Workshops. The Workshop commenced with speakers presenting on the selected CCD topic, followed by an open forum discussion before drawing an end to each CCD workshop.

The first CCD Workshop held on the 29th April 2023 commenced with the session on "***Recent Case Law & Updates in Adjudication***" owing to the ever-evolving nature of the law, and the importance for adjudicators to keep themselves abreast with the latest developments. The speakers for this Workshop were Kevin Prakash, Daniel Tan Chun Hao and Deepak Mahadevan, who went through a number of decisions published by the Malaysian courts in the year 2022 and first quarter of 2023, with a focus on remarkable cases that have impacted and further developed the legal CIPAA landscape. This insightful session was moderated by none other than YA Dato' Lim Chong Fong, Court of Appeal Judge.

The second CCD Workshop entitled "***Analysis and Evaluation of Various Claims Arising in Adjudication Proceedings***" was held on 8th July 2023. I had the pleasure of moderating this very engaging and interactive session. For this Workshop, the topics were split into three pertinent areas of claim i.e., claims related to Liquidated Ascertained Damages (LAD) and Extension of Time (EOT) which were covered meticulously by Soh Lieh Sieng; Loss and Expense claims in Adjudication presented in-depth by Rodney Martin, and Valuation and Final Account claims by Sr. V. Ratnalingam who navigate us through the pricing mechanisms and documentation, valuation and interim payments, variations and final account. It was definitely a very illuminative and informative session judging from the feedback received from the participants.

The third and last Workshop for this year will be held on 9th September 2023 entitled "***Practical Approach on Handling Procedural, Factual***, ***Legal Issues in Adjudication and Advancing Adjudication Decision Writing Skills***" with YA Tuan Nadzarin Bin Wok Nordin, a High Court Judge, as the moderator. This will definitely be another very interesting workshop to attend with imminent speakers including Wilfred Abraham, Adrian See Jooi Hong and Datin Chu Ai Li, who will provide not only in-depth review of procedural, factual and legal issues encountered in adjudication proceedings but will also provide practical approaches to dealing with such issues and provide practical tips on advancing adjudication decision writing skills.

Based on the AIAC's data, about 120 participants on average (physical and virtual) attend each CCD Workshop. The hybrid arrangement is welcomed by many and has encouraged many more participants to attend the Workshops as they can attend from wherever they are located. From the feedback received thus far by AIAC after each Workshop, the common consensus is that the participants find the Workshops helpful as they are able to keep themselves abreast with the latest developments in adjudication, get practical tips and further gain knowledge through the information imparted by the speakers on the topic presented at the CCD Workshop. Some other feedback received include the insufficient time allocation for the participants to ask questions. Perhaps, AIAC may consider a full day CCD Workshop to compensate for these concerns. Overall, these CCD Workshop Series have been well received and proven successful in bridging the knowledge gaps in the practice, principles, and procedures involved in adjudicating payment disputes under the CIPAA.

ASIA ADR WEEK 2023

ASIA ADR WEEK 2023 RECAP: ANNULLED BUT NOT FORGOTTEN

The enforcement of annulled arbitral awards has been highly debated amongst legal practitioners and scholars. The issues with enforcing annulled awards were underscored in the Sulu Claimants vs Malaysia arbitration saga. It is controversial as it leaves room on the enforceability of arbitral awards, which were set aside, annulled or suspended by the courts of other jurisdictions, especially the courts of the seat of arbitration. This would not only contravene the cornerstone of international arbitration awards – "finality" but may also cause confusion on the international standard in the enforcement of arbitral awards.

During Asia ADR Week 2023, the distinguished panel of speakers engaged in a comprehensive discussion, covering the following key topics: (i) the relevant provision of the New York Convention that provides discretion to the courts to enforce annulled foreign arbitral awards; (ii) diverse approaches taken by different jurisdictions; and (iii) the potential for establishing an international standard in enforcing the annulled awards.

The New York Convention adopted the word "may" in Article V(1)(e). It allows the Courts to exercise its discretion over the enforceability of an annulled award. Different jurisdictions have adopted divergent approaches, with some jurisdictions prohibiting enforcement of annulled awards, while others consider enforcement based on public policy considerations.

Various notable cases were discussed. For instance, in ***Hilmarton v OTV***, the Tribunal granted the first award in OTV's favour based on its plea that Hilmarton's claim is premised on a contract in violation of the Algerian anticorruption laws and Swiss public policy. The Swiss Supreme Court annulled the first award. Parties proceeded with the arbitration and a final award was eventually rendered in Hilmarton's favour. However, the French Court of Cassation allowed the enforcement of the first award. In other words, from the French Court's perspective, the contract was void and the arbitration ought not to proceed. Consequently, the French Court refused to enforce the final award. On the other hand, the UK High Court took a different stance and allowed the enforcement of the final award.

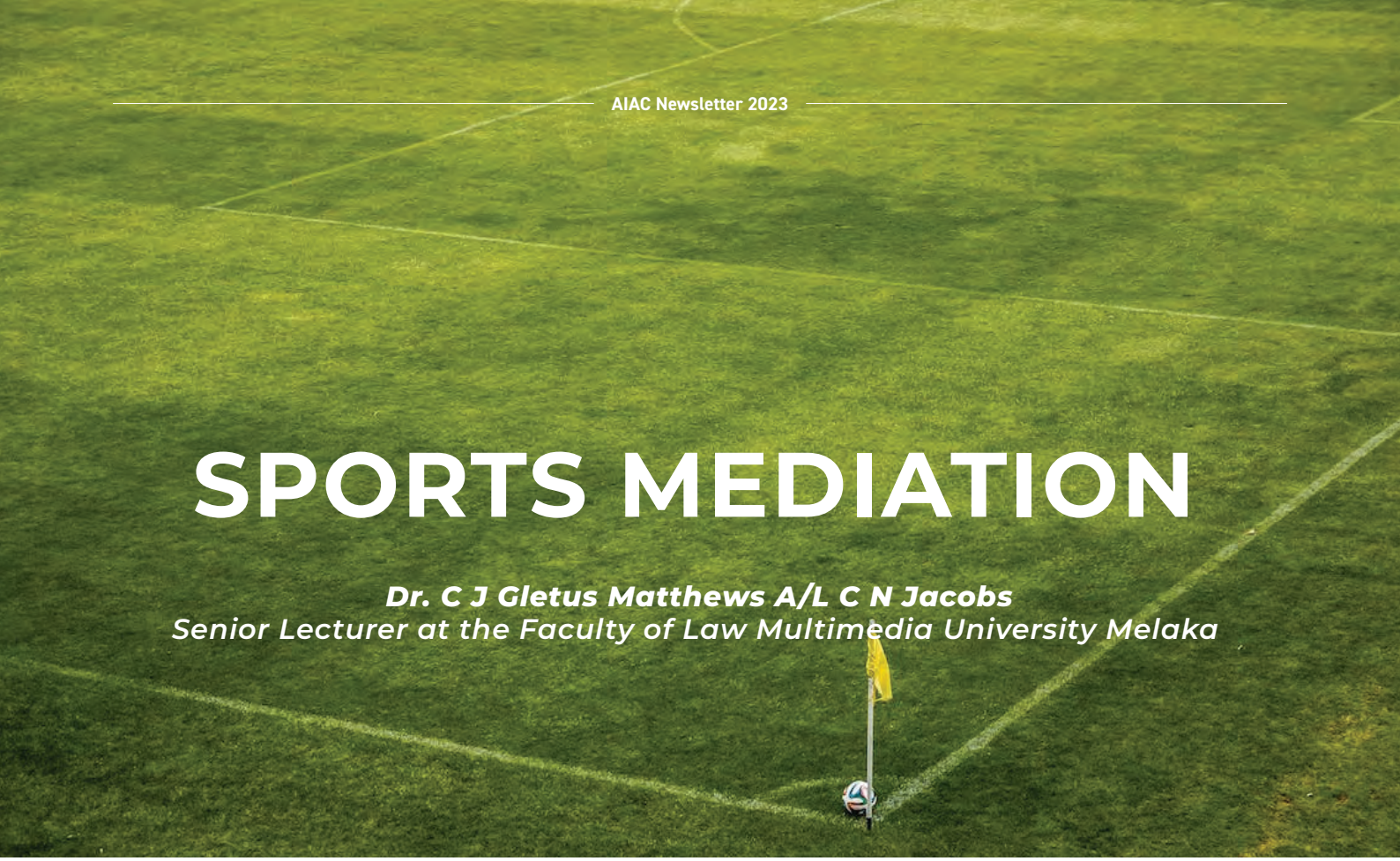
Similarly, in ***Pabalk v Norsolor***, an award was rendered in Austria in Pabalk's favour. Despite the award being set aside by the Austrian Supreme Court, the French Court of Cassation allowed the enforcement of the award. As a result of the permissive language in Article V(1)(e) of the New York Convention, the enforceability of an award pertaining to the same dispute may vary from one country to another based on their respective domestic laws.

In ***Malicorp v Egypt***, an arbitral award was granted in Malicorp's favour with the seat of arbitration in Cairo, Egypt. However, both the Egyptian Court and the French Court later annulled the award. Malicorp subsequently made an *ex-parte* application in the UK High Court for permission to enforce the award. Permission was granted, leading Egypt to apply for the setting aside of the enforcement order. Upon hearing the parties, the UK High Court set aside the enforcement order. The UK High Court is of the view that there is no reason to depart from the decision of the national courts in the seat of arbitration.

The English courts are reluctant to question a foreign court's decision on its own law and/or to undermine a foreign court's judgment for bias or unfairness absent very compelling evidence. Parties seeking to enforce an arbitral award which has been set aside or annulled in the seat of the arbitration should consider the weight of their evidence against the decision of the foreign court.

Whilst these various jurisdictions are signatories to the New York Convention, the approaches taken by the courts of these jurisdictions differ. There is no uniform international standard on the enforceability of the annulled arbitral award. To prevent inconsistent positions on the enforcement of annulled arbitral awards, a uniform international standard must be introduced. However, a fine line must be drawn when creating an international standard governing the enforcement of annulled arbitration awards. It should not be too rigid as to limit the room for upholding the interest of justice, nor should it be too flexible as to forfeit the intention of the parties in entering into arbitration agreement.

The scope of the discussion was expanded to the topic as to whether any revisions and modifications should be made to the New York Convention. There may be a need to substitute the word "may" in Article V(1)(e) to a more precise term in order to provide a clearer guideline for the enforcement of the annulled arbitral awards. However, with approximately 172 contracting states bound by the New York Convention, any proposed revisions and modifications to the New York Convention would be difficult or impractical but it would a have significant impact on the legal industry. Notwithstanding the difficulties, it is perhaps time do so, to create more certainty and improve finality of the arbitral process.



SPORTS MEDIATION

Dr. C J Gletus Matthews A/L C N Jacobs
Senior Lecturer at the Faculty of Law Multimedia University Melaka

1. **As a lecturer in law specialising in sports law and a member of the Professional Footballers Association of Malaysia (PFAM) how does mediation come into play for parties facing doping disputes?**

   There are some serious concerns with doping violations in sports in Malaysia as highlighted by the Sports Law Association ("SLAM") president, Sri Sarguna Raj in a recent article titled '*Professionalism Merely A Gimmick, Sport Integrity In Malaysia Still Has A Long Way To Go*' in the September 2023 edition of the journal 'Twentytwo13'[1].

   ADAMAS, which is the Anti-Doping Agency of Malaysia, should protect the integrity of Malaysian sports. It has a role in increasing awareness and providing services to vulnerable athletes. In a doping dispute the aggrieved party has a right fair and impartial hearing as stated in the World Anti-Doping Agency Code (*WADA Code Art. 8 and 13*). In adopting best practice, mediation by an institutionally independent body should be a fundamental right of a person charged with doping and related other sports related disputes.

2. **Do you think mediation in sports should extend to financial disputes, i.e., commercial disputes which typically involve large corporations?**

   Mediation does extend to financial disputes. The Professional Footballers Association of Malaysia ("PFAM") a football tribunal, deals in many instances on matters relating salary and remuneration of footballers of the local clubs. In commercial and contractual disputes, mediation plays an important role especially when there is a stalemate in arbitration. Expertise is required in dealing with large corporations. Mediation may be combined with arbitration, Med-Arb is an effective method of dispute resolution in the sports dispute. According to Professor Ian Blackshaw, in his article titled "*Sports Mediations: Preserving Sporting and Business Relationships*", mediation has a high success rate that has led to the establishment of international mediation centres like the WIPO Arbitration and Mediation Center, in Switzerland.

[1] https://twentytwo13.my/sports/professionalism-merely-a-gimmick-sport-integrity-in-malaysia-still-has-a-long-way-to-go/ 'Professionalism merely a gimmick, sport integrity in Malaysia still has a long way to go'

3. **Do you find that athletes are currently more aware of their options in case of legal disputes than they have been in the past?**

   The rights of athletes must be protected. Procedural guidelines of their rights and responsibilities, as prescribed by WADA, are mandatory and should be adhered to. However, given the varied backgrounds of sportspersons, the presumption must be that the aggrieved party is unaware of his or her rights and therefore it is the responsibility of the sports body to explain explicitly the substantiative and procedural law related to the dispute in question. The failure of a sportsperson to understand the consequences of the dispute, as a result of the ignorance of the law and procedure, should be seen as the failure of the institution to advise the affected party properly and therefore it is a miscarriage of justice.

4. **From your experience as a third-party neutral, what do you think can be done to improve the existing mechanisms to make it more accessible to the parties seeking efficient resolution?**

   Although the rule of strict liability will apply in doping in sports nevertheless, exceptional circumstances that resulted in the positive findings should be considered where there is substantial evidence to prove that there was no wrongdoing. It is highly recommended that an independent ombudsman that offers a fair and accessible resolution, for a just and impartial hearing and advise on the appropriate defences be made available to the party in dispute. Although mediation can be cost-effective, nevertheless the problem of cost should also be considered and sources of the funds that could be made available to them, should be identified.

5. **Sports disputes often involve multidisciplinary elements such as management, labour rights and broadcasting issues. How does mediation deal with multidisciplinary disputes?**

   The primary goal of mediation is to assist the parties in understanding their respective interests. Multidisciplinary disputes should be well coordinated as it involves the conscious application of mediation. The interest of each party and varying issues should be dealt with as separate issues rather than a holistic approach. Generally, mediation helps to maintain goodwill between parties and adverse publicity can be avoided.

6. **In your opinion, how do you think international politics and relations impact sports law and regulations?**

   There can be a healthy relationship between sports and politics. States have utilised sport as a means to enhance their image and achieve specific policy objectives including social integration of people. Many governments have successfully embarked on reconciling various races and communities of different culture and beliefs through sports. The European Union has successfully blended sports and economics promoting the socio-cultural integration of its 27 member states. The *case of C-415/93 - Union royale belge des sociétés de football association and Others v Bosman and Others* was set in a political context which successfully passed the sceptics test and changed European football forever. However, sports and politics should have a well-defined perimeter. Sports Bodies, such as the International Olympic Council ("IOC") generally do not tolerate political interference. 'Autonomy' and 'political neutrality' of sports bodies are key elements that are essential ingredients of the IOC.

   The International Federation of Association of Football ("FIFA") had in the past suspended football associations because of excessive government interference. For example, the Nigerian Football Federation in 2010. Sports and political ideologies should be kept apart.

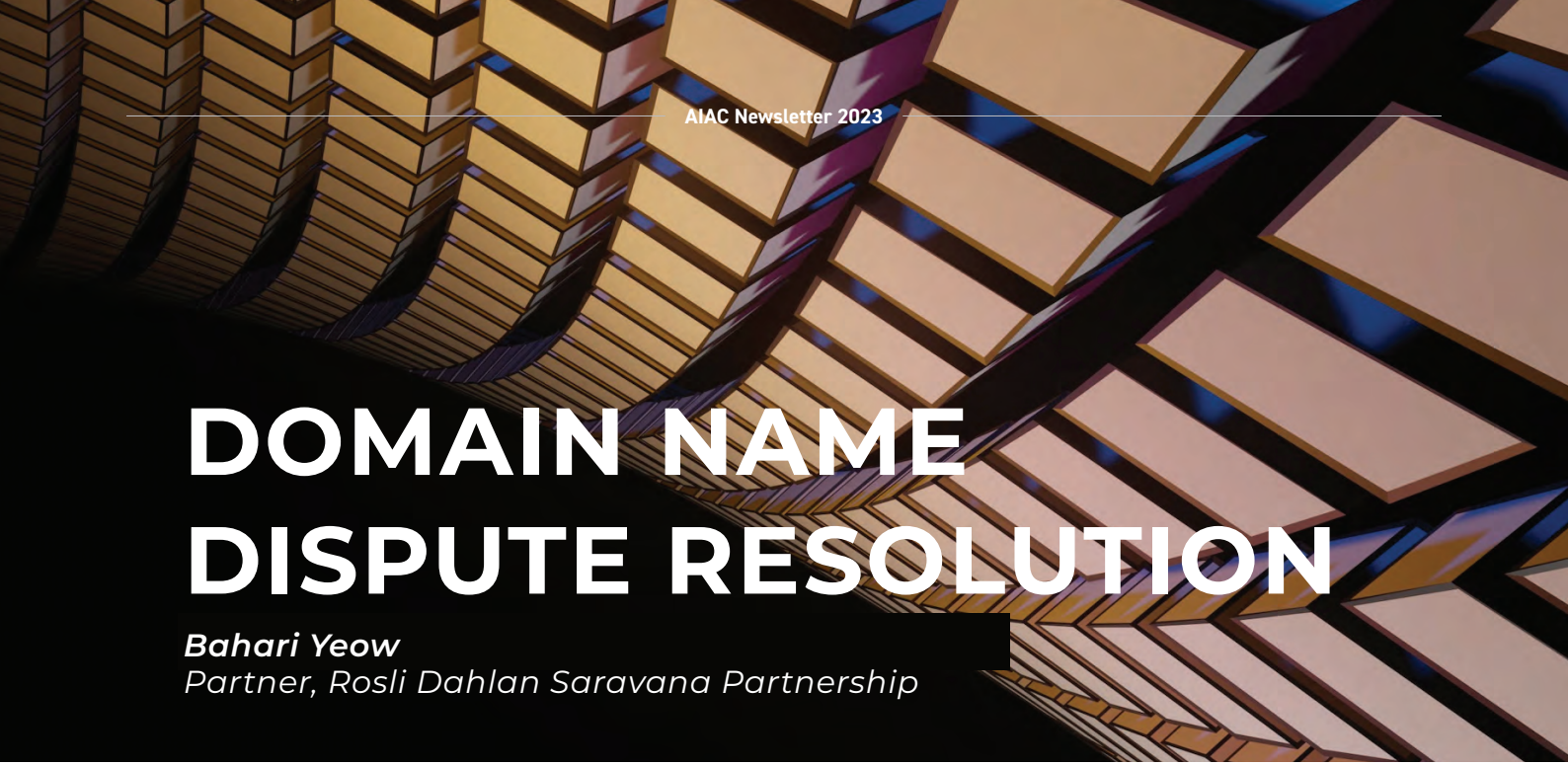
7. Institutions offering alternative dispute resolution services for parties within the sports industry are shifting from arbitration to mediation, which is perceived as a faster, less combative way to settle their differences. Do you agree with this approach? Do you see the benefit of one over the other?

Mediation is particularly useful for an amicable settlement of dispute especially when it is envisaged that arbitration will fail. It helps the parties in dispute to negotiate peacefully and arrive at a peaceful settlement thereby maintaining the business relationship. In Malaysia, sports are regulated by the *Sports Development Act 1997* ("SDA"). Any internal dispute is strictly governed by the Act which gives little space for other alternative means of resolving a dispute. The inclusion of Sec 24A by way of the Sports Development (Amendment) Act 2018 appears to restrict a party in dispute which cannot be resolved in accordance with internal procedures referred to in Sec 23 to seek other avenues to resolve their dispute. The aggrieved member of a sports body or a sports body itself may refer the dispute to the Sports Dispute Committee to manage disputes. The Sports Dispute Committee will have the sole discretion to hear disputes and where the dispute remains unresolved then the matter is referred to the Minster as final. This clause appears to oust the court's jurisdiction which is against natural law of one's right to judicial review. It also appears to restrict independent bodies from acting on or on behalf of the aggrieved party. These parts of the legislation need to be clarified in the interest of sports and sportspersons.

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

Sports is highly regulated and good governance is an essential element in the management of sports. Sports encompasses the political, social and cultural aspects of a society and requires dedicated people to protect and preserve the integrity of sports. The sports industry has developed and forms a significant percentage of the world trade. Professionals in various fields and other laypersons, play an interdisciplinary role in this thriving industry. Some international sports organisations have established their headquarters in Malaysia, like the Asian Football Confederation ("AFC") and the Badminton World Federation ("BWF").

Added to this many international sports events are held in Malaysia. To our practitioners, these are windows of opportunities for practitioners and other layperson to further their interests socially, economically and professionally in this particular field. There has been an increased discussion in the media on human rights matters, fostering greater public awareness and the opportunity for practitioners to occupy a niche in society.



DOMAIN NAME DISPUTE RESOLUTION

Bahari Yeow
Partner, Rosli Dahlan Saravana Partnership

1. **With your expertise in the field of Technology, Media and Telecommunications, what is your breakdown of Domain Name Dispute Resolution (DNDR)?**

   Online and virtual world, e-commerce and cross-border transactions become a norm in today's world. So, as the nature of trade and commerce developed, and persons found new ways committing "theft" of intellectual property.

   Undoubtedly, as a result of the evolution and development of technology, media and telecommunications, trade and commerce has become borderless. Even the territorial principles of IP will need to be relooked carefully.

   Traders are looking at enforcing their rights across the globe, in the most cost effective and efficient manner.

   Domain Name Dispute Resolution ("**DNDR**") provides a comprehensive online dispute resolution mechanism which addresses the need of these traders, and more importantly, it grows to meet changing conditions with dynamism. DNDR is one of the most effective, and costs efficient online dispute resolution which aim to resolve domain name disputes in this borderless world.

2. **In your opinion, have the developments of online selling and e-commerce made domain name dispute resolutions more complex? If yes, how?**

   The developments of online selling and e-commerce certainly made domain name dispute resolutions more complex.

   With commerce moving into the digital realms, it may not be difficult to foresee the rise of e-commerce disputes, and the new way of committing "theft" of IP. The e-commerce platform may indirectly give rise to issues such as IP infringements in different jurisdictions, illegal websites or unauthorised sales of products. Enforcing the IP rights in different jurisdictions may be costly, time consuming and impractical. The other complexity which may be faced by the traders is the differences in the law In different jurisdictions.

   This may be one of the impetus for DNDR to rise to the challenge. It aims to set a uniform rules and coherent legal system which enable online disputes to be addressed within the platform. It provides traders access to justice by providing an alternative dispute mechanism in addition to the traditional courts system. The uniform set of rules and law adopted by DNDR in addressing new challenges in the online selling and e-commerce aim to address the traders need for a system that is speedy, efficient and costs effective manner.

3. **As an expert in Intellectual Property, how important and relevant are domain names in terms of legal and reputational value for trademark owners?**

   Domain names are very important, both in terms of legal and reputational value for trademark owners.

   Whilst silence may not always be equated to acquiescence, it may in some cases be construed as implied consent of the trademark owners for the infringer to use the domain name.

   If trademark owners do not control the use of their trademark, whether the use is on the physical goods and services or by way of domain name, there is every risk that the wrongful use of the trademark may prejudice the trademark owners. For example, the wrongful use of the trademark may resulted in the trademark becoming descriptive and potentially be exposed to invalidation or expungement of the registered trademarks.

   Another obvious reason would be that the public may be misled into thinking that the imposter is somewhat related to or associated with the trademark owners, or even thinking that the site visited belongs to the trademark owners. Naturally, whatever the goods or services, including the quality, the consumer would have purchased from the imposter would form an adverse impression on the consumer of the quality of the goods offered by the "trademark owners". Apart from reputational damage which may arise, the goodwill which the trademark owners may have built over the years may be adversely affected.

4. **How have the recent ADNDRC Decision Drafting Guidelines for UDRP Proceedings assisted panellists in drafting their decisions?**

   It certainly does. I have no doubt that all of our Panellists have vast experience in this field, and many have started practice even before the birth of ADNDRC Decision Drafting Guidelines for UDRP Proceedings ("**Guidelines**").

   However, the Guidelines realign Panellists' thoughts in drafting their decisions. As you will appreciate, online and virtual world, e-commerce and cross-border transactions become a norm in today's world. This inevitable give rise to different issues, and in some instances, cases become far more complex than they were before.

   Guidelines provide two broad ways of aid – procedural aspect and substantive perspective.

   The Guidelines provide a proper structure, and in some way formularized the dispute resolution mechanism. The provide a proper roadmap in a systematic way – from threshold issues, identifying the parties and background leading to the disputes, both parties contentions, finding and decisions.

   Once the Panellists take this roadmap into mind when deliberating the disputes, they will be able to write a persuasive high-quality decision, or what we say to be "speaking judgment". This is important to the effectiveness of the UDRP Proceedings.

   Readers will be able to understand the decision, and this also leads to stability, predictability and certainty that allow the public and the business community to plan and organize their lives, which is one of the foundations upon which our justice system operates.

5. **On the other hand, what do you think are the impacts of these guidelines in the protection of intellectual property against online appropriations done in bad faith?**

   The Guidelines provide a very comprehensive guidelines on real issues presently faced by many in the online and virtual world, e-commerce and cross-border transactions. One of them is misappropriation of domain name done in bad faith.

   The Guidelines provide non-exhaustive lists of circumstances in which the respondent's domain name has been registered and is being used in bad faith:

1. The respondent has registered, or the respondent has acquired the disputed domain name, primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that the complainant, for valuable consideration in excess of the respondent's documented out-of-pocket costs directly related to the disputed domain name;
2. The respondent has registered the disputed domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that the respondent has engaged in a pattern of such conduct;
3. The respondent has registered the disputed domain name primarily for the purpose of disrupting the business of a competitor;
4. By using the disputed domain name, the respondent has intentionally attempted to attract, for commercial gain, Internet users to the respondent's website or other online location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of the respondent's website or location or of a product or service on the respondent's website or location;
5. Fraudulent transfer of the domain name;
6. Misuse of the domain name system which includes activities such as DDoS attack;
7. Phishing, and spreading of malware;
8. Passive holding or inactive website.

These examples actually go to the heart of the issues of online misappropriations done in bad faith frequently faced by the traders. It focuses the Panel to look out for these evidence and circumstances in deciding whether there is any misappropriation of domain name done in bad faith.

With proper guidance and evidence, a fair decision from the Panel will effectively protect intellectual property against online misappropriations done in bad faith.

6. From your observation of domain name disputes, what do you feel are the most common areas of improvement for panellists? What best practices can you impart based from your experiences?

I will address this Question in the general context.

Without a proper structure in the decision, reader may not be able to comprehend the directions or consideration taken into account by the Panellists.

Sometimes, a decision may comprise of regurgitation of contentions of the parties, and when proceeding with ultimate decision, there is no linkages between the two. It may sometimes be said to be a non-speaking judgment. The decisions may on the face of it be seen to be a "template" decision. Panellists must understand, "justice must not only be done, it must be seen to be done".

There is really no short cut to this. I suspect the Guidelines will set the tone right and guide new Panellists towards the right direction.

7. What for you is the content of a high-calibre decision? How should structure and substance interplay?

First, at the forefront of all Panellists mindset, must be one ---impart justice in a fair and expeditious manner. Integrity must always be an important foundation in all decisions.

Second, one must have a standard framework in mind in attaining the first objective mentioned above. The Guidelines provide a good framework in achieving this objective.

Third, one must understand fully the contention of both parties. Whilst DNDR provides online dispute resolution, the principle of *audi alteram partem* cannot be compromised. Don't just regurgitate the contentions from both parties. Understand them. It is only when one understand the contentions of both parties, it is only when the panellists are able to address the issues fairly.

Fourth, evaluate the pleadings and evidence very carefully and diligently, and test it against the contentions of the parties. Thereafter, apply the facts to the law.

Fifthly, like the local say, don't live "*seperti katak di bawah tempurung*"[1]. The Panellists must keep themselves appraise with the new developments. It is only when they keep themselves updated, they are able to deliver justice and address real issues.

Finally, we must appreciate that technology, media and telecommunications are constantly improving is high speed. As a consequence, online selling and e-commerce are constantly on the rise. Similarly, the patterns and nature of IP infringement becomes more "innovative". Thus, at the forefront of the Panellists mind, they must appraise themselves with these changes in order to deliver a fair and just decision.

8. **What other capacity-building initiatives can help individuals and businesses gain awareness to their rights and remedies for domain name disputes?**

Every stakeholders play a pivotal role in this.

Apart from educating the individuals and businesses in terms of the importance of their rights and remedies, AIAC's commitments certainly play an important role, if not the most important aspect. AIAC's constant commitment in driving the DNDR is to be applauded.

In addition to AIAC's long term commitment, the ability of DNDR providing effective and efficient solutions to the problems faced by individuals and businesses in the online ecosystem will be the best spokesman.

9. **With Malaysia's multi-cultural background, what do the AIAC and Malaysian panellists bring to the field of DNDR?**

Truly, most of our Panellists have very wide experience and are expert in this field. Malaysia is a multi-racial, multi-lingual and multi-cultural nation.

What sets us apart is our exposure to these difference culture, and our Panellists are able to understand and address the issues involving cross border and multiple jurisdiction, having in mind the different trends and culture.

Apart from that, many of our Panellists are eloquent in several languages. This is important, particularly when evidence may not necessarily be in one language.

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

There is really no short cut to this. I suspect the Guidelines will be a good start.

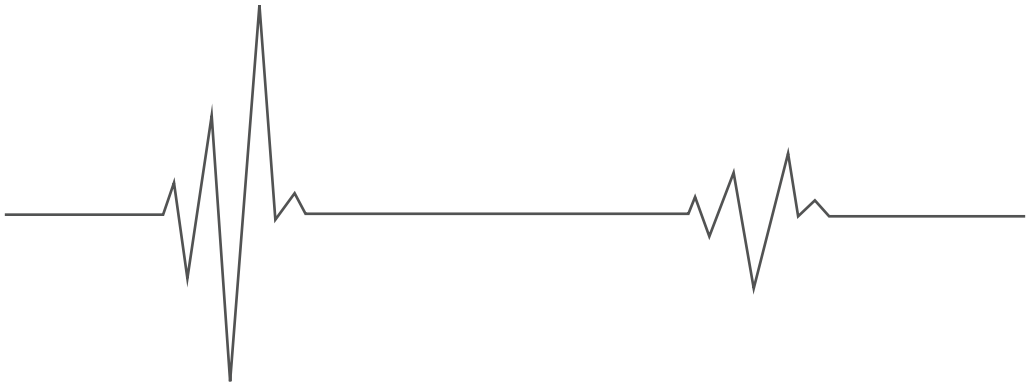
Do not take the "template" provided as the all and end all. The primary purpose of the process is to impart justice and to resolve the online disputes justly and expeditiously.

The Guidelines and the "template" is used as a tool to guide us in our thinking process to ensure that the Grounds are laid out in an orderly and coherent manner.

Most importantly, the mindset, must be one ---impart justice in a fair and expeditious manner. Integrity must always be an important foundation in all decisions.

I Would Say: Read, Understand, Open Your Eyes And Ears, And Most Importantly, Have The Proper Mindset And Soul!

[1] As Frog Beneath A Shell (literal translation)



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