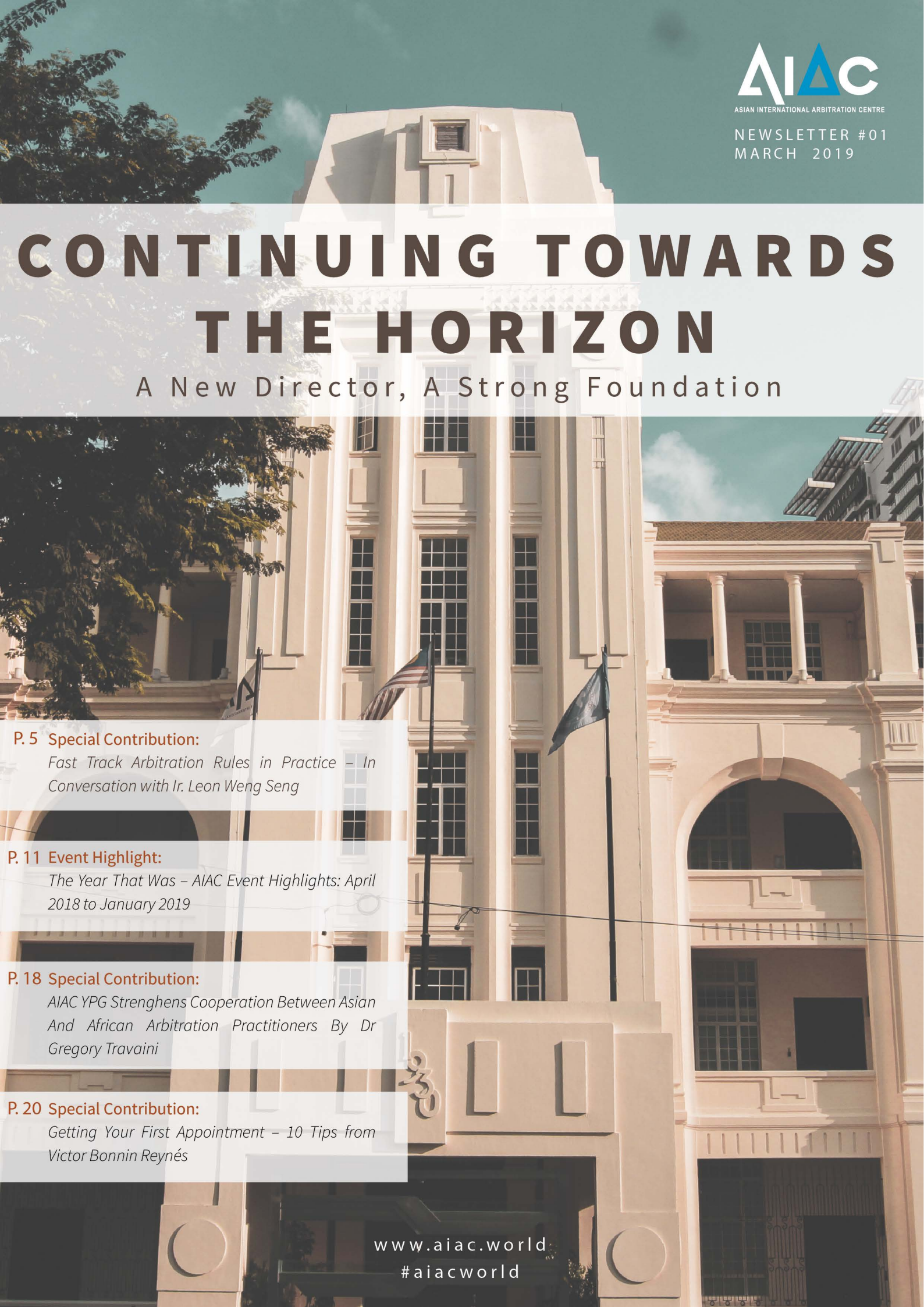

AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE

NEWSLETTER #01
MARCH 2019

CONTINUING TOWARDS THE HORIZON

A New Director, A Strong Foundation

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AIAC YPG Strenghens Cooperation Between Asian And African Arbitration Practitioners By Dr Gregory Travaini

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Getting Your First Appointment – 10 Tips from Victor Bonnin Reynés

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NEWSLETTER #01

March 2019

*This edition of the AIAC Newsletter has been edited and designed by the AIAC Newsletter Team. Edited by: Ms Nivvy Venkatraman. Designed by: Mr Franz Dominic & Mr Mohammad Syahir Alias. Distributed by: Asian International Arbitration Centre.

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

Director's Message

7th February 2019 marked the first anniversary of the Asian International Arbitration Centre ("AIAC")'s name change from its previous moniker – the Kuala Lumpur Regional Centre for Arbitration ("KLRCA"). From its humble beginnings as a regional arbitration centre, the AIAC has now not only grown into a multi-service hub for alternative dispute resolution ("ADR"), but has also stamped its mark in holistic dispute avoidance.

The past year has seen the AIAC undertaking a number of events, in line with the mission to further propel the growth and awareness of the Centre. We successfully organised our 2nd ICC-KLRCA Pre-Moot for the Willem C. Vis International Commercial Arbitration Moot in March 2018. We are now set to introduce the biggest ever Vis Pre-Moot in the world with our 3rd ICC-AIAC Pre-Moot which will take place between 22nd and 24th March 2019, with more than 110 teams participating. The moots are a contribution to the cause of education and career development of the youth of the world.

In May 2018, the AIAC also organised its inaugural Asia ADR Week, which saw ADR experts from not only Asia but from all over the world coming over to Kuala Lumpur to engage in discussions on key issues and the latest developments in the global ADR framework. This year, we hope to not only repeat the success of the 2018 Asia ADR Week, but to also bring it a step further in revolutionising the ADR sphere in Asia. The theme of this year's Asia ADR Week will be "The Kintsukuroi Perspective: The Asian ADR Revolution", and the event will be held between 27th and 29th June 2019. I urge all of you to save the date and to not miss this invaluable opportunity for knowledge sharing and exchange, where attendees can tap into a diverse range of mixed expertise and specialisations in the field of ADR.

Embedding our feet further in the field of holistic dispute avoidance, the AIAC introduced its 2019 Edition of the AIAC Standard Form of Building Contracts ("SFC") in November 2018. The 2019 Edition of the AIAC SFC introduces the new and improved Main Contract as well as Sub-Contract. The introduction of this new edition showcases our commitment and effort in ensuring that the AIAC SFCs are continuously improved in line with the latest developments in the construction industry.

Other notable headlines from the year 2018 include the hosting of the inaugural AALCO Annual Arbitration Forum in July 2018, as well as several key initiatives taken to introduce and promote the Asian Domain Name Dispute Resolution Centre ("ADNDRC") as one of the five domain name dispute resolution providers in the world. The ADNDRC has four offices across Asia and at present, the AIAC is the home to the Secretariat of the ADNDRC. Through the ADNDRC, the AIAC will continue to provide a platform for the expedited resolution of domain name disputes.

More information on AIAC events held between April 2018 and January 2019 can be found in this edition of the Newsletter. My colleagues at the AIAC have also shared some key insights on the functions and products of the AIAC for the information of our readers. A special mention must also go out to our three Special Contributors – Ir. Leon Weng Seng, Mr. Victor Bonnin Reynés, and Dr Gregory Travaini – for voluntarily sharing their insights and experiences in this edition of the Newsletter.

Following from an impressive 2018, we are confident that 2019 will boast countless engaging and informative events that will be aimed at bringing together the local and international ADR community. We sincerely encourage all interested participants to sign up and be part of our future events and initiatives. Together, we can develop the field of ADR not only in the region, but also across the globe.

As we each set our goals for the coming months, lest us not forget that growth is never occasioned by mere chance – it is the result of forces working together in synergistic harmony.

Till the next issue, happy reading!

VINAYAK PRADHAN
Director (Acting)
Asian International Arbitration Centre

FAST TRACK ARBITRATION RULES IN PRACTICE

In Conversation with

Ir. Leon Weng Seng

The Asian International Arbitration Centre ("AIAC") has introduced various kinds of arbitration rules to accommodate the evolution and expansion of commercial practices around the world. One such set of rules is the AIAC Fast Track Arbitration Rules – a set of arbitration rules that provide for a faster and cheaper arbitration process when compared to traditional arbitration proceedings. The key features of the AIAC Fast Track Arbitration Rules 2018 are that they provide for a shorter period in which disputes are to be resolved, and proceedings under these rules can be conducted on a "documents-only" basis or through substantive oral hearings. To better understand how the AIAC Fast Track Arbitration Rules 2018 operate in practice, we asked one of our empaneled arbitrators, Ir. Leon Weng Seng, on his recent experience in using the said rules. [1]

1 You have handled a number of arbitration matters in your career. How was using the Fast Track Arbitration Rules 2018 ("FTAR") different to using the AIAC Arbitration Rules 2018 (or any of its predecessors), or presiding over an ad hoc arbitration matter?

The FTAR offers a real expedited arbitral process and with the short time frames for Parties' submissions and publication of the Award, the Parties and the tribunal are very focused and always alert on queries or clarification requests.

These short time frames reduced the burden and effects on operational, business, financial and other commercial resources of the Parties.

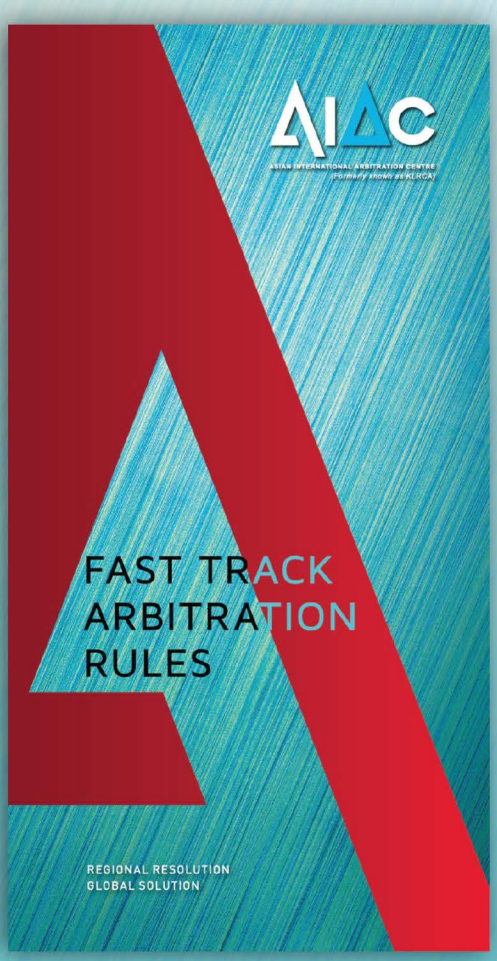
The Rules are easy to follow. There are only 28 rules as compared with the AIAC Arbitration Rules which comprised 18 Rules and 43 Articles of UNCITRAL Arbitration Rules.

2 In your opinion, what are the unique features of the FTAR?

FTAR uniquely provides for the Award to be published within 90 calendar days from the date the proceedings are declared closed.

In a documents-only proceeding, the arbitral tribunal is required to render its award with 90 days from its receipt of the final written submission. Unless the arbitral tribunal otherwise determines, this type of proceeding is useful for international arbitrations where the amount in dispute is less than USD75,000 (or equivalent currency). For domestic disputes, the amount in dispute must be below RM150,000.

Where the proceedings require substantive oral hearings, the arbitral tribunal is required to conduct and complete the oral hearings not later than 90 days from the date the AIAC notifies the parties of the commencement of the proceedings. The arbitral tribunal is then required to publish its award within 90 days from the date when the proceedings are declared to have closed.



[1] Ir. Leon Weng Seng graduated with Bachelor degree in Civil Engineering in 1980 and went on to obtain an honours degree in law with the University of London and a postgraduate Diploma in Arbitration with the University of Reading. He is a corporate member of The IEM and a registered professional engineer and is an advocate and solicitor of the High Court of Malaya (non-practising). Ir. Leon is the principal of a civil and structural engineering consultancy firm. He has vast experiences in the administration of construction contracts including giving advice on contractual, mediation, adjudication and arbitration matters. His other areas of particular interest are forensic engineering and investigation of collapsed structures and slopes, and assessment of fire damaged structures. He acts as an expert witness in courts and arbitration. Ir. Leon is also a CIDB accredited mediator, Fellow and a Chartered Arbitrator of The Chartered Institute of Arbitrators in London and an Adjudicator of AIAC. He is a committee member of the Subcommittee on Dispute Avoidance and Resolution Practice of the IEM and the past Chairman (2008–2010) of the Chartered Institute Arbitrators (CIArb) Malaysia Branch. He is sitting as arbitrator in many on-going arbitrations.

3 In your view, what degree of flexibility (if any) did the FTAR afford the parties over the conduct of the proceedings?

The FTAR offers a high degree of flexibility. As the FTAR is based on the Parties' agreement on the Rules, in my matter, the Parties modified certain provisions of the FTAR to enhance the efficiency of the proceedings by:-

a) shortening the Award publication period to 60 calendar days from commencement of arbitration instead of 180 days (see 4.0 below);

(b) agreeing on the number of arbitrators being one;

(c) defining their agreed commencement date of arbitration being the date the Parties entered into an Arbitration Agreement;

(d) agreeing that that Notice of Arbitration (NoA) and Response to the NA are dispensed with;

(e) concurrently serving their documents in support of their respective claims on the commencement date of arbitration and clarifying that there shall be no reply;

(f) agreeing to dispense with oral hearing but submitting witness statements on affidavits;

(g) agreeing that there be no examination in chief, cross-examination and re-examination of witness or on the expert reports submitted;

(h) agreeing that the arbitration is based on documents only;

(i) excluding the right to legal representation, a breach of which would automatically terminate the proceedings with the defaulting party bearing the costs of the arbitration.

(j) agreeing with the tribunal for a fee different from the FTAR fee schedule; and

(k) agreeing that the parties will bear the fee of the Arbitrator and costs and expenses of the Arbitration in equal shares irrespective of the outcome of the arbitration.

4 What was your perception of the tight timelines imposed in the FTAR?

The following are the timelines stated in the FTAR compared with those stipulated by the Parties.

		In the FTAR			By the Parties
	Event	**Respondent**	**Claimant**	**Arbitrator**	
1	Response to arbitration notice	10 days when arbitration notice is received			*0
2	Case Management meeting			10 days (from AIAC notice of commencement of arbitration)	
3	Statement of claim		14 days (from AIAC notice of commencement of arbitration)		*0
4	Statement of defend	28 days (from AIAC Notice of commencement of arbitration)			*0
5	Any further submission (from date set by tribunal)	14 days	14 days		*0 (Parties agreed no further submission of documents)
6	Substantive Oral Hearing			90 days (from AIAC notice of commencement of arbitration)	No hearing
7	Publication of Award			14 days from close of proceeding, a total of 180 days (from AIAC notice of commencement of arbitration)	60 days from notice and commencement of arbitration

***Note :** In anticipation of the Parties' agreement to engage in Fast Track Arbitration. Parties had prior discussion on the timelines and on the agreed bundles of documents and that they were to serve the Parties' written submissions on the date of commencement of arbitration.

The timelines in FTAR are tight, i.e. the Award needs to be published within 180 days from AIAC's notice of commencement of arbitration, i.e. approximately 6 months.

However, in this case, the Parties required the tribunal to do so within 60 days which was only 33% of the FTAR time period. It was indeed a highly pressured environment to be in.

Under these circumstances, it called for strong case management skills, experience in the technical matters in dispute and the availability of time to be rendered by the tribunal.

If you had another matter conducted under the FTAR, would you be more inclined to follow the documents-only process or permit oral hearings? Why? What sort of matters do you believe are best suited for the FTAR?

Whether to conduct FTAR proceedings on a documents-only basis or to allow oral hearings would depend on the disputed issues.

Most construction cases are factual in nature and suitable for documents-only arbitration. Oral hearings are helpful if witnesses are to testify on the construction method statement and giving actual eye witness accounts of events.

Therefore, whether oral hearings are permitted will depend on circumstances and the needs of the Parties and tribunal.

Did you come across any limitations in using the FTAR?

I would like to point out two things:

(a) there needs to be a high degree of co-operation and team work from the Parties on adherence to timelines. Some stipulated forms of sanction are required if a party fails to comply; and

(b) multiple and complex technical issues, multi-party disputes and arbitrations involving sovereign parties may not be suitable for fast track arbitration. Apart from these types of cases, the FTAR offers many advantages.

Are there any improvements you would like to see in a revised version of the FTAR?

Perhaps provisions;

(a) for sanctions on Parties' non-compliance (see above); and

(b) that an Award published after the time agreed by the Parties or FTAR is void and that the Tribunal is not entitled to the fees and expenses in such an instance, or if the tribunal is entitled to fees and expenses, that the amount is reduced in proportion to the nature of the delay in rendering the Award.

How would you describe your overall experience in using the FTAR?

The FTAR promotes the speedy resolution of disputes especially if the resolution of the dispute is of some urgency, e.g. in a progress payment situation to ease cashflow. It reaffirms the basic principle that arbitration is speedy and more cost effective over litigation. The Parties' identities and matters are kept private and confidential, thus enabling the parties to continue with their business and commercial relationship.In my case, and based on reliable sources of information, I know that the Parties are continuing with their existing contractual relationship and will be cooperating in future contracts. The Respondent also paid the awarded amount to the Claimant within the two week timeframe stated in the Award.

However, one thing for arbitrators to be mindful of in an FTAR proceeding is the quality of the Parties' submissions, especially from the Respondent, given that the Parties have a limited time within which to prepare same.

Would you recommend the AIAC FTAR to practitioners or parties who are minded to opt for a faster arbitration process?

The advantages of speed without the compromise of fair treatment are definitely plus points. Cash flow is enhanced giving a better working and economic environment as a whole.

The probable difficulties are finding a tribunal which is technically competent and can devote time to conduct the proceedings on relatively short notice and publish the Award within such tight time schedule.

In any event, I would definitely encourage the use of FTAR to disputants.

AIAC

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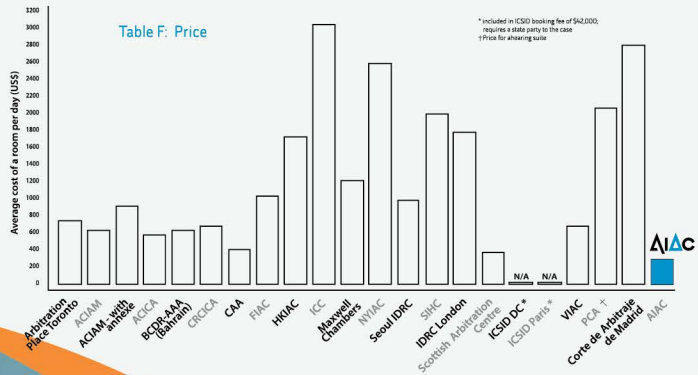

*GAR 2019 SURVEY

Guide to Regional Arbitration (Volume 7 – 2019)

WHAT ARE THE DIFFERENT ROLES OF THE AIAC IN ARBITRATION PROCEEDINGS?

By Ragad Abdulmajeed Alfaraidy [1]

The Malaysian Government has accorded the Asian International Arbitration Centre ("AIAC") with the necessary privileges and immunities to exercise its functions as an international arbitral institution. The AIAC plays a number of roles in arbitrations seated in Malaysia. Not only does the AIAC administer institutional arbitrations, but it can also act as the appointing authority and the authorised fund-holder in ad-hoc arbitrations.

An institutional arbitration is one where the parties have agreed, either in the arbitration agreement or through a submission agreement, to conduct the arbitration under the auspices of the AIAC Arbitration Rules (the most recent being the AIAC Arbitration Rules 2018). In such situations, the AIAC assumes the role of the administrative authority overseeing the conduct of the arbitral proceedings. In doing so, it carries out a number of responsibilities ranging from selecting the arbitrators and resolving challenges of arbitrators, to offering hearing facilities, determining the arbitrators' fees, and undertaking a technical review of arbitral awards. Other notable powers of the AIAC include appointing emergency arbitrators (especially for issuing interim awards prior to the constitution of the arbitral tribunal), considering the joinder of parties prior to the constitution of the arbitral tribunal, and considering the consolidation of proceedings. The AIAC does not determine the merits of the disputes; rather the arbitrator it appoints, or the parties select, decides the dispute on the merits. The parties bear all the costs and expenses of the proceedings, including the AIAC's administrative fees and the arbitrator's fees.

Ad-hoc proceedings are any proceedings which are not conducted under the auspices of an institution's rules. In this instance, the law governing the conduct of the proceedings will be the national arbitration legislation (i.e. Malaysia's Arbitration Act 2005). While parties in ad-hoc arbitrations do not incur administrative fees, they shoulder the burden of selecting the arbitrators, negotiating their fees, and even finding suitable hearing facilities. Since this may prove particularly difficult, the parties may resort to the AIAC to act as the appointing authority pursuant to Section 13 of the Arbitration Act 2005. In its role as the appointing authority, the AIAC will appoint the arbitrator(s) and resolve any conflicts concerning the constitution of the arbitral tribunal.

In addition to acting as the appointing authority, the AIAC also offers ancillary administrative services to ad-hoc arbitrations. The AIAC makes available its hearing facilities to parties in ad hoc arbitrations and can even be authorised to act as a fund-holder. Doing so would both secure the costs and expenses of the arbitration and relieve the arbitral tribunal from having to collect its fees and expenses directly from the parties.

For further information on the administered and ad-hoc arbitration services provided by the AIAC please feel free to contact us at +603 2271 1000, or alternatively, send us an email at enquiry@aiac.world.

[1] Ms Ragad Abdulmajeed Alfaraidy was a former Legal Intern at the AIAC from Saudi Arabia.

PRESS RELEASE

CABE PROVIDES SUPPORT TO AIAC'S STANDARD FORM OF BUILDING CONTRACTS

Chartered Association of Building Engineers (CABE)[1] has today announced its support of two contract publications, produced by the AIAC (Asian International Arbitration Centre (Malaysia)).

The publications – The Standard Form of Building Contracts, Main Contract and Sub-Contract (AIAC 2019 SFC) – provide comprehensive and unified contract templates that help to eliminate contract dispute by providing clear and unbiased standardisation.

The publications have been designed so that users can now customise contracts to meet their specific needs whilst eliminating the distinction between 'With' and 'Without Quantities'. Further, they provide an option for the contract parties to select a Contract Administrator (CA). If no CA is appointed, then the project architect automatically becomes the CA, again, helping to minimise disputes.

The dispute resolution sections of the AIAC 2019 SFC incorporates the AIAC Arbitration Rules 2018 and the 2005 Arbitration Act (as amended 2018) and provides for adaptability to the latest tax regime. The AIAC is the first arbitral institution in the world to launch such a suite of contracts that are suitable for all construction projects, globally.

"The AIAC SFC reflects the best international standards and CABE is delighted to put its support behind its Standard Form of Building Contracts," commented Dr Gavin Dunn, Chief Executive of CABE. "Contract disputes are time consuming and costly, anything that can be done to provide standardisation and clarity, can only be beneficial for all parties. As an organisation that has members working across design, construction, evaluation and maintenance, CABE has a unique understanding of the disputes that can arise. With eight international chapters – Middle East, USA, New Zealand Hong Kong, Singapore, China, Macau and Malaysia – we witness this from a global perspective. Standard Forms of Contacts, that can be adapted to local applications, is a vital step in helping to create a more efficient industry for all."

The AIAC is a not-for-profit, non-governmental international arbitral institution which has been accorded independence and certain privileges and immunities by the Government of Malaysia for the purposes of executing its functions as an independent, international organisation. It has a proven track record for the provision of world-class institutional support as a neutral and independent venue for the conduct of domestic and international arbitration and other alternative dispute resolution (ADR) proceedings. The centre was the first of its kind to be established under the Asian African Legal Consultative Organisation (AALCO), an international organisation comprising 47-member states from across the region. It was also the first centre in the world to adopt the UNCITRAL Rules for Arbitration as revised in 2013 and has its own set of procedural rules which governs the conduct of the entire arbitration proceedings from its commencement to its termination.

The AIAC 2019 SFC is available from the AIAC website - http://sfc.aiac.world/ - where users will have the ability to customise, save, store and share completed contracts. Registered users may also save incomplete contracts for later completion.

For more information on CABE, visit **www.cbuilde.com.**[2]

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[1] Chartered Association of Building Engineers (CABE) is the leading body for professionals specialising in the design, construction, evaluation and maintenance of buildings.

CABE was founded with the principal objectives to:

- promote and advance the knowledge, study and practice of each and all of the arts and sciences concerned with building technology, planning, design, construction, maintenance and repair of the built environment and the creation and maintenance of a high standard of professional qualification, conduct and practice
- encourage and facilitate co-operation between the construction professions.

Providing the prime qualification of Building Engineer the title reflects the professional expertise of CABE members, who practise in over 55 countries working in both private and public sectors.

Formed in 1925 as the Incorporated Association of Architects and Surveyors (IAAS), becoming the Association of Building Engineers in 1993. After being granted a Royal Charter at the end of 2013 the Association changed its name to Chartered Association of Building Engineer (CABE).

[2] This Press Release has been reproduced with the permission of the CABE Malaysia Chapter.

THE YEAR THAT WAS – AIAC EVENT HIGHLIGHTS: APRIL 2018 TO JANUARY 2019

In 2018, the Asian International Arbitration Centre ("AIAC") hosted a myriad of thought-provoking and engaging events all aimed at disseminating knowledge on the trends, practices and/or ideas circulating the alternative dispute resolution sphere. The following pages will highlight the key events held between April 2018 and January 2019.

APRIL 2018

Access to Justice: Out of Competition Independent Adjudication

The idea of Asia becoming a hub for the resolution of sporting disputes has become increasingly topical given the region's capability for hosting internationally acclaimed games. In this talk, The Hon Sir Bruce Robertson (Chairman of the New Zealand Sport Tribunal since 2013) and Mr Izham Ismail (CEO, Professional Footballers Association of Malaysia) presented their insights on the framework and mechanisms of an independent sports tribunal in the adjudication of sporting disputes. The New Zealand framework was thoroughly discussed followed by an exploration of how such a set up could be relevant in the Malaysian sporting scene. An engaging discussion followed.

MAY 2018

New Economic Realities in Arbitration: The Influence of BRI

This Panel Discussion explored the flow of investment under the Belt and Road Initiative ("BRI"). Following a review and analysis of the current trends in the arbitration market, the panellists focussed on the nature and types of issues that could arise from the BRI in the upcoming years (for instance, whether involvement in BRI-related disputes will require a special background, knowledge and skills). The panellists also shared their views on the challenges and problems that may lie ahead for the new generation of arbitration practitioners, and also explored potential career opportunities for young ADR practitioners.

ASIA ADR Week 2018

Between 5th and 7th May 2018, the AIAC hosted the inaugural edition of the Asia ADR Week. This conference delivered the "Asian Experience", tapping from a diverse and mixed culture of expertise and specialisations from all over Asia whilst focussing on the demands and needs of Asian businesses. which attracted over 200 participants and more than 90 speakers from around the world. It was made up of 11 sessions, 9 breakout sessions, and 2 impressive social events, with a particular focus on doing business in Malaysia. The final day marked the 2018 CIPAA Conference and the release of the 2018 CIPAA Report titled "Sharing Solutions"

JUNE 2018

Defying Expectations: Thoughts on Life as a Barrister and the Opportunities and Challenges at the Bar

On 18th June 2018, AIAC YPG proudly hosted an interview with Ng Jern-Fei QC to celebrate his recent appointment as Queen's Counsel. Jern-Fei grew up in Malaysia and practises at Essex Court Chambers, one of the leading Magic Circle sets of barristers' chambers in London. He specialises in international arbitration and commercial litigation. He is described in the legal directories as "a formidable advocate" with "first-class advocacy skills" who "comes up with extremely clever points" and has an ability to "present practical legal solutions that not only win you the battles, but also the war."

Recent Developments in International Construction and Construction Arbitration: What can Germany learn from Asia and What can Asia learn from Germany?

On 26th June 2018, the AIAC hosted an evening talk by Dr Rouven F. Bodenheimer which focussed on exploring solutions for overcoming the difficulties brought by the polarity of construction laws in Asia. Dr Bodenheimer is co-founder of Bodenheimer Herzberg, a law firm specialised in international dispute resolution. He has been involved in many domestic and international arbitration cases, as both counsel and arbitrator and has significant experience in both institutional and ad hoc arbitration, as well as dispute adjudication and mediation. He is a fellow of the Chartered Institute of Arbitrators (FCIArb). He lectures on mediation and international arbitration for the joint master's degree programmes of two prestigious German universities. A detailed write-up of this event is found at pages 26 - 27 of this Newsletter.

JULY 2018

AALCO Annual Arbitration Forum

The inaugural Asian-African Legal Consultative Organisation (AALCO) Annual Arbitration forum was held between 21st and 22nd July 2018 at the AIAC. This forum coincided with the 40th year anniversary of the AIAC's establishment under the auspices of the AALCO. The event placed a special focus on Connecting Asia and Africa and Connecting Investment and ADR: Opportunities and Challenges.

This was the first event of its kind that brought together all five Arbitration Centres established under the auspices of AALCO: the AIAC, the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Lagos Regional Centre for International Commercial Arbitration (LRCSCA), the Tehran Regional Arbitration Centre (TRAC) and the Nairobi Centre for International Arbitration (NCIA).

The AALCO Annual Arbitration Forum was attended by over 200 local and international participants. Spanning across two days, the conference touched on the role of the AALCO arbitration centres in facilitating investment and promoting the use of ADR across Asia and Africa, the opportunities and challenges that lay ahead, as well as providing a practical guide for investors venturing into business in different regions across Asia and Africa. Region-specific break-out sessions on the contemporary developments in ADR in Asia and Africa were also organised to shed some light on current affairs.

Many esteemed legal practitioners, government officials, members of the judiciary and academics from Asia, Africa and beyond presented at the Forum including the Hon. Dipak Misra (Chief Justice of India), Datuk Liew Vui Leong (Minister in the Prime Minister's Department (Law)), Hon. Prof. Palamagamba John Aidan Mwaluko Kabudi (Minister of Constitution and Legal Affairs of Tanzania), H.E. Professor Dr. Kennedy Gastorn (Secretary General, AALCO), YA Datuk Nallini Pathmanathan (Judge of the Court of Appeal of Malaysia), and Prof. Dato' Dr. Rahmat Mohamad (Secretary of Eminent Person Group, AALCO).

Design & Build Launch 2018

In furtherance of the launch of a suite of Standard Form of Contracts (the "SFC") on 15th August 2017, the AIAC revealed its Standard Form of Design and Build Contracts on 3rd July 2018. An essay exploring the features of the Design & Build Contract is found at pages 28 - 30 of this Newsletter.

Workshop on UDRP Rules: Expert Approach to Initiating Domain Name Disputes

On 10th July 2018, the AIAC, in association with Quisumbing Torres (Member Firm of Baker & McKenzie International) and the support of the AIAC YPG & Young PIArb, conducted a highly successful workshop on the Uniform Domain Name Dispute Resolution Policy ("UDRP") Rules & Procedure in Manilla, Philippines. The workshop was well-attended by trademark practitioners, potential filing parties, trademark owners, domain name registrants, Registrars and ccTLD administers amongst others.

The highlights of the workshop included a presentation on the AIAC as a domain name dispute resolution provider by former AIAC Senior International Case Counsel, Mr Alonso Mayordomo Castilla, a session on the preparation and submission of a complaint form and available online services by Mr JJ Disini (Managing Partner, Disini & Disini Law Office; Associate Professor, University of the Phillipines College of Law; Associate Professor, University of the Phillipines College of Law), an overvirew of the structure of UDRP proceedings by Mr Jay Patrick Santiago (Senior Associate, Quisumbing Torres), a discussion on the legal aspects to be considered under the UDRP Rules by Mr Ferdinand M. Negre (Intellectual Property Attorney, Bengzon Negre Untalan; Chair, Commercial Law & Intellectual Property Department, Ateneo de Manila University), and finally an overview on the outcome and consequences of a decision by Mr Teodoro Kalaw IV (Partner, Kalaw Sy Selva & Campos; Professor of Law, Ateneo Law School).

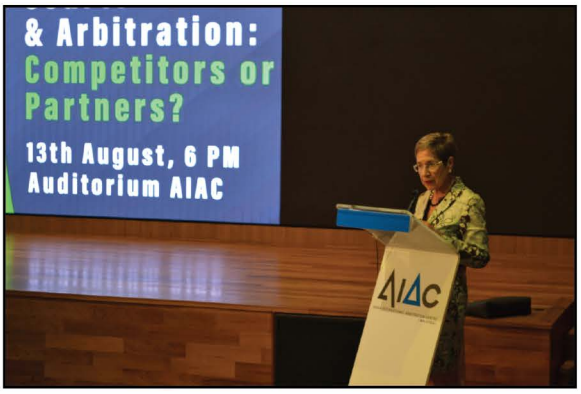
International Commercial Arbitration in an Age of International Commercial Courts

On 27th July 2018, the AIAC held an evening talk presented by AIAC's Young Practitioners Group and the University of Warwick on, 'International Commercial Arbitration in an Age of International Commercial Courts'. Presented by Associate Professor Christopher Bisping of the School of Law, University of Warwick, the talk focussed on the growing trend of international commercial courts popping up across Europe to resolve arbitration disputes, in competition with London courts, which is indicative that the market for jurisdiction in arbitration is undergoing major changes at present. It was noted that some more established international commercial courts, such as the Singapore International Commercial Court, have borrowed certain elements from arbitration to widen their appeal. Against this background, the talk analysed the extent of borrowing from arbitration that has taken place and re-assessed the advantages and disadvantages of both systems of dispute settlement in light of these changes. A truly informative evening!

AUGUST 2018

Courts and Arbitration: Competitors or Partners?

There have been divergent views as to how the relationship between judicial courts and arbitral panels should be perceived. One could argue that those avenues of dispute settlement belong to two competitive realms, while another could argue that the judicial and arbitral processes actually complement each other in the pursuit of justice. On 13th August 2018, the AIAC was honoured to welcome The Hon. Justice Margaret Beazley AO, President of the Court of Appeal of New South Wales (Australia) to deliver a talk on the vital role that courts play in commercial arbitration. Amongst other things, Justice Beazley discussed the general statutory powers and functions of courts that may be exercised to aid arbitral proceedings in what was a highly insightful evening.



Should Malaysia Adopt the French Solution Concerning the Recognition of Annulled Awards?

On 15th August 2018, Professor Christophe Seraglini (Professor of Law and Partner at Betto Seraglini) considered the highly debated issue of the recognition of annulled awards, a topic on which the international framework is divided. In the belief that it allows to give to arbitration its full effect, French legislation recognises in France the awards annulled at the seat of the arbitration. However, this position is rather isolated in comparative law. As an example, the Malaysia Arbitration Act 2005 provides that the award cannot be recognised if it has been set aside or suspended at the seat. Against this background, Professor Seraglini presented his views on key questions such as which legal system is preferable according to recognition of awards? Which is more favourable to Arbitration? What are the issues concerning State sovereignty or International diplomacy? What are the issues regarding the standardisation of International Arbitration? Ultimately, should Malaysia follow the French solution in this matter?

SEPTEMBER 2018

AIAC Sports Month

September 2018 showcased a wide range of sports law related events at the AIAC in celebration of the month's theme – AIAC Sports Month.

Sports Law Conference

On 28th September 2018, the AIAC organised its inaugural edition of the International Sports Law Conference 2018 ("SLAC 2018") themed - Sports Disputes: Block & Tackle.
SLAC 2018 featured innovators and visionaries in the world of sports law and touched upon the various nuances of sports law and resolution of sports disputes. From a distinctly Asian lens, the SLAC 2018 provided a contemporary and futuristic outlook on the world of sports law.

Present at the event were, YB Syed Saddiq Syed Abdul Rahman, Minister of Youth & Sports, YB Mohamed Hanipa Maidin, Deputy Minister in the Prime Minister's Department, and YAM Tunku Tan Sri Imran, Hon Life President of the Olympic Council of Malaysia.

The conference had five interactive and diverse sessions discussed by leading experts, engaging in topics ranging from Malaysia's role as a sporting nation to the global harmonisation of doping rules and regulations as set forth in the World-Anti Doping Code (WADC). The AIAC was particularly honoured to include a recorded special address by Professor Richard McLaren OC, the Canadian author of the famed 2016 "Mclaren Report" presented to the World Anti-Doping Agency (WADA).

The Great Sports Debate

On 21st September 2018, the AIAC hosted "The Great Sports Debate" – a sports arbitration moot presided by a three-member panel of prominent arbitrators including sports arbitrator, Dato' Ambiga Sreenevasan and Mr Anangga W. Roosdiono, CAS Arbitrator and Senior Partner at Roosdiono & Partners (a member of ZICO Law). The moot problem was premised upon a doping violation upon which an infringement notice had been issued by a sports federation to a futsal athlete, in what ended up being an entertaining evening!

Other events which formed part of the AIAC Sports Month include the action-packed AIAC Futsal Tournament held on 8th September 2018 – thank you to all the participants, referees and audience members who made this event a success!

The AIAC also held a viewing session for the independent documentary "The War on Doping" – a film about the use of performance-enhancing drugs as chemical shortcuts to victory, fame and glory. Thank you kindly Mr Bjorn Bertoft (Producer of The War of Doping) for attending and allowing us to screen your documentary on this significant topic.

OCTOBER 2018

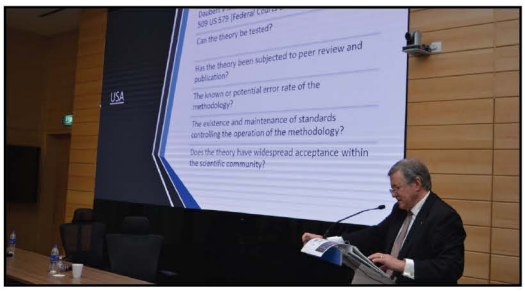
Domain Name Disputes - India Roadshow: New Delhi Chapter

On 29th October 2018, the AIAC, with the support of Lakshmikumaran & Sridaran Attorneys (India), conducted its first Indian Domain Name Road Show. Similar to the earlier domain name workshop held in Manilla, Philippines, the New Delhi Roadshow introduced participants to the basics of Domain Name Dispute Resolution, the structure of UDRP proceedings, the process of filing a complaint & the role of a provider, as well as an insightful discussion on the substantive issues in domain name dispute resolution. A special thank you goes out to our presenters, Mr Prashant Phillips (Partner – Lakshmikumaran & Sridharan), Mr Shantanu Sahay (Partner – Anand & Anand) and our own Ms Nivvy Venkatraman (International Case Counsel, AIAC), for making the AIAC's inaugural India Road-show a success.

Building Your Career in International Arbitration - How to Get Your First Appointment as an Arbitrator and Other Tips

On 25th October 2018, the AIAC was delighted to welcome Mr Victor Bonnin Reynés (Principal – VBArbitration) to deliver an interactive evening talk to practitioners seeking to build a career in international arbitration. Mr Bonnin has kindly made a Special Contribution to this edition of the Newsletter by providing a list of his top 10 tips for building a career in international arbitration – see pages 20 of this Newsletter.

NOVEMBER 2018



Expert Witnesses in Arbitration: Ships Passing in the Night or Foundering on the Rocks

On 12th November 2018, the AIAC welcomed The Hon. Wayne Martin AC QC, the former Chief Justice of Western Australia, to deliver an evening talk on expert witnesses in arbitration. In his talk, the former Chief Justice of Western Australia evaluated the various techniques that have been utilised to manage expert evidence in arbitral proceedings to avoid common pitfalls including oversight of the process by the Tribunal, conferral, single joint experts, and concurrent expert evidence (hot tubbing). The talk also addressed issues relating to the independence/impartiality of the expert witness, and the differentiation between evidence of fact and evidence of expert opinion.

Official Launch of AIAC 2019 Standard Form Building Contracts

On 28th November 2018, the AIAC held the official launch of the 2019 edition of its Standard Form Building Contracts ("AIAC 2019 SFCs"). The AIAC is the first arbitral institution in the world to launch a suite of this kind that is suitable for all building construction projects in both Malaysia and abroad as it can be easily adjusted to the needs of a particular user. The AIAC 2019 SFCs reflect the best international standards and were prepared by the Expert Advisory Committee comprised of distinguished professionals. The welcoming address for this event was delivered by Mr. Vinayak Pradhan, Director (Acting) of the AIAC, followed by an in-depth discussion of the features of the AIAC 2019 SFCs by the SFC Expert Advisory Committee. A write-up on the key features of the AIAC 2019 SFCs is found at pages 31 - 32 of this Newsletter.

AIAC Training Programme on Domain Name Disputes

On 29th November 2018, the AIAC organised the Kuala Lumpur instalment of its training program on domain name disputes. The welcoming address for this event was delivered by Mr. Vinayak Pradhan, Director (Acting) of the AIAC, followed by an engaging exploration of the principles, procedure and substantive issues associated with domain name dispute resolution. A detailed write-up of this event is found at page 33 of this Newsletter.

The Maritime Silk Road: Exploring Dispute Resolution Opportunities

On 15th November 2018, the AIAC, in cooperation with the China Maritime Arbitration Commission (CMAC), proudly presented this joint seminar highlighting the unique features of maritime dispute resolution mechanisms from the Malaysian and Chinese perspectives. The topics covered included an overview of Chinese and Malaysian perspectives on maritime projects that are caught under the umbrella of the Belt and Road, an exploration of arbitrating maritime disputes in China, and the growth and development of maritime dispute resolution mechanisms in Malaysia.

AIAC-APJA Conference on Arbitration 2018

On 22nd November 2018, the AIAC and the Asia Pacific Jurist Association (APJA) jointly presented the AIAC-APJA Conference on Arbitration 2018. This conference provided a platform for delegates from India and Malaysia to discuss, address and learn various issues, challenges and best practices relating to different aspects of Arbitration in both countries. The welcoming address for this event was delivered by Mr. Vinayak Pradhan, Director (Acting) of the AIAC. In attendance were YABhg Tun Dato' Seri Zaki Tun Azmi (Chief Justice of Dubai International Financial Centre Courts & Former Chief Justice of Malaysia), The Hon. Justice KG Balakrishnan (Former Chief Justice of India), and The Hon. Justice Vijender Jain (Former Chief Justice of Punjab & Haryana & President of APJA), amongst other notable Malaysian and Indian arbitration practitioners.

JANUARY 2019

Mooting Workshop: A Star Is Born

On 26th January 2019, the AIAC and the AIAC-YPG conducted a mooting workshop in preparation for the Willem C. Vis International Commercial Arbitration Moot 2019. The attendees had the opportunity to hear from practitioners and experienced mooters, and they were also given a chance to have a practice session and obtained useful advice on how to improve their oral advocacy skills. The topics were wide-ranging and covered: understanding arbitration, how to structure and organise an argument, what to bring to the mock hearing, style of arguments, the laws – procedural and substantive, responding to questions and rebuttals. A special thank you is required for the AIAC Pre-Moot Team for successfully co-ordinating this event.

ADR and 21st Century Diplomacy – An Event for Asia's Diplomatic Corps

On 24th January 2019, the AIAC held its inaugural event: "ADR and 21st Century Diplomacy: An Introduction and Networking Event for Asia's Diplomatic Corps". The welcoming address for this event was delivered by Mr. Vinayak Pradhan, Director (Acting) of the AIAC. A detailed write-up of the purpose of this event is found at page 34 of this Newsletter.

AIAC YPG STRENGHENS COOPERATION BETWEEN ASIAN AND AFRICAN ARBITRATION PRACTITIONERS

By Dr Gregory Travaini[1]

Between 21st and 22nd July 2018, the Asian International Arbitration Centre ("AIAC"), previously known as Kuala Lumpur Regional Centre for Arbitration, hosted the first Asian-African Legal Consultative Organization (AALCO) Annual Arbitration Forum. AALCO is an international governmental organisation comprising of 47 member states, whose primary functions include assisting member States in drafting constitutions, model legislations and bilateral agreements; appointing and training arbitrators; and overseeing other matters relating to arbitration.

The strengthening of trade and investment ties between Asia and Africa carries with it the potential for commercial disputes of an international character. This underpins the need for arbitration as an expert, expeditious and enforceable mechanism in order to deal with the potential rise in cases. To address the needs of the disputing parties and to tailor suitable mechanisms, legal counsels are required to be aware of the current state of arbitration and other means of alternative dispute resolution on both continents.

In light of this, the AIAC Young Practitioners Group ("YPG"), decided to take the opportunity to organise, on the eve of the AALCO Annual Arbitration Forum, an event on 'Tailoring Dispute Resolution Mechanisms: Asia and Africa in Focus'. Tatiana Polevshchikova (Senior International Case Counsel at the AIAC and co-chair of the AIAC YPG) explained: "We wanted to create a dialogue amongst young international practitioners, sharing their dispute resolution experience and focussing on the opportunities and challenges of connecting Asia and Africa, where both arbitration and diversity are 'hot topics'".

Held at AIAC in Kuala Lumpur, the event involved a panel discussion featuring Nigerian practitioners Deborah Dumebi Chukwuedo (Accendo Law) and Femi Gbede (Schwartz LLC); Jonathan Lim (Wilmer Hale), Kenyan practitioner Mercy Okiro (CIArb YMG), academic Dr. Chinyere Ezeoke (University of Malaya) and myself, Dr. Gregory Travaini (Herbert Smith Freehills, AfricArb). Sharon Chong (Skrine) moderated the discussion.

Lim introduced energy arbitration in Africa by pointing out how critical the energy sector (oil, gas, coal and to some extent renewable sources of energy) is in Africa's economic development. Resources vary by region: north and west Africa are rich in oil and gas reserves, whilst southern Africa is rich in coal. In light of the recent increase in economic competition on a global scale, the number of exploration projects has soared in Africa within the past two decades. New participants and foreign investments were brought into the region. To attract investors, many jurisdictions have taken to modernise their arbitration legislation and facilitate the enforcement of foreign arbitral awards, and several arbitral institutions have also been created in the region. Although energy projects involve a broad range of commercial relationships, resources in Africa are usually owned and controlled by the State, which means that State-owned entities or the government itself will be involved – either in issuing and renewing a license and/or in participating in the running of the project through the creation of joint ventures and the conclusion of a production sharing agreement (PSA). The latter will deal with exploration and production rights and obligations. State intervention can lead to conflicts between international private companies and the government as governments attempt to control the resources sector to yield wealth for socio-economic development. The oil and gas and mining industries and other large-scale energy projects have generated a significant number of international commercial and investor-state arbitrations.

Chukwuedo focused on the Micro, Small and Medium Enterprises ("MSME") Arbitration scheme in Nigeria. The scheme was launched by the Nigerian branch of the Chartered Institute of Arbitrators ("CIArb") on 7 July 2017 as a means of addressing the pitfalls and challenges associated with the conventional court system in resolving commercial disputes. MSME are a major component in the growth of Africa's economy. Many MSME devote

[1] Dr Gregory Travaini joined Herbert Smith Freehills in 2012 after formerly acting as Deputy Counsel at the ICC where he managed more than 150 arbitration cases. Dr Travaini also worked as a Research Assistant to Professor J. Martin Hunter at Essex Court Chambers and trained at a magic circle firm. He specialises and advises clients in commercial and investment treaty arbitration in particular in energy, infrastructure, sales, joint-venture and construction disputes, acting for both private companies or state-owned entities (ICC, HKIAC, LCIA, SIAC, ICSID, UNCITRAL and AFA). He regularly teaches and publishes articles in the fields of civil procedure and arbitration. Dr Travaini holds a PhD and a Masters in Comparative Law (University Pantheon-Assas), an LLM in International and Comparative Dispute Resolution (King's College London and the School of Oriental and African Studies) and a Masters in Business and Institutional Communication (University Sorbonne-Nouvelle). He was awarded the King's College Principal Award and recognized as a Future Leader in International Arbitration (Who's Who Legal).

significant resources to court cases to the detriment of the development of their businesses. The MSME Arbitration Scheme, which is modeled after the CiArb's Business Arbitration Scheme, is making Alternative Dispute Resolution ("ADR") systems easily accessible to a wide range of business owners across Nigeria due to its reduced cost and shorter time frame. Commercial disputes under the MSME Arbitration Scheme can be brought with a monetary value between N250 000 (USD 700) and N5 000 000 (USD 14 000). The arbitrators' fees are capped to ensure that the costs of the arbitration do not prevent access to settlement and range from N25 000 (USD 70) to N100 000 (USD 280). Recoverable expenses are also capped at N100 000 (USD 280). The arbitrator has an obligation to render its award within 90 days from his/her appointment. Awards are enforceable and have the same effect as a court's decision. Technical rules and procedures have been limited to a minimum. The question that now arises is whether other African countries will adopt similar schemes for MSMEs and if businesses will widely resort to them for their commercial and transactional disputes.

I presented the specificities and challenges of African projects on the Belt and Road Initiative ("BRI"), emphasising on deal structures (predominantly in the construction, infrastructure, and finance sectors) and key considerations for dispute resolution. I explained that, given the variety of agreements (investment agreements, shareholders agreements, financing agreements, EPC and O&M contracts etc.), the parties involved in these projects (State entities, private entities, banks, contractors and sub-contractors), and the scale and complex contractual matrix of the projects, disputes are unavoidable. The likelihood of disputes in the region is increased by the existence in particular of political and environmental issues. Although the BRI is relatively new, issues and disputes have already emerged concerning non-payment, cancellations, delay, disruptions and royalty fees. Foreign investors usually insist on international arbitration under the rules of well-known international arbitral institutions. Increasingly, it has become clear that there is an emerging preference for dispute resolution clauses combining different mechanisms – escalation clauses. In Autumn 2017, the International Academy of the Belt and Road (a Hong Kong-based think tank) published the "Blue Book" on dispute resolution mechanisms for the BRI, which proposes a unified clause requiring negotiation, then mediation, and finally arbitration if no negotiated settlement is reached. In parallel, I noted that many African countries have amended their legislation to ease access to arbitration.

Gbede followed giving an overview of the enforcement regimes in sub-Saharan Africa, grouping them into 3 categories: (i) those that are members to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NY Convention"), (ii) Organisation for the Harmonization of Corporate Law in Africa ("OHADA") countries and (iii) those not parties to the NY Convention and/or OHADA members. Echoing Lim's presentation, Gbede emphasised that African countries will attempt to facilitate the recognition and enforcement of an arbitral award, thereby giving foreign investors some reassurance. However, it was pointed out that: (i) while the number of signatories is continuously growing, with Angola recently ratifying the NY convention, 18 of the 54 African countries (almost one third) are still not party to the NY Convention (including Namibia, Malawi and Congo); (ii) despite the growing number of disputes involving African parties and interests, arbitrations are usually not conducted using the OHADA arbitration framework; and (iii) countries neither party to the NY Convention nor member of OHADA are likely to have an inadequate arbitral legislation (that is, something dating from the 1950s and 1960s) that will be unable to suit the demands of modern commercial arbitration. Finally, Gbede concluded with the major changes in the 2017 Nigerian Arbitration and Conciliation (Repeal and Re-enactment) Bill.

Ezeoke then explained the amendment to the Malaysian Arbitration Act 2005 ("Malaysian Act") prompted by the decision in Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang, which expanded the scope for judicial supervision on domestic arbitral awards through challenges on questions of law. The Malaysian Act is modelled on the UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006). Ezeoke explained that the Malaysian High Court may no longer review awards on questions of law arising out of an arbitration award, which disgruntled parties used to rely on as an alternative method to set aside an award.

Finally, Okiro tackled a topic which has recently received considerable amount of attention within the community: diversity in arbitral tribunals. She referred to the 2016 BLP Survey on Diversity in Arbitration stressing that the catchphrase "pale, male, and stale" has unfortunately not lost its stand. On the question of who is responsible for initiating a change, she emphasised that it is not only arbitral institutions that should play a role in achieving greater diversity on arbitral tribunals and widening the pool of arbitrators; counsel for the parties are also important players in bridging the gap in diversity.

The floor was then opened to the audience. Attendees discussed and debated with the panel on (i) how to facilitate investment and promote the use of arbitration across Asia and Africa and (ii) the need to be culturally sensitive and understand the specificities of the African and Asian continents.

Overall, the event was a truly informative and engaging evening for young practitioners to learn about the topical issues surrounding arbitration in Asia and Africa. On behalf of AfricArb, I would like to say that we were delighted to be working together with AIAC YPG on this event and we are truly grateful for the AIAC's support and encouragement in promoting our cause. Our joint cause of promoting arbitration in Africa and as well as increasing diversity across the field is essential.

GETTING YOUR FIRST ARBITRATION APPOINTMENT

10 TIPS from VICTOR BONNIN REYNÉS

Eureka! After many years of pondering how to progress your career, you have finally decided that a career as an arbitration practitioner is the right thing for you. You have looked at professional qualifications such as becoming accredited by the Chartered Institute of Arbitrators or undertaking a postgraduate degree specialising in dispute resolution, and have also gained some practical experience. But then you wonder, how do I get my first appointment as an arbitrator? The AIAC posed this question to Mr Victor Bonnin Reynés (Principal of VBArbitration) who delivered an evening talk at the AIAC in October 2018 on the topic of building a career in international arbitration. Below are 10 tips from Mr Bonnin on how to go about getting your first appointment as an arbitrator:

1. Know yourself

Only you know what your skills are, in which areas you are good at, and also those particularities that make you different compared to the other people around you

2. Let people know who you are

Knowing who you are is useless if other people do not know of your existence. When you meet people, let them know your skills and talents. But do not talk only about yourself. Try to get to know them too. People like that other people are interested in them. The more the people who know you, the more you increase your chances of being considered for an appointment.

3. Start networking early with your peers

You may be tempted to do networking with partners only, because you think that they have the influence to appoint you. However, you need to know people of your generation, because in the future, they will also have the influence to appoint you.

4. Know the arbitral institutions

Institutions are trying to build the next generation of arbitrators and they appoint young lawyers for small cases. Therefore, know the different arbitral institutions and the people working there. Having prior experience with your local arbitral institution(s) will help you get appointed by international arbitral institutions.

5. Learn languages

Although most arbitrations are conducted in English, many of them involve documents written in other languages, and/or witnesses who may wish to testify in their mother tongue. Thus, knowing additional languages may boost your possibilities of being appointed in a certain case.

6. Try to specialise

If you specialise in a certain topic or sector, there will be more chances that you will be appointed in a case that involves the topics or sectors in which you are specialised in. But remember that people have to know and be confident that you know the subject matter well – being the jack of all trades and the master of none might not help.

7. Try to find your own sector

If in addition to specialising in a topic or sector, consider choosing a sector that is niche or developing, or that only a few people are aware of. This will give you even more chances of getting appointed if one day there is a dispute in that sector.

8. Write publications

Writing is a very useful tool for making people know who you are and become aware of your expertise. Further, nowadays articles have a worldwide reach and sometimes parties look for arbitrators who are experts in a certain domain and also for someone who has at least written on a certain topic.

9. Create and develop your brand

Sometimes, when clients look for a counsel to represent them, they place trust in the brand of a law firm. At other times, they look for a specific person. When looking for an arbitrator, the parties and the institutions look for the person, so you are your own brand and you must work to develop your brand.

10. Be patient

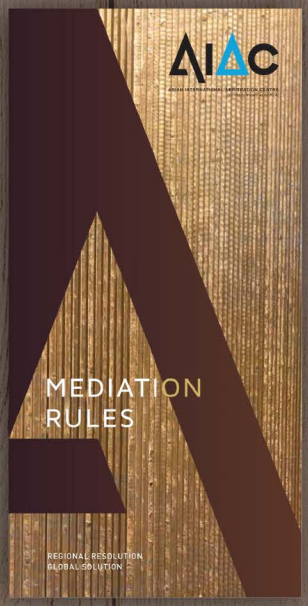
Very often your name will be considered as a potential appointee, but you will not be finally appointed. Do not be frustrated and think in the positive that your name is already being considered, which means that people are starting to know you. Also, do not expect being appointed at a very young age, as parties, obviously want arbitrators with some experience. Youth is an illness that will be cured with time.

The above are just some tips to increase the possibilities of receiving your first appointment, but at the end, some luck is also needed. However, you can work your luck. By being active in promoting yourself, learning languages, etc, you can reduce the weight of the luck factor!

KEY INSIGHT

MEDIATION REVISITED

The AIAC Mediation Rules 2018



By Mrityunjay Kumar[1]

Mediation continues to be increasingly accepted as a viable and cost-effective form of dispute resolution. It provides the parties an opportunity to achieve a balanced solution to their dispute(s) through a shared perception of the business relationship.

Considering the wide acceptance of mediation and the changing landscape of alternative dispute resolution, the AIAC recently revised its mediation rules. The AIAC Mediation Rules 2018 (the 'Rules') are modelled after the IBA Rules for Investor-State Mediation. The AIAC has become the first institution to adopt such a model for its mediation rules.

The Rules provide a flexible framework for the conduct of mediation without compromising on complex issues, such as confidentiality concerns and the non-cooperation of one of the parties. This ensures a time and cost-efficient settlement. Parties can now initiate mediation even in the absence of an agreement to mediate. To that effect, parties can either enter into a submission agreement, or make a proposal to mediate. Additionally, the Rules suggest a Med-Arb clause which enables the parties to convert their settlement agreement into a consent award. The effect of such a clause would be to treat any settlement agreement reached through mediation akin to an award rendered pursuant to the AIAC Arbitration Rules 2018. The consent award would then be enforceable under the New York Convention 1958.

Another marked feature of the Rules is the procedure for the appointment of a mediator, or mediators, as the case may be, and the conduct of the proceedings. The mediator or mediators are now confirmed or appointed by the Director of the AIAC, considering the parties' agreement as to the qualifications and attributes of a potential mediator. The mediator(s) has to at all times remain independent and impartial to assist the parties in reaching a balanced, 'win-win' settlement.

In conclusion, the Rules prescribe a set of procedures to ensure a more flexible and transparent proceeding. This will aid parties in formulating creative forward-looking solutions for both international and domestic disputes. The Rules can be used by parties at any stage of a dispute even if there is no prior agreement to mediate. With the Rules, the AIAC is arguably the most rewarding venue to resolve almost all kinds of domestic and international commercial disputes in South-East Asia.

[1] Mr Mrityunjay Kumar was a former Legal Intern at the AIAC from India.

ASIA ADR WEEK 2019

27TH-29TH JUNE 2019
–AIAC

THE KINTSUKUROI PERSPECTIVE: THE ASIAN ADR REVOLUTION

Kintsukuroi, meaning "to repair with gold", is the centuries-old Japanese art of fixing broken pottery with a special gold-dusted lacquer. Upon completion, visible seams of gold are meant to glint in the former cracks of the ceramic ware. *Kintsukuroi* is said to have been heavily influenced by Japanese philosophical ideas. Put simply, the visible golden flaws of the object are but a story of its history. The cracks and seams represent resilience to all the hardships that had happened in the life of the object, rather than merely symbolizing its destruction. Its history is highly visible, and plays a direct role in improving the object through beauty.

The Japanese philosophical art of *Kintsukuroi* is thus applicable in the wider context of ADR in the global economy; with cracks and imperfections denoting costly and harmful commercial disputes, ADR is arguably the gold-dusted lacquer that mends the imperfections of the global economy. Parties that engage in international commerce require effective dispute resolution mechanisms to mitigate their business risks and provide legal certainty on the enforcement of their contractual rights.

The history of global commerce is one that is marked by epochal changes. It is only in acknowledging these changes and adapting accordingly to 21st century practices that global commerce can advance uninhibited by avoidable conflict and struggle. Thus, by acknowledging the basis for the existing criticisms and adapting accordingly, as in the Japanese art of *Kintsukuroi*, global commerce through the medium of ADR can remain appealing to commercial parties. These improvements are but another phase in the constant evolution of the global economy, an evolution that tells the story of trial and error, and of constantly striving for a beautiful end-product.

Kintsukuroi—

(n.) (v. phr.) "to repair with gold"; the art of repairing pottery with gold or silver lacquer and understanding that the piece is more beautiful for having been broken

GENERAL ADMISSION:

Full Conference Fee: MYR 1,588 / USD 410

Day 1 & 2 Conference Fee: MYR 1,088 / USD 280

Full Conference Fee with 4 nights accommodation: MYR 3,328 / USD 850

CIPAA Conference (29th June): MYR 588

For further information and sponsorship opportunities, please contact **enquiry@aiac.world/ +603-2271 1000**

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AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE

ASIA ADR WEEK 2019

PROGRAMME

DAY 1: THURSDAY, 27TH JUNE 2019

0830 – 0930	Registration
0930 – 1100	Opening Remarks by the Director of the AIAC
	Launch of the **AIAC ASIA ADR WEEK 2019**, ***"The Kinstsukuroi Perspective: An Asian ADR Revolution"***
	Keynote Address
1100 – 1130	Networking Break
1130 – 1300	**Session 1 – Breaking Down Walls: The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)**
	Following the United States' withdrawal from the Trans-Pacific Partnership (TPP), the remaining TPP signatories agreed to revive it in what is now known as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). With 11 signatories on board to date, including Malaysia, Japan, Singapore, Vietnam, Australia, and some having ratified the same, questions are abound as to how ADR will play a role in investment and trade disputes arising from the CPTPP and what it means for global trade and commerce.
1300 – 1400	Lunch
1400 – 1530	**Session 2 – Bespoke or Off the Rack? Dispute Resolution in Project Financing Arrangements**
	Project financing is a method of financing major infrastructure projects, often requiring large amounts of sunk capital with many projects envisaging years before sufficient revenue is generated. At the heart of project finance arrangements are a large number of individualized contracts and due to its international nature, with parties hailing from multiple jurisdictions engaging in multiple contracts, other means of dispute resolution is being found to be increasingly suitable to national court litigation in a number of contexts.
1530 – 1600	Networking Break
1600 – 1730	**Session 3:**
	Breakout 1 – Specialist Arbitrations: Patent Disputes, Maritime, Investment, Domain Names and Fashion & Art
	The niche areas of some industries require specialist arbitrators – for example, patents, art and fashion, maritime as well as human rights and investment treaty cross-over cases. What are the key considerations and issues which set these types of arbitrations apart?
	Breakout 2 – Holistic Dispute Resolution and the Belt & Road: A Realm Where Cooperation Reigns
	Five years has passed since China brought up the OBOR Initiative, and we have seen a handful of projects under OBOR beginning to encounter disputes ranging from financing issues, corruption, noncompliance with contractual terms, project delays and, in some cases, sovereignty and control issues. With the philosophy of holistic dispute resolution being 'no one size fits all', parties in OBOR disputes are now desirous of more hands-on and holistic tips that could serve as a bridge between business entities and ADR stakeholders in an effort to prevent and resolve disputes on OBOR projects.
1730 – 1830	**Session 4 – The Gentle Force of Compromise: Mediation**
	Following the draft approval of the Convention on the Enforcement of Mediation Settlements and accompanying Model Law at the 51st Session of the United Nations Commission on International Trade Law (UNCITRAL), the Singapore Convention is widely hailed and expected to be for mediation what the New York Convention was for international commercial arbitration. Is this the instrument that cross-border commercial parties that engage in Mediation have been waiting for? What will it mean for enforcement, especially in Asia? And how will mediation complement arbitration?
1830 onwards	**AIAC ASIA ADR WEEK 2019 Cocktail Reception**

DAY 2: FRIDAY, 28TH JUNE 2019

0930 – 1100	**Session 1 – Fellowship of the Judges: The Role & Impact of the Judiciary in Asia's ADR Landscape**

An in depth understanding of the judiciary's vision for Asia-ADR and its views on ways in which improvements can be made to improve the arbitral framework, making way for greater clarity, enhanced procedural efficiency, whilst safeguarding and increasing party autonomy and access to justice. What role and impact does the judiciary in each country play in efforts to further reinforce its respective status' as an international ADR hub?

1100 – 1130	Networking Break
1130 – 1300	**Session 2 – Public Policy as a Shield: Enforceability of Contractual Obligations**

With the lines between the public and private continually being blurred, how can private commercial parties enforce their contractual rights against a government when the latter reneges on their obligations on the basis of their sovereign right to regulate public policy? This session also seeks to explore the disparate nature of international law and considers the position of the sovereign state that has to renege a contract for the benefit of their people.

1300 – 1430	Lunch
1430 – 1600	**Session 3 – The Bullet Train: Summary & Expedited Procedures in Arbitration**

A longstanding criticism of international arbitration is that it is no longer expedient and cost-effective. In response to this, arbitral institutions have strived to innovate by adopting expedited procedures (also known as fast-track rules) and rules on summary disposition. With rightful questions of natural justice and the possibility of non-enforcement of an award accompanying these innovations, this session aims to spark a discussion on the long-standing debate of whether arbitrations should be rushed?

1600 – 1630	Networking Break
1630 – 1730	**Session 4 – Rapid Fire Debate: Swiping Left or Swiping Right?**

- Digitization: Are we missing the human element in ADR?
- Diversity in Age: Opportunities for the Young vs Quality in Experience
- Prague Rules vs IBA Rules: The Good and the Bad
- Revealing the Person behind the Mask: Third Party Funding

1730 – 1830	**Session 5 – The Wireless Connection: Blockchain Technology & ODR**

This session explores the 'maturation' of Online Dispute Resolution beyond what might have been seen as a digital variant of ADR, discussing the use of blockchain technology and smart contracts in ADR administration as well as how Online Dispute Resolution can widen the scope of ADR access. Will the use of technology be a blessing or curse for ADR?

1830 onwards	**AIAC ASIA ADR WEEK 2019 Gala Dinner**

ASIA ADR WEEK 2019

ASIA ADR WEEK 2019

DAY 3: SATURDAY, 29TH JUNE 2019

0930 – 1100	**CIPAA Conference Opening Remarks** by Director of the AIAC **Showcase of the Annual CIPAA Report 2018**
1100 – 1130	Networking Break
1130 – 1300	**Session 1 – Keeping in Line with Judicial Decisions** The judicial trends following View Esteem and Bauer – discussing: *Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd*; *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor*; *Kerajaan Malaysia v Shimizu Corp & Ors*; *TYL Land and Development Sdn Bhd v SIS Integrated Sdn Bhd* and another case.
1300 – 1400	Lunch
1400 – 1530	**Session 2:** **Workshop 1 – Common Mistakes Your AIAC Case Counsel Encounters** Meet your AIAC Case Counsels and discuss with Practitioners, the common mistakes made by Parties and Counsel in adjudication proceedings and how one may rectify and avoid these mistakes. **Workshop 2 – Submitting a CIPAA Claim and Dispelling Myths about CIPAA** A workshop with Practitioners discussing the common misconceptions about CIPAA and providing practical advice on how to file CIPAA claims and key points to consider in the CIPAA process. **Workshop 3 – Discussing the new AIAC 2019 SFCs – how to use them and why they are effective** The workshop will demonstrate a step by step guide on using the online platform to customise your contracts and consider the effect of the Federal Court case of *Cubic Electronics Sdn Bhd v Mars Telecommunications Sdn Bhd".*
1530 – 1600	Networking Break
1600 – 1730	**Setting us Apart: SFCs and the Contract Administrator** Introducing the contract administrator in the AIAC 2019 Standard Form of Building Contracts, Practitioners and Construction Industry Experts will discuss who can be a contract administrator, what the role entails, and how it works in different jurisdictions.

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ASIA AND GERMANY in International Construction and Construction Arbitration

By Simone Townsend[1]

When it comes to creating a space that facilitates and encourages a massive injection of foreign capital in the construction industry, both Germany and Asia bring a wealth of knowledge to the table. However, both nations also bring a history checkered with mistakes and challenges. On 26th June 2018, Dr. Rouven F. Bodenheimer offered insights on the shared similarities and differences between the Asian and German approaches to this issue during an evening talk at the Asian International Arbitration Centre. Dr Bodenheimer also proffered invaluable insight on addressing the challenges in International Construction and Construction Arbitration.

The difficulties in the optimal development of the construction industries in both Germany and Malaysia are manifold. The severe constraints placed on foreign investors are evidenced in complex public procurement schemes, restrictions in investment options and corruption. The challenges are also present on an inter-party level between contractors, subcontractors and the government agency responsible for construction. The absence of a standard contract that is universally accepted in Asia poses a problem due to poor contractual drafting. This results in a rising number of disputes. It is against this backdrop that Dr. Bodenheimer expressed how Asia could benefit from Germany and the benefits Germany can garner from the Asian experience in international construction arbitration.

[1] Ms Simone Townsend was a former Legal Intern at the AIAC from Jamaica.

In addressing the public procurement scheme, Dr. Bodenheimer suggested the consolidation of the various public procurement laws that govern the construction industry in Asia. The fact that procurement regulations are disparate, technical and burdensome, and in some cases not even properly promulgated to the public, creates a bottleneck on the influx of foreign capital. Dr Bodenheimer opined that the unification of procurement laws and the creation of a comprehensive scheme will demystify the procurement process and encourage investment. This was considered the best practice Asia should learn from Europe.

Dr Bodenhiemer also commented that there was a restriction in the investment options in Asia. In some jurisdictions, foreign investors are prohibited from investing in construction given that this is the government's domain. It was suggested that these avenues for investment should also be open to foreign investors.

In addressing corruption, Dr. Bodenheimer noted that the bribery rates across the Asia-Pacific region and Europe were very high. He commended the region for its adoption of anti-corruption policies, the establishment of anti-corruption agencies and the use of specialised courts. These features were considered to foster public confidence in the procurement process. Dr Bodenheimer posited that there were no specialised anti-corruption courts in Germany - this was a best practice in Asia that could be taken back to Germany. However, Dr Bodenheimer's overall view was that further dispute resolution mechanisms should be established in both jurisdictions.

Dr. Bodenheimer made extensive reference to the FIDIC (Fédération Internationale des Ingénieurs-Conseils which means the International Federation of Consulting Engineers). The FIDIC has become famous for the creation of standard form contracts in the construction and engineering industries. These contracts have been adopted in Europe, and particularly in Germany. However, its adoption in Asia has been limited. Private parties in Asia do not make use of the FIDIC because of its incompatibility with the faith-based legal systems. Dr Bodenheimer commented that the limited use of the FIDIC in Asian countries was attributable to the influence of international bodies such as the International Monetary Fund. He recommended that Asia adopt a standard form of contracts since this would reduce the number of disputes that could arise due to broadly drafted contractual provisions.

In summary, Dr. Bodenheimer provided much valuable insight into the similarities and differences in the construction industries in Asia and Germany. The key takeaway was that each jurisdiction had implemented "best practices" which the other jurisdiction could learn from.

THINK TANK

The AIAC's Design & Build Contract

A Tool for Pre-Emptive Dispute Avoidance?

By Rachel Tee [1]

In an epoch where the construction industry is the backbone of Malaysia, advancements in how projects are executed have become of paramount importance. On 3rd July 2018, the Asian International Arbitration Center ("AIAC") added the Design and Build Contract (hereinafter referred to as the "D&B Contract") to their suite of Standard Form Contracts. The provision of this particular free and customisable contract is a method of pre-emptive dispute avoidance. While Design and Build projects stray from traditional procurement routes, such as the design-bid-build model, omission of the intermediary step provides ample benefits. Reducing the number of arbitrary links required between parties enables a substantial reduction of time required, increases certainty in pricing, and creates a more accommodating environment for unexpected changes. To a large extent, the design and build procurement method presents less risks to the client in their construction endeavours. The design and build process is accompanied by unique and inherent characteristics that the AIAC facilitates via their standard contract.

The concept of single point responsibility functions as the cornerstone of a design-build project's success. When a single entity is held accountable for the delivery of a project, the presumption of efficiency stems from the understanding that all parties are working in conjunction with one another. When the procurement method entails that various bodies are responsible for their own portion of the delivery, the body to which liability should be imputed can become difficult to identify. This results in efficiency being easily stagnated. Furthermore, the aforementioned stagnation arises particularly when a single body lags behind or is faced with difficulty. To combat this issue, single point responsibility ensures specific performance obligations are met. Since the Architect and Contractor are able to work concurrently, their progress is that of one single unit. However, the concept of single point responsibility imports risks of its own. Clients run the risk of the project unfolding into a build-design process, as the roles become overly intertwined.

To combat this issue, the D&B Contract covers and clarifies the scope of a Contractor's responsibility in a thorough manner (Clause 4.0). From the rudimentary stages of architectural design, to the project handover, which follows through into the maintenance of Works, the D&B Contract encompasses every aspect of the design-build model. In particular, the Contractor must comply with 'any of the Employer's planning, coordination and scheduling requirements' as per the stipulated agreement (Clause 4.1(c)). The Contractor and the Employer thus have the discretion to approve a mutually agreed upon time-frame and organisational structure for the design-build flow, to meet the specific needs of each project. The Contractor also bears the obligation to undertake consequential/incidental work of 'whatsoever nature and scope in relation to the construction and completion of Works'. By virtue of including this element, the project is able to run more seamlessly.

[1] Ms Rachel Tee is a Malaysian student currently in her second year of law school. Ms Tee was a former Legal Intern at the Asian International Arbitration Centre, and is currently a representative of the AIAC Young Practitioners Group. Queries or comments can be directed to rachelzwt@gmail.com. The views/opinions expressed in this article are those of the author only and they do not necessarily reflect the views of the AIAC unless otherwise stated.

Another essential feature of the D&B Contract is that Employers delegate authority to an appointed representative, known as the Employer's Representative ("ER"), who is often accompanied by an assistant ("ERA"). ERs administer the contract that has been agreed upon and are equally able to bind the Employer to the decisions made. There are no specific requirements for who should fulfill the role of an ER; the appointee may be an engineer, quantity surveyor, consultant architect, or any qualified third party. Even outside of the D&B Contract, such projects are generally flexible on who should assume the role. For example, in the International Federation of Consulting Engineers (FIDIC) Conditions of Contract for Plant and Design-Build (also referred to as the Yellow Book) this role is undertaken by an Engineer who is referred to as the Employer's Agent (Clause 3.2). Tasks of the ER are predominantly undertaking managerial and administrative roles, such as reporting issues to the Employer, handover of documents, submission of contractually compliant claims, and executing written instructions. The benefit of allocating authority onto representatives can be observed from how the ER is able to take a bird's-eye perspective on the operations, viewing and overseeing the project development holistically. Throughout the D&B Contract, ERs and ERAs are granted a wide scope of authority that enables them to effectively conduct their role (Part II, Clause 6.0), such as the right to take action (Clause 7.0), capacity to issue instructions (Clause 8.0), and full access to works (Clause 10.0). While ERs are thus granted a high degree of discretion, their role is both limited as well as protected, to a certain extent. The ER does not have the authority to relieve the Contractor of any of their rights and duties (Clause 6.1) unless expressly provided for otherwise in the Contract (Clause 6.5). Additionally, neither the ER or ERAs owe a duty of care to the Contractor with respect to their role as a Representative. In parallel, the Contractor designates authority to act as a representative of their own (CR), serving as an authorised agent (Clause 16.3(b)), with the power to execute similar functions. In both instances, the representatives of each are able to ensure smooth contract administration from a macroscopic lens, which the D&B Contract guides and facilitates.

Ms Rachel Tee

Moreover, the D&B Contract provides for completion on an elemental basis. The contract will be broken down into individual components to in order to magnify the needs and intricacies of each particular project component (Clause 37.0). Completion on an elemental basis also gives rise to an elemental cost plan, which permits a greater degree of adaptability throughout the construction process. The method of dividing the project sum into its respective parts enables the Contractor to adjust any variations in cost more smoothly. As a natural result of design and build processes, cost plans evolve to become more accurate throughout the course of the project as more information becomes available. The elemental cost plan would therefore enable small details to be adjusted whenever necessary. In the event that there are funds that have been misallocated, there will already be a clear system by which each and every component has been taken into consideration. Given that the design and build process is broken down into parts, Employers will also be able to draw a clearer comparison between tender documents received. Thus, decisions can be made by pinpointing precisely what makes one Contractor's plan distinctively more appealing than the other. In turn, it should also be noted that the D&B Contract facilitates the process of contract conclusion, assisting the Employer to determine which Contractor would be most suitable for the Employer's needs. By doing so, another method of pre-emptively avoiding disputes can be observed.

Ensuring that the entire project stays on task is a serious factor that the D&B Contract supports. Clause 31.0 oversees any potential delays and consequences, as well as the procedure to be followed should they occur. The substance of the clause ensures that all delays are legitimate and are accounted for through proper documentation. While the contents are also reiterated in other standard form contracts, the AIAC Contract also brings to the fore specific issues such as floats,

methods of Delay Analysis, Acceleration in lieu of Extensions of Time (EOTs), as well as Inclement Weather. The detailed explanation of Exceptionally Inclement Weather may particularly resonate with our local Malaysian construction environment, as temperature, lightning, and air pollution, are just a few of the many potential scenarios outlined (Clause 31.4(d)). However, due to the constant unforeseen circumstances that may arise, the D&B Contract also addresses matters of expediting the progress of works (Clause 31.7). By having clauses like these mutually understood between the contracting parties, it is clear from the outset that the parties, while committed to stay on task, are realistic regarding the possibility for change and delay, and will take the necessary precautions to navigate any issues of delay with the utmost degree of professionalism and efficiency.

The D&B Contract also takes into account liquidated damages that the Contractor must pay in the event that the agreement is breached (Clause 35.0). As liquidated damages are brought to the fore only when completion is delayed, they are calculated as per the profits that may have been made given that the project was completed on time. The assessment of liquidated damages is mutually beneficial to all parties involved, as Contractors are able to limit their liability and Clients need not bear the burden of proving the damages they are seeking at a later date. At a rudimentary level, liquidated damages avoid the difficulty and expense of proving damages, and in turn, the only factor to take into consideration is the amount of time by which the project completion has been delayed. However, the element of certainty provided by liquidated damages is that flexibility is undermined, as the ability to account for unforeseen change is diminished. The recovery of losses which were not accounted for, may it be for reasons of impossibility or unforeseeability, would, at a later date, not be compensated for. The courts thus err on the side of caution regarding contractual liquidated damages provisions and interpret clauses against the parties that intend to rely on them. The D&B Contract combats such an issue by the following two means. Firstly, Section 75 of the Contracts Act 1950 has been excluded from any potential application, eradicating the option to seek 'reasonable compensation' despite there being a pre-determined sum (Clause 35.2). By omitting this section, parties are able to come to terms and enforce a more specific sum beforehand instead of abiding by the pillar of reasonableness later on. Secondly, the D&B Contract contains a specific provision that holds both the Employer and the Contractor to stand by the sums indicated, whether by legal proceedings or not, and will not attribute the sums to being unlawfully procured (Clause 35.2(b)). While this approach does not grapple with developing a middle ground between the strengths and weaknesses of calculating damages as a concept, it is effective in asserting liquidated damages and ensuring that the agreement will not falter at a later date. Since the values have been pre-determined, the parties have excluded the option of Section 75, and they have also agreed to abide by the said pre-determined sums, it is possible that courts will be more willing to enforce any outcomes made on this basis.

Lastly, the D&B Contract also accounts for the circumstances surrounding termination of the contract. Determination within the contract can be invoked by the Employer, for reasons of performance defaults, bankruptcy and insolvency, as well as corruption, to name a few. The D&B Contract delves into and expands on the types of suspension, as well as the remedies available. The post-determination procedures have also been outlined, adding to the holistic approach that the D&B Contract takes with dispute resolution. The clauses permitting termination due to corruption and bribery were of particular interest in the launch of this contract, as there has been divided interest on whether such a clause has a suitable place in a standard form contract. The D&B Contract thus takes the position that corruption and bribery are severe to the extent of being equated to a common law level fundamental breach, which is determined by an issue going to the root of the contract. The purpose and effect of utilising the corruption and bribery clause within the D&B Contract is that a contract that has been procured by bribery or corruption should have the option of being terminated. This feature of the contract makes a concerted effort not to endorse corruption and bribery in the construction industry, as it generates understanding and caution regarding the topic prior to the conclusion of the contract.

The above are only a few of the key provisions in the AIAC's D&B Contract. The clauses outlining procedures for single-point responsibility, Employer's Representatives, elemental finalisation, time scheduling, liquidated damages, and termination, are efforts towards the smooth execution of construction contracts. In its entirety, the D&B Contract is part of a larger movement that works towards avoiding contractual disputes, as opposed to waiting for disputes to be administered. The D&B Contract is an addition to an existing collection of Standard Form Contracts, all of which take up the burden of prioritising pre-emptive dispute avoidance. While this process may still be in a sunrise phase, every revision of each Standard Form Contract is a nuanced nudge towards a collective effort of shifting the dispute resolution scene into one of dispute avoidance.

The Launch of the AIAC 2019 Standard Form of Building Contracts

By the AIAC SFC Team [1]

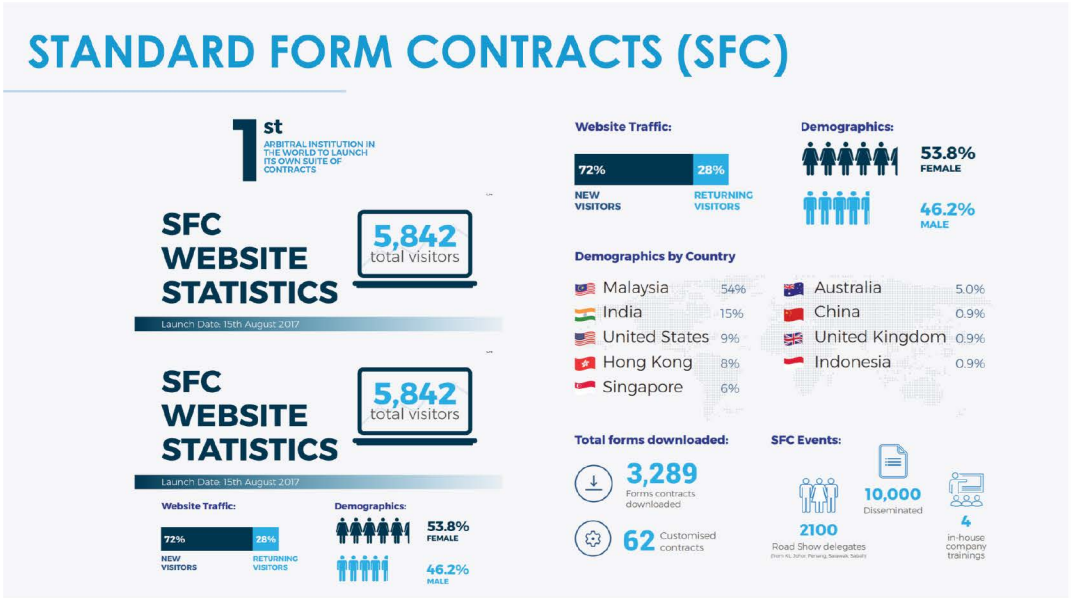
On 28th November 2018, the Asian International Arbitration Centre ("AIAC") introduced its latest addition to AIAC's suite of building contracts, the 2019 Edition of the Standard Form of Building Contracts ("AIAC 2019 SFCs"). The AIAC 2019 SFCs comprise of the Main Contract as well as the Sub-Contract.

The AIAC is the first arbitral institution in the world to launch a suite of this kind. The AIAC 2019 SFCs are suitable for building construction projects not only in Malaysia, but also abroad as they are customisable and can be easily adjusted to the needs of a particular user. The AIAC SFCs, which reflect international standards, were prepared by the AIAC Expert Advisory Committee comprised of distinguished construction industry professionals who have selflessly volunteered to make this contract a reality. Some of the key features of the AIAC SFC include, but are not limited to: clarity enhancement, user-friendly platform, easy accessibility and customisability. These features allow for the smooth progression of the contractual works. The AIAC SFCs are accessible free of charge on a dedicated website: www.sfc.aiac.world.

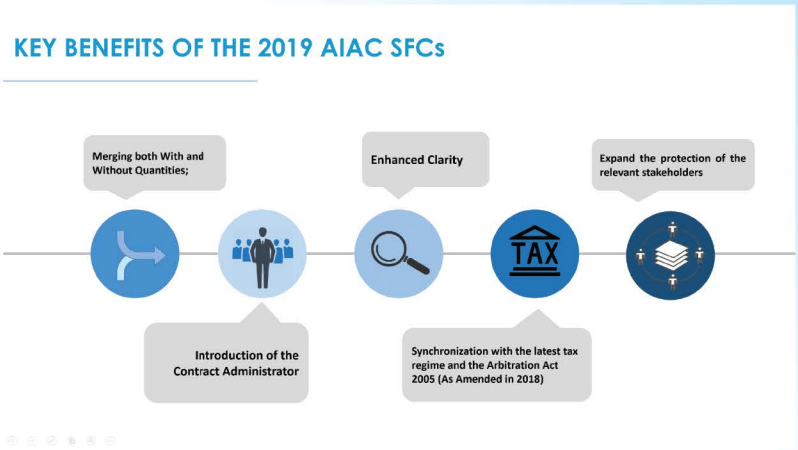
Since the inception of the AIAC SFCs, there have been 19,000 visitors to the AIAC SFC web portal. In addition, a total of 46,000 AIAC SFC forms have been downloaded with 250 contracts customised by users. Additionally, over 3,500 delegates have attended the AIAC SFC roadshows around Malaysia, over 15,000 copies of the contracts have been disseminated, and 6 in-house company SFC trainings took place in 2018.

The AIAC 2019 SFCs fill the gaps between local and foreign standard form contracts taking into consideration the current laws and judicial precedents impacting the Malaysian construction industry while simultaneously maintaining a recognisable model. This is to expand the coverage of the AIAC SFCs, not only domestically, but also globally.

The AIAC 2019 SFC Main Contract is a comprehensive unified single contract that does away with the distinction between With and Without Quantities. By introducing the role of the Contract Administrator, the AIAC 2019 SFCs paved the way for a more comprehensive checks and balance mechanism in a construction contract. Including the role of the Contract



[1] This Key Insight has been written by the AIAC SFC Team comprised of Mr Aldio Albertus Primadi (International Case Counsel), Ms Anusha Reddy (Case Counsel), Ms Diana Rahman (Case Counsel) and Ms Chelsea Pollard (International Case Counsel). For more information related to the AIAC SFCs, please visit our website at www.sfc.aiac.world, or alternatively, please send an email to the AIAC SFC team at sfc@aiac.world.



Administrator advances the scope and avenues for Architects, Quantity Surveyors, Engineers and other stakeholders to take charge. In addition, the AIAC 2019 SFCs clearly set out the accountability between the Employer and the Contract Administrator which adds greater transparency to the duties and obligations of all parties concerned, e.g. the Employer, Contractor, Nominated Sub-Contractor, Nominated Supplier, Contract Administrator as well as Consultant. The transparency within the AIAC 2019 SFCs aims to enhance trust for a better working relationship between all parties.

Further, the AIAC 2019 SFCs clarify the definitions of terms in the contract as well as stipulating specific time periods for parties to carry out their obligations. These clarifications uphold the agreement of the parties and allow them to decide and create clear contractual arrangements to promote efficiency based on a case-by-case basis.

Previously introduced provisions, such as synchronisation with the Arbitration Act 2005 and AIAC Arbitration Rules, compliance with the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"), as well as the provisions on bribery and corruption, were maintained to reinforce the principles of integrity in the implementation of construction contracts. Similar additions were introduced in the AIAC 2019 SFC Sub-Contract, where the provisions have been improved to reflect the changes that were made in the Main-Contract.

Following the launch of the AIAC 2019 SFCs, the AIAC will be hosting roadshows in various cities around Malaysia, with the aim of promoting not only the AIAC SFCs but also AIAC's services encompassing statutory adjudication as well as arbitration. These roadshows will include presentations from members of the AIAC SFC Expert Advisory Committee, panel discussions as well as Q & A sessions. In addition, the AIAC will also be organising a training and certification program for Contract Administrators, which aims to equip candidates with the knowledge and skills required to efficiently manage the administration of the AIAC 2019 SFCs. Other programs that may be introduced include an AIAC SFC website tutorial video, AIAC SFC Practice Manuals as well as internationalising the AIAC SFCs.

All in all, the AIAC 2019 SFCs are a testament of the AIAC's commitment towards ensuring continuous improvements within the construction industry. That commitment began with the AIAC SFC inaugural launch on 15th August 2017 and was followed by the launch of the AIAC Standard Form of Design and Build Contracts on 3rd July 2018. The AIAC plans to continually evolve, improve and adapt in response to the needs of the construction industry to best serve its stakeholders.

SECURING YOUR ONLINE PRESENCE

A Re-Cap of the AIAC Training Programme on Domain Name Disputes

By the AIAC DNDR Team [1]

On 29th November 2019, the Asian International Arbitration Centre ("AIAC") organised its Training Programme on Domain Name Disputes in Kuala Lumpur as a knowledge sharing session on the practice of Domain Name Dispute Resolution ("DNDR"). This event re-created the success of similar DNDR workshops conducted by the AIAC in Manila and New Delhi in July and October 2018 respectively.

The programme featured a number of speakers from various institutes including organisations such as the International Intellectual Property Institute ("IIPI") and the International Trademark Association ("INTA"), local law firms such as Skrine, Shearn Delamore and Lee Hishammuddin Allen and Gledhill, and educational institutions such as the Inha University School of Law.

Domain Name Dispute Resolution is a form of alternative dispute resolution based purely around disputes arising from similarities of a domain name to a registered (or unregistered) trademark. The training programme delved into the general explanations of what is DNDR and introduced the policies that govern it as well as the authorities that regulate and oversee domain name disputes, such as the Asian Domain Name Dispute Resolution Centre ("ADNDRC"). As of 2018, the ADNDRC has 4 global offices in China, Korea, Hong Kong and Kuala Lumpur with the Secretariat of the ADNDRC located in Kuala Lumpur.

The event began with the welcoming address of Mr Vinayak Pradhan, Director (Acting) of the AIAC and the current Chairman of the ADNDRC. This was followed by the keynote speech of Mr Dennis Cai, President of IIPI. Mr Cai emphasised that having a body like the ADNDRC to administer Domain Name Disputes is essential since domain names have an international character, as opposed to traditional trademark disputes which have a territorial nexus. He also explained the difficulties in arbitrating a domain name dispute by pointing out that the parties to a domain name dispute do not have a private agreement to arbitrate, hence the necessity of providers such as the ADNDRC. Mr Cai also outlined how DNDR is a burgeoning area of law that is lucrative for lawyers, DNDR panelists and also for the registrar of domain names.

Mr Cai's keynote address was followed by the launch of the guidebook titled 'Guide to Domain Name Dispute Resolution' published by the AIAC. This guide is meant to help practitioners and potential complainants to navigate the procedure for lodging a domain name dispute complaint.

The remainder of the programme involved 2 plenary sessions and a panel discussion on the practice, procedure and key concepts in DNDR as well as an overview of interesting case studies in the field.

A special thank you should go out to the participants and the speakers who presented at the Training Programme including Dr Chan Mo Chung, Mr Dennis Cai, Ms Francine Tan, Mr Bahari Yeow Tien Hong, Mr Indran Shanmuganathan, Ms Hemalatha Parasa Ramulu, and the AIAC's very own Ms Diana Rahman, Mr Aditya Pratap Singh and Ms Nivvy Venkatraman. Your support was invaluable in making this event a success.

The AIAC aims to organise further educational programmes and capacity building platforms in DNDR across Malaysia and Asia in the near future.

[1] This Event Highlight has been written by the AIAC DNDR Team comprised of Ms Diana Rahman (Case Counsel) and Ms Nivvy Venkatraman (International Case Counsel). For more information on the domain name dispute resolution services provided by the AIAC, please visit our website at **www.adndrc.org**, or alternatively, please send an email to the AIAC DNDR Team at **aiac@adndrc.org**.

An Inaugural Event
ADR and 21st Century Diplomacy

By Joseph Paguio [1]

On 24th January 2019, the Asian International Arbitration Centre ("AIAC") held its inaugural event: "ADR and 21st Century Diplomacy: An Introduction and Networking Event for Asia's Diplomatic Corps". In attendance were commercial representatives from Malaysia's diplomatic corps, national and international chambers of commerce, business associations, trade federations, as well as a delegation from Malaysia's Ministry of International Trade and Industry.

Given the non-legal background of the attendees, as well as their role in facilitating international trade and investment in both a public and private sector function, the purpose of the half-day conference was to provide a broad, non-technical and practical introduction to alternative dispute resolution ("ADR").

Since the advent of the traditional Westphalian state system, the role of Embassies and High Commissions worldwide has increasingly taken on a trade and investment promotion function, in addition to their originally envisaged political role. Diplomatic missions, and more specifically the Trade Commissioners and Commercial Attachés within these missions, act as de facto business consultants for businesses from their respective countries. They provide in-market intelligence, introduce qualified key contacts, and generally act as problem solvers should business clients from their countries encounter difficulties in a foreign market.

Contrary to popular belief, diplomatic missions not only advocate on an international level (i.e promote free trade agreements and negotiate international investment agreements), but they also work closely "on the ground" with private business clients from their respective countries, with the mandate of promoting and facilitating their business in foreign markets. Put simply, diplomatic missions are often the first point of contact for a business person embarking on an international venture, most especially in a market that is unfamiliar to their particular client. In addition, given the public function of an Embassy/High Commission, these services are often free of charge.

In recognition of these prevalent and constantly shifting 21st century business trends, as well as the intersecting role of private business associations in working closely with diplomatic missions to promote trade and investment, the AIAC has recognised the importance of introducing ADR to commercial representatives that engage in international and cross-border business. ADR can be a highly effective method in which a private foreign business person can ensure the enforcement of their contractual rights in a cross-border context, thereby underscoring the importance of this half-day conference in promoting and facilitating this discussion amongst Malaysia's international community.

With diplomatic representatives from 20+ different missions in attendance, as well as an audience of over 60 attendees, the AIAC's inaugural event will hopefully act as a catalyst that will lead to further discussion on the burgeoning use of ADR and the myriad of benefits it could provide to international business persons – the end-users of ADR and those whom should be the primary focus of any international arbitration centre.

[1] Mr Joseph Paguio was a former Legal Intern at the AIAC from Canada.

EFFECT OF THE LEAP MODULATION EXPUNGEMENT ORDER

Reference is made to the dissenting judgment of Justice Hamid Sultan bin Abu Backer in *Leap Modulations Sdn Bhd v PCP Construction Sdn Bhd and another appeal* [2018] MLJU 772.

On 9th November 2018, upon the application by the AIAC for leave to intervene at the Federal Court of Malaysia, and upon the same being granted, the Federal Court of Malaysia ordered the expungement of certain paragraphs of the dissenting judgment from the records. The following paragraphs were expunged in full pursuant to the Federal Court's said order: **Paragraphs 9, 10, 23(c), 23(e), 23(f), 23(g), 23(h), 23(i), 24, 25, and the last paragraph** which states "I hereby order so".

Portions of certain paragraphs were also expunged pursuant to the Federal Court's order as identified below:

* Paragraph 7: The sentence "In addition … KLRCA (AALCO)".

* Paragraph 8: The section beginning "Having said that, …" to the end of paragraph 8.

* Paragraph 22(vi): The word/abbreviation "(AALCO") in the sentence "This decision-making process …. KLRCA(AALCO)"; the sentence "This nuance … through the scheme".

* Paragraph 23(a): The section beginning "However, the Government …" and ending "… own discretion"; the section beginning "The Arbitration Act 2005 … " and ending "… rule of law".

* Paragraph 23(b): The section beginning "However, it will be …" and ending "… administration of justice".

* Paragraph 23(c): The section beginning "What is KLRCA …" and ending "… Federal Constitution".

The AIAC wishes to take this opportunity to remind the public that anyone who attempts to cite the expunged paragraphs of the *Leap Modulation* dissenting judgment would be in contempt of the order of the Federal Court of Malaysia. If such a citing were to occur, the offending party is put on notice that defamatory proceedings may be initiated against them by the AIAC.

RECENT ANNOUNCEMENTS BY THE DIRECTOR (ACTING) OF THE AIAC

On 21st November 2018, Mr Vinayak Pradhan was officially appointed as the Director (Acting) of the Asian International Arbitration Centre ("AIAC") by the Attorney General of Malaysia, Mr. Tommy Thomas, in consultation with Prof. Dr Kennedy Gastorn, Secretary-General of the Asian-African Legal Consultative Organization. The announcement was made following the resignation of the former Director of the AIAC, Datuk Professor Sundra Rajoo, on 21st November 2018.

Following Mr Pradhan's helming of the directorship of the AIAC, a number of announcements have been issued regarding changes to the process of appointing adjudicators and arbitrators at the AIAC. In this and the following pages, the AIAC has collated the relevant announcements for your information and perusal.

ANNOUNCEMENT 1 – CONFLICTS RESOLUTION PANEL

Announcement
November 26, 2018

CONFLICTS RESOLUTION PANEL (CRP)

In order to deal with the situations where the Director of the AIAC has to make a decision but it is apparent that there may be a conflict of interest on the part of the Director, the AIAC constitutes the Conflict Resolution Panel comprising those named below.

In the event of a conflict of interest, the Director may call upon at least 2 Members of the Panel to enable a decision to be arrived at for the Director's implementation.

The members of the CRP are :

1) Dato' Varghese George Varughese (Retired Judge, Court of Appeal)
2) Mr Lambert Rasa-Ratnam
3) Mr Razlan Hadri
4) Ms Yoong Sin Min
5) Mr Christopher Leong

These appointments take effect from today and will be for the period until 30 June 2019.

Yours sincerely,

VINAYAK PRADHAN
Director (Acting)
Asian International Arbitration Centre (AIAC)

ANNOUNCEMENT 2 – CHANGES TO THE APPOINTMENT PROCEDURE OF ADJUDICATORS UNDER THE CIPAA

Announcement
December 3, 2018

CHANGES TO THE APPOINTMENT PROCEDURE OF ADJUDICATORS UNDER THE CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012

To enhance the efficiency of the appointment procedure of adjudicators under the **Construction Industry Payment and Adjudication Act 2012** (the **"CIPAA"**) and to reinforce compliance with the strict statutory deadlines for making such appointments, the AIAC, as the adjudication authority under the CIPAA, is implementing the following changes to the appointment procedure.

Upon receipt of the "Request to the Director of AIAC to appoint an adjudicator" (Form 5) (the **"Request"**), the AIAC will identify 3 (three) potential candidates to be appointed as the adjudicator.

In the absence of any circumstances preventing the AIAC from acting on the Request (e.g. incompleteness of documents, non-payment of the appointment fee, etc.), the AIAC will send a conflict check to 3 (three) potential candidates identified simultaneously.

For the avoidance of any doubt, the receipt of the conflict check and the subsequent clearance of any conflicts of interest, do not necessarily mean that one of the 3 (three) potential candidates identified would ultimately be appointed as the adjudicator.

The changes take effect from today and will be in force until further notice.

Yours sincerely,

VINAYAK PRADHAN
Director (Acting)
Asian International Arbitration Centre (AIAC)

ANNOUNCEMENT 3 – COMPETENCY STANDARD AND CRITERIA OF ADJUDICATORS UNDER THE CIPAA

Announcement
December 3, 2018

COMPETENCY STANDARD AND CRITERIA OF ADJUDICATORS UNDER CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION REGULATIONS 2014

According to Regulation 4(a) of the Construction Industry Payment and Adjudication Regulations 2014 (the "Regulations"), the competency standard and criteria of an adjudicator includes the requirement of and adjudicator to have "working experience of at least seven years in the building and construction industry in Malaysia".

The Asian International Arbitration Centre (AIAC), as the adjudication authority under the Construction Industry Payment and Adjudication Act 2012 (the "CIPAA"), determines whether a potential adjudicator meets the competency standard and criteria set out in the Regulations on the basis of information contained in his / her Curriculum Vitae (CV), resume, or any other document of the same nature, submitted to the AIAC.

As such, the AIAC kindly requests every person currently enlisted on the AIAC's Panel of Adjudicators to ensure that his / her CV, resume, or any other documents of the same nature, submitted with the application to be enlisted on the AIAC's Panel of Adjudicators contains information about his / her "working experience of at least seven years in the building and construction industry in Malaysia".

If a CV, resume, or any other document of the same nature, submitted to the AIAC by a person enlisted on the AIAC's Panel of Adjudication to the AIAC does not contain information specified above, the Director of the AIAC cannot ascertain whether such person may be properly appointed as an adjudicator under Sections 21(b) and 23 of the Construction Industry Payment and Adjudication Act 2012.

Current panellists whose CV, resume, or any other document of the same nature, does not conform to the said requirements are encouraged to submit an amended version of same to panel@aiac.world, clearly indicating full name and panellist ID in the subject line.

The announcement takes effect from today and will be in force until further notice.

Yours sincerely,

VINAYAK PRADHAN
Director (Acting)
Asian International Arbitration Centre (AIAC)

CASE SUMMARIES

Keeping abreast of the latest developments in local and international jurisprudence is important for anyone practising or interested in alternative dispute resolution. In the following pages, the AIAC has summarised a selection of local and foreign decisions relating to adjudication, arbitration, construction contracts, and investment arbitration for your reading pleasure. Enjoy!

ARBITRATION

Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd (and another appeal) [2018] MLJU 968

In *Pancaran*, at [28], the Court of Appeal addressed the issue of whether an arbitrator breached "the rules of natural justice by relying on extraneous evidence thought up by the learned arbitrator himself which was not tendered by the parties, not submitted upon and for which the parties [were] not given a chance to address and for which no evidence or allegations had been tendered". The Court of Appeal held that in relying on extraneous evidence, the arbitrator breached the rules of natural justice, thus exceeding his jurisdiction. It was explained that because the parties had not been given the chance to address the extraneous evidence, which the arbitrator had unilaterally introduced, the arbitrator violated Section 20 of the Arbitration Act 2005 (the "AA 2005"), which states: "The parties shall be treated equally and each party shall be given a fair and reasonable opportunity of presenting that party's case". In relying on his own computation for damages, rather than that submitted by the parties, the breach was indeed relevant and material to the arbitrator's ruling. Consequentially, the Court of Appeal ordered the award to be set aside in its entirety under Sections 37(1)(a)(iv) and 37(2)(b) of the AA 2005.[1]

La Kaffa International Co Ltd v. Loob Holdings Sdn Bhd (and another appeal) [2018] MLJU 703.

In *La Kaffa* the Court of Appeal dealt with the issue of whether courts in Malaysia have the inherent jurisdiction to grant an interim award in a case that is being arbitrated in Singapore under Singaporean law. The Court of Appeal, in following the High Court's holding that Singaporean law, as applied to the facts of the case, were the same as Malaysian law, by way of the principles relating to Private International Law, relied on Section 11 of the AA 2005. The Court of Appeal held that under Section 11 of the AA 2005 it has the jurisdiction to grant interim relief, even if the seat is not in Malaysia, however "it must strictly relate to the parties within the jurisdiction.". In this instance, the Court of Appeal recognised that the interim relief was limited to supporting, assisting, aiding or facilitating the Singapore Arbitral Proceedings, but this is not a per se caveat for all arbitrations in which the seat is outside of Malaysia. Consequentially, the Court held that the injunction ordered in this case by the High Court was within the court's jurisdiction.

Tidalmarine Engineering SB v Kerajaan Malaysia (Jabatan Kerja Raya Malaysia) [2018] MLJU 1632

Tidalmarine Engineering arose out of a delay in construction as a result of suspension in the construction by the Plaintiff (Tidalmarine Engineering) and the subsequent determination of the contract by the Defendant (Jabatan Kerja Raya Malaysia). In this case, the Court of Appeal upheld the test for 'any question of law' under the former Section 42 of the AA 2005 as enounced in *Far East Holding v Majlis Ugama Islam dan Adat Resam Melayu Pahang* [2018] 1 MLJ; [2018] CLJ 693. While the issue of damages is an issue of fact, the issue of whether an arbitrator may impose liquidated damages on the plaintiff when no such claim was made by the defendant is an issue of law. The Court also held that an issue relating to performance bonds is an issue of law.

[1] *Citing Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd* [2018] 1 LNS 52, at [34] – [41].

Tan Sri Dato' Seri Vincent Chee Yioun & Anor v Jan De Nul (M) Sdn Bhd & Anor and another appeal [2018] MLJU 1545

The arbitration in *Tan Sri Dato' Seri Chee Yioun* arose out of a land reclamation project in Johor which resulted in two appeals, one on the scope of Section 37 of the AA 2005 (which was decided on 24th October 2017) and the present appeal, which raised issues under the former Section 42 of the AA 2005. In this case, the Court clarified that where one party to the arbitration is foreign, even where the seat of the arbitration was in Malaysia, this is an international arbitration for the purposes of the AA 2005. The term 'domestic international arbitration' is a term coined to explain such a type of international arbitration, but for all intents and purposes, it is still an international arbitration. The Court further rejected the position in *Ajwa for Food Industries Co (MIGOP) v Pacific Inter-Link Sdn Bhd [2013] 2 CLJ 395*, where it was held that as long as the arbitration was governed by the laws of Malaysia, the former Section 42 of the AA 2005 would apply. Instead, the proper course was to first decide on whether the arbitration was a domestic or international arbitration, and since this present case was an international arbitration, the courts are unable to set aside the award under the former Section 42 of the AA 2005.

ADJUDICATION

Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd [2018] MLJU 773

The Court of Appeal in *Leap Modulation* set aside an adjudication decision for breach of natural justice under Section 15 of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"). The adjudicator in that matter had relied on the plain wording of Section 27(1) of the CIPAA and had not considered the respondent's defence, the reason being that the defence was set out in the adjudication response but not in the payment response. Relying on the position in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2017] 1 LNS 1378, at [74], the Court of Appeal held that by failing to consider the respondent's defence, the adjudicator had acted in breach of natural justice, and thus ordered the adjudication decision be set aside.

Niko Bioengergy Sdn Bhd v RH Balingian Palm Oil Mill Sdn Bhd (No. 2) [2018] 7 AMR 2018[2]

In *Niko*, the High Court explained that since the Federal Court has given leave to appeal in order to resolve the uncertainty created by the *Bauer* and *UDA* cases, there would be special circumstances under *Kosma Palm Oil Mill Sdn Bhd & 2 Ors v Koperasi Serbausaha Makmur Bhd* [2003] 5 AMR 7 to stay a proceeding, which is even broader than the test under Section 16 of the CIPAA.

Vistasik Sdn Bhd v BME Tenaga Arus Sdn Bhd [2018] MLJU 1217[3]

In *Vistasik*, the High Court yet again addressed the issue of whether CIPAA is applied retrospectively. The High Court recognised that although *Bauer* held that Section 35 of the CIPAA does not apply retrospectively, this should be contrasted with the holding of *UDA* that CIPAA applied retrospectively, which was upheld by *Bond M&E (KL) Sdn Bhd v Isyoda (M) Sdn Bhd (Brampton Holdings Sdn Bhd – Third Party)* [2017] [2017] MLJU 376 at [63], although no written judgement was given. The High Court pointed out that *UDA* was cited by *View Esteem*, which was decided before *Bauer*, yet the Court of Appeal in *Bauer* did not refer to *View Esteem*. Notably, the Federal Court in View Esteem, at [10], acknowledged that *UDA "held that CIPAA has a full retrospective effect to cover both construction contracts and payments disputes that arose before."* In relying on this wording

[2] *Referencing Bauer (M) Sdn Bhd v Jack-In Pile (M) Sdn Bhd and another appeal* [2018] 4 MLJ 640 and *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor* (and Another Case) [2015] 11 MLJ 499.

[3] *C.f. Bauer (M) Sdn Bhd v Jack-In Pile (M) Sdn Bhd and another appeal* [2018] 4 MLJ 640 with *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor* (and Another Case) [2015] 11 MLJ 499 and *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2017] 8 AMR 167.

of *View Esteem* and the opinion of Mr Lam Wai Loon, acting as amicus, the High Court reasoned that the Federal Court had accepted *UDA*'s holding and thus *Bauer* must be read as inconsistent with the Federal Court. Consequentially, the High Court held that CIPAA applied retrospectively.

Kerajaan Malaysia v Shimizu Corp & Ors [2018] MLJU 169

The Plaintiff is the Government of Malaysia while the Defendants are an unincorporated joint-venture between two Japanese (Shimizu Corporation and Nishimatsu Corporation) and two Malaysian (UEM Builders SB and IJM Construction SB) companies. The dispute arose out of a contract to undertake works for the Pahang-Selangor Water Transfer Project. The Plaintiff argued that the contract fell outside the ambit of the CIPAA as it was a contract that related to 'national security' or 'security related facilities' under the CIPAA Exemption Order 2014. The High Court held, following the trend in landmark cases *Semenyih Jaya SB v Pentadbir Tanah Daerah Hulu Langat & Anor* [2017] and *Indira Gandhi a/p Mutho v Pengarah Agama Negeri Perak & Ors and other appeals* [2018] 1 MLJ 545, that it recognised the Plaintiff's subjective discretion in exercising executive powers to decide national security, but the Plaintiff must nonetheless satisfy the requirement for objective facts demonstrating the Plaintiff is in fact acting reasonably and fairly by saying the contract relates to national security or security-related facilities. Further, the Plaintiff argued that there was a breach of natural justice because the adjudicator failed to give adequate reasons in support of the conclusions reached. Here, the Court reiterated the decided position in *ACFM Engineering & Construction SB v Esstar Vision SB [2015] 1 LNS 756* that the court will only set aside the award where the breach of natural justice was "either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant, it must be material." For the above reasons, the application to set aside the adjudication decision was dismissed.

CONSTRUCTION AND STANDARD FORM CONTRACTS

Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd (Civil Appeal No. W-02-(NCC)(W)-563-04/2015)

In *Cubic Electronics*, the Federal Court of Malaysia addressed the issue of whether earnest deposit monies were forfeitable and subject to section 75 of the Contracts Act 1950 ("Contracts Act"). The Federal Court determined there are three separate scenarios that may occur:

- First, monies were paid in advance and considered partial payment of the contract price, which typically would be refundable to the payer, thus not forfeitable;
- Second, monies were paid in advance and considered partial payment of the contract price, however, in addition payment guaranteed performance would occur. Then, it considered a deposit (part-payment and guarantee) and may be forfeited subject to the reasonable compensation test of section 75 of the Contracts Act. If the innocent party can prove that the deposit was reasonable, the onus shifts to the defaulting party to show the forfeited deposit is excessive;
- Third, if the amount is stated as liquidated damages in the contract, then proof of loss is not mandatory, albeit it is a useful place to start. To recover under this, the innocent party must show there was a breach, the contract contains a clause stating the amount payable upon breach, and the amount receivable must not exceed the amount stated in the contract. Finally, the burden shifts to the defaulting party to show the amount is unreasonable.

Although Cubic Electronics deals with the sale of land, it is directly applicable to all industries in which deposits may be used as both partial payment of the contract and as a guarantee that performance will occur.

FOREIGN ARBITRATION DECISIONS

Astro Nusantara International BV v PT Ayunda Prima Mitra [2018] 21 HKCFAR 118

The Final Appeal Court of Hong Kong in Astro Nusantara dealt with two issues on appeal: 1) determining the proper test under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards for whether an extension of time should be granted to a party seeking to resist an arbitral award; 2) in determining issue 1, should the courts consider whether the award has not been set aside by the courts of the seat of arbitration.

In assessing these issues, the Court compared the tests in The Decurion with that in *Terna Bahrain Holding*.[4] In comparing these two tests, *Astro Nusantara* held that the *Decurion* test was the correct one in this instance, since the test in *Terna Bahrain* was applicable to interim measures, whereas this case dealt with resisting an arbitration award. In *Astro Nusantara*, since there was no arbitration agreement between the applicant (the joined parties) and the respondent, the Tribunal had no jurisdiction to render the Award. Further, although the Applicant's delay was significant, in looking at the overall justice, it would have been vastly unjust to not grant the Applicant an extension of time. Thus, the Court held that the extension of time should have been granted.

Finally, the Court held that the lower courts erred by taking into consideration the fact that the applicant opted to not set aside the award in Singapore, the seat of arbitration. It explained that in line with the choice of remedies principles, the applicant was free to either opt to set aside the award in Singapore and use that as a defence in any enforcement action, or to take no steps to set aside and resist enforcement on grounds such as Section 44(2)(b) of the Arbitration Ordinance (cap.341), which it did.

Belaya Ptitsa - Kursk v Robot Grader AB, (case number Ö 3626-17) [2018]

The Swedish Supreme Court, in Kursk, held that there were grounds for refusing to recognise and enforce a foreign arbitral award in Sweden on the grounds that the Counterparty was not given an opportunity to present its case under Item 2 of Section 54 of the Swedish Arbitration Act, which is based on Article V(1)(b) of the New York Convention. The Court explained that in refusing to grant the Counterparty an extension of time to present its case when the delay by the Counterparty was caused by ongoing negotiations between the Parties that failed, the Tribunal violated the due process principles of international arbitration. In so holding the Court relied on the fundamental principle of international arbitration that parties must be guaranteed due process, meaning "the parties must be treated equally, and the proceedings must be transparent and reasonably predictable for the parties".

Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. ___ (2019)

In *Henry Schein*, the Supreme Court of the United States held that under the American Arbitration Act (the "AAA") when an arbitration agreement designates the issue of arbitrability to an arbitral tribunal, the courts have no jurisdiction to decide that issue regardless if they find the argument that the arbitration agreement applies to an issue wholly groundless. The Court

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[4] In *The Decurion* [2012] HKLRD 1063 it was held that that in considering whether to grant an extension of time, the Court should consider all relevant factors and the overall justice of the case. In *Terna Bahrain Holding Co WLL v Al Shamsi* [2012] EWHC 3283 (Comm), [2013] 1 Lloyd's Rep 86, it was held that courts should consider the following primary factors first:

1. length of the delay;
2. whether the applicant acted reasonably given the circumstance;
3. whether the respondent or arbitrator contributed to or caused the delay;

then only if either the applicant's case can be seen as strong, or the respondent's as weak on its face, may the court consider the following secondary factors:

4. whether respondent will suffer irreparable prejudice;
5. whether the arbitration continued during the delay and the impact of the delay on its progress;
6. the strength of the application; and
7. whether it would be unfair to deny the applicant the opportunity to have the application determined.

relied not only on the AAA, but also on precedent.[5] In so holding, the Court explained that the courts may first determine whether there is a valid arbitration agreement and whether that agreement designates the issue of arbitrability to an arbitral tribunal.[6] If the parties have agreed to such, the Court held since arbitration is a matter of contract, the courts must enforce that decision as they do not have the power to override it.[7]

Marty Limited v Hualon Corporation (M) Sdn Bhd [2018] SGCA 63

The appeal arose as a result of challenge to the arbitrator's jurisdiction to hear an ongoing arbitration in Singapore after the Respondent (Hualon Corporation (M) Sdn Bhd) commenced litigation proceedings against the Appellant (Marty Limited) in the British Virgin Islands (BVI). The question raised was whether the Respondent was in breach of the arbitration agreement, which was accepted by the Appellant, and/or whether the Respondent had waived his right to arbitration under the arbitration agreement. The Singaporean Court of Appeal clarified that the commencement of a court proceedings is *prima facie* repudiation of the arbitration agreement. In the present case, the Court reasoned that a reasonable person in the Appellant's position would have expected the Respondent to either commence arbitration proceedings, or commence court proceedings but reserve his right to arbitration. The mere assertion that the Respondent did not know about the arbitration clause is not good enough to displace the *prima facie* presumption of breach. Nonetheless, the Court found that there was actual knowledge of the arbitration clause since the person who signs the document is deemed to know the contents of the same and this knowledge can be imputed onto the company. This breach was further accepted by the Appellant as they raised a summary judgment application as to the jurisdiction of the BVI court. As such, there was no need for the Court to go further into the issue of waiver since it was established that there was a breach of the arbitration agreement, which was accepted by the Appellant, thus removing jurisdiction for the arbitrator to hear the case.

INVESTMENT ARBITRATION

Foresight Luxembourg Solar 1 S.Á.R.L., and others v Kingdom of Spain (SCC Case No. 2015/150) [14th November 2018]

A Stockholm Chamber of Commerce (SCC) Tribunal issued an award against Spain in one of many cases relating to the change in Spain's energy regime. They issued this award against Spain for a breach of the fair and equitable treatment (FET) standard under Article 10(1) of the Energy Charter Treaty (ECT). This investment treaty arbitration tribunal found that certain actions taken by Spain in 2013 did not violate the FET standard because the Claimants (a group of Luxembourg, Italian and Danish companies) should have expected some change in the regime since there were changes to the regime prior to the Claimant's investment in Spain. However, the tribunal considered that the Claimants did have a legitimate expectation that "the regulatory framework would not be fundamentally and abruptly altered so as to deprive the investors of a significant part of their projected revenues" after the 2013 regime was in place. As such, the Tribunal allowed the claim but only granted an award of EUR39 million to the Claimants instead of the EUR58 million claimed.

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[5] See *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649–650 (1986) where it was held that a court may not "rule on the potential merits of the underlying [claim assigned to the arbitrator by the contract], even if it appears to the court to be frivolous."); see also *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960): "[Courts have] no business weighing the merits of the grievance [because the] agreement is to submit all grievances to arbitration, not merely those which the court will deem meritless".

[6] Citing *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944: "[Courts] should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.").

[7] Citing *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67.

EVENT CALENDAR

SAVE THE DATE

18th Jan	The Jonathan Yoon MIARB Debate Series
26th Jan	Mooting Workshop: A Star Is Born
31st Jan	CABE MAlaysia Annual Conference 2019: Pathways to Excellence
9th Feb	Refresher Course on Effective Drafting of Submission in Adjudication (MSA)
22nd -24th Feb	3rd AIAC-ICC Pre-Moot for The Willem C. Vis International Commercial Arbitration Moot
18th May	Drafting a Valid & Enforceable Decision (MSA)
27th - 29th June	Asia ADR Week 2019 - The Kintsukuroi Perspective: The Asian ADR Revolution
2nd - 6th Nov	AIAC Certificate in Adjudication

JANUARY

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The AIAC is the only arbitral institution in Asia that provides **Complete Alternative Dispute Resolution** (ADR) & **Holistic Dispute Management Services**

WE CARE ABOUT THE FINER DETAILS:

- Light touch approach to ensure quality and uphold party autonomy
- Separate rules for expedited procedure *Fast Track Arbitration Rules*
- Unique *Mediation Rules* focusing on trends including Med-Arb
- Option for parties to choose any currency for international arbitration for greater business flexibility
- International legal team from across the globe to assist in international arbitration

ARBITRATION

The revised AIAC Arbitration Rules, 2018 (formerly known as the *"KLRCA Arbitration Rules"*) is a set of rules and procedure which adopt the framework provided by the UNCITRAL Arbitration Rules (as revised in 2013). 2017 brought 100% increase in arbitration cases at AIAC compared to 2016. These New Rules are timely in the light of recent trends of costs and length optimisation of arbitration proceedings.

MEDIATION

The AIAC Mediation Rules (formerly known as *"KLRCA Mediation Rules"*) are a set of procedural rules encompassing different aspects of the process of Mediation to aid parties in resolving both international and domestic disputes. With the AIAC Mediation Rules and the Malaysian Mediation Act 2012, AIAC seeks to promote mediation as a desirable commercial option for parties in Malaysia.

ADJUDICATION

Since the inception of CIPAA (The Construction Industry Payment & Adjudication Act 2012), AIAC has administered over 1,400 adjudication cases with 2017 recording the highest number of adjudication cases with a total number of 708 cases alone. In carrying out its duty as the adjudication authority, AIAC also regularly conducts adjudication training programmes as part of its efforts to regulate and maintain the high standards of competency expected of Malaysian adjudicators.

DOMAIN NAME COMPLAINTS

AIAC administers disputes under the ADNDRC rules in generic top-level domains offering resolution of ".my" domain names disputes (amongst others), through the Malaysian Network Information (MYNIC) rules and policy. Domain disputes are usually settled in less than 60 days at AIAC, being one of the most cost effective providers in Asia.

AIAC'S STANDARD FORM OF BUILDING CONTRACTS

AIAC's SFC is Malaysia's first ever CIPAA-compliant suite of building contracts and contains more mechanisms for parties to resolve disputes and deadlocks including mediation, encouraging parties to continue work despite disputes, while preserving parties' rights till completion. The hallmark of AIAC's SFC is continuity of works and working relationships. More information at sfc.aiac.world

MODEL ARBITRATION CLAUSE

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the AIAC Arbitration Rules."

ASIAN INTERNATIONAL ARBITRATION CENTRE | **E:** enquiry@aiac.world
Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia

ASIAN INTERNATIONAL ARBITRATION CENTRE
www.aiac.world


Auditorium


Koi Fish Pond

FACILITIES PERSONIFIED

The exterior and the galleries reflect the building's historical significance as a National Heritage Site while the interiors of the halls speaks about modern architecture of the contemporary times that is technologically advanced:

- Strategic location at the heart of South East Asia and Kuala Lumpur city.
- Advanced proprietary Court Recording & Transcription (CRT) systems.
- Well-connected flights and easy visa entry.
- Politically peaceful environment and booming economy – a stable platform to host international arbitrations or business event needs.

MULTI-DIMENSIONAL SPACE

- For Arbitrations or Meetings: 30 specialised Hearing Rooms, ranging from Small (10 pax) to Medium (14 pax) to Large (22 pax) sized rooms.
- Additional Meeting and Breakout Rooms, with Business Centre access for private discussions.
- VIP / Arbitrator Lounge.
- 200-seater Auditorium theatre.
- Two (2) Seminar Rooms / Extra-large Hearing Rooms, seating 100 pax each.
- Pavilion for cocktail or networking events / dinners.
- Vibrant koi fish pond and natural surroundings for corporate events.


Seminar Room


Extra Large Hearing Room


Large Hearing Room


Medium Hearing Room

ROOM RENTAL RATES

	Seating Capacity	Weekday (8.30 a.m - 5.30 a.m.)		Weekend (8.30 a.m - 5.30 a.m.)	
		Full day (MYR)	Half day (MYR)	Full day (MYR)	Half day (MYR)
Extra Large Hearing Room	50	3,680	2,300	5,865	3,680
with Advanced CRT		4,530	3,265	6,715	5,600
Large Hearing room	22	1,265	750	1.955	1,265
with Advanced CRT		3,265	2,750	3,955	3,265
with CRT		3,105	2,645	3,795	3,105
Medium Hearing Room	14	920	575	1,380	920
with CRT		2,530	2,185	2,990	2,530
Small Hearing Room	8 - 10	500	350	810	500
Breakout Room	8	150	N/A	250	N/A
Breakout Room	4	130	N/A	230	N/A
Auditorium	182	3,800	N/A	4,900	N/A
Seminar Room		2,530	N/A	4,000	N/A
Theatre	100				
Classroom / U-shape	30				
Private Dining Room	80	650	N/A	1,100	N/A

WHAT'S INCLUDED?

- Free Wi-Fi
- Lounge for Arbitrators/VIP
- Complimentary:
  - Tea, coffee, mineral water
  - Stationery, paper
  - Whiteboard and flipcharts
- Free parking
- Electric vehicle charging station

ON REQUEST SERVICES AND EQUIPMENT

- HD Projectors
- Ultra-HD Video Conference
- Tele-conferencing
- Live Broadcast on Facebook
- HD Camcorder Recording
- Furniture
- In-house catering services
- Webseminar

CRT FEATURES

- High Definition Recording (1080p)*
- Voice Tracking Recording Microphones*
- PTZ Cameras for HD Recording*
- Automated Audio-to-text Transcription**
- HD Document Visualiser*
- Interactive Smart-screen Board (Ultra HD 4K 75 inch)*
- Standard Recording (480p) and auxiliary microphones
- Standard presentation whiteboard

SUPPORT SERVICES

AIAC's suite of amenities offers an extensive array of hospitality spaces that cater for comfort and privacy of guests, fulfilling your every need:

- Concierge and registration counters
- Disabled-friendly
- Library with specialised ADR and Construction Law resources
- Outdoor Cafeteria with relaxing natural elements
- Private Dining Rooms
- Media and Conference Rooms
- Discounted Hotel Rates
- Hands-on Technical Support Staff

* Advanced CRT

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Outdoor Dining

Arbitrator's Lounge

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