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The ADR Centurion is the Bimonthly Newsletter of AIADR published six times per year by the Editorial Committee of AIADR for the members of the AIADR (the “Institute”) and general readers interested in ADR subject and practices. All rights reserved. Copyrights by ©Asian Institute of Alternative Dispute Resolution (AIADR). Opinions and views expressed in the ADR Centurion are solely of the authors and writers and are not necessarily endorsed by AIADR or its Editorial Committee. AIADR, Editors and or its Committees are not responsible or liable in any manner whatsoever for the contents and or to any person for relying on the contents of any of the advertisements, articles, photographs or illustrations contained in this Publication. All information is correct at the time of publication.

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aiadr.editor@aiadr.world
### EVENTS

First AGM 2019 to be held on 15 October 2019 at 4p.m.

Upcoming event: Enforcement of Mediated Settlement Agreements Across the Causeway, under Singapore Mediation Convention

### Cyber Space

PANELS OF CERTIFIED INTERNATIONAL ARBITRATORS AND PRACTITIONERS LAUNCHED - VISIT THE WEBSITE PAGE

Second Phase of the AIADR website has been launched!

Members and non-members are invited to visit the website https://www.aiadr.world to create their accounts and upload profile data.

### Volunteers

NEW MEMBERS ELECTED TO THE COMMITTEES OF AIADR

- **Dr. Dimitar Kondev**, Member BDIRC, ESC, and Evangelist (C & E Europe)
- **Dr. S. Nadarajah**, Member PDEC
- **Mr. Lim Yong Hong**, Member BDIRC and FRPSC
- **Mr. Wilson Ho Sheen Lik**, Member PDEC and BDIRC

### Social

**AIADR FACEBOOK PAGE**

AIADR Facebook Page has been launched on 22 July 2019.

Members and non-members are invited to visit the Facebook Page https://www.facebook.com/aiadr.world/ and post news, views, comments.
Dear Members,

On behalf of the Board of Directors (the “Council”) of your Institute, it is my pleasure and an honour to present this first Annual Report and Audited Financial Statements of AIADR for the first financial year from the date of incorporation till 30 June 2019.

FINANCIAL PERFORMANCE

AIADR has been in the incubation stage since its incorporation with limited expenditure. AIADR being a Not-for-Profit organization is not for generating financial profits but intangible assets for its membership. The service to society and countries is by enhancing competency standards of its members for supporting international trade & business communities, in managing their differences in a cost effective and efficient manner.

The audited financial reports as presented to the Members show modest surplus from heavily discounted membership subscriptions in 2018. Till to date the Institute did not employ any direct staff but was being managed through the volunteer members and the Council members freely devoting their time, including bearing all their out of pocket & travel expenses incurred, on pro bono basis.

COMMENCEMENT REPORT

I am pleased to present my report as President of the Council and the Asian Institute of Alternative Dispute Resolution (AIADR). Our journey started with the launch of AIADR in Kuala Lumpur on 6th May 2018. It is the first member-based institution specific for Asia and other parts of emerging economies. It covers the whole of Asia as compared to the country based arbitral and ADR institutions that existing in most jurisdictions. It is hoped that eventually it will move to the other seven continents especially Africa.

There were a number of initiatives that were completed since launch. They include as follows:

- the setting up the Institute’s website;
- the appointment of Council Members from Singapore, Korea, Hong Kong and China;
- the setting up of a satellite secretariat office at Singapore;
- the search for a Chief Executive officer;
- the formation of various Committees on the particular areas of the work of the Institute;
- the publication of the Institute’s newsletter, The ADR Centurion;
- publication of the 10 core values and Code of Ethics and Conduct for the members of the Institute; and
- AIADR Membership Certificate Award Ceremony on 25th July 2019 which coincided with a successful event titled “Effective Forums for Disputes Management in Times of Turmoil.”

I record my appreciation and thanks to the staff of AIAC and my fellow Council members:

Dato’ Quek Ngee Meng,
Mr. Jayems Dhingra,
Professor Hi-Taek Shin,
ACKNOWLEDGEMENT & RECOGNITION OF

Dr. Li Hu and
Mr. Man Sing Yeung,
for managing the Institute’s affairs well.

We intend to implement capacity building and knowledge dissemination based on regional needs with adherence to best practices and international standards. Various courses are being developed with corresponding membership recognition arrangements. This will be concurrently done with activities planned in various other jurisdictions.

The future of the Institute is about leveraging on those positive imprints left across the region and using them as a springboard as we seek to develop further and reach out geographically, and grow in the under-served markets in the wider context of ADR.

Thank you!

Prof Datuk Sundra Rajoo
President

Dato’ Quek Ngee Meng

AIADR will remain indebted to the management and all the staff of AIAC for being the incubator for the Institute from the time it was born, and for nursing it well till it is grown and able to stand on its own feet. AIAC has been generously providing the rent free office at Bangunan Sulaiman. AIAC has also been managing the book keeping, banking and accounting services on behalf of the Institute.

The current Financial Statement and Audit functions were also kindly prepared and managed by the designated Accountants under the directions and supervision of the office of the Director, AIAC.

In addition AIAC has also extended the offer for use of its function rooms on special terms as per the MOU between AIAC and AIADR.

I personally and on behalf of the membership of the Institute express our heartfelt appreciation to all the staff and management team of AIAC. We hope that this support and cooperation will continue for the future as
Payment disputes in the construction industry remain a persistent issue for industry players and there are various underlying causes leading up to issue on the quantum of the claim itself. Unless the contractual provisions deal with the issue such as non-certification and under-certification of the contractors’ progress claims, contractors are usually left with no recourse until they are able to trigger the dispute resolution clauses. This will typically be at the tail-end of the construction project and contractors facing such payment issues would be out-of-pocket to embark and sustain dispute resolution forums such as arbitration or litigation.

The coming into force of the Construction Industry Payment and Adjudication Act, 2012 [“CIPAA”] on 15th April 2014 heralded in a dawn for contractors in Malaysia that provides for “temporary” resolution to such payment disputes pending a full and final determination through arbitration or litigation. From 29 matters being registered with the Asian International Arbitration Centre (formerly known as the Kuala Lumpur Regional Centre for Arbitration) [the “AIAC”] by the end of 2014, the AIAC saw a total of 463 disputes being referred to adjudication under CIPAA in 2016 while 2017 saw a drastic increase to 704 disputes being registered for adjudication where the aggregate sum of claims involved was in excess of MYR200 million.

This ‘game-changing’ legislation saw a re-think of construction industry players when approaching payment issue, although it could be argued that it was not necessarily for the better. Court proceedings arising from adjudication decisions have grown in legal technicalities and, to some, has deviated from its original intent of being a quick and simple procedure for resolving payment disputes. While CIPAA itself only allows an adjudication decision to be set aside if a party could show that either the decision was obtained through fraud or bribery or there was a denial of natural justice or the adjudicator did not act independently or impartially or acted in excess of his/her jurisdiction, the legal jurisprudence on these setting aside grounds have grown considerably.

In recent times, the Malaysian Courts have afforded greater latitude by removing the shackles of administrative law interpretation of ‘jurisdiction’ in adjudication matters and requiring that defences presented by a respondent, notwithstanding that no payment response was submitted, to be duly considered. Similarly, the Federal Court of Malaysia dismissed the argument that CIPAA was confined only to progress claims. What this necessarily means is that parties ought to be keep abreast with the legal developments and pronouncements to better navigate the perilous waters of an increasingly complex area of dispute resolution mechanism.

References:
2. Section 15 of CIPAA
It is most fundamental to the law of Arbitration that not only the disputes but also the method of resolution of disputes is in the realm of a contract. Therefore, by its very nature, only those disputes arising as between the parties to a contract can be referred to arbitration. Parties, who are not privy to the Contract/Arbitration Agreement, cannot be forced to subject themselves to arbitration. This aspect has been clarified by the Supreme Court of India in Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya. However, over passage of time the law regarding reference to arbitration has evolved in India. Even non signatories have now been referred to arbitration. The reference of disputes to Arbitration where non-signatories are concerned is neither unknown to arbitration jurisprudence nor is the same impermissible.

In this context reference may be made to the dictum of the Supreme Court of India in Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc. & Ors. (‘Chloro Controls’) by which the concept of lifting the corporate veil and application of the alter ego doctrine have been judicially recognized in India. This article analyses the law on the status of non-signatories in arbitration as it developed in India.

**Group of Companies Doctrine and Non-signatories: Chloro Controls**

Albeit the scope of an arbitration agreement is limited to the party who entered into it and those claiming under or through them, the Indian Courts have been expanding the scope on certain principles such as group of companies doctrine, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates.

Two legal theories that recognised such a jurisprudence are as follows:

1. the theory of implied consent, under which third party beneficiaries, guarantors, assignees and the transferees of contractual rights were held liable to be joined; and
2. the theory under which certain legal doctrines such as agency, apparent authority, piercing of the corporate veil, joint venture relationships, succession and estoppel are applied.

The above theories were cited with approval by the Supreme Court of India in Chloro Controls. The decision was rendered in the context of Section 45 of the Arbitration & Conciliation Act, 1996 (‘Act’) under which, an applicant seeking reference of disputes to arbitration can either be a party to the arbitration agreement or any person claiming through or under such party which includes non-signatory parties who can be referred to arbitration provided they satisfy the requirements of Sections 44 and 45 read with Schedule I of the Act. Thus, the expression “any person” clearly refers to the legislative intent of enlarging the scope of the words beyond “the parties”, who are signatory to the arbitration agreement.

Albeit the ratio laid down by the Supreme Court in Chloro Controls was rendered in relation to
interpretation of Section 45 of the Act, the same ratio is applicable in case a non-signatory is deriving its right to invoke arbitration from several inter-connected agreements. Where several contracts entered into by the common parties for one single purpose, the Court may rely upon the group of companies to refer all the agreements and the parties thereon to arbitration. However, the existence of a relationship between the parties, commonality of the subject matter and whether the agreement between the parties is a part of a composite transaction have to be seen.

A ‘composite transaction’ refers to a transaction which is inter-linked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.

The group of companies doctrine has also been invoked in cases where there is a tight group structure with strong organizational and financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement.

However, it must be noted that pre-agreement negotiations by an unauthorised employee of an affiliate does not bind other affiliates of same group of companies.

**Anti-suit injunction involving non-signatory**

The ratio in Chloro Controls is applicable even in matters relating to anti-suit injunction involving non-signatory to the principal agreement. In Chatterjee Petrochem (Mauritius) Co. v. Haldia Petrochemicals the Supreme Court applied the dictum of Chloro Controls even in the context of a matter relating to an anti-suit injunction involving non-signatory to the principal agreement arguing that it is not bound by the arbitration clause. The court has held that the fact of it being a non-signatory “does not jeopardize the arbitration clause in any manner”.

**Appointment of arbitrator by Court on behalf of non-signatory**

Normally arbitration takes place between the parties to the arbitration agreement. The Supreme Court in Purple Medical Solutions Pvt. Ltd. v. MIV Therapeutics Inc and ors made an exception to this general rule for non-signatories. In that case, the Supreme Court considered the permissible area for appointment of arbitrator by a Court on behalf of non-signatory to arbitration agreement while addressing the issue of joinder of non-signatory parties to arbitration. In that case, the plea of the petitioner was that the second respondent (the non-signatory) is an alter ego of the first respondent and that the first respondent was a corporate veil of the said respondent. The Supreme Court reiterated the law laid down in Chloro Controls and having found that relevant facts justify lifting of corporate veil, referred the second respondent to arbitration.

**Conclusion**

As a corollary, under the Indian arbitration regime, in order to extend the scope of an arbitration agreement on non-signatories the intention of the parties is of paramount importance. Whether a non-signatory can be brought within the scope of arbitration proceedings must rest on facts of each case and normal rule of only parties to the agreement being involved in arbitration can be deviated only under exceptional cases such as when there is a direct relationship to the party signatory to the arbitration agreement, commonality of the subject-
Gender Equality in the 2019

Anran Zhang

On 22 March 2019, the Dutch Government published its newly revised Netherlands Model Investment Agreement (the 2019 Dutch Model BIT). The 2019 Dutch Model BIT includes innovative provisions which incorporate with investment arbitration practice and reflect national and international objectives. One of the most innovative changes in the context of the treaty is the emphasis of the equality between men and women in international investment.

Firstly, the preamble mentions that this agreement recognizes “the importance of equality between men and women when formulating, implementing and reviewing measures within the field of international trade and investment.” Secondly, the contents emphasize the importance of women’s participation in global economic growth in the sustainable development provision (Article 6.3). The investment protection provisions also provide liability to the Contracting States if the State breaches the obligation of fair and equitable treatment with measures including direct or targeted indirect discrimination on wrongful grounds, such as gender, race, nationality, sexual orientation or religious belief (Article 9.2). Furthermore, when there is a dispute, an investor may submit an investor-state arbitration claim. With respect to the constitution and function of the arbitral tribunal. The appointing authority shall also strive for gender and geographic diversity.

The 2019 Dutch Model BIT addresses the participation of both genders in international investment and dispute settlement mechanism and illustrates the important role of women in the global economy. It is indeed a very Dutch way, but it is also an innovative achievement in the investment agreement. It has both legal and strategic values.

The input of gender equality is necessary because it reflects one of the highly debated issues in investor-state arbitration. It was argued that ensuring the diversity of the decision-making bodies in international contributes to a fair decision-making process because the decision-makers with different culture and social backgrounds may avoid cognitive biases and group thinking (Bjorklund 2019). The diversity also helps to provide a comprehensive understanding of the disputes in the context. However, compared to man, women are less involved in investment arbitration. International arbitrators are usually (white) men from a developed state. Only less than 20% of the ICSID Panel of Arbitrators are female (ICSID 2017). In the past years, the proportion of the female arbitrators appointed at the ICSID was usually under 10% (Langford, Behan and Letourneau-Tremblay 2019). Although it witnessed significant progress in female participation in investment arbitration, the improvement is far from enough, and a lot of efforts need to be made to promote the participation of women in the arbitral proceedings.

The Dutch model BIT has been representative in the investment agreement negotiations since its 2004 model BIT was adopted in many BITs. The 2019 Model BIT that intends to replace the 2004 model BIT will be used for the negotiation of future BITs as well as the renegotiation of the existing Dutch BITs with the non-EU Member States. The 2019 Model BIT indicates the position of the Dutch government on gender equality and may most likely be discussed in the negotiation and renegotiation processes with their negotiating states. Moreover, from an international point of view, the idea of gender equality is also an international objective because it demonstrates the Sustainable Development Goals of the United Nations (Goal 5). Therefore, it is possible that the theme of gender equality may appear in the investment agreements in the new generation.

Overall, the 2019 Dutch Model BIT made a step to emphasise the importance of gender equality by asking the female participation in international investment and dispute settlement proceedings. It might be one small step for this model BIT, but one giant leap for the investment agreements in the new generation.

About the Author
CALL FOR BOOK CHAPTER PROPOSALS

Book Title: The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?
Expected Publisher: Wolters Kluwer – Kluwer Law International (publication expected in 2020)
Deadline for Proposals: 15 November 2019
Proposal Acceptance Date: 1 December 2019 (proposals may be accepted earlier)
Deadline for Initial Submission of Chapters: 1 March 2020
Deadline for Manuscript Submission to Publisher: 1 July 2020

The Book:
The present Investor-State Dispute Settlement (ISDS) system developed over the past 50-plus years.
The ISDS system has become an essential feature of foreign direct investment, BITs, and international trade agreements. The ISDS system has come under increasing criticism by participants and third-parties to the system. These criticisms have been directed, for example, at questions of consistency and predictability in decisions, transparency and impartiality amongst arbitrators and arbitral tribunals, and the costs and duration associated with ISDS. Further, in the summer of 2017, the United Nations Commission on International Trade Law (UNCITRAL) assigned to Working Group III “a broad mandate to work on possible reform of ISDS.” Working Group III began consideration of this mandate, whether reforms are required, and what form those reforms should take, in early-December 2017. Those discussions are on-going.

This book will be an edited collection of papers from scholars, practitioners, and representatives of interested parties, addressing ISDS and more specifically the on-going discussions regarding whether or not the ISDS system needs to be reformed or even replaced entirely. It will engage with the current debate regarding ISDS and will discuss possible reforms or alternatives to the present ISDS system. It will provide a balanced approach, with papers addressing all sides of the issues.

The Editors:
Dr Alan M. Anderson, PhD, FCIarb
Mr Ben Beaumont, FCI Arb
Possible Contribution Topics:
The editors presently expect to select 15-20 contributions from individual or joint authors for the monograph, which is expected to comprise approximately 300 pages. While proposals on any topic relevant to the current debate on the ISDS system are invited, areas of particular interest include:

1. Review of the Current ISDS System – Overviews of the current ISDS system, including the strengths and weaknesses/deficiencies of the present system. Contributions in this area may reflect the perspectives of different stakeholders in the ISDS system, including developed States, developing States, investors, and special interest/non-party groups (e.g., labour organisations, environmental).

2. ISDS: Fit for Its Purpose? – Possible reforms to ISDS, its replacement, or whether the ISDS system should remain unchanged, particularly as viewed from the perspectives of the different stakeholders; should State parties, particularly developing States, be able to assert defences based on their specific development or other (i.e., political) needs; what role, if any, should be allowed for special-interest groups who are not parties to an actual ISDS dispute.

3. Inconsistencies, Predictability, Review, and Enforcement – Perceived inconsistencies in decisions in ISDS; predictability of results; and alternative means of addressing these issues.

4. Ethics, Transparency, and Diversity (Gender & Geographical) – Issues relating to party appointment of arbitrators, “double-hatting” (arbitrators acting as counsel and arbitrators in different proceedings); arbitrators who are viewed as “pro” investor or “pro” State, and questions of impartiality and transparency; how can diversity – both gender- and geographic based – be improved among arbitrators (and counsel) to ISDS disputes; what can be done to decrease perceived ethical conflicts arising from individuals acting both as arbitrators and as counsel in different ISDS cases?

5. Costs and Duration – The costs and duration of investor-State disputes and possible solutions to reduce these inter-related issues; how can the costs and duration of ISDS disputes be better managed, particularly to reduce costs to developing States?

6. BITs, Trade Agreements, and IIAs – Issues arising out of the fact that ISDS is based on BITs, multi-lateral trade agreements, and IIAs and that therefore, reform or replacement of the ISDS system may not be practicable or may require a significant period of time to fully implement; consideration of the creation of an UNCITRAL Model BIT; should the language in BITs and other transnational or international investment agreements be changed or modified in order to improve consistency and predictability in outcomes?

7. Damages – Damages issues in ISDS disputes, and the large damages awards that have been prevalent; competency of tribunals to address damages; and alternative damages measures or limitations on damages awards.

Submission Procedure
Please submit your proposals by providing by 15 November 2019:
* Title of your contribution
* Abstract of the proposed chapter (no more than...
The publishing house "Yurydychnyi Svit" has published a book by Dr. Sergiy A. Voitovich, the partner at Grischenko & Partners law and patent firm, entitled "International Investment Law in the Arbitration Process" (in English, 268 pages).

The book reveals the structure of international investment law, its interaction with other rules applied in the resolution of international investment disputes.

The author analyzes how arbitral tribunals assist sovereign states in building modern international investment law.

The book will be of interest for the practicing lawyers and scholars specializing in international investment law, as well as research students and students studying international law.

Contact: AShymon@gp.ua;
Applications for Corporate Memberships are invited under the following groups:

- **Platinum Members**: Users of ADR Services
- **Gold Members**: Arbitral Institutions and ADR / Legal Services Providers
- **Silver Members**: Educational Institutions

**AIADR Panelists Section is Live!**

Your profile will get noticed by parties seeking ADR professionals, you chose what to place in public profile section.

**UPDATE MEMBERSHIP RECORDS ONLINE**

All existing members are urged to register online, update full particulars and create your public profile on the new website.

Deadline: 30 November 2019

Registered members will be able to create their own blogs and post comments on other blogs.

**AIADR MEMBERSHIP GRADES**

- Learners & Learned (Silver) Members
- Associate Members (AAIADR)
- Members (MAIADR)
- Fellows (FAIADR)
- Honorary Fellows (Hon. FAIADR)
- Corporate Members
- Certified International Practitioners (Arbitrator, Mediator, Adjudicator, ADR Practitioner) [Post Nominals: CIA, CIM, CIAdj, CIP, ADR]
AIADR WELCOMES NEW COMMITTEE MEMBERS

Dr. Dimitar Kondev

Appointed as Member of the Business Development & International Relations Committee (“BDIRC”), Editorial Sub-Committee and Evangelist (Central & Eastern Europe)"

“My overarching objective of becoming a member of these committees is to raise the awareness of the AIADR across borders, and in particular on the European Continent.”

Dr. Dimitar Kondev is an Associate working in the International Arbitration Group in Paris. His practice includes construction law in general, construction disputes and international commercial arbitration. He has experience in various sectors, including commercial development, energy and

Dr. S. Nadarajah

Appointed as Member of the Professional Development and Education Committee (“PDEC”)

Dr. Nadarajah is an Advocate and Solicitor of the High Court of Malaya. Practice Area: Construction & Engineering, Infrastructure and Projects, Information Technology and Software.

Lim Yong Hong

Appointed as Member of the Fund Raising & Promotions Sub-Committee (“FRPSC) and Business Development & International Relations Committee (“BDIRC”)

Mr. Lim Yong Hong is the Managing Director of a large Construction Group of Companies, Empaneled Adjudicator and Fellow of AIADR.

Wilson Ho Sheen Lik

Appointed as Member of the Professional Development & Education Committee (“PDEC”) and Business Development & International Relations Committee (“BDIRC”)

Mr. Wilson is the Partner of Ho Partnership and qualified & experienced Advocate & Solicitor and Panel Adjudicator.
Inviting Corporate Members

Contact us at thesecretariat@aiadr.world for advertisements and sponsorships!

Be seen and enhance your presence as ADR Services User or Provider!
That AIADR is a NGO and Members Institution!

* Subscription funds of the members will be used for membership records administration only and not for the payroll of the AIADR Secretariat!

* Education, Training and CPD Programs will be affordable and without discrimination!

* AIADR will be the Institute for members from all industries and walks of life, including but not limited to lawyers and legal professionals!

* Free from any historical inclinations, but for the future generations to come!

* Affordable, Independent, Accessible, Desirable and Resourceful!

**ADR Centurion** is the bimonthly Newsletter of AIADR containing contributions from individual authors, for distribution to the members of AIADR, ADR practitioners, professionals from trade & industry and associated organizations. The constructive feedback and comments from the readers are most welcome!

**Cut-off Date for Submission of Contributions:**
1. For the Next Newsletter: 15 Nov
2. For AIADR Journal Articles: 15 Oct