ADR CENTURION

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Delivering Excellence in ADR

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ADR Centurion

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.

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ADR CENTURION

EVENTS

AIADR Entry Course Module-1: Foundation in ADR

3 Sep 2020, Online Full Day Session

(*The course is industry neutral and is suitable for young and practicing professionals from diverse range of industrial and commercial segments*.)

Weekly and Fortnightly ADR Tool Box Meetings

Conducting Virtual Hearings Post Pandemic Period

27 August 2020

(*Members of AIADR keen to propose or moderate special discussion sessions during Tool Box Meetings and events, are invited to submit a proposal with details to thesecretariat@aiadr.world;*)

Cyber Space

MEMBER'S PORTAL ONLINE GAINING TRACTION

Members who have yet to update their profile are invited to visit the website https://www.aiadr.world to update their profile from the Dashboard.

Members Portal is linked to the search engine for selection and nomination of neutrals as Adjudicators, Arbitrators, Mediators and Expert Witnesses to be appointed by parties, when required. If your profile is not updated, you will not be able to benefit from this service of AIADR to its members.

Volunteers

INVITING FELLOWS & PANEL MEMBERS OF AIADR!

To contribute towards building of your Institute and be a Volunteer by joining the Committees and Subcommittees of AIADR as Chairpersons and Faculty Members.

Applications for joining the AIADR Faculty are invited for following voluntary roles:

⇒ **Course Developers**

⇒ **Tutors**

⇒ **Lecturers**

⇒ **Examiners and Course Directors**

Social

Visit AIADR Facebook and LinkedIn Pages to stay in touch with the latest updates!

Professionals with interest in ADR Forums, Education and Training, Members and non-Members, are invited to visit the Facebook Page and LinkedIn Page to post news, views and comments.

AIADR HIGHLIGHTS

Message from the President

Our Movement Forward Despite Covid-19 Pandemic

Prof Datuk Sundra Rajoo

Dear Members,

Asian Institute of Alternative Dispute Resolution was set up in May 2018 with support of the Asian African Legal Consultative Organization and the Malaysian Government. It is a company limited by guarantee. Its membership is open to everyone around the world.

The focus of the Institute is in Asian and African regions where some of the most exciting things in dispute prevention and resolution practices are taking place. Jurisdictions like China, India, South East Asia, Middle East, and Africa are emerging as important areas where there is economic growth. Concurrently, there are disputes that needs to be prevented and resolved.

The AIADR fills the void for ADR training and membership accreditation that exists in Asia and in Africa. The Institute is in the process of setting up training programmes to allow persons from around the world, especially Asia and Africa, to obtain the training and know-how they need to become certified ADR practitioners.

First and foremost, AIADR wants to identify and develop the talent that already exists here in Asia and Africa. Prominent Asian and African ADR specialists, have applied to our panels become Certified ADR Practitioners, bearing our Post-Nominal Letters as a mark of Excellence. This includes arbitrators, mediators, adjudicators, domain name dispute practitioners and experts. I am confident that the numbers will grow in the years to come. They are now ready to resolve disputes across our target continents and worldwide.

AIADR is now a platform for interchange of information and building relationships with all stakeholders including individuals, organizations, corporations, policy makers, the judiciary and all other members of the ADR community, to take their role and contribute their expertise, impart knowledge, share ideas and build capacity while also gaining from AIADR's membership benefits.

In this regard, we have already established dedicated committees to cater to all our members so that we can better reach out to all our members. These committees will also provide feedback to create activities so that our members will be better served within the sub-regions within our great continents and will be represented in the Council, the organ in charge with the overall management of the AIADR.

I wish to highlight the opportunities for law firms and parties to avail of the search, selection and appointment services of adjudicators, arbitrators, mediators from the pool of professional members of AIADR. This service is now available online and discreetly for ad hoc arbitrations and mediations on our AIADR website.

The Secretariat at Kuala Lumpur will also be able to assist in search for suitable neutral adjudicators which parties can appoint by consent based on the shortlists provided by AIADR when requested by parties. Another benefit could be for corporate members to join AIADR and gain benefits of being recognised worldwide. Our next attraction is the launch of AIADR Journal and invite authors to be part of the inaugural issue to be launched soon.

We are moving forward despite the COVID 19 pandemic.

Thank you!

Prof Datuk Sundra Rajoo

President

Message from the Vice President

Malaysia as an ideal FDI host amidst Covid-19

Dato' Quek Ngee Meng

FDI GROWTH?

According to UNCTAD's recent World Investment Report 2020, the Covid-19 pandemic, along with its consequential worldwide lockdown measures, supply chain disruptions and economic slowdown, is bound to trigger a significant fall of close to 40% in the global FDI flows. This plunge is in comparison to a total of USD1.54 trillion of global FDI in 2019, which draws this year's figure below USD1 trillion for the very first time since 2005.

Disrupting almost every aspect of our lives, the Covid-19 outbreak is forcing businesses to rethink their traditional business model, especially those in the tourism industry and its related sectors. Meanwhile governments of countries recovering from the outbreak are understandably prioritizing the immediate need to revive and rejuvenate their domestic economic performance, with minimal focus on foreign investments. The escalating trade war and worsening bilateral ties between the United States and China, the volatile value of crude oil and increasingly unstable costs of production, have accumulatively affected export-oriented and commodity-linked investments and as a result adversely strained flows of foreign direct investments (FDI) into developing economies.

In 2019, vigorous investments from major countries like the United Stated resulted Asia to emerge as the world's largest FDI host, with 30% of global FDI inflows worth USD474 billion. FDI inflows into the region are however projected to decline by up to 45% in 2020. Whilst FDI flows to some of the ASEAN member states such as Myanmar, the Lao People's Democratic Republic and Thailand declined last year, investment rates into Malaysia remained flat.

As at 30 June 2020, Malaysia recorded a sum of RM37.4 billion worth of approved investments in the manufacturing, services and primary sectors in the first quarter of this year, RM26.3 billion of which comprised direct domestic investment (DDI), compared to the corresponding first quarter of 2019 which recorded a total of RM21.7 billion of net FDI inflow alone.

Like the rest of the world, the Malaysian government has been strict in shutting down its international borders since the second quarter of 2020 which has largely caused investors to reconsider and even postpone their investment decisions. Nevertheless opportunities of an economic revival could be in the horizon for Malaysia given the ongoing re-alignment of domestic and regional supply chain, increased reliance on technology to boost efficiency or outreach, reduction of costs and increased awareness on health with larger spending on personal protection equipment and other hygienic or pharmaceutical products.

A look into the 11th Malaysian Plan as announced last year suggests that the nation is in general headed towards the right direction. Through the said Plan, Malaysia indicated its focus on developing five main catalytic and high growth sub-sectors to stimulate its FDI performance – namely, Electrical and Electronics, Chemical and Chemical Products, Machinery

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and Equipment, Medical Devices and Aerospace. In the specific context of the ongoing pandemic, Malaysia has indeed made the right decision in identifying strategic high -growth sub-sectors such as the production of medical devices.

The Malaysian government will be announcing related incentives meant for these chosen industries. To address the present situation, the recently announced National Economic Plan - PENJANA focuses on bringing overseas projects and investments back to Malaysia. Below are some of the tax-based and other incentives which would apply to foreign MNCs for investing and/or relocating into Malaysia:

- 0% tax rate for 10 years for new investment in manufacturing sectors with capital investment between RM300 - RM500 million;
- 0% tax rate for 15 years for new investment in manufacturing sectors with capital investment above RM500 million;
- 100% Investment Tax Allowance for 3 years for existing company in Malaysia relocating overseas facilities into Malaysia with capital investment above RM300 million;
- Special Reinvestment Allowance for manufacturing and selected agriculture activity, from year 2020 to year 2021;
- Establishment of Project Acceleration & Coordination Unit (PACU) at Malaysian Investment Development Authority (MIDA);
- Enhancement of Domestic Investment Strategic Fund;
- Manufacturing License approval for non-sensitive industry within 2 working days.

The PENJANA also allocates additional operating expenditure for MIDA to undertake promotional activities, whereby its assigned officials are proactively leading initiatives of targeted marketing and lobbying certain foreign MNCs. As a result, the Authority reported on 16th July to have identified a total of 433 potential foreign investment worth RM97.4 billion to be brought into the country.

Besides these attractive investment incentives launched by the government, Malaysia's strength lies fundamentally in its strategic location within Asia and its rich natural resources. For one, Malaysia provides ample opportunity for keen investors to explore the emerging area of agri-technology in sectors of padi, cocoa, rubber and pepper, and not forgetting 'celebrity' agri-products of durian and palm tree.

With the implementation of a Recovery Movement Control Order since 8th June 2020, majority of economic activities in Malaysia have resumed, with adherence to standard operating procedures in place. This includes continuance of some of the mega domestic railway link infrastructure projects namely the ECRL, MRT 2 and LRT 3. With prominent infrastructure projects in the pipeline, such as the Johor Bahru-Singapore Rapid Transit System, and hopefully with the continuance of KL-Singapore High Speed Rail, the infrastructural enrichment within the nation would serve as a catalyst for FDI inflow.

By and large, Malaysia has been maintaining a healthy business environment, being ranked at the 12th position in terms of ease of doing business by the World Bank.

Malaysia should treat the ongoing pandemic as a window of opportunity to preserve and even transform its business ecosystem by establishing transparent and viable incentive systems for FDI inflow, improve labour skill -sets and mindset and encourage robust adoption of technology, so that we are better prepared and positioned to attract FDI of high value and high impact.

Most importantly, as our international borders remain close for now, all investment promotion agencies and professional practitioners should collectively ensure the interests of FDI investors who already in Malaysia, is not forgotten and neglected.

Dato' Quek Ngee Meng
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A Brave New World for ADR?

"Kleros" claims to dispense online "justice" using collective trans-border principles of conscience. A reckless disregard of the law? Or an inspired return to the Lex Mercatoria of the Middle Ages?

Sapna Garg & Antonello Leogrande

Sapna Garg

The goal of this article is to bring to your attention a development quietly appearing on the dispute resolution landscape that might be nothing short of a revolution and is, at the very least, audaciously disruptive. Kleros, the brainchild of a young and imaginative entrepreneur, is an idea for resolving civil disputes online, worldwide, within days and without the involvement of lawyers or judges.

What no lawyers?! At first glance, the notion of online, lawyer-free dispute resolution, seems to defy all of what we know about how disputes are normally resolved, which is to say, with legal advisers (unless the litigant is acting in person) and/or some sort of tribunal. Usually, the decision whether to bring a claim forces into the spotlight key considerations such as the likely legal costs of pursuing the claim, whether such costs are retrievable and the probable amount of management time which will be incurred. These key factors must then be weighed against the likely outcome and crucially, whether one's opponent is good for the money and how easily a damages award can be enforced. This issue of enforcement is very much affected by whether assets are located in the same jurisdiction that the claim is heard in and if not, whether that jurisdiction has reciprocal enforcement arrangements with the foreign jurisdiction in question.

The question any sensible litigant must ask is, "Even if the Court awards me the damages I am seeking, what is the percentage chance of these funds actually arriving in my bank account, how long will this process take and how much will it cost me?" In layman's terms, is it worth it?

How does Kleros make it "worth it"? If Kleros' marketing proposal is to be believed, it would massively simplify this cost v benefit analysis by removing lawyers (and thus legal costs) entirely from the process. It resolves disputes online by the use of lay jurors drawn from an online pool of lay members who are skilled in the type of dispute in question, whether that be insurance, e-commerce or transport to name but a few. Yes, you read that correctly, "lay jurors".

Once the panel of jurors has determined the dispute in question, if successful, the claimant receives his damages immediately, using blockchain technology. This works on the basis that, before working with each other, the paying party "locks" the payment into a smart contract and once the jurors have provided their decision, the money is released to the correct party, with deductions made to the jurors for their fees.

Kleros claims to provide fast, secure and affordable arbitration for "virtually everything" including complex disputes. Upon first hearing about the Kleros proposal, our reaction was one of slightly bemused surprise and disbelief that this dispute resolution mechanism could actually work in practice for all types of dispute. Surely, we asked the founder via video-conference, lawyers are essential to the process, especially where the legal and factual issues are intricate and there needs to be a suitably qualified person to scrutinise and adjudicate upon them?

Kleros' response to this lawyerly shot across its bows, was that although undoubtedly, not every horse is suitable for the Kleros course, several disputes are eminently suitable and it makes considerably more sense for them to be resolved rapidly, with the remedy reaching the aggrieved

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Antonello Leogrande

party within a mere matter of days of that party launching his complaint. Particularly suitable transactions will be those that occur online and cross-border. Kleros paints a scene of a world where disputes are resolved virtually instantaneously and all parties reach the ultimate goal, that of being free to move on and put their dispute behind them, in a very short timeframe.

Contrast this to burning through a small fortune on legal fees only to find months or years later that the judgement debtor has squirrelled away assets such that no amount of emergency applications to court will ever result in those assets being clawed back, and there can be no doubt that what Kleros is offering merits a closer look.

So, what are Kleros' key features? The website states that "disputes in the global, digital and decentralized economy occur in areas where they cannot be solved by state courts and existing dispute resolution methods" and "Kleros connects users who need to solve disputes with jurors who have the skills to fairly settle them. Our resolution layer uses blockchain technology and crowdsourced jurors to adjudicate disputes in a fast, secure and affordable manner."

The dispute resolution process is simply described as: step 1: "users create a smart contract and choose Kleros as its adjudication protocol"; step 2: "the relevant information (about the dispute) is securely sent to Kleros"; step 3: "A tribunal is drawn from the crowd. Jurors evaluate evidence and cast their vote"; step 4: "the decision is enforced by the smart contract". The website offers various examples of disputes which it envisages are suitable to be resolved via Kleros:

- A freelance job is contracted between two people working cross continent. The service is not rendered to a satisfactory standard and a jury of experts analyse the evidence, vote and find a verdict.
- An unpleasant comment posted on a decentralized social media platform is deemed to have broken terms and conditions. Kleros jurors rule to deduct reputation points from the user.
- Online gaming is a growing market with superstar players. Professionals will require a highly skilled group of jurors to arbitrate disputes, and for the provision of safe spaces to play in.
- A start-up backed by crowdfunders never materialises a viable product. The funds have been locked in a smart contract escrow adjudicated by Kleros jurors and are returned to the investors.
- A product purchased online does not meet the advertised standard. Kleros adjudicates in favour of the buyer and a smart contract returns the funds.

Will Kleros achieve what it says it will? An obvious concern will be over both the quality and integrity of the jurors deciding the disputes. The website claims that: "crowdsourcing taps into a global pool of jurors. Blockchain guarantees evidence integrity and transparency in jury selection. Game theory provides incentives for honest rulings". The Kleros discussion paper (link below) makes a valiant effort to explain the manner in which game theory will incentivise jurors to produce "coherent" and "honest" results. One thing cannot be doubted, the jurors will not be lawyers, so the scope for this method of dispute resolution to apply the law (which also begs the question of which law, assuming litigants are located all over the world) will be very limited indeed. Instead the rules that will be applied will distill into whatever guiding principles are

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expected to be applied as a matter of group common sense by the panel of appointed jurors, who will not know or meet each other and may be located in different locations around the globe.

In this manner, Kleros, probably unwittingly, heralds a return to a system of Lex Mercatoria (Merchant Law), an unwritten set of rules for dealings between merchants which once existed in the middle ages, prior to being replaced by a more formal expression of the "law" i.e. written rules, judge made laws and contracts (in England, for example).

Kleros claims that the jurors' desire not to get their decision "wrong" and thereby increase the chance of acting as juror again (and obtaining fees for acting), will incentivise them to vote with the majority for the "true" answer. Arguably, this turns the decision making exercise from a legal one into one of collective trans-border conscience. Appeals against jurors' decisions are theoretically possible, although parties are discouraged from doing so by having to pay ever greater jurors' fees per appeal.

Is Kleros suitable for high value, complex disputes? We question whether the Kleros offering would be suitable, as the traditional use of witnesses (including expert witnesses) to assist the determination of the issues, is not expressly catered for. Nor does there seem to be scope for anything more than very limited disclosure of documents. All Kleros' literature says on this front is that "evidence" is provided electronically to jurors to download and (in the example given in its discussion paper) states that the jurors would have three days from receiving the evidence to submit their decision. Although not stated expressly, this suggests that the types of disputes Kleros is really intended to resolve are smaller, lower value disputes where the evidence underlying the dispute is not voluminous. In its discussion paper, Kleros also refers to its role as "enabling arbitration in a large number of contracts that are too costly to pursue in court" and further that, "just as Bitcoin brought "banking for the unbanked", Kleros has the potential to bring "justice for the unjusticed".

We also question whether Kleros will be suitable for those disputes where the parties have come together beforehand, negotiated with each other and drawn up a detailed contract setting out their terms. Where parties have reached this level of sophistication in their dealings, we think it may be a tall order for a group of disconnected lay jurors to interpret the wording used and make determinations on the disputed issues. A lively international arbitration scene exists for just this purpose and it seems counter-intuitive to suggest that the weeks and months parties spend arbitrating can all be reduced into a dispute resolution process that takes a matter of days. All this without reference to any particular body of law, lawyers and no recourse to qualified judges or arbitrators. This circles back to the point made earlier about precisely how Kleros will work where the legal and factual issues raised by disputes are complex. Kleros claims in its literature to be suitable for complex disputes by stating: "Kleros is a decentralized application ... that works as a decentralized third party to arbitrate disputes in every kind of contract, from very simple to highly complex ones." It will be fascinating to see just how this will work in practice.

In conclusion...

Will Kleros turn into a dispute resolution phenomenon or will it enter the ADR hall of fame of another ADR method that sounds great in theory, but is little used in practice? At this early stage, it is very difficult to predict with certainty. However, one thing is clear. The world is changing apace. The billable hour is in decline.

Users of legal services are increasingly demanding greater visibility of litigation's "bottom line" and unwilling to proceed if there is a risk of the whole enterprise being a gigantic waste of everyone's time. Users of legal services increasingly expect efficient and cost effective support and lawyers must reinvent their charging structures to maintain their appeal. The current climate in which time is of the essence and the expectations that blockchain technology has given rise to, is an excellent breeding ground for

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innovations such as Kleros. Our collective experience so far of new technologies which have come about to make our life easier (smart phones, smart contracts, e-signatures) tells us that to naysay new developments such as these risks looking the fool in a few years to come. Will Kleros deliver rougher justice than we are used to receiving from ordinary courts? Probably. But has it the potential to deliver far speedier and effective determination of potentially millions of lower level disputes which would otherwise falter or fail to be pursued? Definitely.

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Disruptive Technology or Back to Basics?

- *Express your opinion on this Article, to be published in Reader's Column*
- *Create a Blog on AIADR Website to invite further debate*
- *ODR can render Speedier Justice or parties in low value disputes suffer in silence?*

All critique and constructive feedback is welcome!

Need of Technical Tribunal Secretary in Virtual Arbitration

Krrishan Singhania and Alok Vajpeyi

Krrishan Singhania

There is considerable public discourse on the impact of the ongoing pandemic on international arbitrations. Commentators, scholars & practitioners have provided perspectives on how to navigate and find safe harbours in the uncharted territory of COVID-19. In this new normal of wide-ranging travel advisories and government restrictions, there is an emerging consensus to better integrate the use of technology with dispute resolution.

All the major arbitral institutions across the globe have observed increased use of electronic filings, virtual evidentiary hearings, and online case management, and these mechanisms are now being applied at pace in international arbitrations.

The Covid-19 pandemic has essentially changed the way the arbitrations are functioning across the globe. This has resulted in demand of technical secretaries who can better assist the tribunal in conducting the virtual arbitrations.

Delegation of administrative and non-substantive work to the juniors by the adjudicators is not novel as a concept. In international arbitration, the use of tribunal secretaries is not alien as it helps in efficiency in arbitration.

However, due to the current pandemic, the role of tribunal secretaries has been impacted as use of technology has increased in conducting virtual arbitrations. This article discusses the different roles which a tribunal secretary may take in an era of virtual arbitration.

Orientation of the Technology

The lack of awareness and familiarity with the technologies used in virtual arbitration could lead to confusion and inefficiencies. Therefore orientation of the technologies being used is essential for the participants in order to better conduct the virtual arbitration. The various technological platforms required in the virtual arbitration include a video conferencing platform, document sharing platform, transcription and interpretation services platform.

The technological platform used for the video conferencing should be decided on the basis of availability of breakout rooms, option of screen sharing, data security, video quality, end to end encryption, waiting room/lobby. The participants need to be guided as to how to use the feature of breakout rooms or how screen sharing can be done. Therefore the tribunal secretary should be well aware about the usage of different platforms like Cisco Webex, Bluejeans, Microsoft Teams, Zoom etc.

The virtual arbitration will also include the usage of document sharing software for sharing of written pleadings, procedural orders, witness statements, exhibits, authorities etc. Platforms like Knovos Arbicomm, Nuix Discover, Transperfect and Epic are few of the platforms specifically made for document sharing in Arbitration. The tribunal secretary should know how these platforms work and accordingly should orient the participants involved.

Setting up the Technology

The tribunal secretary can take up the role in setting up the technology before each virtual hearing. This would include conducting a test run before each virtual hearing and checking whether the available technology being used by the parties, witnesses and counsels meet the minimum technological requirements or not.

This would further involve checking the audio/video quality, transmission speed available with each of the participant, camera angles etc.

The tribunal secretary needs to be aware about how to

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Krrishan Singhania and Alok Vajpeyi

check the minimum transmission speed or the bandwidth, so that he can check whether the minimum requirements as laid down by the arbitral tribunal are met or not. If not specifically prescribed by the tribunal then the tribunal secretary needs to be aware of the general standards.

For example, Article 5.1 of the Seoul Protocol on Video Conferencing recommends that minimum transmission speeds should not be less than 256 kbs/ second.

The tribunal secretary should also be in the position to deal with any technological glitches which may occur during the conduct of the virtual arbitration.

Managing Document Storage

As stated above, in the case of virtual arbitration there would usually be a platform dedicated for document sharing and document storage. The tribunal secretary needs to ensure that the documents are securely stored and are deleted once the arbitration is over or as mentioned in the procedural order. The tribunal secretary has to make sure that the parties comply with the deadlines mentioned in the procedural orders for submissions of claims, defence and witness affidavits by sending reminders to the representatives of the parties.

Assistance during Witness Examination

Witness examination is most critical in virtual arbitration as the credibility of the witness, the demeanour, interventions, objections requirement and witness coaching needs to be monitored. The tribunal secretary can play a vital role in ensuring proper conduct during witness examination in virtual arbitration.

In order to prevent witness coaching, the tribunal may order the witness to share their screens and the tribunal secretary should keep a watch on the screen of the witness. Alternatively, if possible, the tribunal secretary can also be physically present at the same venue as the witness in order to protect any kind of witness coaching.

Witness examination may also require transcription and interpretation services. The tribunal secretary can arrange for the required transcription and interpretation services and can coordinate with the service providers. In the test run conducted before the actual hearing, these services should also be used.

Alok Vajpeyi

Cost of the Tribunal Secretary

The parties might be concerned with the cost involved in the appointment of these technical tribunal secretaries. However, considering that virtual arbitration reduces travel costs and other related ancillary costs, the appointment of a tribunal secretary for efficient dispute resolution in a virtual mode should be definitely considered by the parties and the arbitral tribunal.

The HKIAC in 2014 published its Guidelines on the Use of a Secretary to the Arbitral Tribunal (HKIAC Guidelines). It clearly demarcates the duties which the tribunal secretary can perform. Guidelines No. 4 of the HKIAC Guidelines mentions about the remuneration aspect of the tribunal secretary.

It provides that the arbitral tribunal in consultation with the parties should determine the fee of the tribunal secretary. It can be either on per hour basis or certain

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percentage of the tribunal fee can be given to the tribunal secretary.

The Young ICCA also issued the Young ICCA Guide On Arbitral Secretaries containing the roles and duties of tribunal secretaries (Young ICCA Guidelines). Article 4 of the Guidelines states that the remuneration of the arbitral secretary should be reasonable and proportionate to the circumstances of the case and should be transparent from the commencement of the arbitration. It also contemplates that the parties can pay the secretary on the hourly rate or the tribunal can pay the secretary from its own fees.

The above mentioned guidelines need to be revised in order to better lay down the roles of the tribunal secretaries in virtual arbitrations. Apart from assisting the institutions, these revised guidelines will also act as a guidance to the tribunal secretaries appointed in the ad hoc tribunals.

Conclusion

Traditional roles of tribunal secretaries have become more relevant in the context of virtual hearings. These tribunal secretaries now need experience and understanding of the functioning of the technologies being used in virtual arbitration and the issues commonly faced by the concerned parties. Arbitral institutions have been taking measures to ensure that the case managers and tribunal secretaries are well versed with these technological processes. For example, the Singapore International Arbitration Centre has initiated the training of their counsels by the technical officers of various firms who use these technologies regularly.

The arbitral institutions are better equipped to service the parties engaged in virtual arbitration by training their case managers. However, ad hoc tribunals doing virtual arbitrations would require a need of technical tribunal secretary to assist the tribunal in managing the technology and other administrative work.

While the above list of the roles of the technical tribunal secretary is not exhaustive and are just illustrative in terms of virtual arbitration, the arbitral tribunal may also assign specific technology related work or other administrative work to the tribunal secretary as mentioned in the HKIAC Guidelines and Young ICCA Guidelines.

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Readers' Views!

- Can AI perform the function of Virtual Tribunal Secretary?

Send your responses to aiadr.editor@ aiadr.world

Promotion of Arbitration in Global Market

Mrityunjoy Seal

Mrityunjoy Seal

Object of the article is not to placard much discussed topics in connection with domestic and international commercial arbitration in institutional or ad hoc platform. Much debate have taken place in national and international arbitration journals on moot points such as,

1. If national courts should interfere in executing an admitted position of the parties as reflected in a reasoned arbitral award in an international commercial arbitration?
2. If arbitration proceedings in general should be allowed to be dragged on for decades for extraneous considerations?
3. If arbitration proceedings are conducted and continued for sole benefit of the parties or largely in the interest of practitioners and arbitrators?
4. If unlimited timeline is usually made a practice of conducting arbitration not by choice of the parties but those who are responsible to conduct arbitration?
5. If arbitration proceedings are truly time and cost effective or generally pitched out as marketing gimmick for attracting potential parties to arbitration?
6. If maintainability, language, rules, interim reliefs, venue, seat, candidature chosen in or out of arbitration council panels, jurisdiction, limitation and so on are essential questions superior to the interest of the parties to expeditious resolution of disputes resolving core questions involved?

The list may go on and on. Primarily, developing and underdeveloped countries particularly third world countries by and large are the victims of majority of disputes at home, society and works, leave alone commercial disputes of diverse value and volume.

This exposes a major challenge of seeking logical resolution either by judiciary or by arbitration. Reference to arbitration is made largely by organised sector trade and commerce. Unorganised sector generally resort to third party mediation and conciliation at informal level conducted by the interference of powerful or influential entities or persons having material and financial interest in the outcome of such disputes and resolutions.

Reference of commercial disputes to judiciary by preferring a suit involves deeper pockets, greater patience and stronger ability to sustain complex riddles of country specific court procedure and unusual longer time line. After the initial phase of admission of a claim on satisfying maintainability, general experience goes that it takes decades and multiple forums for the claimant to see the light at the end of the tunnel. If dissatisfied party prefers to move higher forum, it might as well be his next generation to celebrate success for or incur the cost of misdeeds of his litigant predecessor. On the other hand, unless the parties are big corporate houses or high net worth persons to get into loggerheads at arbitration, that the common people would prefer to stay away considering the complex procedure, cost and time factor of arbitration.

It is well known that arbitration is a taboo for country specific common small court practitioners, having genuine vested professional interest of dragging on court proceedings for years together for building on bricks upon bricks at home. Contrarily, some senior counsels and retired judges treat this as golden opportunity to act as arbitrator or arbitration counsel treating as a grapevine. The fees and expenses just double up and the sittings are held in cosy country clubs or cool comforts of 5 Star hotel business centres on off days in court or on public holidays

with sumptuous spread lunch and other amenities. With recent reforms sought to be introduced in some country laws by amendment, such practices might be receding but not vanishing overnight.

In smaller trade and commerce circle, the word 'arbitration' has truly lost credibility for multifarious reasons. While the level of education and standard of culture do not encourage traders or merchants to believe that remedy was available in arbitration. Some of them even disbelieve to attach legal weightage to the process or outcome of arbitration. They tend to believe physical attachment or seizing or confiscation or control of assets and objects were stronger method than verbal discussion and reasoned award passed by a non-judicial person having no real power and authority. In many cases such people are required to be dealt with additional court proceedings to support or supplement a reasoned award duly passed by an arbitrator for enforcing the award.

By far, arbitration has by and large been confined to trade, commerce and business disputes, that too with large value and volume capable of carried on by high net worth business houses or national governments with state exchequer funding the high cost of such arbitration. In effect the whole process of arbitration has lost its strength, charm and effectiveness as the common people and smaller business entities failed to derive the desired benefit of arbitration or ADR process as a whole in that view of the matter. In other words, ADR has by far been identified with financial heavy weights, powerful and influential senior counsels and judges, specially benefitted members on the panel of arbitration institutions, political heavy weights and their kith and kin in general. Institutional arbitrations have been restricted to the merchant members of chambers of commerce and their constituents. It is no longer a secret that ad hoc arbitration on any day is preferred to institutional arbitration. Instances of mandatory compliance of a provision for arbitration reserved in a contract, by a pre-settled award signed by a specially engaged 'arbitrator' for a meagre fee are common. In other words, arbitration awards are treated as tradable commodity by some.

National and international arbitration institutions have been increasingly losing sight that an 'out of court settlement' system cannot be kept limited to big ticket business disputes and high net worth persons only. The object of ADR was much bigger than keeping it confined to the reaches of riches distancing from the mass and needy sector of society, especially in developing and underdeveloped third world countries. The arbitration institutions with the help of their professional members having interest and expertise in ARD can create ample opportunity of a business model by engaging with the respective country governments for creating a homogenous and uniform ADR system across the globe imbibing low cost, faster and effective ADR process capable of execution under the force of uniform local laws. These would be pillars of a parallel process to supplement the local judiciary that are in any case grappling under huge load of pending litigation, drawing flaks for judicial delay and mismanagement.

Omnipresent disputes and dissents are the buzzwords in the current century. No system, society, country, political leader and party, family, couples, business entities, NGOs, organisations, clubs, religious places and bodies, projects, governments, non-governments, semi-governments, professional persons, industries, peasants, workers, bankers, lenders, borrowers, contractors and individuals are immune of disputes and dissents. It is needless to say that the dominant prevails over the dormant and the powerful wins over the weak and meek in general. It is not because of absence of dispute resolving machinery. It is because of the capacity of the former class to bend the system to their benefit within four corners of law and most importantly it is due to incapacity of the later class to make an effective and meaningful representation. Moreover, their fear and apprehension added with unsupportive law enforcing agencies make the things worse.

Promotion of Arbitration in Global Market

It is therefore necessary to have an innovative, out of the box idea to evolve an ADR system for the forthcoming society and generations that is beneficial equally to all stakeholders. This is undoubtedly a tedious and daunting task that is where the national and international arbitration institutions can join hands to work together in collaboration with the national governments. This would go a long way in satisfying the customers of justice, i.e., the claimants or litigants to access a time and cost effective dispute resolving mechanism, provide long awaited reliefs to the country based judiciary reeling under mounting pressure of accumulating cases piling up every day, growing by leaps and bounds.

The proposed system would be equally beneficial for the arbitration institutions at various levels to propagate through their constituent members to advance the system once legislated by country governments for mass awareness and conducting necessary ADR at a reasonable fee and minimum time frame on virtual platform as conforming to post Covid 19 norms.

Travelling, physical filing, personal meeting and hearing, adjournments, seats of arbitration and such other trivial issues shall become things of the past. It would be as easier as opening an online bank account and operating it on daily basis from a hand phone. Online filing, exchange of pleadings, payment of cost, hearing on video conference and examining/cross examining witnesses although sound difficult but with the advent of technology and time might not turn out to be an impossibility. Only materials required implementing the system are grit and determination of the stakeholders with a positive mind set. The constituent members of the arbitration institutions too shall be immensely benefitted by getting and taking up suitable assignments in turn for none left to bemoan at the end of the day of being deprived of an assignment throughout his/her membership of the arbitration institutions. In the process, ad hoc arbitration shall be gradually losing its charm being anti-ADR customer culture as perpetuated over the years. Efforts may accordingly be made to draw up a mass friendly ADR model in this direction.

In the beginning, if a preliminary check could be run, the following areas are generally prohibited from reference to arbitration, viz., criminal complaints, information technology complaints, fraud, marriage, conjugal rights and divorce, will and testamentary disposition, cheque bouncing, contracts with unlawful consideration being void in nature, guardianship matters, insolvency and winding up, will, grant of probate, letter of administration, eviction of tenants, IPR registration, antitrust/competition law, motor vehicles accident related compensation matters, etc. On the other hand the following matters are eligible of being referred to arbitration, viz., civil, contract, labour, employment, construction, shipping and maritime, insurance, banking, shares and securities, real estate, health care, telecommunication, mining, entertainment, sports, start-ups, education, corporate and shareholders' disputes etc.

The list under mediation may go further to include international border disputes, arms pilling and build up, cross boarder infiltration and migration, international trade issues, environmental degradation of common resources so on and so forth. Conciliation may be resorted to by two parties on any permitted matters by a consensus for an amicable settlement. It appears that the scope and ambit of permissible ADR matters are no shorter than those impermissible currently but capable of converting into the list of 'permissible' by necessary changes in country laws.

The first action may therefore be charted out that once clear identification of impermissible matters for reference to arbitration was made by the respective countries with the help of legal experts, negotiation could be entered into with the local government for necessary amendments in law to allow arbitration in as many further matters by conversion into permissible list for arbitration as possible. This would be paving way for wider coverage of areas of relief being given by local level quicker arbitration process.

Judiciary may be relieved to that extent. This is

Promotion of Arbitration in Global Market

de facto privatisation of judicial process for expeditious justice delivery system online at minimum harassment, time and cost.

As a next step, respective country based institutions may be activated for launching awareness programme among the small traders, merchants, service providers and private individual classes for resorting to arbitration for dispute resolution at grass root level as far as possible on virtual platform in a time bound manner. For example, pleading may be completed within 60 days from the date of filing a claim/complaint, evidence and argument may be completed in next 30 days so that award can be passed by three month time frame. Fees and expenses at a reasonable scale may be deposited in advance and online. Every award must be mandatorily enforceable under the local laws, appealable for setting aside in rarest of the rare cases. Frivolous appeals must be imposed with exemplary cost.

Arbitration institutions must be preparing a panel each of the arbitrators, counsels, expert witnesses, mediators, negotiators, conciliators, advisors etc. together with listing their experience, education, interest and expertise. A prefixed fee and expenses chart must be set out for deposit online in the arbitration institutions. Award passed online would be mandatorily copied to the judicial department of the country for forwarding to the respective court registry of competent jurisdiction for records and enforcement.

A separate wing of marketing and advocacy panel should also be prepared by the arbitrations institutions for taking forward such commercial venture by their marketing skill and drive on commission payment basis, so that this class of professionals may also derive the benefit of the system. In general, arbitration professionals and institutions, country governments, judiciary and the public at large would be immensely benefitted as the international trade, commerce, economy and society as a whole.

With the unprecedented pandemic Covid 19 spreading its deadly tentacles all over the globe and resultant grey cloud of economic gloom covering the sky of economic activities, especially the judiciary, with its activities coming to near halt, such reforms in the field of ADR at the instance of the arbitral institutions shall be going a long way in providing much needed relief to the dispute stricken countries, community of trade, commerce and private individuals, helping the international ADR movement to see a new flash of light in the face of prevailing gloom all across the globe. Arbitration institutions may also be able to create a footmark in the whole process by contributing to the cause of poor and needy countries, business and people by promoting and advancing such reforms in worn out ADR system.

About the Author

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How do you rate this Article?

Is it time to regulate party autonomy?

- *Express your opinion on this Article, to be published in Reader's Column*
- *Create a Blog on AIADR Website to invite further debate*

All critique and constructive feedback is welcome!

Ratifications and Entry into Force of UNCITRAL and UN Conventions

United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Mediation Convention")

Ghana is the latest State to sign the SMC (53 States till date) and Belarus is the fifth country to ratify the Convention. SMC was launched for signatures on 7 August 2019 and marks the first anniversary this year. It has been ratified by five Member States (Belarus, Fiji, Qatar, Saudi Arabia, and Singapore) and expected to come into force on 12 September 2020.

In 2020 till date, Tonga and Seychelles accede to Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Tonga is the 164th country to become party to the Convention

On 12 June 2020, with its accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also commonly known as the "New York" Convention), Tonga becomes the 164th State party to the Convention. The Convention will enter into force for Tonga on 10 September 2020.

Adoption of ADR Forums is on the rise!

AIADR is well founded to promote and educate communities and businesses for resolving their disputes by ADR and use Arbitration as the final One Stop Centre at AIADR!

Third Party Funding in Indian Arbitration: The Way Forward

Akash Gupta & Ayush Sharma

Akash Gupta

Arbitration has emerged as the most sought after mechanism for resolution of commercial and investment disputes in India and worldwide. Although, being an efficient and time saving method of dispute resolution, preferred over litigation in domestic courts, there are often exorbitant costs attached to arbitration. The recent concept of Third Party Funding (herein after TPF) in arbitration has significantly helped financially weaker claimants to pursue their legal actions without their business getting economically affected.

TPF is a funding of litigation costs by a third party in exchange of a share in the award, if the funded party gets an award in its favor. It is often considered as a mode to level the playing field between the parties by leveraging the capital while the dispute is ongoing. Though the practice of TPF being a champerty agreement is considered unlawful across many jurisdictions, in India it not considered illegal per se. However, the necessary evils of unregulated TPF in India cannot be ignored.

Background of Third Party Funding In India

Historically, TPF was regarded illegal under common law due to the principles of champerty and maintenance. Like many other English laws and practices incorporated into the Indian legal system, the restrictions on champerty and maintenance were also thought to be applied to TPF.

However, the Privy Council's decision in Ram Coomar Coondoo v. Chunder Canto Mookerjee where it was held that "the English laws of maintenance and champerty are not of force as specific laws in India" changed the landscape of TPF in India. The position in India has, since then, remained unchanged. An agreement between a party to the dispute and a third party financing the cost of litigation in consideration for a share of monetary benefit arising out of said litigation, was not per se illegal.

Recently, the Supreme Court of India also held that "there appears to be no restriction on third-parties (non-lawyers) from funding the litigation and getting repaid after the outcome of the litigation." However, if the funding, upon its construction, was found to be based on an unconscionable contract viz. recovery of gambling debt, extortionate bargain and wagering contract or affected by undue influence exerted by the funding party over the funded party, it would be against the Public Policy of India and thus, become illegal.

Identified Problems with TPF

There are numerous advantages of TPF as discussed above, but there are certain complications that might arise with respect to impartiality and independence of arbitrators in the arbitration proceedings funded by third parties. In cases of non-disclosure of the TPF there can be abuse of position by the person acting as arbitrator in one case and as a counsel in other arbitration funded by the same funder, giving rise to serious doubts on independence and impartiality of the arbitrator in the former case. The situation can be better understood with the help of an example.

Third Party Funding in Indian Arbitration: The Way Forward

Akash Gupta & Ayush Sharma

Suppose there are two arbitration proceedings A1 and A2, a person A acting as an arbitrator in A1 where the claimant C1 is funded by F1. On the other hand, the same person A is acting as a counsel in arbitration proceedings A2 for claimant C2 which is also funded by F1. In this case, the relation of A with C2 in A2 funded by F1 will not come to light in case of non-disclosure of TPF agreement, raising serious questions with respect to impartiality of arbitrator A.

This non-disclosure can lead to disqualification of the arbitrator on the grounds of independence and impartiality, rendering the award delivered by him liable to be set aside. Situations like these calls for a comprehensive regulation of TPF in India. Today, with the ever increasing need of TPF in arbitration due to economic crises caused by Covid-19, it becomes necessary to have an inclusive legislation in order to avoid unfair practices and help the parties to pursue their legitimate claims.

The Way Forward

India, like other arbitration friendly jurisdictions such as Hong Kong and Singapore does not expressly permit TPF in international arbitration which affects its competitiveness as an international arbitration centre. The litigation funders, on the other hand, are dedicated to explore the possibility of self-regulating models like that of England which follows Code of Conduct for Litigation Funders containing provisions related to maintenance of capital adequacy by the funders and creates security for the claimants as well.

Many jurisdictions like Singapore, Hong Kong, Australia, Paris has already incorporated the necessary changes according to the market needs. For instance Hong Kong has made it mandatory to disclose any TPF agreement at the commencement of arbitral proceedings. It is high time for India to take a holistic view of these jurisdictions and incorporate the necessary changes in its Arbitration Laws to work towards its aim of becoming an arbitration friendly nation. Moreover, with the demand-supply dynamics falling in line for third party funding due to Covid-19 pandemic, it can work as a catalyst for litigation finance in India.

About the Authors

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AIADR Congratulates Students and Young Practitioners to publish their thoughts and ideas!

Fellows and Members Are Invited to Volunteer as Chairman or Member of Committees

AIADR INVITATIONS

To contribute towards building of your Institute and be a Volunteer by joining the Committees and Subcommittees of AIADR as Chair or Committee Members of:

- Φ Membership Development Committee ("**MDC**")
- Φ Professional Development & Education Committee ("**PDEC"**)
- Φ Disputes Resolutions and Appointments Committee ("**DRAC**")
- Φ Events Development & Management Committee ("**EDMC**")
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- Φ Editorial Sub-Committee ("**ESC**")
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Apply with Expression of Interest Form to thesecretariat@aiadr.world;

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- ☺ ***Create your own Blog at http://aiadr.world ; for everyone to know!***
- ☺ ***Submit news of interest from your jurisdictions for all to know!***
- ☺ ***Write scholarly articles for the AIADR Journal!***
- ☺ ***All readers and members are welcome to contribute!***

AIADR EVENTS

Foundation in ADR Forums and Module-1 Entry Course for Associate Membership of AIADR

Visit for details: https://www.aiadr.world

Inviting:

Fresh Law Graduates, Contracts Managers, Supply Chain Management Executives, Project Managers, Operations Managers & Executives, Inhouse Legal Counsel, Quantity Surveyors, Valuers, Services Providers and all others involved in negotiations and award of contracts and agreements. The course is industry neutral and is suitable for diverse range of industrial and commercial segments.

This course provides an overview of the conflict management principles and dispute resolution forums for both domestic and international commercial transactions and trade related contracts. It covers introduction to AIADR, membership tracks, eligibility criteria and various alternative dispute resolution methods as an alternative to litigation in court. The course is developed for participants with either limited or no prior legal qualification but with experience in projects and contracts management.

Course Objectives:

The participants will be able to:

⇒ Gain an understanding of the principles of diversity of interests, conflicts, disputes, and resolution strategies.

⇒ Appreciate the interpretation of applicable law and dispute resolution clauses in contracts.

⇒ Evaluate the differences between various dispute resolution forums in context of nature of contracts and develop a methodology for resolving issues between parties.

⇒ Gain an understanding of arbitration process as an alternative to litigation in courts.

⇒ Understand the role of Model law of Arbitration, UNCITRAL Arbitration Rules and New York Convention for Enforcement of Arbitration Agreements and International Arbitral Awards.

Expected Learning Outcomes

* Upon completion of the Course, the participants are expected to:
* Draft an applicable law and dispute resolution clause for a given contract.
* Develop an ability to implement ADR procedures before invoking a dispute resolution clause in a contract.
* Analyse different forums from cost-benefit perspectives.
* Explain possible options available to parties when faced with conflicts leading to disputes.

Approval of New (Amended) Constitution of AIADR

Dear Members,

It gives me great pleasure to inform you on behalf of the Governance Council, that the Proposed Amendments to the Constitution of the Institute, as tabled during the first AGM held on 15 October 2019 have been finally approved in full by the Companies Commission of Malaysia (SSM) on 17 June 2020. The latest copy of the Amended Constitution is available in the Member's Section of the AIADR Website for download.

Perhaps this is a good time to interact with your network of members of the AIADR and contribute towards the growth of your Institute by joining Committees and contributing articles for the AIADR Journal and ADR Centurion, the Bimonthly Newsletter.

We also invite all Members of the Institute to submit proposals for holding events and online discussion sessions, on subjects of interest to members and industrial segments for continuous learning through sharing. The Secretariat will coordinate with the volunteer speakers and presenters on the schedule and content of such events, after receiving your proposals.

Thank you for your commitment and support to your Institute – AIADR!

Sincerely,

Datuk Professor Sundra Rajoo

President

LAUNCH OF INAUGURAL ISSUE OF AIADR JOURNAL

The inaugural issue of AIADR Journal is set to be launched on 31st August 2020 to celebrate the National Day of Malaysia!

Be part of the Inaugural ADR Journal!

Submit your scholarly articles in English, Asian or other Languages!

All readers and members are welcome to contribute!

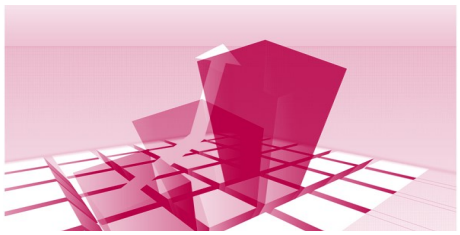
Cut-off Date for Submission of Contributions**: 15 August 2020**

Submit to**: aiadr.editor@aiadr.world**

UPDATE MEMBERSHIP RECORDS ONLINE

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

If you have missed the Deadline of 30 June 2020, renew your membership online or write to:
thesecretariat@aiadr.world;



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

AIADR Panelists Section and Member's Portal is Live!

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

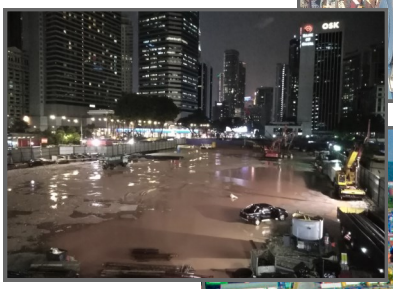
Applications for Corporate Memberships are invited under the following groups:

- Φ ***Platinum Members*** *: Users of ADR Services*
- Φ ***Gold Members*** *: Arbitral Institutions and ADR / Legal Services Providers*
- Φ ***Silver Members*** *: Educational Institutions*
- Φ ***Ordinary Members*** *: All Other Corporates*

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]

Inviting Corporate Members



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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 September 2020**
2. For AIADR Journal Articles: **15 October 2020**

Direct queries to aiadr.editor@aiadr.world