

# ADR CENTURION

The bimonthly newsletter of the Asian Institute of Alternative Dispute Resolution

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Dec 2020

Volume 1

Issue 9



ASIAN INSTITUTE OF  
ALTERNATIVE  
DISPUTE  
RESOLUTION

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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All information is correct at the time of publication.

**Electronic Version Available at:**  
<https://www.aiadr.world>

eISSN: 2735-0800



## AIADR UPDATES

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### EVENTS

#### AIADR SECOND ANNUAL GENERAL MEETING 2020

The AIADR second Annual General Meeting (AGM) was successfully held on 5 November 2020 at 4:00 p.m. MYT (GMT +8). The summary of proceedings is available at page 22.

### CYBER SPACE

#### MEMBER'S PORTAL ONLINE

Members who have yet to update their profile are invited to visit the website <https://aiadr.world> and 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.

### VOLUNTEERS

#### INVITING MEMBERS OF AIADR!

To contribute towards building of your Institute and be a Volunteer by joining the Committees and Subcommittees of AIADR for the new term 2020-2021 for:

- ⇒ **Membership Committee**
- ⇒ **Professional Development & Education Committee**
- ⇒ **Editorial Sub-Committee**

Click [HERE](#) to register your interest now!

### SOCIAL

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Professionals with interest in ADR Forums, Education and Training, Members and non-Members, are invited to visit AIADR [Facebook Page](#) and [LinkedIn Page](#) to get news updates, views and post comments.

## Message from the President

Datuk Professor Sundra Rajoo



**Dear Members,**

We are in the crux of significant global economic trade developments and commercial relationships especially on the Belt and Road Initiative. Grievances and conflicts are inevitable part of the commercial relationship. On 5th November 2020, AIADR jointly organised a webinar event with the International Commercial Dispute Prevention and Settlement Organisation (ICDPASO) on the topic of “Rethinking Alternative Dispute Resolution in the Midst of COVID-19” with multilingual setting. The webinar is of commemorative significant as it marks the first joint collaborative effort between ICDPASO and AIADR, as its founding member. Most importantly, it was also the first seminar event held by ICDPASO since its establishment.

ICDPASO as an international organisation jointly set up by various stakeholders including legal service providers, the chambers of commerce, research institutions, universities and other stakeholders from around the world is true game changer. Its global outreach particularly along the Belt and Road Countries will create a holistic dispute prevention, management and resolution structure aimed at achieving the aim of business efficacy. The main policy objective is to manage conflict and promote sound relations by creating a system for the effective prevention and settlement of disputes besides upholding confidence in global governance and multilateralism. ICDPASO also strives to achieve the following three goals with adherence to the principles of extensive consultation, joint contribution and shared benefits: -

1. The First One is Building a New Platform to Inject Impetus into International Economic and Trade Cooperation.
2. The Second One is Accelerating Development and Providing a New Option for Dispute Prevention and Settlement Mechanism.

3. The Third one is Exploring a New System and Building Consensus for a New International Economic Order.

AIADR as founding member of ICDPASO strives to achieve common goals in line with the vision and mission of ICDPASO. We are very fortunate that His Excellency, the Secretary General of ICDPASO, Dr. Liu Chao took time to deliver his keynote speech introducing the aspiration, vision, purpose and mission of ICDPASO during the webinar. Thank you so much, Your Excellency. We reproduce the speech in this issue.

We shall march forward despite the pandemic and impediments to achieve a world where disputes are minimised. Those disputes that remain are resolved expeditiously using a variety of ADR mechanisms.

**Datuk Professor Sundra Rajoo**  
**President, AIADR**  
sundra@aiadr.world



## AIADR HIGHLIGHTS

# AIADR formally joins ICDPASO



ICDPASO is an international non-governmental and non-profit organization jointly initiated and established by China Council for the Promotion of International Trade (CCPIT) and China Chamber of International Commerce. In accordance with the concept of “Consultation, Contribution and Shared Benefits”, ICDPASO is composed of commercial institutions, trade associations, legal service providers as well as other entities in the field of international commerce around the world on the voluntary basis.

ICDPASO is committed to providing the diversified services covering the international commercial dispute prevention and settlement, protecting the legitimate right of the parties, creating the business environment with high efficiency, fairness and justification, and facilitating the construction of a more justifiable and equitable international economic order.

ICDPASO is headed by Her Excellency, Zhang Yuejiao, former chairman of WTO Appellate Body, as the Honorary Chairwoman. His Excellency, Dr. Yu Jianlong, vice president of The World Chambers Federation of International Chamber of Commerce, was appointed the Chairman, while His excellency, Derek Vaughan, Chairman of the EU-China Friendship Association, was appointed as Vice Chairman.

ICDPASO Secretariat will be headed by the Secretary-General, His Excellency, Dr. Liu Chao, General Director of Legal Affairs Department of China Council for the Promotion of International Trade.

The Council of ICDPASO consists of 14 council members including representatives from the Bar Association of India, the Russian Federal Chamber of Lawyers, the Law Society of Singapore, the Arbitration Foundation of Southern Africa, and the Asian Financial

Cooperation Association. The Council will be supported by 2 main Committees, namely the Supervisory Committee and the Advisory Committee.

The 16-member Supervisory Committee includes representatives from Associacao dos Advogados de Macau, Polish Chinese Business Council and Belgian-Chinese Chamber of Commerce. The Advisory Committee meanwhile consists of 16 representatives including from AIADR, Amfori, and the Peruvian Chinese Chamber of Commerce.

All of the senior candidates, Council members and Committee members were formally appointed during the First General Assembly of ICDPASO on 29 September 2020 conducted in hybrid setting with main venue and via web conference.

AIADR is privileged to formally joins ICDPASO as one of the founding members and appointed as one of the Advisory Committee members.

# **ICDPASO Secretary-General Keynote Speech**

His Excellency, Dr. Liu Chao



His Excellency, the Secretary General of the International Commercial Dispute Prevention and Settlement Organization (ICDPASO), Dr. Liu Chao is also serving as the Director-General of Legal Affairs Department of the China Council for the Promotion of International Trade (CCPIT). Dr. Liu holds doctoral degree in Law and Economics and acts as an arbitrator of China International Economic and Trade Arbitration Commission (CIETAC) and China Maritime Arbitration Commission (CMAC).

***Distinguished guests, experts and friends,***

***Ladies and gentlemen:***

Good afternoon! It is a great pleasure to jointly hold the seminar with AIADR, a founding member of ICDPASO. Covid-19 has brought us online. With representatives and friends from business community and legal professions, I would like to take this opportunity to share with all of you ICDPASO's establishment, mission and vision .

I am sure that most of you have already heard the news of ICDPASO's establishment. The

Inaugural Ceremony received full recognition and support from political, business and legal circles. Chinese Premier LI Keqiang and Malaysia Prime Minister Muhyiddin Yassin sent Congratulatory letters. Major international legal organizations, including UNCITRAL, WIPO, Asian-African Legal Consultative Organization, expressed congratulations in various means. Key political figures from more than 10 countries affirmed ICDPASO's establishment. I believe this is a great event for international commercial legal community, a victory for the global business community and, more importantly, a victory for multilateralism.

**As the Secretary General of ICDPASO, I will firstly introduce the aspiration of ICDPASO.**

Everybody know that long before the Covid-19 pandemic, there was a surge of deglobalization trend in the world. Protectionism and unilateralism were rising. Some countries took measures to restrict trade and investment in the name of national security. The Appellate Body of the WTO was paralyzed with interruption from US. ICSID under the World Bank started rule revision to keep up with times. In a word, we can say that the multilateral trading system and cross-border

## ICDPASO Secretary-General Keynote Speech

His Excellency, Dr. Liu Chao

*(Continued from page 6)*

investment encountered unprecedented challenges.

At present, the COVID-19 epidemic around the world has not been effectively contained. With more unstable factors, world economy's recovery is faltering. The habits of human beings, traditional international interaction norms, world economic patterns are undergoing profound change. With such a public health crisis, after initial shock, countries start to establish mechanism for coordinated response and risk prevention. Under such background, risk prevention awareness has become the key word of the times.

Amid the international vicissitudes, the dispute resolution market also witnesses great reforms. In terms of litigation, some countries embark on specialized judicial organs. International commercial courts are expected to provide flexible, professional and efficient litigation channels. In terms of ADR, arbitration and mediation have also ushered in reform opportunities. Existing institutions have reformed rules one after another. Countries actively participate in the new mediation convention. With joint efforts, traditional ADR market is expected to be revitalized.

In a period of major change rarely seen in a century, it has become the common aspiration of the global

business community to integrate resources and make full use of international mechanism. Only in this way, can we achieve free flow of cross-border trade and investment. Only in this way, can we achieve a market-oriented, rule-based business environment. This belief is firmly shared among the founding members of ICDPASO, that is forty-five business associations, legal service agencies and academic institutions. They are from more than 20 countries and regions in Asia, Europe, Africa and Latin America. As founding members of ICDPASO, we continue to uphold confidence in global governance and multilateralism. We continue to strongly agree on dispute prevention. This is why we jointly initiate ICDPASO.

### **Secondly, I would like to explain ICDPASO's purpose and mission.**

As a brand-new international organization, ICDPASO is a non-governmental and non-profit organization, headquartered in Beijing China. Step by step, we will have offices in different countries and regions. It aims to serve the business community with diversified dispute prevention and settlement service. It adheres to the principle of extensive consultation, joint contribution and shared benefits. The business

departments of ICDPASO include publicity and training, compliance construction, bankruptcy and reorganization, law ascertainment, arbitration, mediation, and investment disputes settlement, etc.

I would like to explain to everybody how ICDPASO will prevent disputes. To achieve dispute prevention, ICDPASO will set up several Centers.

### **Center of Law Ascertainment.**

We all know that the first step for dispute is law ascertainment. That means we should know the laws and rules in different countries and regions, which is very difficult in practice. For example, when Chinese companies investing in foreign countries, the first thing to do is to understand local laws and regulations. It is not easy. In this respect, we have done similar project and built the network. So ICDPASO will set up a Center of Law Ascertainment.

### **Center of Early Warning.**

After we know the laws and rules, for any related revision and update, we should also have an early warning system. Such a system will keep enterprises informed of the latest development of laws and regulatory rules. ICDPASO will set up a Center of Early

## ICDPASO Secretary-General Keynote Speech

His Excellency, Dr. Liu Chao

*(Continued from page 7)*

Warning for enterprises in need of these information.

**Center for Complains.** Currently, laws and rules in trade and investment area for enterprises to obey are exploding. ICDPASO will set up a Center for Complains. It is not for one country, but for the whole international community. It is for enterprises to express their opinions and comments on the regulations and rules.

**Center of Lobby and Consultation.** How to facilitate effective communication between industries in different countries is always a big challenge. In this respect, ICDPASO will set up a Center of Lobby and Consultation. For example, anti-dumping cases happen every day. The investigation process is costly and time-consuming both for complaining industries and government. If it is appealed to WTO, it would take years. The situation is even more complicated since the Appellate Body was paralyzed last year. That is why ICDPASO will set up the Center of Lobby and Consultation. It is for industries to fully exchange ideas and cooperate to find win-win solutions, to avoid prolonged legal battles.

**Center of Bankruptcy and Reorganization.** With the increasing

volume of international investment, for unfortunate enterprises or enterprises adjusting their strategies, bankruptcy and reorganization is an indispensable choice. That's why ICDPASO will have a Center of Bankruptcy and Reorganization, which is going to help companies to end unsuccessful trials and start new adventures.

**Center of Common Standards, Center of Training and Publicity and Center of Professionals.** We believe that a unified standard system could help to significantly reduce disputes. That's why ICDPASO will set up a Center of Common Standards. ICDPASO also deeply understand the importance of training and publicity, which will disseminate information and increase risk awareness. That's why we will have a Center of Training and Publicity. Meanwhile we are fully aware the value of professional and talented staff to the development of anew organization. That is why we will have a Center of Professionals.

Those Centers mentioned above will coordinate and complement each other to achieve the united goal of dispute prevention. On the one hand, ICDPASO is committed to reduce disputes in advance through prevention; on the other

hand, it also provides full chain dispute settlement service. ICDPASO will strive to add some new elements for traditional means. For mediation, ICDPASO will have a mediation court. The court of mediation can be composed of mediators of the same nationality with two disputing parties. For commercial arbitration, ICDPASO will provide a cost-efficient service with high quality. The language difference between disputing parties would be taken care of, since ICDPASO will have staff from many countries recommended by the founding members. For litigation, we would like to keep close monitor of the litigation environment in different countries and publish up-to-time evaluation reports for enterprises.

**Finally, I would like to share with you ICDPASO's vision for the future.**

In less than a month after the establishment of ICDPASO, the Secretariat has received numerous positive responses from all over the world. Requests for dispute service, inquiries for cooperation, and membership applications keep coming into our mailboxes.



## ICDPASO Secretary-General Keynote Speech

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*(Continued from page 8)*

Among them, a founding member from Russia, sought help for several cross-border trade cases. The cases have not evolved into disputes. The parties just need a third-party help to find a satisfying solution. We are working on a feasible solution before initiation of any mediation or arbitration procedure. Royal Institution of Chartered Surveyors contacted the Secretariats for collaboration and membership. Besides, membership applications from the whole world pours in.

Today's seminar is the first seminar after the establishment of ICDPASO. It marks the first joint event between ICDPASO and its founding members. It is of great commemorative significance. As a brand-new organization, with the trust and support from all sides, we deeply feel that the mission is glorious. Faced with new opportunities and new challenges, we know we shoulder heavy responsibilities and have a long way to go! In the future, ICDPASO will strive to achieve three goals:

**The First One is Building a New Platform to Inject Impetus into International Economic and Trade Cooperation.** ICDPASO will strengthen cooperation among all members under the principle of extensive consultation, joint contribution and shared benefits. By

reducing disputes and facilitating win-win cooperation, ICDPASO strives to be a third-party communication platform to achieve economic and trade cooperation,

**The Second One is Accelerating Development and Providing a New Option for Dispute Prevention and Settlement Mechanism.** As an innovative organization, ICDPASO needs to explore and innovate along development. We will remain open-minded and inclusive. We will follow good international practices. We will carefully take account of different countries' varying conditions. In doing so, we are confident that ICDPASO will rise into a broadly-accepted international dispute prevention and settlement organization.

**The Third one is Exploring a New System and Building Consensus for a New International Economic Order.** In recent years, the international landscape evolves very fast. ICDPASO will firmly encourage multilateral and multi-party participation to construct a rule system for dispute settlement. The system will conform to international trend and pay due respect to party autonomy. By means of such system, ICDPASO

will work with all sides to protect legitimate rights and interests of the parties, and jointly build a fair and reasonable international economic order!

Ladies and gentleman, I would like to thank all of you for such an opportunity to present ICDPASO. Although the Covid-19 pandemic has impeded our face-to-face communication, it won't stop our efforts to go forward. The Secretariat will forge ahead with dispute prevention and settlement service to achieve our common goals.

Thank you!

**Dr. Liu Chao**

**Secretary - General**

International Commercial  
Dispute Prevention and  
Settlement Organisation  
(ICDPASO)

*\*The speech was delivered as part of the ICDPASO—AIADR joint webinar on 5 November 2020.*

# Acting in the Spirit of Mutual Trust and Cooperation is more than Paying Lip Service

## ADR VIEWS

Albert Yeu Yu Shen

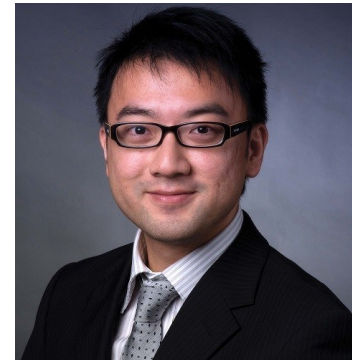
In my experience, some New Engineering Contract ('NEC') users in construction project throw around words like "NEC spirit" and "trust and cooperation" casually as though the mere process of paying lip service to such concepts is sufficient to manipulate parties' relationship. In reality, not all parties practice true transparency and honesty within the context of NEC contract because of the perception of traditional industry practice and accountability to organization leaders.

The express words "mutual trust and cooperation" (Clause 10.1 of NEC3 and Clause 10.2 of NEC4) have its significant value in the modern construction industry. In *Keating on NEC3*, it is suggested that while parties are at liberty to maintain their legitimate commercial interests, "they must behave so that their words and deeds are honest, fair and reasonable and not attempts to improperly exploit [the other party]".

The following cases remind NEC users that acting in the "spirit of mutual trust and cooperation" is more than just paying lip-service to the words. Being transparent and open with the other party is paramount in successful NEC project management.

### Disclosure of necessary record

Refusal of disclosure of record genuinely needed for the assessment of compensation event may result in the breach of "mutual trust and cooperation". In *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited [2017] NIQB 4*, the consultant refused to disclose timesheet for the assessment of Defined Cost when they argued the compensation event should have been assessed based on forecast Defined Cost. The court nevertheless ruled on the best evidence approach to find that actual timesheet record should be considered in the assessment because the works under compensation event were complete.



Albert Yeu

### Implied Term

The spirit of mutual trust and cooperation under NEC3 Clause 10.1 does not create an implied term that overrides an express term of a contract. In *Mears Limited v Shoreline Housing Partnership Limited [2015] EWHC 1396 (TCC)*, Mears was successful in reliance of the doctrine of estoppel by convention regarding some agreement on payment terms between the parties before the contract was signed. However, Mears also submitted that the trust and partnering language used in the contract should be interpreted and applied on the basis of an implied term that "any

# Acting in the Spirit of Mutual Trust and Cooperation is more than Paying Lip Service

## ADR VIEWS

party would not take advantage against the other of the departure by the other from the strict requirements of the contract where the first mentioned party was or ought to have been aware of the departure without warning the other party and affording an opportunity and a reasonable time to the other party to change". The court did not find in favor of these arguments that the obligation to act in a spirit of mutual trust and cooperation or even in a partnering way would prevent either party from relying on an express term of the contract. Equally in *Costain Limited v Tarmac Holdings [2017] EWHC 319 (TCC)*, the mutual trust provision did not mean that it was open to the parties to decide on their own the most appropriate tribunal to resolve disputes for the express dispute resolution clause in the contract.

### Omission of work

Omission of work from one contract for the purpose of transferring it to another is not uncommon. In *Van Oord UK Limited v Dragdos UK*

*Limited [2020] ScotCS CSOH\_87*, Dragdos entered into three dredging works subcontracts with a common area of works who later omitted the scope of works in that common area with Van Oord and transferred it to the other subcontracts. The court applied the law in *Abbey Developments Ltd v PP Brickwork Ltd [2003] EWHC 1987 (TCC)* to find that there was no clear wordings in the express provisions in the concerned NEC3 subcontract to omit work if it was intended that such work will be executed by an alternative subcontractor. The court did not consider necessary to inquire into whether the omission of the works amounted to a breach of obligation under NEC3 Clause 10.1. It remains to be seen if NEC3 Clause 10.1 will be relevant in omission of works if the contract provisions are silent in respect to an instruction on omission of work.

The success of NEC3 project management is dependent on a change of mindset for all those involved in the construction industry. A great deal of debate will likely to continue until more judicial

comments are available on compliance of mutual trust and cooperation obligation.

### About the Author

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# LCIA Arbitration 2020 Rules: New Rules for the Changed World

Krishan Singhania and Alok Vajpeyi



**Krishan Singhania**



**Alok Vajpeyi**

On August 11, 2020, the London Court of International Arbitration (“LCIA”) revised its arbitration rules (“LCIA 2020 Rules”). These Rules will come into force on 1 October 2020. The Rules supersede the 2014 edition of the LCIA Arbitration Rules (“LCIA 2014 Rules”).

The changes introduced by the LCIA reflect the recent developments in good practice amongst arbitration and mediation

practitioners during the COVID-19 pandemic. LCIA 2020 Rules also address the users’ desire for even more streamlined arbitral and mediation processes. In this article, the authors have highlighted the key changes in the LCIA 2020 Rules and how does these affect the LCIA Arbitrations.

### **Commencement of Arbitration**

LCIA 2020 Rules allow a party to use a single, composite request for arbitration to commence more than one LCIA arbitration, whether against one or more respondents or under one or more arbitration agreements.

Under Article 1.2 of the LCIA 2020 Rules, a claimant wishing to commence more than one arbitration under the LCIA Rules (whether against one or more respondents and under one or more arbitration agreements) may serve a composite request for arbitration in respect of all such arbitrations. This change means that claimants will no longer need to file multiple requests.

### **Early Determination**

Under LCIA 2014 Rules, it was accepted that arbitral tribunals had an implied power of early dismissal in relation to claims outside their jurisdiction or claims which are manifestly unmeritorious.

In the LCIA 2020 Rules, the provision of early determination has been introduced. This brings LCIA in line with general trend towards allowing for express powers of early determination of claims to the arbitral tribunal, which was started by SIAC (Singapore International Arbitration Centre) in 2016 and then followed by the institutions like SCC (Stockholm Chamber of Commerce) in 2017 and HKIAC (Hong Kong International Arbitration Centre) in 2018.

### **Consolidation & Concurrent conduct of Arbitrations**

The new Article 22A of the LCIA 2020 Rules broadens the power of the LCIA Court and the tribunal to order for consolidation and concurrent conduct of the arbitration proceedings. Even in cases where parties have not agreed in writing for such consolidation, the LCIA Court or the arbitral tribunal can order for consolidation if (a) the arbitration has been commenced under the same arbitration agreement or any compatible arbitration agreement/s, and (b) either the arbitration agreement exists between the same disputing parties or the disputes have arisen out of the same transaction or series of related transactions.



# LCIA Arbitration 2020 Rules: New Rules for the Changed World

### Use of Technology

The LCIA 2020 Rules makes it clear that all requests for arbitration and responses must be submitted in electronic form, and parties will require prior permission to file documents in any other form.

The LCIA 2020 Rules address virtual hearings in greater detail. The LCIA 2014 Rules provided for the possibility of hearings being held by video, the LCIA 2020 Rules in Article 19.2 state that “a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form).”

The changes in virtual hearing rules also includes clarification that, if a hearing takes place otherwise than in person, it will nonetheless be treated as being conducted at the arbitral seat (this mirror and supplements the existing provisions for in person hearings held at locations other than the seat). Moreover, Article 26.2 of the LCIA 2020 Rules provides for electronic signature of the award.

### Data Protection

In the age of virtual hearings and electronic filings, data protection becomes significant. Under Article 30.4 of the LCIA 2020 Rules, it is stated that any processing of

personal data by the LCIA is subject to applicable data protection legislation. Further, after due consultation with the parties or the LCIA, a tribunal can also adopt (a) any specific information security measures to protect the physical and electronic information shared in the arbitration; and (b) any means to address the processing of personal data produced or exchanged in the arbitration in light of applicable data protection or equivalent legislation.

### Role of Tribunal Secretary

The international arbitration community has seen a rise in the appointment of tribunal secretaries. With the incorporation of Article 14A into the LCIA 2020 Rules, the process of approval and appointment of a tribunal secretary, its role and involvement in the arbitration proceedings have been envisaged as a binding provision. The LCIA 2020 Rules also mandate a disclosure from the tribunal secretaries as to their independence and ability to devote time in the case.

### Nationality of Parties

To deal with the issue of determination of nationality,

Article 6 of the LCIA 2014 Rules is revised to require parties to give information on their nationality, and to clarify how nationality is to be determined. This will aid in the timely appointment of sole and presiding arbitrators (who must be of different nationality to the parties).

The LCIA 2020 Rules have set out a detailed framework for determination of nationality. The LCIA 2020 Rules explain the process of determination of nationality both in case of a natural person and in case of a legal person. As far as a natural person is concerned, nationality under the LCIA Rules means citizenship, acquired by birth or

**How do you rate this Article?**

**Any updates in your jurisdiction?**

- 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!*

# Arbitration in Malaysia: A Brief Update

naturalization or other relevant requirements. For a legal person, nationality has been defined as the jurisdiction in which it is incorporated and has its seat of effective management. A legal person that is incorporated and has its seat of effective management in different jurisdictions shall be treated as a national of both jurisdictions.

### Improving Efficiency

The LCIA 2020 Rules introduce a number of changes designed to improve the efficiency of the arbitration proceedings:

Under Article 15.10 of the LCIA 2020 Rules, the arbitral tribunals are given a three-month deadline from the last submission by the parties to issue the final award.

Under Article 14.3 of the LCIA 2020 Rules, the tribunal and the parties are now required to make contact within 21 days of the tribunal's appointment.

Under Article 14.6 of the LCIA 2020, a list of certain steps that a tribunal can take to expedite the procedure (such as limiting written submissions, limiting the written and oral testimony of witnesses or employing technology) are contemplated.

### Costs of Emergency Arbitrator

The LCIA 2020 Rules allow an emergency arbitrator to determine the costs of the emergency proceedings. They also expressly

allow arbitrators to take the conduct of the parties' representatives into account when making costs awards.

### LCIA Administrative Fees

The LCIA's Schedule of Costs has also been revised with the increase in the maximum hourly rate to be charged by arbitrators to £500 from the £450. This will lead to increase in cost of the LCIA Arbitrations.

### Conclusion

The LCIA 2020 Rules are praiseworthy as it takes into consideration the issues faced by the parties to the arbitration in the present pandemic, and also upgrades the rules in line with the practices of other arbitral institutions. LCIA 2020 Rules have also laid down the guidance on compliance and data protection, which are unique and have not been contemplated in the rules of other arbitral institutions.

The updated rules of the LCIA strikes a balance between meeting the needs of modern users by introducing various technology related changes and maintaining the stability and predictability of the LCIA Rules by not making lot of changes.

The amendments also reflect practices first pioneered by other arbitral institutions that

have proven effective (such as early determination and broader consolidation powers). Overall, the changes introduced by the LCIA are a welcome development as they are likely to further facilitate efficient and streamlined arbitration proceedings.

### About the Authors

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# Government of India v Vedanta Ltd: An Attempt at Resolving the Non-Liquet for Foreign Seated Arbitration in India



Lakshya Sharma



Apoorv Upadhyay

Lakshya Sharma and Apoorv Upadhyay

position came to exist and thereafter analyses the recent decision of the Supreme Court in *Government of India v. Vedanta*<sup>1</sup> on 16th September, 2020 that appears to have crystallized the correct position in law on this point.

### Background

In 2018, the Supreme Court of India pronounced the first out of the three decisions, starting out with *Union of India v. Hardy Exploration and Production*<sup>2</sup> [*Hardy Exploration*], wherein the Court observed, that ‘seat’ and ‘place’ cannot be used interchangeably, which rekindled the debate of determining juridical seat for arbitration in India. The Hon’ble Court in the case held, that the place of arbitration can tantamount to seat only in cases where no preconditions such as an agreement between the parties or determination by the tribunal are attached to it. Additionally, the venue can be inferred as the seat if there exist factors which can be appended to it concomitantly.

The position laid down by *Hardy Exploration* attracted considerable criticism and, in 2019, the Hon’ble Court had another opportunity to

settle the persisting debate on determining juridical seat through *BGS SGS Soma JV v NHPC Ltd*<sup>3</sup> [*BGS Soma*]. The Court while making its decision, revisited its seminal decision in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services*<sup>4</sup> (*BALCO*) wherein it duly recognised the principle of territoriality i.e, the scope of the Model Law would be limited to the territorial jurisdiction of the seat of arbitration. It further explained that seat shall be construed as the epicentre of the arbitration which thereby, mandates all foreign seated arbitration to be governed by the curial law of the foreign country. The Court for arriving on these principles referred to the “Shashoua principle” outlined by the High Court of England and Wales in *Roger Shashoua and Ors v. Mukesh Sharma*<sup>5</sup> that determined the then prevailing position under English Law.

The principle stipulates that arbitrations having a foreign seat shall inexplicably invoke the laws of the country where the seat is located over the arbitral proceedings. This position was later adopted in the Indian leg of

### Introduction

The Indian Supreme Court has considered the critical issue of the choice of seat on several occasions previously. However, the jurisprudence flowing from these decisions has failed to provide an intelligible guidance on the issue which eventually proves to be perilous for the parties. This article discusses how the muddled

# Government of India v Vedanta Ltd: An Attempt at Resolving the Non-Liquet for Foreign Seated Arbitration in India

Shashoua.<sup>6</sup> Resultantly, the judgment put a lid on the persisting debate by holding that under Section 20 of the Arbitration and Conciliation Act 1996, place and seat can be used interchangeably.

More importantly, the Court in BGS Soma noted that Hardy Exploration made a departure from the position settled by BALCO, which was delivered by a Constitutional Bench of the Court and therefore the settled law on the point. Additionally, the Court emphasized that party autonomy should be at the forefront in determining the place of the arbitration. The Court devised a 'Bright Line Test' for determining the juridical seat according to which, place and seat shall have the same meaning unless there exists a significant contrary indicia for venue to be a convenient geographical location.

However, it becomes pertinent to note at this juncture, that the bench in BGS Soma being co-equal to the bench in Hardy Exploration, could not expressly overrule the law laid down by it. Yet, it opined that so far as the law laid down in Hardy Exploration in contravention from the erstwhile position laid down by BALCO should be considered bad in law.

To make matters worse, the Supreme Court came out with a third judgement on the same point through its decision in Mankastu Impex Private Limited v. Airvisual Limited ['Mankastu']. This was another opportunity for the Court to refer the matter to a higher bench and settle the position; rather it pushed it into further abyss. The Court instead of following any of the previous decisions, devised a new criterion and noted, that the place of arbitration cannot be the sole determinant for determining the seat, rather the same should be construed from the other clauses of the arbitration agreement as well as the conduct of the parties. In Mankastu, the Court failed to apply the principles of territoriality and party autonomy recognized previously in BALCO and instead, added to the uncertainty by introducing new parameters which find no mention in BALCO or BGS Soma or even Hardy Exploration.

As a corollary, there exist three different rulings by co-equal benches of Supreme Court on the issue of determining juridical seat for foreign seated arbitration in India. Due to this ambiguity, the proper law governing the arbitration agreement gets significantly affected. The parties can now argue as per their convenience in determining the

juridical seat relying on the three different rulings supporting either parties' case and since seat plays a pivotal role in determining the proper law or the lex arbitri,<sup>7</sup> the entire arbitral process suffers as a result.

### **Government of India v. Vedanta: End of the persisting Place and Seat debate**

The aforementioned discussion highlights how the legal quagmire revolving around the seat, place and venue of arbitration has acted as a barrier for encouraging foreign seated arbitrations in India. However, in what may be considered as a transformative judgement, the Supreme Court has attempted to crystallise the law on this point through its decision in Government of India v. Vedanta, ['Vedanta'].

The Court while addressing the seat and venue aspect of the case, noted that the contract uses 'venue' to refer to Kuala Lumpur, Malaysia as the place of arbitration. The Court placed reliance on its seminal decision in BALCO wherein the Constitutional Bench of the Court held that law of the place or seat where arbitration is held shall be the law governing the arbitration agreement and ruled that both terms can be used interchangeably.<sup>8</sup> Based on the foregoing, the Court held that



# Government of India v Vedanta Ltd: An Attempt at Resolving the Non-Liquet for Foreign Seated Arbitration in India

Kuala Lumpur shall be the seat of arbitration and the Malaysian Law will be the *lex arbitri*.

More importantly, the position taken by the Court in *Vedanta* is also in tune with the established position under international arbitration as well.<sup>9</sup> Prof. Hunter in his book<sup>10</sup> while discussing the issue of juridical seat has emphasised on the concept of “Seat Theory”,<sup>11</sup> according to which, the arbitration shall be governed by the law of place in which it is held, which is the ‘seat’. He further notes that ‘place of arbitration’ should be interpreted as the ‘seat of arbitration’. The judgment in *BGS Soma*, also referred to these portions of Prof. Hunter’s book while outlining the bright line test in while deciding on this issue. Therefore, since *Hardly Exploration* is per incuriam and *Mankastu* devised new parameters which were neither in consonance with *BALCO* or the international practice,<sup>12</sup> going forward, they should be not be considered while determining the juridical seat.

### Conclusion

To conclude, the authors submit that the decision in *Vedanta* is a step in the right direction towards resolving the quandary that has come to exist as a result of

differing opinions on this point. The very purpose of arbitration is to ensure principles like party autonomy, seat neutrality as well as the principle of territoriality. However, decisions like *Mankastu* and *Hardy Exploration* allow for judicial interference and therefore act as a major impediment for parties opting for arbitration in India. Therefore, until such decisions are expressly overruled, the question of determining the seat should be settled by following the principles crystallized through the decisions in *BALCO* read together with *BGS Soma* and *Vedanta*. Following the same is not only in alignment with international practices but also ensures a pro-arbitration approach in the Indian jurisdiction.

8. *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc.*, (2012) 9 SCC 552
9. *Process and Industrial Developments Limited v. Nigeria*, (2019) EWHC 2241.
10. N. Blackaby, Redfern and Hunter on *International Arbitration* (6th ed. Oxford University Press 2015)
11. *Shagang South-Asia (Hong Kong) Trading Company Limited v. Daewoo Logistics*, (2015) EWHC 194.
12. *BNA v BNB and another* (2019) SGCA 84.[ [https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/-2019-sgca-84-\(amended\)-pdf.pdf](https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/-2019-sgca-84-(amended)-pdf.pdf)]

### About the Authors

Lakshya Sharma and Apoorv Upadhyay

*Fourth year law students at National Law University Odisha, India.*

1. *Government of India v. Vedanta Ltd.*, 2020 SCC Online SC 749
2. *Union of India v. Hardy Exploration and Production (India) Inc.*, 2018 SCC OnLine SC 1640
3. *BGS-SGS SOMA JV v. NHPC Limited*, 2019 SCC OnLine SC 1585
4. *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc.*, (2012) 9 SCC 552.
5. *Roger Shashoua & Ors. v. Mukesh Sharma*, [2009] EWHC 957 (Comm)
6. *Roger Shashoua & Others v Mukesh Sharma & Others* (2017) Civ. Appeal No. 2841–2843
7. N. Blackaby, Redfern and Hunter on *International Arbitration* (6th ed. Oxford University Press 2015)

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## Ratifications and Entry into Force of UNCITRAL and UN Conventions

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International**

### **Bolivia is the 7th party to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 2014 ("Mauritius Convention on Transparency")**

*On 16 October 2020, Bolivia deposited the instrument of ratification for the Convention on Transparency in Treaty-based Investor-State Arbitration 2014 ("Mauritius Convention on Transparency") at the United Nations Headquarters in New York . It becomes the 7th state party to the Convention.*

### **Sierra Leone is the 166th country to become party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention")**

*Sierra Leone acceded the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (also commonly known as the "New York" Convention) with effect on 28 October 2020. It becomes the 166th State party to the Convention.*

## **Adoption of ADR Forums is on the rise!**

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AIADR is set up for the benefit of not just its members, but also for the ADR fraternity globally. As an organisation that is driven primarily through its users, our Institute also relies heavily on the participation of its members to drive the Institute forward in achieving its vision and mission.

In that regard, the Institute encourages members to apply to join us for the new term of 2020 – 2021 for the following Committees:

- Φ Membership Development Committee (“**MDC**”)
- Φ Professional Development & Education Committee (“**PDEC**”)
- Φ Editorial Sub-Committee (“**ESC**”)

In general, Committee members will be expected to commit their effort to for the Committee's works which include interval meetings and communications. However, rest assured that the Secretariat would always be available to assist the Committees in their endeavors.

Application is now open to all active members. Please click the link [HERE](#) to register your interest



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# Committees

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# AIADR PAST EVENTS

## INAUGURATION CEREMONY OF ICDPASO

15 October 2020



The Inauguration Ceremony of ICDPASO was successfully held on 15 October 2020. The event was held in Beijing, China for local attendees while international attendees had participated virtually from their home countries. AIADR was formally represented in the event by AIADR President, Datuk Professor Sundra Rajoo.

The ceremony kicked off with the speech by Excellency, GAO Yan, Chairperson of CCPIT, presenting the Congratulatory Letter from Premier LI Keqiang of the State Council of China, and proceeded with his Excellency, Dr. YU Jianlong, Chairman of ICDPASO, announcing the resolutions of the 1st General Assembly and the first conference of the 1st Council of ICDPASO.

Thereafter, Congratulatory Letters from relevant international organizations, countries and regions were read including from the Prime Minister of Malaysia, Ministers from Singapore and South Africa, governors, member of parliaments, and international bodies such as UNCITRAL, WIPO and AALCO. The highlight for AIADR was the commentary of the ICDPASO logo by AIADR President. He shared that ICDPASO has spent considerable effort in creating the logo with its deep meaning, taking into consideration the global participation of various stakeholders and the eventual impact of this great institution on the well-being of the world.

The end of the ceremony marked the official first step by ICDPASO to truly create a meaningful impact in the field of ADR in this region and throughout the world.



# AIADR PAST EVENTS

## ICDPASO—AIADR WEBINAR ON RETHINKING ALTERNATIVE DISPUTE RESOLUTION IN THE MIDST OF COVID-19

05 NOVEMBER 2020

**Rethinking Alternative Dispute Resolution in the midst of COVID-19**

5 Nov 2020 @ 2:30-3:50pm MYT (GMT+8)

Join via Zoom Join via FB Live

**KEYNOTE SPEAKER:**

**Dr. Liu Chao**  
Secretary General, ICDPASO  
The Secretary-General of International Commercial Dispute Prevention and Settlement Organisation (ICDPASO) and the Director-General of the Department of Legal Affairs of the China Council for the Promotion of International Trade (CCPIT).

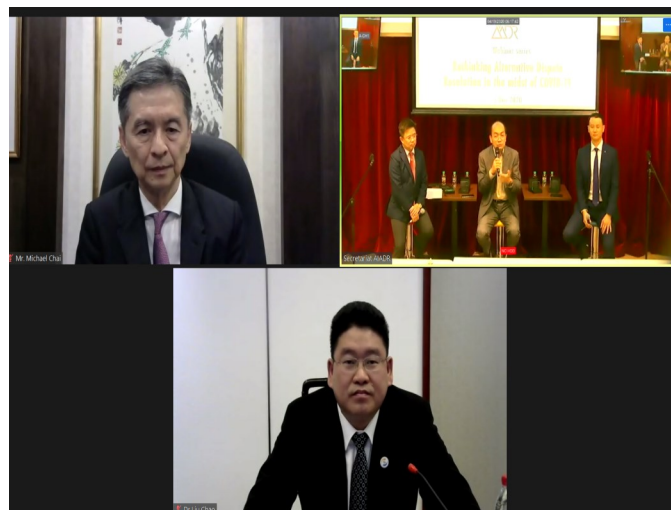
The Secretary General of ICDPASO, His Excellency Dr. Liu Chao will be delivering the keynote policy address for the seminar.

**MODERATOR:** Dato' Quek Ngee Meng, Vice President, Asian Institute of Alternative Dispute Resolution

**PANELLISTS:** Mr. Michael Chai, Chairman of Legal Affairs Committee, The Associated Chinese Chambers of Commerce and Industry of Malaysia; Dr. NoorFajri Bin Ismail, Senior Lecturer of ADR, Islamic Science University of Malaysia; Mr. Lam Wai Loon, President, Malaysian Society of Adjudicators

Jointly organised by: ICDPASO (International Commercial Dispute Prevention and Settlement Organisation) and AIADR (Asian Institute of Alternative Dispute Resolution)

The panel will be discussing on the dispute settlement in commerce and business setting, the role of arbitral institutions and awareness in alternative dispute resolution (ADR) and the comparative access to court litigation and ADR, besides sharing their perspectives on the responses and means of moving forward with COVID-19.



## RETHINKING ALTERNATIVE DISPUTE RESOLUTION IN THE MIDST OF COVID-19

On 05 November 2020, AIADR organized a webinar on the topic of “Rethinking Alternative Dispute Resolution in the Midst of COVID-19” in collaboration with ICDPASO. The webinar was conducted in English medium with simultaneous Chinese translation *via* online platforms. AIADR is honoured to have his excellency, Dr. Liu Chao to deliver the policy speech for the webinar and beyond pleased to be part of the first joint event held by ICDPASO since its establishment!

The webinar was moderated by AIADR Vice President, Dato Quek Ngee Meng and joined by esteemed panelists, Mr. Michael Chai, Chairman of Legal Affairs Committee of The Associated Chinese Chambers of Commerce and Industry of Malaysia (ACCCIM), Dr. NoorFajri bin Ismail, Law lecturer of Islamic Science University Malaysia and Mr. Lam Wai Loon, President of the Malaysian Society of Adjudicators. Amongst others, the panel suggested for cooperation between the industrial and academic sectors for training and courses, envision that the establishment of ICDPASO would fill the gap on dispute prevention in cross-border context and the need for advocacy, roadshow and education on dispute prevention and settlement to raise awareness.

AIADR is thankful for the collaboration with ICDPASO and look forward to more collaborative opportunities in the near future!

To watch the recording of the seminar, please click [HERE!](#)

# AIADR PAST EVENTS

## AIADR SECOND ANNUAL GENERAL MEETING

05 NOVEMBER 2020



### AIADR HELD ITS SECOND ANNUAL GENERAL MEETING VIA WEB CONFERENCE

AIADR successfully held its second AGM on 5 November 2020 starting at 4.00pm MYT (GMT +8). The AGM was held simultaneously at Triune Centre, Kuala Lumpur Malaysia and also via Zoom conference.

A total of 28 members were present for the AGM. The AGM was chaired by AIADR President, Datuk Professor Sundra Rajoo and also joined by the AIADR Vice President, Dato Quek Ngee Meng and AIADR's auditor, Mr. Krishnan.

After the Chairman of the meeting confirmed the quorum and notice of meeting, he proceeded to start the meeting by presenting the Statement of the President as well as the Report of the Governance Council for the term 2019 - 2020. This is continued with the presentation of the Audited Financial Statements and the Reports of the Directors and Auditors for the financial year ended 30 June 2020. Both of these documents had been sent out to all members prior to the meeting. Alternatively, the documents could be accessed at AIADR [website](#).

As per Article 60 of the Institute's Constitution, all members of the Governance Council shall continue to hold office until the third AGM. Finally, the Ordinary Resolution 1 to re-appoint Messrs NK Associates, as the Company's Auditors was passed by the members without any objection.

The Institute sincerely appreciate the participation of all members during the second AGM.

# AIADR PAST EVENTS

## AIADR—BAR ASSOCIATION OF SRI LANKA WEBINAR ON BUILDING A CAREER IN INTERNATIONAL ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION

16 NOVEMBER 2020



Webinar organised by the International Relations Committee of the BASL in collaboration with, Asian Institute of Alternative Dispute Resolution

**Building a Career in International Arbitration and Alternative Dispute Resolution**

Register before the 15th of November 2020

[zoom](#)

**International Relations Committee**  
Chairman:  
Dr. Asanga Gunawansa, AAL  
Co-chairman:  
Mr. Anuruddha Perera, AAL  
Co-convenors:  
Mr. Janaka Basuriya, AAL  
Mrs. Champika Amarasekara, AAL

[YouTube](#)

on 16th (Monday) November 2020 at 3.30p.m. to 4.30p.m.

For more Information :  
info@basl.lk  
076 440 8342 / 077 335 9569

**Datuk Prof. Sundra Rajoo**  
Founding President,  
Asian Institute of Alternative Dispute Resolution,  
Certified International ADR Practitioner and  
Chartered Arbitrator

**Dr. Asanga Gunawansa**  
PhD - National University of Singapore  
LLM - University of Warwick  
(Moderator)

**BAR ASSOCIATION OF SRI LANKA**  
Rajeev Amarasuriya  
Secretary, BASL

## BUILDING A CAREER IN INTERNATIONAL ARBITRATION AND ALTERNATIVE DISPUTE RESOLUTION

AIADR collaborated with the Bar Association of Sri Lanka on 16 November 2020 to deliver a webinar on the topic of “Building a Career in International Arbitration and Alternative Dispute Resolution”.

The webinar was moderated by Dr. Asanga Gunawansa and facilitated by convener, Mr. Janaka Basuriya. AIADR President, Datuk Prof. Sundra Rajoo was invited to share his views and experience on how to build a career in international arbitration and alternative dispute resolution. Amongst others, Datuk Sundra highlighted the importance of having a mentor to guide and develop career. A mentor will give good advice on which way to go besides improving on the knowledge and skills.

On top of that is the concept of “being in the right place at the right time” to have the opportunity. However, this requires preparation of yourself by working hard and building up. Never be afraid to start small and always be consistent in alternative dispute resolution viewpoint. You must believe in the system and leap of faith when deciding to do something. One more important thing is having an institutional environment that are progressive to create the system. The ecosystem, yourself, institution, government would have to fall together to build up a career in ADR.

Last but not least is good attitude and constant improvements. Write articles, take up courses, attend talks and join membership organizations for the opportunity to converse and mingle in intellectual thinking.

To watch the recording of the seminar, please click [HERE](#).



# AIADR SUPPORTED EVENTS



Wednesday,  
16 December 2020



4:00pm - 6:30pm  
(Jamaica Time)



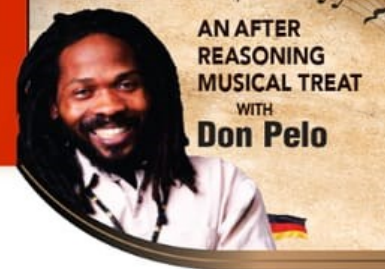
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**A Reasoning**

Moderated by

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Founding Partner,  
Hay Law & Advisory Board Member, JAIAC

with International Thought Leaders

**Mr Anil Changaroth**  
Managing Director & General Counsel, ChangAroth Chambers LLC & ChangAroth InterNational Consultancy

**Dr Iria Giuffrida**  
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FCI Arb, President of the Asian Institute of ADR



### Annette Magnusson

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### Ray McKenzie

FCI Arb, FASCE, Principal and Senior Transportation/Traffic Engineering Specialist, Caribbean Civil Group Limited



### Mauro Rubino Sammartano

Lawyer at the Paris Bar, LAW FED BRSA



### Dr. Peter D. Maynard

FCI Arb, Head of Law Department, University of the Bahamas; National President for the Bahamas of the WJA



### Paul Hehir

Associate Vice President of Litigation Royal Caribbean International / Celebrity Cruises / Azamara Cruises

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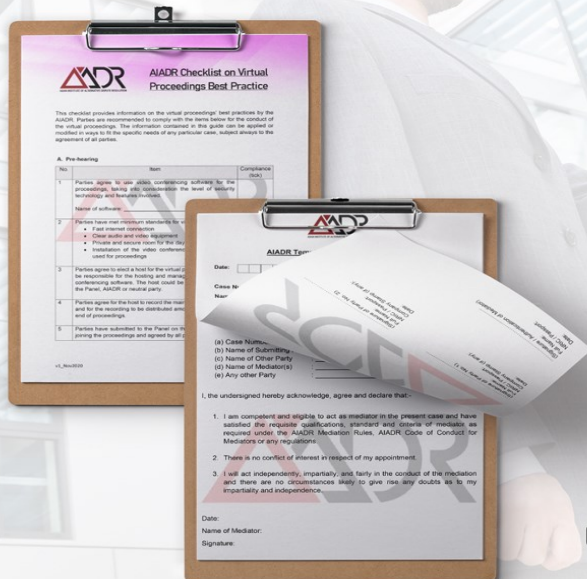


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## Renewal of membership for 2021!

Please renew your membership for the new 2021 term by logging in to the website or by contact the Secretariat at [aiadr.membership@aiadr.world](mailto:aiadr.membership@aiadr.world)

## AIADR invites experienced members in Maritime Arbitration to become panel judges during NLUO IMAM 2021!

Enhance your profile and contribute to the development of the young practitioners by volunteering as panel judge during this moot competition. Scheduled in April 2021 in India, judges will be provided with travel and accommodation expenses throughout the event. Click [HERE](#) or contact the Secretariat to register your interest!



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- ⇒ **Honorary Fellows** [Post Nominal: Hon. FAIADR]
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#### **Cut-off Date for Submission of Contributions:**

1. For Newsletter : **15 January 2021**
2. For Journal : **15 January 2021**

Direct your queries to [thesecretariat@aiadr.world](mailto:thesecretariat@aiadr.world) / [aiadr.editor@aiadr.world](mailto:aiadr.editor@aiadr.world).