ASIAN INSTITUTE OF ALTERNATIVE DISPUTE RESOLUTION
Delivering Excellence in ADR

ADR CENTURION

Inside this Issue

DECEMBER 2023
Volume 4
Issue 27

The AIADR shall be a repertoire of global jurisprudence, formed by professional membership, recognized by international institutions, striving for the advancement of alternative dispute resolution methodologies, for amicable conflicts management and effective dispute resolution.

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.

Electronic Version Available at: https://www.aiadr.world
eISSN: 2735-0800

Contents

" I can imagi
which does not
method of a

ne no society
t embody some
arbitration."

Herbert Read

Join the spotlight - submit your profile to the AIADR Newsletter

Membership

Collaborate with us!

Members are welcome to reach out to the Secretariat for assistance or collaboration in organizing webinars on ADR topics of their choice. No charges are levied. Do not miss out on this great opportunity to enhance your resume by delivering a webinar for the benefit of other members and the ADR fraternity. Email us to register your interest!

Upgrade Your Membership!

Members can now upgrade their membership level or get accredited as a Certified Practitioner through our fast-track path by virtue of having comparable membership or accreditation from equivalent international ADR organisations (e.g. Chartered Arbitrator with CIArb).

aiadr.membership@aiadr.world

PRESIDENT'S MESSAGE

DATUK PROFESSOR SUNDRA RAJOO

Dear members,

Warm greetings from the Asian Institute of Alternative Dispute Resolution. I am delighted to present you with the 27th Issue of the ADR Centurion. I would like to take this opportunity to thank all individuals for their constant support and trust in the work of the institute to achieve our vision of building a global platform in alternative dispute resolution (ADR)

I would like to take this moment to express my gratitude to the Governance Council, Office Bearers, committee members, AIADR Secretariat, partner organizations, esteemed members, and our latest subscribers for their dedication in advancing AIADR's objectives. We encourage you to stay tuned for our latest news and content across different social media platforms such as Facebook, LinkedIn, Twitter, YouTube, and Instagram.

At this time, I take the pleasure to update all our members on our recent endeavors and initiatives at the Asian Institute of Alternative Dispute Resolution (AIADR). Over the past couple of months, we have orchestrated a variety of engaging and multifaceted events, tailored to cater to a broad spectrum of interests within the realm of alternative dispute resolution (ADR).

1. Firstly, On the 1st of October, AIADR successfully concluded its inaugural Mediation Competition. This event marked a significant milestone in promoting the practice of mediation across Asia, bringing together 12 teams from diverse regions, including Malaysia, India, Hong Kong, and Indonesia. The competition not only showcased the participants' impressive mediation skills but also strengthened cross-cultural connections among aspiring mediators in the continent.

The competition was a testament to the growing interest and recognition of alternative dispute resolution methods, with mediation taking center stage. Mediation, as a dispute resolution process, is gaining prominence for its efficiency, cost-effectiveness, and ability to foster amicable solutions in various contexts, be it commercial, civil, or family disputes. Among the 12 participating teams, it was the team from Hong Kong that emerged victorious, showcasing their exceptional mediation skills and problem-solving abilities. Their victory underscores the growing influence and expertise within the region's mediation community.

2. Following that, On the 14th and 15th of October 2023, the Asian Institute of Alternative Dispute Resolution (AIADR) had the honor of participating in the China-ASEAN Sub-Forum for Regional Legal Cooperation, an event dedicated to fostering collaboration and legal development within the region. AIADR made a significant impact at the forum, with its distinguished representatives sharing valuable insights and expertise.

AIADR was prominently represented by Dato Ricky Tan, the Chairperson of the Business Development and International Relations Committee (BDIRC), an

-d Dr. Adolf Peter, a Fellow member of AIADR. Their presence at the event added substantial value to the discussions and sessions, contributing to the exchange of ideas and best practices in the field of legal cooperation and dispute resolution.
The event served as a testament to AIADR's dedication to advancing alternative dispute resolution methods and enhancing legal cooperation in the Asia-Pacific region. As AIADR continues to play a pivotal role in shaping the future of dispute resolution and legal collaboration, its presence at events like the China-ASEAN Sub-Forum remains instrumental in promoting peace, understanding, and legal excellence within the region.

3. Furthermore, from the 18th to the 21st of October 2023, AIADR embarked on a significant journey to empower Justices of the Peace (JP) in Selangor and its neighboring states by organizing the AIADR-JP Selangor Community Mediation training course. Justices of the Peace play an important role in our communities, providing valuable support and wisdom. Recognizing their significance, AIADR identified an opportunity to empower these community leaders through specialized mediation training. By improving their skills as Certified Community Mediators, JPs are now more effective in promoting peaceful resolutions and harmony within their communities. This initiative not only revitalizes the roles of Justices of the Peace but also strengthens their ability to contribute significantly to the well-being of the community. Through expert training and hands-on experience, participants gained valuable insights into conflict resolution techniques, communication strategies, and mediation practices. The AIADR JP Selangor Community Mediation Training Course stands as a testament to AIADR's commitment to building resilient communities through education and empowerment.

4. Next, On the 17th of October 2023, AIADR had the honor of hosting a courtesy visit from the China Maritime Arbitration Commission (CMAC), led by Dr. Li Hu, Vice Chairman of CMAC. This courtesy visit transcended traditional formalities, representing a significant step toward fostering meaningful dialogue and exploring potential opportunities for future collaboration between CMAC and AIADR. The meeting provided a platform for both organizations to exchange ideas and insights, laying the groundwork for potential joint initiatives and cooperative endeavors.

5. Following the visit by CMAC, AIADR also had the pleasure of welcoming the distinguished delegation from the Hainan International Arbitration Court (HIAC) on the 20th of October 2023. The delegation, led by Mr. Chen Huajun, Vice President of HIAC, included Ms. Jia Wen, Vice President of the Hainan Lawyers Association, Ms. Liu Juan, Deputy Director of the International Mediation Center of HIAC, and Mr. Li Lianjie, International Cooperation Specialist of HIAC. The visit provided an invaluable opportunity for both organizations to engage in meaningful discussions aimed at exploring potential synergies and collaborative prospects. These conversations are instrumental in aligning common objectives and enhancing the practice of alternative dispute resolution.

6. Finally, AIADR proudly extended its support to the Iskandar Malaysia Law Conference 2023, a notable event that took place on the 23rd of November. This conference served as a platform for professionals and experts to delve into critical topics relevant to the contemporary legal landscape. The conference featured in-depth discussions on a variety of subjects, including employment law, environmental, social, and governance (ESG) practices and sustainability, as well as the ever-pressing issue of data privacy. These topics are at the forefront of the legal and business worlds, and their exploration at the conference provided attendees with valuable insights and knowledge.

In closing, I would like to extend my appreciation to all our members for their unwavering participation and support in our various activities and events. We are grateful for your continued engagement, as it is your involvement that fuels the success and impact of our endeavors.

Towards Seamless Justice: Unveiling Blockchain Arbitration, Smart Contracts and The Ascendancy Of Kleros & Aragon ODR

Sanvi Zadoo

My name is Sanvi Zadoo, currently in the 3rd year of 5 year BALLB program in Hidayatullah

National Law University, Raipur, India. I completed my schooling in Amity International School Gurugram, Haryana, India.

I have an insatiable curiosity about the ever-evolving landscape of technology law, with a particular focus on artificial intelligence (AI) and blockchain. This makes me passionate about exploring the legal and ethical implications of these cutting-edge technologies, striving to bridge the gap between innovation and regulation.

In my downtime, one can often find me on the sports field, where I channel my competitive spirit. I believe that a sound body complements a sound mind.

Abstract

Smart contracts entered markets as game changers, with an objective to eliminate human interference. Integration of blockchain technology and its application in smart contracts has proven to be transformational. However, the complex and technical nature of smart contracts and blockchain network requires some level of foreseeability which poses uncertainty and might become a challenge. Despite the development of alternative automated dispute resolution systems namely, Kleros, Aragon and Mattereum, the case for smart contracts and blockchain applications to supplant real world institutions is still weak. The inherent incompleteness arising from limitations in information availability, human cognition, and communication necessitates that traditional contract governance institutions will persist in complementing blockchain smart contract governance arrangements. The constraints posed by these factors acknowledge the continued relevance and importance of conventional governance structures alongside the innovative applications of blockchain and smart contracts. This paper aims to discuss the problem in the current online dispute resolution mechanisms and provide a better and more sustainable mechanism.

1. Introduction

Recent technological breakthroughs[1] have revolutionized the way society conducts transactions. At forefront of this transformation is the development[2] of blockchain technology, a decentralized and immutable ledger that has garnered significant attention and adoption across various industries. As intermediaries are eliminated[3], so are fraudulent activities. In particular, the widespread adoption of cryptocurrencies, which operate[4] on blockchain networks, has propelled the use of this technology even further, facilitating seamless and swift transfers of digital assets across the globe. Despiteblockchain's robust security measures, reliance on cryptocurrencies and complexities in smart contracts and token transfers can lead[5] to

disagreements and conflicts.

In this context, the exploration of online dispute resolutions, such as blockchain based arbitration systems like Kleros and Aragon court gains significance. Despite the development[6] of these alternative automated blockchain institutions, the case for smart contracts and blockchain applications to supplant the real world institutions remains weak. This is primarily due to inherent incompleteness caused by lack of information and human interference. Moreover, the complex nature of contract makes it difficult to comprehend the problems precisely.

The discussion in this paper is divided into two parts. Part 1 of the paper would paint a picture on the questions revolving around (i) working of blockchain arbitration and smart contracts (ii) why is there is a need for any kind of dispute resolution? (iii) why is arbitration best suited dispute resolution?

Beyond this inquiry, Part 2 of this paper also sheds light on (iv) how ODR courts like Kleros and Aragon work? (v) problems that are withholding them from widespread adoption (vi) what could be the possible solution or alternative for the same.

The paper ends with a solution proposing a hybrid model of existing legislation and online dispute resolution models, both having a wiggle room in their arena. This will help to bridge the gap between the inconsistencies in the existing laws and upcoming technologies of blockchain network.

2. Need for dispute resolution mechanisms in blockchain environment

How do disputes arise in blockchain network?

With the increasing trend of convergence between technology and law, we transform into a new virtual space, effectively eliminating the need for intermediaries. With respect to India, this has revolutionized the traditional legal system, evidently so, under section 5 and 10 of the Information Technology Act, 2000[7], electronic signature has been legally recognized, whilst section 65B of the Evidence Act states that digital signatures can be submitted as evidence.

To comprehend the whole context of the discussion, we can say that blockchain provides an infrastructure[8] for a smart contract to be executed over a distributed network rather than a centralized organization like judicial system. Smart contracts are coded contractual clauses, defined ex- ante to be automatically executed through computer codes once all conditions are fulfilled.[9] Smart contract work on the concept of 'contractware' a term coined by Nick Szabo to describe the physical instantiation of a computer-decipherable contract.[10] The terms and facts of the contract are programmed into a decentralized[11] blockchain, where no individual maliciously or mistakenly overrides the process.

Smart contracts create negotiation costs by requiring parties to define all possible future states of the contract. However, there can be certain unforeseeable circumstances. Such as, one of the parties could be declared fraud by court, in such situation in a traditional contract the other party backs out however, in case of smart contract it is not easily amendable or terminate[12]. Moreover, a late payment results in reduction of payment from the count of the concerned person.

This leads to emergence of concept of incomplete contracts[13], since it can be very rare to predict all future states of a contract. Bounded rationality[14] of humans due to biological, physical and social factors makes it impossible to foresee how parties will behave in specific contingencies. This gives rise to fundamental uncertainty.

Hence, any incomplete contract will potentially lead to disputes, not eliminating human interference entirely.

What are the possible disputes?

Lifespan of a blockchain network is exposed to various kinds of disputes. Some disputes like non-transactional[15] disputes are addressed better outside the blockchain protocol. These disputes[16] are relevant to parties in real world and may not

directly involve to transactions on the network.

On the other hand, an off- chain[17] governance should be handled outside the network and it relates to issues amongst others evolution of blockchain, access criteria of the network etc. Governance mechanism would be appropriate forum of dispute resolution since blockchain protocol are more complex in nature.

The central focus of this paper is on-chain disputes, which involve transactions intended to be partially or entirely performed or recorded on the blockchain network. Examples of such disputes include issues related to the timely delivery of goods, verification of authenticity in supply chain blockchains.

The current situation regarding cryptocurrency in India is very uncertain which also increases the scope of disputes. While the bill of Banning of Cryptocurrency and Regulation of Official Digital Currency, 2019[18] rests with the parliament, the Indian Supreme Court in the case of Internet and Mobile Association of India vs Reserve Bank of India (2020 SCC online SC 275)[19] has uplifted the ban on cryptocurrency. Though it has provided a relief and opportunity to investors while at the same time, it has raised questions regarding the legality of cryptocurrency in India.

One of the examples of such cases that has arisen out of such dubiety is, In Re Tezos Securities Litigation, 2017[20], a notable dispute arose when a lawsuit was filed[21] against Tezos, a company that launched Initial Coin Offering (ICO can be understood as stake of investors in a company buying coin offering and holding cryptocurrency issued by the company). The plaintiffs, who were investors, alleged that they were deceived by Tezos, as what they believed that ICO was an investment but it actually turned out to be classified as a non-refundable donation.

Why is arbitration best possible forum for dispute resolution?

There can be several methods for resolution of blockchain dispute[22], broadly categorizing them into two:

1. First approach relies on existing contractual framework and established jurisprudence. Parties use traditional courts and existing ADR procedures, but this procedure may not recognize unique features of smart contracts.

2. Second approach allows smart contracts to create a separate and special legal tool for dispute resolution, a new regulatory tailored regime, Lex Cryptographia[23]

Arbitration (as existing in traditional legal system or Lex Cryptographia) is regarded as the most effective dispute resolution, considering the volatility of market, it is better that dispute be settled soon to avoid any more possible losses.

Another reason can be due to the borderless nature of cryptocurrencies as crypto transactions occur around the globe, understandably there is no specific legislature that can be referred for dispute resolution. Thus, conveniently arbitration being independent of any specific jurisdiction allows parties to enforce awards in multiple jurisdictions by choosing preferred and relevant laws.

Hence, one of the significant advantages of arbitration is its flexibility as compared to the rigid court systems.

Further, in the case of Vidya Drolia vs Durga Trading Corpn (2021) 2 SCC 1[24] , the Supreme Court laid[25] down four- fold test to determine the non-arbitral cases. The four tests include:

1. Disputes involving rights in rem, also in cludes rights in personam which arise out of right in rem
2. Disputes requiring either central adjudi cation or affecting public at large
3. Disputes involving state's sovereign and inalienable public interest functions
4. Disputes that are non- arbitral due to a bar placed by a statute.

3. What Are The Exsisting Online Dispute Resolution Mechanism and Protocols

As ODR is significantly growing in recent years, the

first ODR systems were developed[26] by private companies for resolution of small -scale disputes in e- commerce space. According to Metzger[27] at least nine such systems came into existence from 2017 and one of the best of these platforms is e-bay Resolution Centre which is cited to resolve 60 million disputes in a year.

Kleros Court

Kleros can be defined[28] as an opt- in court system. Smart contracts designate Kleros as their arbitrator, while opting in they choose the number of jurors and which court will rule in case of dispute. Kleros takes ODR one step further by adapting it to accommodate disputes of blockchain network and smart contracts.

Kleros makes use of two cryptocurrencies[29], namely, Pinakion (PNK) and Ethereum (ETH)[30]. Kleros requires users to initially purchase ETH using fiat money and then subsequently use ETH to buy PNK. The arbitrators, called jurors, stake PNK as an entry fee to the Kleros court, the likely hood of being selected increases as the amount of stake increases. Once the jurors are selected, they review the dispute in hand, applying the laws and analyzing the evidence submitted by the parties and form a decision. This decision can be coherent (aligning with the majority decision) or incoherent (dissenting from majority). The tokens are then redistributed after the decision is passed, only jurors with the coherent decision[31] get the remuneration.

The assumption behind this is, someone who did not take the majority decision might be involved in sub- court in which they do not have any expertise, or they did not evaluate the evidence meticulously. This system follows game theory principles.[32]

Drawbacks

Kleros acts an investment and dispute resolution mechanism, which essentially means respondents should be interested in investing and acting as jurors. The question that arises is whether financial gain can influence juror's neutrality? Given that they have a financial stake which depends on the decision they take, this might hinder their impartiality[33] and objectivity while making decision. One of the major drawback or obstacles kleros is the lack of knowledge about blockchain and cryptocurrency among people.

Aragon Court

DAO or Decentralized Autonomous Organization which is a self -governing platform, coordinating and collaborating around the same objective. As stated[34] by Luis Cuende, co- founder of Aragon court, DOA is "native entity on internet without central management which is regulated by set of enforceable rules in the public blockchain network." One such example is the Aragon court. The functioning of Aragon court can be explained in the following paragraph, involving initiation of the dispute with both parties having equal stake of Aragon Tokens (ANT).[35]

Individuals are invited to become guardians and receive rewards proportional to the number of guardians drafted. The guardians review the evidence during the evidence stage. The Final Ruling stage involves the maximum number of appeals, and guardians must manually reveal their votes. The successful appealing and confirming parties receive rewards, while the collateral of the opposing party is returned minus the guardian fee.

Mattereum

Indian CEO, Vinay Gupta, run legal- tech firm, which supports decentralized commercial law system called Smart Property Register. This system functions[36] through smart contract eliminating the need for legislative support.

Matteruem's contract protocol is based on "Ricardian Contracts"[37], which are smart Application Programming Interface (API) in order to bridge the gap between fast moving digital world and the complex legal world. The focus[38] is on dispute avoidance, with an "automated custodian" becoming the legal owner and registrar of an asset during the contract period, simplifying enforcement. However, Mattereum acknowledges that some enforcement issues may persist, and they propose the involvement of "technically compe-

tors" to resolve any remaining disputes.

A case study conducted[39] in partnership with Ocean Protocol demonstrates the integration of a dispute resolution mechanism within smart contracts, making dispute resolution a layer of governance aligned with existing charters, missions, goals, and principles. This built-in dispute resolution system involves[40] an "adjudicator" role, with four elements for deciding disputes: evidence, escalation options, decision-making, and enforcement (e.g., redistribution of staked tokens). This system serves as a flexible layer of governance that can be added to markets and sub-markets, providing an efficient and effective method for resolving disputes in the digital realm.

4. Way Forward

Various procedures of ODR that are adopted around the globe have been discussed above, one element common in all is the financial interest of the people who are of importance to the dispute. This poses a major problem of commodification [41] of justice, which poses a risk that bias might creep threatening the fair decision promised by blockchain arbitration.

Moreover, until now there is no rigid data for online dispute resolution and it has been reduced to mere discussions and theory.

Further, the legal principles given by blockchain dispute resolution mechanisms may not align with a country's legislative provisions. For instance, In France, article 16 of the Code of Civil Procedure [42] provides some mandates that require the judge to hold adversarial debates, guaranteeing sufficient time to the defendant to prepare his documents. It is also mandatory for the parties to authenticate their identities as well as examination of case documents. However, these conditions are not met on such platforms, at times the identities of the parties are not authenticated[43] and evidence is presented without any debate.

Adding to this, Article 22[44] of the Code of Civil Procedure of France also necessitates those judgments be made public, which is not the case for decentralized justice system.

Taking inspiration form the Mexican court and designing a potential solution for these problems, a hybrid model of blockchain dispute resolution mechanisms and existing legal framework is proposed.

In this scenario, two private parties engaged in a real estate leasing agreement, incorporating a standard arbitral clause with one unique modification. The parties mutually agreed that the sole arbitrator would utilize the Kleros Protocol to formulate their decision.

When a dispute emerged between the parties, the appointed arbitrator prepared a procedural order summarizing the key aspects of the controversy, the positions and arguments presented by both parties, and the supporting evidence. This procedural order was subsequently submitted to the decentralized justice platform, "Kleros," which issued its decision based on rigorous legal protocols. The arbitrator then received the decision from "Kleros" and seamlessly integrated it into the final arbitral award. This award[45] was duly recognized and enforced by the Mexican Court.[46]

Conclusion

As seen above, there might be difference or inconsistencies between the legal order of a nation and blockchain dispute mechanism, however, a hybrid model will help to bridge these differences. Keeping India in the light, Indian legislation provides enough wiggle room in case of arbitration procedures. In the case of Bharat Aluminium v. Kaiser Aluminium Technical, (2012) 9 SCC 552,[47] it was held that the parties have the autonomy to decide which law will govern substantive part of the dispute and they can even resolve on the basis of a chess match. This right is also given in Section 19 of the Arbitration and Conciliation Act[48]. Section 28 (2) of the same act also provides the principle of ex aequo et bono which means arbitrator can exercise his good conscience while pronouncing the award. Drawing parallels to such models a hybrid model can be adopted in the Indian Regime and in different regions of the world as practiced in Mexico.

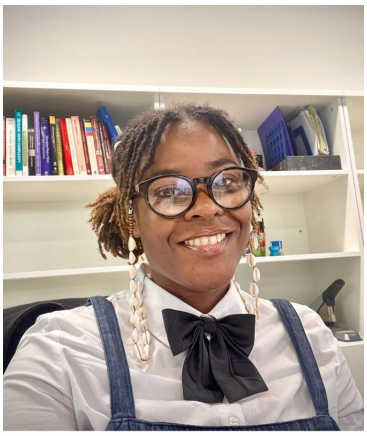
***

[1] https://doi.org/10.3390/fi14110341
[2] https://www.mdpi.com/1999-5903/14/11/341
[3] https://www.forbes.com/sites/bernard-marr/2017/08/10/practical-examples-of-how-blockchains-are-used-in-banking-and-the-financial-services-sector/?sh=40d7588c1a11
[4] https://www.cambridge.org/core/journals/journal-of-institutional-economics/article/abs/uncertainty-and-dispute-resolution-for-blockchain-and-smart-contract-institutions/6C06720B46228EA9D95E5E7611E5EFA5
[5] https://www.mondaq.com/india/arbitration--dispute-resolution/1330488/the-blockchain-arbitral-order-an-indian-perspective
[6] https://www.researchgate.net/publication/349957419_Uncertainty_and_dispute_resolution_for_blockchain_and_smart_contract_institutions
[7] https://www.indiacode.nic.in/handle/123456789/1999
[8] https://www.intelliwavetechnologies.com/how-sitesense-uses-blockchain-for-construction-transactions/
[9] https://scholarship.law.missouri.edu/facpubs/726/
[10] https://ccl.yale.edu/sites/default/files/files/Raskin_Draft_The_Law_and_Legality_of_Smart_Contracts.pdf
[11] https://rm.coe.int/report-on-blockchains-en/1680a8ffc0
[12] https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitations/
[13] https://doi.org/10.1093/jleo/ewy012.
[14] https://core.ac.uk/download/pdf/301384316.pdf
[15] https://www3.weforum.org/docs/WEF_WP_Dispute_Resolution_for_Blockchain_2020.pdf
[16] https://www3.weforum.org/docs/WEF_WP_Dispute_Resolution_for_Blockchain_2020.pdf
[17] https://www3.weforum.org/docs/WEF_WP_Dispute_Resolution_for_Blockchain_2020.pdf
[18] https://www.medianama.com/wp-content/uploads/2021/02/Draft-Banning-of-Cryptocurrency-Regulation-of-Official-Digital-Currency-Bill-2019.pdf
[19] https://indiankanoon.org/doc/12397485/
[20] https://tezosfoundationsettlement.com/
[21] https://www.courthousenews.com/tezos-cryptocurrency-founders-settle-with-investors-for-25-million/
[22] https://www.frontiersin.org/articles/10.3389/fbloc.2021.564551/full
[23] https://plato.stanford.edu/entries/natural-law-theories/
[24] https://indiankanoon.org/doc/121987320/
[25] https://www.scconline.com/blog/post/2022/12/08/supreme-court-post-vidya-drolia-reconsidering-referral-jurisprudence-in-india/#fn3
[26] https://www.mbie.govt.nz/assets/00ddebf604/online-dispute-resolution-report-2018.pdf
[27] https://www.mq.edu.au/__data/assets/pdf_file/0010/866287/Blockchain-Based-Crowdsourced-Arbitration.pdf
[28] https://kleros.io/whitepaper.pdf
[29] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=891100
[30] https://blog.kleros.io/kleros-ethfinex-tcr-an-explainer/
[31] http://www5.austlii.edu.au/au/journals/DeakinLawRw/2019/3.html
[32] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=891100
[33] https://moritzlaw.osu.edu/sites/default/

[34] https://www.hksmp.com/journals/ep/article/view/418
[35] https://www.coinbureau.com/review/aragon-ant/
[36] https://mattereum.com/wp-content/uploads/2020/02/mattereum-summary_white_paper.pdf
[37] https://ieeexplore.ieee.org/document/1319505
[38] https://medium.com/humanizing-the-singularity/the-first-mattereum-briefing-11a67c75d840
[39] https://www.researchgate.net/publication/331662682_The_Governance_of_Blockchain_Dispute_Resolution
[40] https://www.researchgate.net/publication/331662682_The_Governance_of_Blockchain_Dispute_Resolution
[41] https://arbitrationblog.kluwerarbitration.com/2023/07/17/arbitration-tech-toolbox-the-rawlsian-veil-of-ignorance-and-blockchain-arbitration/
[42] https://allowb.org/acts_pdfs/CPC.pdf
[43] https://kleros.io/whitepaper.pdf
[44] https://allowb.org/acts_pdfs/CPC.pdf
[45] https://blog.kleros.io/how-to-enforce-blockchain-dispute-resolution-in-court-the-kleros-case-in-mexico/
[46] https://indiacorplaw.in/2022/06/blockchain-arbitration-in-india-adopting-the-hybrid-model-envisaged-by-mexican-kleros-case.html#:~:text=Recently%2C%20a%20Mexican%20court%20upheld,are%20written%20entirely%20in%20code.
[47] https://indiankanoon.org/doc/173015163/
[48] https://www.indiacode.nic.in/bitstream/123456789/1978/1/a1996-26.pdf

Revisited: The Legality of Arbitration Clause and Anti-Suit Injunction

Dr Chinwe Egbunike-Umegbolu



Chinwe is an ESRC-UKRI-funded Postdoctoral fellow and a Fellow of the American Bar Association (ABA) Dispute Resolution (Mediation Committee). She is a Barrister and Solicitor of the Supreme Court of Nigeria and a lecturer at the Law Department University of Brighton (UoB). Her doctoral studies at the University of Brighton, conducted primarily at Lagos Multi-Door Courthouse (LMDC) and at Enugu State Multi-Door Courthouse (ESMDC), aimed to assess the Court-Connected ADR and the impact of the LMDC, which is the first court-connected ADR center in Africa, on other states' adoption of similar initiatives, like the ESMDC. She is also an accredited mediator, an ADR blogger, podcast Trainer, consultant, and host of Expert Views on ADR (EVA) Vid / Podcast.

ABSTRACT

The paper critically examines the impact of the UK Supreme Court's decision as to the legality of the arbitration agreement after the Kazakhstan Supreme Court had declared the agreement to be invalid. It also explores the implication of the verdict and how the UK Supreme Court arrived at such a determination. The work further scrutinises the impact of the anti-suit injunction and the reasons given by the UK Supreme Court to intervene in a matter relating to court proceedings in a foreign jurisdiction. The work utilises the black-lettered method of data gathering. It concludes by justifying the stance of the apex court in her decision not to be held captive by the English Arbitration Act 1996.

INTRODUCTION

The paper examines the decision of the UK Supreme Court in the case of AES Ust-Kamenogorsk Hydropower v Ust-Kamenogorsk Hydropower Plant JSC, which was declared invalid by the Kazakhstan Supreme Court, irrespective of its validity and enforceability[1]. The presiding judge was of the view that it was time to take issues on a case-by-case basis rather than relying on the old legal decision, in which the lead judgement was given by Lord Mance JSC, with whom the other four judges agreed[2] , demonstrating that the court would not flinch from difficult decisions as long as there are substantial legal reasons for doing so. It is, however, surprising that this power demonstrated by the English court is limited by the Brussels Regulation by the EU Court of Justice in the West Tankers case[3]; it now means that an English court can no longer enforce contractual rights by injuncting a party within its jurisdiction from continuing proceedings in a foreign court in Brussels[4]. This distinction is crucial because when we refer to the courts in future following the decision, in this case, the difference must be borne in mind[5]. This decision is significant for the simple reason that the judges were willing to take a very definite

[1]Ust-Kamenogorsk Hydropower Plant JSC (Appellant) v AES Ust-Kamenogorstk Hydropower Plant LLP (Respondent) [2013] UKSC 35
[2]Ibid
[3]West Tankers Inc v Ras Riunione Adriatica di Sicurta Spa [2005] 2 All ER (COMM) 240
[4]West Tankers Inc v Ras Riunione Adriatica di Sicurta Spa [2005] 2 All ER (COMM) 240.
[5]Turner v Grovit [2001] UKHL 65: [2002]1WLR 107.

stand against what they thought was the right thing to do in this individual case. They pointed out that issues of this nature must be treated on a case-by-case basis,[6] having removed the then hoodoo surrounding the reluctance of the English courts to intervene in injunctive reliefs concerning actions taken in the foreign court.

THE LEGALITY OF THE ARBITRATION CLAUSE

The Issue was whether the High Court in England was right to entertain or look into a concession agreement entered by the owners against the operators AES Ust-Kamenogorstk Hydropower Plant LLP.[7] The agreement was governed by Kazakh law but contained an arbitration clause providing for arbitration in London[8]. In proceedings relating to the concession, the Supreme Court in Kazakhstan held that the arbitration clause was contrary to Kazakhstan public policy and thus invalid[9]. Therefore the claimant who had not commenced arbitration proceedings and had no intention or wish to do so, commenced proceedings in England for a declaration as to the validity of the arbitration clause and obtained without notice an interlocutory anti-suit injunction in respect of the Kazakh court[10]. In challenging the decision of the UK Supreme Court the defendant relied on Section. 44 of the Arbitration Act 1996 that in as much as there was no actual or intended arbitration, there was no jurisdiction to grant an injunction under section.37 of the Senior Courts Act 1981[11].

This case is compelling for the reasons advanced by the EU Court of Justice (court of first instance) or reaching its conclusions. First, the court relied on sec.32 (3), showing that the decision by the Supreme Court of Kazakhstan did not bind it and that it would neither recognise the decision nor enforce it[12]. Secondly, it proffered the idea that English public policy favoured the enforcement of arbitration clauses and, thirdly, that the agreement was adequately construed and did not offend Kazakh public policy[13]. Fourthly, there was a good case that the claimant had not submitted to the Kazakh economic court for the purposes of Sect.33 of 1982[14]. The defendant appealed this decision, and the UK Court of Appeal dismissed it[15].

The writer seeks to explore the rationale of the decision taken by the UK Supreme Court and why this may have changed the legal climate as it affects declarative relief and an anti-suit injunction against foreign proceedings, where there had been an undertaking not to bring those actions[16].

Regarding the arbitral agreement, the Supreme Court of Kazakhstan held that one of the key provisions in the arbitral agreement in clauses 17.8 and 17.9, which dealt with tariffs, was outside the arbitral agreement and was meant to be dealt with by an expert.[17] The English court argued that the disputes related to tariff were against Kazakh public policy as it puts it beyond its control.[18] The English court equally accepted that this was outside the arbitral agreement but argued that if adequately construed, it was not against the Kazakh public policy.[19] But the second point on which the Supreme Court of Kazakhstan dismissed the arbitration agreement as even more controversial.[20] In their view, the Kazakh court thought that the refe-

[6] Philip Clifford, English Supreme Court Confirms Power To Issue an Anti-Suit Injunction, Even if no Arbitration is Contemplated (Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP)[2013] UKSC 2.
[7] Ibid
[8] Smith Herbert, Aes Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35[2013] WLR (D) 232 (The Incorporated Council of Law Reporting for England &Wales) 2-3.
[9] Ibid 1.
[10] Ust-Kamenogorsk Hydropower Plant v Ust-Kamenogorsk Hydropower Plant JSC Supreme Court [2013] UKSC 3.
[11] Ibid 1.
[12] Civil Jurisdiction & Judgement Act 1982 Section 32(3).
[13] Dan Tench, Laura Coogan, Sophie Harbord, Luke Pardey, Case Preview: Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP (UKSC blog 2013)1-2< https://www.ukscblog.com>accessed on 6th April 2020
[14] Civil Jurisdiction & Judgement Act 1982 Section 32(3).
[15] Dan Tench, Laura Coogan, Sophie Harbord, Luke Pardey, Case Preview: Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP (UKSC blog 2013)1-2< https://www.ukscblog.com>accessed on 6th April 2020
[16] Ust -Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35
[17] Ibid.
[18] Ibid.
[19] Supreme Court of the Republic of Kazakhstan <https://sud.gov.kz/eng> accessed 1st May 2023
[20] Ibid

-rence in clause 32[21] did not refer to ICC and left the arbitral body unspecified.[22] This is a strange ruling by the Kazakh Court as there is, in their opinion, only one ICC, and to discard the arbitration agreement on that basis leaves much to be desired.[23] It was therefore not surprising that Burton J concluded that neither the ground espoused by the Kazakh court was sustainable.[24]

The focal point here is that AES Ust-Kamenogorsk Hydropower Plant LLP ("AES") had been frustrated through consecutive rulings by Kazakh courts and was left with no alternative but to seek relief from the English courts, as attempts to stay proceedings under the arbitration agreement were rejected by the Kazakh "Economic Court.''[25] Ust-Kamenogorsk Hydropower Plant JSC ("JSC"), on its part, refused to give any undertaking that it would cease asking for further information nor from taking further proceedings in Kazakhstan.[26] These were, therefore, the reasons for the hearing in the court of the first instance and the Court of Appeal.[27] "JSC" was unsuccessful on both appeals, and the matter proceeded to the UK Supreme Court.[28]

The process through which the Supreme Court reached its decision was based on pragmatism and a real review of what was available to the disputant according to precedent.[29] Thus, it will form the basis of this analysis. Before proceeding to how the Supreme Court reached its decision, it is pertinent to point out that an arbitral tribunal could rule on their jurisdiction under section. 30 of the Arbitration Act 1996, their ruling could be tested under sec.32, 67, and 72 and the court was asked to give interim relief under sec.44.[30]

However, the logic of their argument is such that they had argued about the effect of section 30 of the Arbitration Act 1996 which primarily deals with the situation where a tribunal would rule in its substantive jurisdiction whether there is a valid arbitration agreement, whether the tribunal is adequately constituted or whether the matter has been submitted in accordance with the arbitral agreement.[31] It certainly reflects the rational of the case of Kompetenz –Kompetenz, lending credence to the above claim is the case of Dallah,[32] in which it was held that a tribunal might rule whether the question was within its jurisdiction. It, however, does not prevent the court from reviewing the tribunal decision based on sec. 32, 67 or 72 of the English Arbitration Act 1996.[33]

Consequently, it would appear that there is a difference between the examples relied upon by JSC and the cited authorities as they contemplate a situation where a tribunal hearing is anticipated. After extensive examinations of the above-listed sections, together with the case such as ABB Lummus case, concluded that it has no bearing on the present matter.[34] Here no arbitration proceedings are on foot, and "AES" does not intend or wish to institute any. Sec. 30, 32, 44, and 72 of the Act are all in terms of inapplicable. No arbitration tribunal exists to determine its competence under section.30.'[35] This ruling was inescapable as it is clear that a tribunal cannot be asked to rule on its jurisdiction where no arbitral proceeding was anticipated. In the final analysis, the UK Supreme Court held and in the writer's view rightly so, that "*In these circumstances there is, in my opinion, every reason why the court should be able to intervene directly, by an order enforceable by contempt, under sec. 37.*"[36] To do so cannot be regar-

[21] The ICC Arbitration Rules <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/> accessed 1st May 2023
[22] Ibid
[23] Fiona Bruce, Supreme Court of the Republic of Kazakhstan <https://sud.gov.kz/eng> accessed 1st May 2023
[24] Case Comment: Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013]
[25] Ibid
[26] Ibid
[27] Ibid
[28] Ibid
[29] Ibid
[30] Arbitration Act 1996, Section 32, 67,72.
[31] Ibid.
[32] Dallah Real Estate& Tourism Holding Co v Ministry of Religious Affair of the Government of Pakistan [2010]UKSC 46.
[33] Ibid (n30).
[34] ABB Lummus Global Ltd v Keppel Fels Ltd [1999] 2 Lloyd's Rep 24.
[35] Ibid (n32).
[36] Ibid (n34).

as intervening in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation as the means for resolving their disputes.[37]

THE POWERS OF ENGLISH COURT TO GRANT INJUNCTIVE RELIEF AGAINST FOREIGN COURT'S DECISION.

The power of the English Court's to decide about the jurisdiction of a tribunal whose seat is London is one thing, but to make an injunctive order to a party to a dispute from pursuing their claim in a foreign court is the subject of our next inquiry. Before going further, it is vital at the outset to lay a brief foundation. First, Burton J's order needs to be revisited:

"The claim, the subject matter of the [Kazakhstan proceedings] or any other claim arising out of or in connection with any matter or thing concerning the provisions of the Concession Agreement ... save only for excepted matters, arbitration proceedings in the International Chamber of Commerce in London and under its Rules.'[38]

The second point is that the ruling above was accepted by both the appellant and respondent as being the final order.[39] This issue was not challenged throughout the appeal, thus demonstrating that specific claims could only be adequately pursued in arbitration and restraining their pursuit in any other forum. So future claims can only proceed in line with Burton J's[40] order and injunction; it appeared that the Supreme Court had proceeded on that basis.[41] Hence, the principle brings out a peculiar feature which compares the power to apply for a stay under sec. 9 of the arbitration, with the power to injunct foreign proceedings.[42] Why this is crucial, is the fact that it demonstrates that the UK Supreme Court has not done anything strange. It could be considered from this perspective to be within the remit of the courts. What was, however, interesting was the remark made by the judges that the previous caution must be re-examined and a more robust approach adopted in this case.[43] Therefore, the court was not impressed with the view expressed by JSC.[44] In the sub-heading below, the paper would now examine how the Supreme Court relied on its characteristics boldness to use the powers conferred on it by sec. 37 to injunct against the commencement or continuation of foreign proceedings.

AUTHORITIES ANALYSED

The authorities for the formulation of the decision to rule on the need for the UK Supreme Court to intervene in the matter of whether the arbitration clause was enforceable had been dealt with above. But having said that there was no dispute as to Burton J's decision in the course of the appeal from both sides, the writer is left with pointing out the reason for the protracted appeals. However, it is crucial to explore the authorities on how the UK Supreme Court examined the various options available to them and why they choose to take the path they took.

First, they examined the ratio of the case of Pena Copper Mines Ltd v Rio Tinto Ltd, Moulton LJ said *"that words in the arbitration clause were that they would not sue in foreign court"* was certainly contrary to their contractual duties.[45] This was the point reached over a hundred years ago, so the UK Supreme Court proceeded to a more recent case in the 1990s; they examined the decision in the case of Aggeliki Charis Cia Marittima SA v Pagnan Spa.[46] In this case parties had agreed to arbitrate in London and then the Charterers took proceedings in Venice. The Court of Appeal held citing Pena Copper and other authorities, that the courts ought not to feel different about granting an anti-suit injunction if sought promptly.[47] But the ideas of the court in the 1990s were such that the

[37] Ibid 12.
[38] Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35
[39] Ibid 7.
[40] Ibid 3
[41] Ibid 7
[42] Arbitration Act 1996, Section 9.
[43] Ibid (n38).
[44] Ibid 8.
[45] Pena Copper Mines Ltd v Rio Tinto Ltd, Moulton LJ [1911] 105 LT 846.
[46] Aggeliki Charis Cia Marittima SA v Pagnan Spa [1995] 1 Lloyd's Rep 87.
[47] Pena Copper Mines Ltd v Rio Tinto Co Ltd [1911]105 LT 846

1990s were such that the courts were willing to injunct foreign proceedings brought in breach of not having a right to *"interfere with the conduct of proceedings in a foreign court.''* This showed that the English courts approach to foreign proceedings was cautious and non- interventionist; therefore, for the Lordships to proceed from this approach to the present is a demonstration of a massive shift in outlook. Hence, Millet LJ words highlighted the new strategy, which this case note considers to be the pointer and essence of this paper.[48] He said that the time has come, the question must be the present and in essence showing the shift in intent and purpose of the courts) for the courts *"to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution.''*[49] An injunction should be granted to restrain foreign proceedings in breach of an "arbitration agreement on a simple and clear ground that the defendant has promised not to bring them.''[50] The reasons for the appeals through to the UK Supreme Court could now be appreciated, that there was an apparent controversy between the position held by AES and JSC. While it is JSC's position that the injunction was a violation of the lawful right chosen by the parties to settle their dispute and that the English court's proceeding was neither needed nor required, as parties have chosen to arbitrate.

CONCLUSION

The paper concludes that the approach for or by the UK Supreme Courts to abandon its conservative approach to a declarative and injunctive order against foreign proceedings was reckless. This case signals a new approach by English courts to become pro-active in their quest to granting injunctions against the backdrop of acting within their lawful authority. Nothing makes this position more salient than the statement made by His Lordship *"Where an order is sought to restrain foreign proceedings in breach of an arbitration agreement; whether on an interim or final basis and whether at a time when arbitral proceedings are or are not on foot or proposed." "The source of the power to grant such an injunction is to be found not in sec.44 of the 1996 Act but in sec.37 of the 1981 Act."*

This, therefore, justifies the stance of the apex court in her decision not to be held captive by the English Arbitation Act of 1996 which further noted that sec. 37 of the 1981 Act gives the court and all-encompassing power to endorse the decision of Burton J. Hence, the appeal of JSC was accordingly dismissed. This decision therefore, opens in this writers view the flood gate of new cases that would jump on the bandwagon of this landmark case

***

[48] Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013]UKSC 35.7-8
[49] Ibid 7-8.
[50] Ibid 8.

Profile Highlight: Sponsors for the AIADR Mediation Competition 2023

Introduction

At the core of AIADR's mission is a strong belief that disputes, no matter how intricate or contentious, can be turned into opportunities for understanding, growth, and collaboration. We are devoted to empowering individuals, organizations, and communities throughout Asia with the necessary knowledge, skills, and resources to navigate conflicts with wisdom and empathy.

As a testament to our steadfast commitment to advancing alternative dispute resolution (ADR), we introduce the inaugural AIADR Mediation Competition. This platform is specifically designed to elevate the practice of mediation and increase awareness of the transformative potential of ADR. By offering students a real-world opportunity to participate in the art of mediation and negotiation, our goal is to cultivate a new generation of adept and passionate mediators and negotiators.

On October 1, 2023, we successfully concluded the final round of the Mediation Competition, which featured teams from four different jurisdictions, including Indonesia, Hong Kong, India, and Malaysia. The participants showcased a profound understanding of the mediation process, coupled with a genuine enthusiasm for promoting peaceful conflict resolution.

On that note, we would like to take this opportunity to express our gratitude to our generous sponsors, without whom this competition would not have been possible. In the following pages, you will have an opportunity to learn more about them.

PLATINUM SPONSOR

belden

Belden is a boutique legal practice recognised as specialists in construction and engineering dispute resolution. Belden's core expertise is in construction & engineering, oil & gas, energy & utilities, and insurance claims related to these industries. The firm's expertise, coupled with their meticulous analysis, lead to effective management and resolution of claims and disputes. Their lawyers are capable of analyzing complex engineering and technical issues to support experts, consultants and technical teams involved in disputes and claims. Their experience ensures they understand industry requirements and their clients' desire to balance risk and reward and aim for a win-win solution. The partners at Belden have a hands-on approach in every engagement. Because of their attention to detail, they leave no stone unturned in every issue they are asked to advise upon.

AIADR Mediation Competition 2023

PLATINUM SPONSOR

北京仲裁委员会
Beijing Arbitration Commission
北京国际仲裁中心
Beijing International Arbitration Center

The Beijing Arbitration Commission, also known as the Beijing International Arbitration Center (the BAC/BIAC), was established on 28 September 1995. Over the past two decades, the BAC/BIAC has become a leading arbitration institution in China with an international reputation for its independence, impartiality, professionalism, efficiency, and excellence. Since 2013, the Commercial Dispute Resolution in China: An Annual Review and Preview has become a major source of information concerning China's dispute resolution practice and has been highly recognized in the industry. The BAC/BIAC has been invited as an observer for the UNCITRAL Working Group II since 2017. The BAC/BIAC was recommended as one of the arbitration institutions within the "one-stop" diversified international commercial dispute resolution platform established by the China International Commercial Court in 2018. The BAC/BIAC released Investment Arbitration Rules in 2019, which provides a Chinese approach in response to investor-state dispute settlement reform. The BAC/BIAC also provides other alternative dispute resolution services such as commercial mediation and construction dispute board.

AIADR Mediation Competition 2023

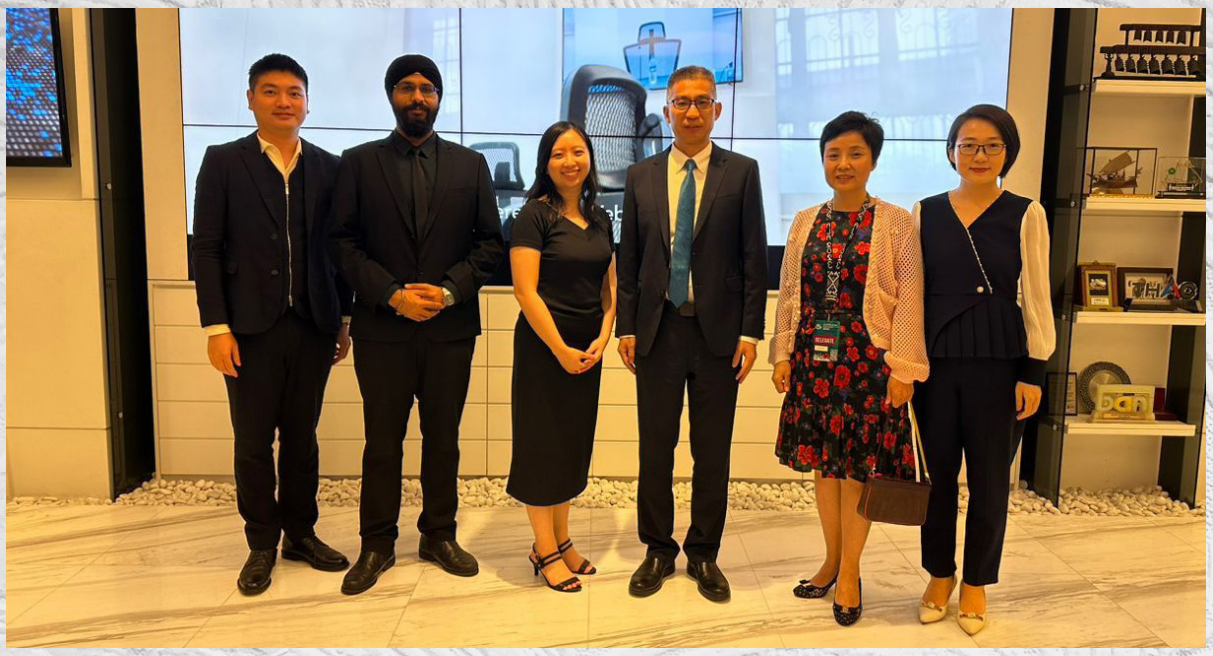
PLATINUM SPONSOR

JUSTLAW
广西岱威优律师事务所
GUANGXI JUSTLAW LEGAL FIRM

JUSTLAW is a comprehensive legal service provider from ASEAN-Business District, Nanning China. We are one-stop center, principally bridging China and ASEAN foreign related legal services and business platform. In aiding Chinese enterprises going abroad, mergers and acquisitions, investment, and promote international trade cooperation, are part of our firm's forte to provide risk assessment, prevention and avoidance measures. Armed with ethics, integrity and professionalism, we use our vast experience to help customers in resolving international disputes, to amicably resolve disputes by negotiation, mediation, arbitration, litigation and other ADR means.

AIADR Mediation Competition 2023

Highlights From AIADR's Past Events



Distinguished delegation from the Hainan International Arbitration Court (HIAC) on the 20th of October 2023 meeting with AIADR.

Chairperson of the Business Development and International Relation Committee (BDIRC) Dato Ricky Tan speaking on behalf of at the China-ASEAN Sub-Forum for Regional Legal Cooperation

Highlights From AIADR's Past Events

AIADR & AIAC Renewing their collaboration agreement in a signing ceremony held on the 11th of October

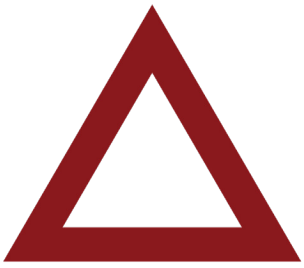
Participants of the AIADR JP Selangor Community Mediation Training program with the YA Dato' Lim Chong Fong, Court of Appeal Judge.

Upcoming Events.

8 - 13 December
AIADR Mediation Training Course

10 December 2023
AIADR Networking Dinner

16 - 18 February 2023
Allen & Overy - NLUJ International Deal Negotiation Competition



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 welcomed.

Next Cut-off Date for Submission of Contributions:
Newsletter: 1st January 2024
Journal : 15th January 2024

Direct your queries to aiadr.editor@aiadr.world.

ASIAN INSTITUTE OF ALTERNATIVE DISPUTE RESOLUTION
Delivering Excellence in ADR

The Asian Institute of Alternative Dispute Resolution
No.28-1, Jalan Medan Setia 2,
Bukit Damansara, 50490,
Kuala Lumpur, Malaysia.
T: (60) 3 2300 6032
E: thesecretariat@aiadr.world
URL: https://aiadr.world

eISSN 2735-0800
9 772735 080008