ASIAN INSTITUTE OF ALTERNATIVE DISPUTE RESOLUTION
Delivering Excellence in ADR

ADR CENTURION

Inside this Issue

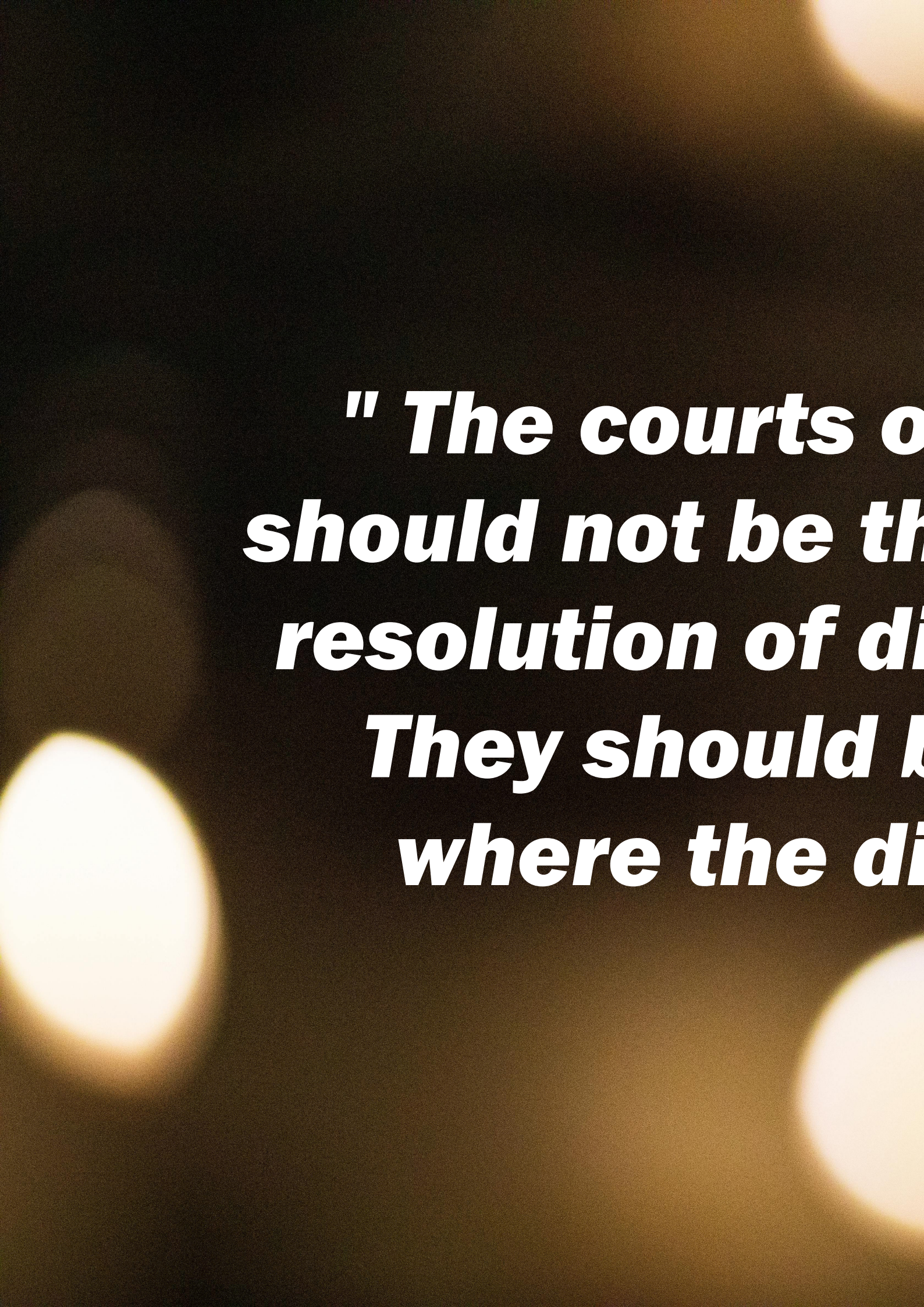
FEBRUARY 2024
Volume 5
Issue 28

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


" The courts o
should not be th
resolution of di
They should l
where the di


of this country
ne places where
isputes begins.
be the places
isputes end"
Sandra Day O'Connor

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,

As we kick off the new year, I am delighted to present you with the 28th Issue of the ADR Centurion. We are thrilled to welcome in the new year, as AIADR has numerous exciting activities planned for 2024. 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 also like to take this opportunity to thank the Governance Council, Office Bearers, committee members, AIADR Secretariat, partner organizations, valued members, and our newest subscribers for driving AIADR towards its goals. Please keep an eye out for our updates and posts on various social media platforms including Facebook, LinkedIn, Twitter, Youtube, and Instagram.

While we are excited about the future, it is pertinent to take stock of the past and reflect on how we as an institute have grown. At this time, I take the pleasure to share with all members some of our recent work and initiatives in the past two months as follows:

1. Firstly, AIADR successfully conducted its second Mediation Training Course from the 8th to the 13th of December 2023. The course, officially recognized by the International Mediation Institute (IMI), attracted participants from diverse jurisdictions. The IMI is an independent organization that promotes global mediation standards and advocates for excellence in the field of dispute resolution. As such, this recognition underscores AIADR's unwavering commitment to delivering top-notch mediation training aligned with international standards.

The success of the second AIADR Mediation Training Course stands as a testament to the institute's dedication to cultivating a culture of continuous learning and professional development in the field of dispute resolution. Notably, this training was conducted in-person, providing a hands-on and immersive experience for participants seeking to enhance their skills in mediation.

2. Next AIADR organized the "Mediation Practice in Asia" workshop on the 10th of December 2023, extending a unique opportunity to participants to gain a distinctive perspective on the development and growth of mediation in Asia. This workshop was tailored to enrich the learning experiences of participants, providing valuable insights into the evolving landscape of mediation practices in the region.

The workshop, was free for all AIADR members, aimed to add value and support ongoing learning, demonstrating our commitment to enhancing the professional growth of our members.

The event featured esteemed speakers, Mr. Randolph Khoo and Ms. Louise Azmi, both recognized authorities in the field of mediation. heir expertise and experiences added depth to the workshop, allowing participants to glean insights fr-

-om their extensive knowledge of the Asian mediation landscape.

3. Following the successful workshop on Mediation Practice in Asia, AIADR was delighted to host a Networking Dinner on the evening of December 10, 2023. The primary purpose of this event was to provide a platform for members of AIADR and like-minded ADR practitioners to connect, network, and exchange ideas in a relaxed and lively setting.

The Networking Dinner offered a unique opportunity for professionals in the field of alternative dispute resolution to foster meaningful connections and share experiences. Attendees had the chance to engage in discussions, exchange insights, and build valuable relationships with fellow practitioners who shared a common interest in advancing the practice of mediation.

AIADR remains committed to creating environments that facilitate collaboration and knowledge exchange. This Networking Dinner serves as a continuation of this commitment, encouraging an atmosphere of camaraderie and mutual support within the ADR community.

4. On the 27th of December 2023, AIADR had the privilege of hosting a courtesy visit from the Xiamen Municipal Bureau of Justice, led by Mr. Tang Qian, Deputy Director. This courtesy visit went beyond conventional formalities, marking a significant stride in fostering meaningful dialogue and exploring potential avenues for future collaboration between the Xiamen Municipal Bureau of Justice and AIADR. The meeting served as a valuable platform for both entities to exchange ideas and insights, setting the stage for possible joint initiatives and cooperative endeavours.

5. Next, AIADR was pleased to organise a webinar on "International Arbitration in Central Asia" that took place on the 12th of January 2024. The primary objective of this webinar was to provide participants with a distinctive perspective on the development and growth of arbitration practices in Central Asia.

Distinguished speakers from Kazakhstan, Kyrgyzstan, and Uzbekistan shared their expertise, offering valuable insights into the regional dynamics and advancements in the field of international arbitration. The webinar served as an opportunity for participants to gain a comprehensive understanding of the unique challenges, trends, and successes shaping the landscape of arbitration in Central Asia. We appreciate the participation of all attendees who joined us for this informative session.

6. Lastly, I am pleased to announce that AIADR served as the resource partner for the Lex Infinitum 2024 International Dispute Resolution Competition, organized by V.M. Salgaocar College of Law. The competition, held from the 18th to the 20th of January 2024, brought together participants from around the globe to engage in simulated dispute resolution scenarios and gain practical insights into the field.

Our partnership with V.M Salgocar School of Law exemplifies AIADR's dedication to promoting alternative dispute resolution methods and nurturing the next generation of legal professionals. The event provided a platform for participants to enhance their skills in dispute resolution, and we are honoured to have been part of this enriching experience.

We extend our gratitude to V.M. Salgaocar College of Law for the collaboration and look forward to continued partnerships with educational institutions and organizations, further advancing the field of alternative dispute resolution.

With that, I would like to conclude by expressing my utmost gratitude to all of our members for their continued participation and support in our activities and events. We look forward to bringing more value to our members and the ADR community in the year 2024.

Ensuring Clear Paths To Redress: Examining The Shifts In Judicial Review Of CIAC Arbitral Awards

Michael Marlowe G. Uy

Michael Marlowe G. Uy is a Partner at Kua Sy & Yeung Law Offices (SKY Law). He holds a Master in International Law, Foreign Trade and International Relations from the Instituto Superior de Derecho y Economia (ISDE) in Madrid and a Juris Doctor from the University of the Philippines College of Law. He is an accredited arbitrator and the current Deputy Secretary General for Operations of the Philippine International Center for Conflict Resolution (PICCR). He has recently been admitted in the panel of arbitrators of the Thailand Arbitration Center (THAC). He is also an Assistant Vice-President for the Development Community (SIG – Mediation and Negotiation) of the Philippine Institute of Arbitrators (PIArb), a Fellow of the Philippine Arbitration Center in the Visayas (PACV), a recognized arbitration practitioner (2nd level) of the Office for Alternative Dispute Resolution of the Department of Justice in the Philippines, a Member of the Chartered Institute of Arbitrators (CIArb) and the Asian Institute of Alternative Dispute Resolution (AIADR).

Mark John T. Yeung

Mark John T. Yeung is a Mid-level Associate at Kua Sy & Yeung Law Offices (SKY Law) whose current practice focuses on corporate and commercial transactions, as well as labor and employment matters. He has been involved in applications before government agencies such as the Securities and Exchange Commission and the Department of Labor and Employment, and has played a key role in negotiations with a local conglomerate regarding properties affected by the MRT7 and Skyway Projects. In addition to his transactional work, John has extensive experience in drafting pleadings for various legal matters, including labor disputes, civil and criminal cases, and construction arbitration disputes before the Construction Industry Arbitration Commission (CIAC). His legal training began during his time as a student intern at the University of the Philippines Office of Legal Aid, where he drafted pleadings and attended court hearings for indigent clients. Notably, he was nominated as one of the Outstanding Law Interns of his graduating batch.

Introduction

The Construction Industry Arbitration Commission ("CIAC") in the Philippines was established in 1985 under Executive Order (E.O.) No. 1008 titled "Creating an Arbitration Machinery for the Philippine Construction Industry." This creation was driven by the recognition of the imperative need for an efficient arbitration mechanism dedicated to settling disputes within the construction industry. The expeditious resolution of issues connected to construction was deemed essential for achieving national development goals, as the construction industry provided employment to a large segment of the national labor force, and was a leading contributor to the gross national product.[1]

Under Section 4 of E.O. No. 1008, the CIAC is vested with original and exclusive jurisdiction involving disputes arising from, or connected with contracts

[1] Licomcen Incorporated v. Foundation Specialists, Inc., G.R. Nos. 167022 and 169678, 04 April 2011, 647 SCRA 83, 96.

entered into by parties involved in construction in the Philippines, whether the disputes arise before or after the completion of the contract, or after the abandonment or breach thereof. These disputes may involve government or private contracts. The Supreme Court of the Philippines has held that the CIAC's jurisdiction over construction disputes to include those arising from, or connected to, contracts involving "all on-site works on buildings or altering structures from land clearance through completion including excavation, erection and assembly and installation of components and equipment."[2]

An arbitral award issued by CIAC is binding upon the parties, but nonetheless can be subject to judicial appeal or review.

Changes in the judicial review of CIAC arbitral awards

On 11 May 2021, the Supreme Court of the Philippines sitting En Banc promulgated its decision in the landmark case of Global Medical Center of Laguna, Inc v. Ross Systems International, Inc. ("Global Medical Center")[3] The decision changed the available remedies to an arbitral award rendered by a sole arbitrator or an arbitral tribunal in a CIAC arbitration.

The 2023 CIAC Revised Rules of Procedure,[4] particularly Section 18.2 thereof, mirrors the changes in the available remedies to a CIAC arbitral award as held by the Supreme Court in the Global Medical Center case.

For comparison, Section 18.2 of the 2019 CIAC Revised Rules of Procedure and Section 18.2 of the 2023 version read as follows:

2019 CIAC Revised Rules of Procedure	2023 CIAC Revised Rules of Procedure
Section 18.2. Petition for review – A petition for review from a final award may be taken by any of the parties within fifteen (15) days from receipt thereof in accordance with the provisions of Rule 43 of the Rules of Court.	SECTION 18.2. Recourse against final award. - Recourse against a final award may only be taken through either of the following modes: 1. Where a party seeks to raise pure questions of law, by appeal to the Supreme Court through a petition for review under Rule 45 of the Rules of Court; or 2. Where a party seeks to appeal factual issues but only on the limited grounds that pertain to either a challenge on the integrity of the CIAC arbitral tribunal (i.e., allegations of corruption, fraud, misconduct, evident partiality, incapacity or excess of powers within the Tribunal) or an allegation that the arbitral tribunal violated the Constitution or positive law in the conduct of the arbitral process, by a petition for certiorari in accordance with the provisions of Rule 65 of the Rules of Court, on grounds of grave abuse of discretion amounting to lack or excess in jurisdiction. 3. An appeal to the Supreme Court shall be filed within fifteen (15) days, and a petition for certiorari to the Court of Appeals within sixty (60) days, from notice of the final award.

[2] Metropolitan Cebu Water District v. Mactan Rock Industries, Inc., G.R. No. 172438, 04 July 2012, 690 PHIL 163-192.
[3] G.R. Nos. 230112 & 230119, 11 May 2021.
[4] Issued last 01 January 2023.

Given the foregoing, it is apparent that the current modes of appeal provided under Section 18.2 of the 2023 CIAC Revised Rules of Procedure are significantly different from the remedies made available in the previous rules. With this in mind, the question arises: What prompted the Supreme Court in the Global Medical Center case to change the rules for judicial appeal of a CIAC arbitral award? If the previous version of Section 18.2 of the CIAC Revised Rules of Procedure is anchored upon Rule 43, Section 1 of the Rules of Court[5], what then is the legal basis of the current modes of judicial review?

To answer these questions, we need to revisit the relevant discussions made by the Philippine Supreme Court in the Global Medical Center case.

Original Intent of E.O. No. 1008

In the Global Medical Center case, the Supreme Court noted that the intention of E.O. No. 1008 is to remove "the disputes of the industry from the languid and problematic machinery of the courts." This intent is evident not only in its whereas clause[6], but in Section 19 of E.O. No. 1008, which makes the CIAC arbitral awards decisive and conclusive. Section 19 reads:

"Sec. 19. Finality of Awards. The arbitral award shall be binding upon the parties. It shall be final and [u]nappealable except on questions of law which shall be appealable to the Supreme Court."

Noticeably absent in the appeal process is the role of the Court of Appeals. Moreover, it is clear that when questions of law are involved, the same can only be appealed to the Philippine Supreme Court.

Departure from E.O. No. 1008: The inclusion of the Court of Appeals in the appeal process

The inclusion of the Court of Appeals in the appeal process marked a departure from E.O. No. 1008. The Philippine Supreme Court noted this development, highlighting that the Court of Appeals' involvement began on 16 May 1995 when the Supreme Court issued Revised Administrative Circular No. 1-95, amending Circular No. 1-91. The revising circular added the CIAC in the enumeration of quasi-judicial agencies, the decisions of which may be appealed to the Court of Appeals. Furthermore, it permitted appeals to the Court of Appeals for questions of fact or a mixed of questions of fact and law.

This change was subsequently incorporated into Rule 43, Section 1 of the 1997 Rules of Civil Procedure, a rule that the CIAC followed in its previous rules of procedure and its subsequent revisions, up to the 2019 CIAC Revised Rules of Procedure.

Since then, CIAC cases have been appealed to the CA through a petition for review under Rule 43. Examples of these cases are the following: *Metro Construction, Inc. v. Chatham Properties, Inc.,*[7]

[5] Rules of Court, Rule 43, Sec 1:

RULE 43

APPEALS FROM THE COURT OF TAX APPEALS AND QUASI-JUDICIAL AGENCIES TO THE COURT OF APPEALS

Section 1. Scope. – This Rule shall apply to appeals from judgments or final orders of the Court of Tax Appeals and from awards, judgments, final orders or resolutions of or authorized by any quasi judicial agency in the exercise of its quasi-judicial functions. Among these agencies are the Civil Service Commission, Central Board of Assessment Appeals, Securities and Exchange Commission, Office of the President, Land Registration Authority, Social Security Commission, Civil Aeronautics Board, Bureau of Patents, Trademarks and Technology Transfer, National Electrification Administration, Energy Regulatory Board, National Telecommunications Commission, Department of Agrarian Reform under Republic Act No. 6657, Government Service Insurance System, Employees Compensation Commission, Agricultural Inventions Board, Insurance Commission, Philippine Atomic Energy Commission, Board of Investments, Construction Industry Arbitration Commission, and voluntary arbitrators authorized by law. (Emphasis supplied)

[6] EO No. 1008, the Whereas clauses provide:

WHEREAS, there is a need to establish an arbitral machinery to settle such disputes expeditiously in order to maintain and promote a healthy partnership between the government and the private sector in the furtherance of national development goals;

WHEREAS, Presidential Decree No. 1746 created the Construction Industry Authority of the Philippines (CIAP) to exercise centralized authority for the optimum development of the construction industry and to enhance the growth of the local construction industry;

WHEREAS, among the implementing agencies of the CIAP is the Philippine Domestic Construction Board (PDCB) which is specifically authorized by Presidential Decree No. 1746 to "adjudicate and settle claims and disputes in the implementation of public and private construction contracts and for this purpose, formulate and adopt the necessary rules and regulations subject to the approval of the President"[.]

[7] G.R. No. 141897, 24 September 2001, 418 PHIL 176-208.

Public Estates Authority v. Uy,[8] *Bangko Sentral ng Pilipinas v. Santamaria,*[9] *Pro Builders, Inc. v. TG Universal Business Ventures, Inc.,*[10] *Wyeth Philippines, Inc. v. Construction Industry Arbitration Commission,*[11] *Maxim Philippines Operating Corp. v. First Orient Development and Construction Corp.,*[12] *and Datem, Inc. v. Alphaland Makati Place, Inc.*[13]

Additionally, it is worth mentioning that in the Metro Construction case, the core issue addressed by Supreme Court was whether the Court of Appeals could also review findings of facts of the CIAC. In the Metro Construction case, the Philippine Supreme Court ruled in the affirmative.

Judicial Review of CIAC Arbitral Awards prior to Global Medical Center

Prior therefore to Global Medical Center, the primary mode of judicial review vis-à-vis CIAC arbitral awards was an appeal to the CA through a petition for review under Rule 43 of the Rules of Court. A decision of the CA on such a Rule 43 petition could then be appealed to the Supreme Court via a Rule 45 petition, but only on questions of law.

Return to E.O. No. 1008

In its examination of the relevant rules and laws, the Supreme Court in the Global Medical Center has noted that with the passage of R.A. 9285, also known as the Alternative Dispute Resolution Law of 2004, the appeal process specified in E.O. No. 1008 was restored. Section 34 of R.A. 9285 reads:

"SEC. 34. Arbitration of Construction Disputes: Governing Law. — The arbitration of construction disputes shall be governed by Executive Order No. 1008, otherwise known as the Construction Industry Arbitration Law."

Section 34 thus provided for the return to E.O. No.1008, as the original applicable law, whose Section 19 thereof as cited above, precludes judicial review of the CIAC's factual determination, and exclusively provides that appeals may only be made to the Supreme Court.

Further, on 01 September 2009, to avoid uncertainties as to where the line of review is drawn, the Supreme Court issued Administrative Matter No. (A.M) 7-11-08-SC, 59 also known as the Special ADR Rules. These rules, in particular Rules 19.7 and 19.10 thereof, affirmed the rule on judicial restraint with regard to factual review:

PART VI
RULE 19: MOTION FOR RECONSIDERATION, APPEAL AND CERTIORARI

B. GENERAL PROVISIONS ON APPEAL AND CERTIORARI

RULE 19.7. No appeal or certiorari on the merits of an arbitral award. — An agreement to refer a dispute to arbitration shall mean that the arbitral award shall be final and binding. Consequently, a party to an arbitration is precluded from filing an appeal or a petition for certiorari questioning the merits of an arbitral award. (Emphasis supplied)

xxx xxx xxx

RULE 19.10. Rule on judicial review on arbitration in the Philippines. — As a general rule, the court can only vacate or set aside the decision of an arbitral tribunal upon a clear showing that the award suffers from any of the infirmities or grounds for vacating an arbitral award under Section 24 of Republic Act No. 876 or under Rule 34 of the Model Law in a domestic arbitration, or for setting aside an award in an international arbitration under Article 34 of the Model Law, or for such other grounds provided under these Special Rules.

If the Regional Trial Court is asked to set aside an arbitral award in a domestic or international

[8]G.R. Nos. 147933-34, 12 December 2001, 423 PHIL 407-419.
[9]G.R. No. 139885, 13 January 2003, 443 PHIL 108-123.
[10]G.R. No. 194960, 03 February 2016, 780 PHIL 284-308.
[11]G.R. Nos. 220045-48, 22 June 22, 2020.
[12]G.R. No. 240179 (Notice), 03 February 2021.
[13]G.R. Nos. 242904-05, 10 February 2021.

arbitration on any ground other than those provided in the Special ADR Rules, the court shall entertain such ground for the setting aside or non-recognition of the arbitral award only if the same amounts to a violation of public policy.

The court shall not set aside or vacate the award of the arbitral tribunal merely on the ground that the arbitral tribunal committed errors of fact, or of law, or of fact and law, as the court cannot substitute its judgment for that of the arbitral tribunal. (Emphasis supplied)

With these changes, the Supreme Court concluded that CIAC was effectively, albeit not expressly, removed from the list of quasi-judicial agencies under Rule 43, Section 1 of the Rules of Court.[14]

Appeal via Petition for Certiorari under Rule 65

Interestingly, Rule 19.7 of the Special ADR Rules bars the filing of a special civil action of a petition for certiorari. However, the Supreme Court, in harmonizing E.O. No. 1008, R.A. 9285 (specifically, first paragraph of Rule 19.10 thereof), and the Special ADR Rules, with the Court's constitutional power to take cognizance of petitions alleging grave abuse of discretion, carved an allowance for the factual review of a CIAC arbitral award but only for the narrowest grounds. The Court in the Global Medical Center illustrates:

"If the parties will appeal factual issues, the appeal may be filed with the CA, but only on the limited grounds that pertain to either a challenge on the integrity of the CIAC arbitral tribunal (i.e., allegations of corruption, fraud, misconduct, evident partiality, incapacity or excess of powers within the tribunal) or an allegation that the arbitral tribunal violated the Constitution or positive law in the conduct of the arbitral process, through the special civil action of a petition for certiorari under Rule 65, on grounds of grave abuse of discretion amounting to lack or excess in jurisdiction. The CA may conduct a factual review only upon sufficient and demonstrable showing that the integrity of the CIAC arbitral tribunal had indeed been compromised, or that it committed unconstitutional or illegal acts in the conduct of the arbitration."[15]

This allowance is now embodied in Section 18.2.2 of 2023 CIAC Revised Rules of Procedure.

Conclusion

E.O. No. 1008, the relevant provisions of R.A. 9285 and Special ADR Rules, and their harmonization with the Court's constitutional power to take cognizance of petitions alleging grave abuse of discretion, serve as the legal grounds for the changes in the judicial review of CIAC arbitral awards as held by the Philippine Supreme Court in the Global Medical Center case, and now reflected in Section 18.2 of the 2023 CIAC Revised Rules of Procedure.

Greater certainty has been injected into CIAC arbitration thanks to the Philippine Supreme Court's clear articulation of available remedies. This provides parties and counsels with the confidence to navigate disputes effectively, knowing the precise remedies applicable to each scenario.

[14] Since the removal of the CIAC from the list under Rule 43 is not evident, the then prevailing rule regarding to the judicial review of CIAC arbitral awards was still adhered to and remained unchanged until the promulgation of the Global Medical Center case.
[15] Global Medical Center, supra note 3.

The Use of the FIDIC Contracts in Uzbekistan: Relevant Conclusions as to the Avoidance of Disputes Altogether

Feruza Bobokulova

A certified FIDIC trainer in two categories and a certified FIDIC contract manager, an expert in international law and arbitration at MY LAWYER Law Firm, a member of the International Court of Arbitration of the International Chamber of Commerce (ICC), a member of the Chartered Institute of Arbitrators, a member of Dispute Resolution Board Foundation

Olga TSOY

A certified FIDIC consultant, a board member of the Association of Consulting Engineers of Uzbekistan, a head of the legal department of UzEngineering Design Institute, a member of the Chartered Institute of Arbitrators, member of Dispute Resolution Board Foundation

No construction project in the world is free from claims, conflicts, and disputes. The same is applicable to the infrastructure projects that are realized on the basis of the proforma contracts of the International Federation of Consulting Engineers, i.e. FIDIC. While the occurrence of the conflicts and disputes is the norm, it remains interesting whether it is possible to avoid the future disputes altogether or at least to a certain extent. If yes, what are those keys that help the parties to avoid the disputes to the maximum possible extent? On the basis of the experience as legal experts in more than 20 infrastructure projects that were realized in Uzbekistan, the authors of the current article have determined the points, which can serve as the key to avoid the future disputes. It should be noted that in most cases, these points concern the errors that are frequently made in the said infrastructure projects and that have served as a springboard for disputes. Moreover, the analysis of the experience of Uzbekistan in using the FIDIC Contracts in infrastructure projects demonstrates a number of mistakes made by the parties when preparing the particular conditions of contract as well as during the realization of the project. Therefore, this article will provide a short review of the key points identified by the authors that may be helpful in avoiding the disputes in addition to giving some regard to the mistakes made by the parties at different stages of the infrastructure project.

THE CHOICE OF A SUITABLE CONTRACTOR AS A MEANS OF AVOIDING THE FUTURE DISPUTES

One of the components that can influence the fate of the project concerns the selection of the proper contractors. In international construction projects,

The more detailed these criteria are, the greater is the likelihood of selecting the optimal contractor. When considering the submitted tender bids, the employers should not pay attention to the formal criteria and to the submitted documents only, but they should also consider the previous experience of tender participants in similar projects. It is advisable for internal compliance services of the employer to conduct comprehensive studies on the potential winner of the tender for financial difficulties and other problems.

In the practice of the authors, three projects seriously suffered with the consequent termination of the contract because of the initiation of the insolvency proceedings by the contractors, which had been chosen despite the first signs of financial difficulties being noticeable right after the conclusion of the tender. As a result, in all three projects the parties ended up in arbitration. Moreover, due attention should also be paid to the existence of the relevant licenses and permissions issued to the foreign contractors by the relevant authorities of their state of origin prior to their selection as the winner of the tender.

OUTDATED AND UNREALIABLE DATA ARE THE REASON FOR THE FUTURE DISPUTES

Another common mistake that is encountered in projects realized on the basis of FIDIC proforma contracts is the use of outdated and unreliable data in the design of works, whether carried out by the employer or the contractor. Errors in the design lead to significant difficulties in the realization of the project, which, in turn, is the basis for the first disagreements and conflicts between the parties of the project. Amicable resolution of these situations usually means spending of more money in order to eliminate the errors contained in the design or in order to do the complete redesign.

Unfortunately, the parties are not always able to find additional funding to cover the costs of eliminating the errors of the design or of doing a complete redesign and as a result, there are cases when one of the parties terminates the contract. As a result, the use of outdated and unreliable data when designing the works leads not only to a waste of time and money to resolve the disputes arisen between the parties, but it also leads to the conduct of a new tender and selection of a new contractor. In its turn, this means lost opportunities for all project participants and delayed completion of the project, if such project is completed at all.

THE CHOICE OF A SUITABLE ENGINEER IS THE KEY IN AVOIDING THE DISPUTES

The choice of an experienced and suitable engineer/employer's representative may serve as the key factor in the successful and timely realization of the project. Unfortunately, there were instances in the projects governed by the FIDIC Silver Book when the employers had not appointed their representatives despite the fact that the project was in the active realization stage or when the employers did not grant the relevant powers to the representatives they had appointed. Even if the appointment of the employer's representative is in the prerogative of the employer under the FIDIC Silver Book, the absence of the said representative or the absence of the relevant powers of this representative made the effective and efficient resolution of many issues arising during the project realization difficult. On the basis of these observations as well as of the observations where the engineer and employer had their own disagreements, it can be stated that there is nothing worse than the employer and the engineer being busy with resolving the issues arisen between them instead of the realization of the project.

MISTAKES MADE WHEN DEVISING THE DISPUTE RESOLUTION MECHANISM OF THE CONTRACT

In most cases the difficulty, with which the authors of the article have encountered in their practice, was due to the alteration of the dispute resolution provisions of FIDIC contracts. It should be noted that FIDIC contracts differ from other contracts with their three-tiered dispute resolution mechanism, under which the differences and claims arising between the parties are first dealt by the engineer/employer/employer's representative, then by the dispute adjudication board, and finally by the arbitral tribunal constituted pursuant to the arbitration rules chosen by the parties.

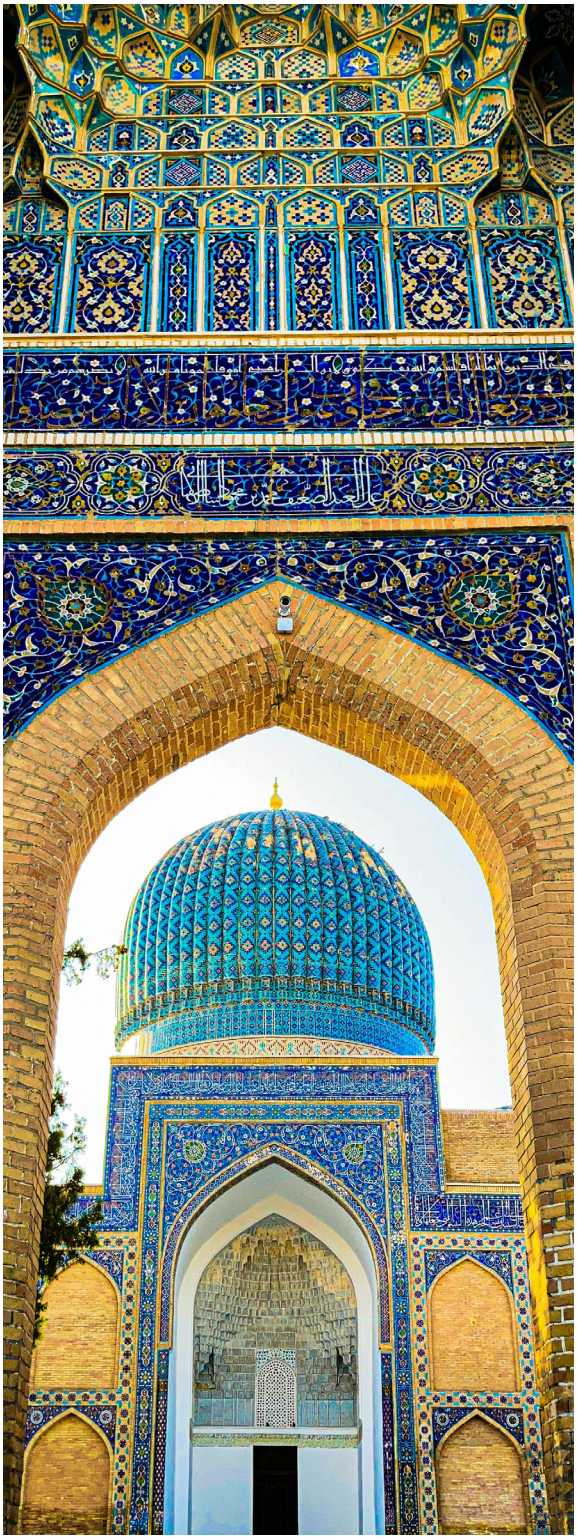
At first glance, the decision to remove the dispute adjudication board provisions appears to simplify and reduce the cost of dispute resolution. However, as the practice shows, such a solution is not effective and efficient as the effectiveness of dispute adjudication boards in resolving the disputes arisen between the parties of construction projects has already been proven by international practice.

The use of dispute adjudication boards leads to more rapid resolution of disputes, reduces the number of referrals to arbitration, and as a result, reduces the cost of the dispute resolution process. With this in mind, the 2017 version of FIDIC contracts elevated the dispute adjudication boards to a new and a higher level: their status was changed from “ad hoc” (temporary) to permanent in all contracts. The right to exercise the relevant functions in the avoidance of disputes was also granted to the dispute adjudication boards by the 2017 version of FIDIC contracts, as the result of which they became ‘dispute avoidance/adjudication board.’ Therefore, the parties should exercise great care when drafting dispute resolution provisions of the particular conditions of the contract.

THE IGNORANCE OF THE PROCEDURAL CHARACTER OF THE FIDIC CONTRACTS

FIDIC contracts have a peculiar procedural character, which means that a due compliance with the time envisaged in such contracts is of utmost importance for any of the parties in making claims under any provision of the contract. As the practice of using FIDIC contracts in Uzbekistan demonstrates, the parties, especially, the employers, ignore the relevant periods for making claims and sending notices, as the result of which they lose their right of claim and an opportunity to recover for damages from the party at fault. Even if the parties try to pursue such claims during the arbitration stage by referring to such possibility on the basis of the applicable law, this does not mean that the arbitral tribunal will accept such claims to its consideration and that it will actually consider them.

As it has been seen above, the best way to avoid the disputes that may arise from infrastructure projects realized on the basis of FIDIC Contracts is to eliminate the causes that may serve as the foundation of the future disputes. Moreover, the significance of the due and timely compliance with the provisions of the contract should not be underestimated by the parties.



Webinar Highlights: International Arbitration in Central Asia

We are thrilled to bring you a brief overview of the enlightening and insightful webinar that unfolded on the 12th of January 2024, Friday, exploring the intricacies of "International Arbitration in Central Asia.

In the context of our interconnected global landscape, this online event, hosted via Zoom at 3 pm (MYT) GMT +8, offered a unique perspective into the dynamic realm of international arbitration, specifically focusing on the burgeoning landscape of Central Asia. The gathering brought together legal minds, experts, and enthusiasts eager to explore the evolving nature of dispute resolution in this pivotal region.

Dmitry Marenkov skillfully steered the conversation, ensuring a thoughtful and engaging discussion that unfolded with insights from three esteemed speakers representing the heartlands of Central Asia: Natalia Alenkina, Bakhyt Tukulov, and Diana Bayzakova, experts hailing from Kyrgyzstan, Kazakhstan, and Uzbekistan, respectively.

Natalia commenced the webinar with an expert exploration of the nuanced evolution of both domestic and international commercial arbitration within the unique context of Kyrgyzstan. She provided a panoramic view of the landscape, tracing the developmental trajectory, and delved into the intricacies of commercial arbitration law in Kyrgyzstan, shedding light on its unique features, with a keen focus on the arbitrability of public disputes. Finally, she drew attention to the crucial interplay between state courts and arbitration, emphasizing key aspects, particularly the setting aside of awards.

Following this, Bakhyt Tukulov commenced his exploration of the legal framework for arbitration in Kazakhstan. He explained that the legal framework in Kazakhstan is comparatively more intricate than that of its neighboring countries in Central Asia. Bakhyt then delved deeper into elucidating the reasons for this complexity, stating that Kazakhstan employs two systems of arbitration courts. The default system, under Kazakhstan law

adopted in 2004 and subjected to numerous amendments, and the second system under the Astana International Financial Centre (AIFC), was incorporated into Kazakhstan through a constitutional amendment. This essentially grants an exemption to the AIFC from the entire legal system of Kazakhstan, as it is instead based on the principles of English Law. Bakhyt then expertly elaborated on the peculiarities of each system and the intricate interplay between them.

Continuing the exploration, Diana Bayzakova focused on the legal framework for arbitration in Uzbekistan. She emphasized three key pillars propelling Uzbekistan onto the global arbitration map: a state-of-the-art arbitration legislation based on the UNCITRAL Model Law, the establishment of the Tashkent International Arbitration Centre (TIAC), and an arbitration-friendly judiciary. Diana explained the advantages and uniqueness of TIAC, citing recent cases illustrating the supportive nature of the Uzbek judiciary in enforcing arbitral awards.

Finally, the session concluded with a highly engaging Q&A session between the participants and the speakers. Among the interesting questions addressed were inquiries about the fees for arbitrators and the cost of arbitration proceedings in Central Asia compared to London and Singapore. Participants also sought information on the development of Med-Arb and Arb Med in Central Asia. Additionally, questions regarding the collaboration between HKAIC and TIAC in relation to the Cross-Institutional Rules of Arbitration were explored. The absence of a setting-aside procedure for an award in Kyrgyzstan, along with discussions on the new draft law addressing this issue, was also a focal point during the Q&A session.

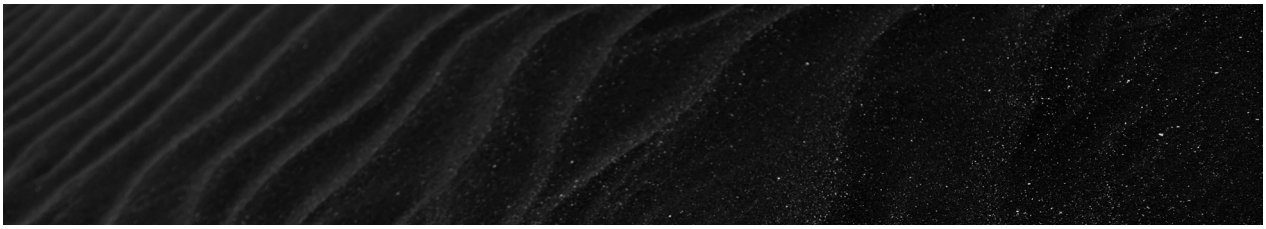
We express our sincere gratitude to all the speakers and the moderator for sharing their time and expertise, making this webinar a success. Special thanks to the participants for their active involvement and thought-provoking questions. If you're interested in watching the webinar, please visit our YouTube channel or click the link provided below:
https://www.youtube.com/live/gic2yVFjozQ?si=7C2E7lX3K6smGj3h

Moderator : Dmitry Marenkov

Dmitry Marenkov is an in-house legal counsel and regularly acts as arbitrator in international commercial cases. He has participated in more than 30 international arbitrations under various rules, including appointments as co-arbitrator, sole arbitrator and presiding arbitrator.

A Fellow of the Asian Institute of ADR and the Chartered Institute of Arbitrators, Dmitry is included in the list of arbitrators of the Hong Kong International Arbitration Centre (HKIAC), Asian International Arbitration Centre (AIAC), Thailand Arbitration Center (THAC) and other institutions.

Dmitry Marenkov is a member of the AIADR Editorial Sub-Committee. He has published on international arbitration and appeared as speaker in conferences.



Speaker : Bakhyt Tukulov

Bakhyt Tukulov is Partner at TUKULOV KASSILGOV SHAIKENOV LITIGATION ARBITRATION in Almaty, Kazhakstan. He represented clients in a large number of high-profile commercial disputes concerning Kazakhstan or Kazakh law. Bakhyt has significant experience acting as an arbitrator in Kazakhstan's arbitration institutions. He frequently acts as an expert in cross-border litigation and arbitration proceedings. Bakhyt Tukulov is a member of the Expert Advisory Commission under the Supreme Judicial Council of the Republic of Kazakhstan. He is authorized to represent the interests of the parties in the AIFC Court and is a CEDR certified mediator.

Speaker : Natalia Alenkina

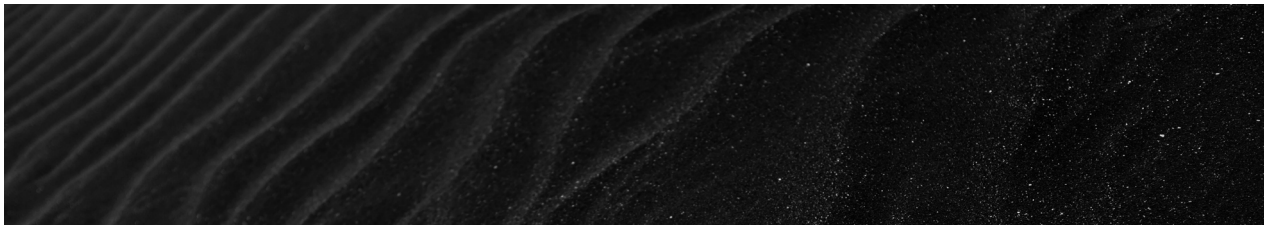
Natalia Alenkina is an Associate Professor at the American University of Central Asia, Ph.D.

Ms. Alenkina has extensive experience in arbitration as an arbitrator, legal counsel, and an expert in Kyrgyz law. Since 2019 Natalia has been a court member of the ICC International Arbitration Court (Paris) and from last year – an Ambassador of the Vienna International Arbitral Centre in Kyrgyzstan.

Ms. Alenkina is a member of the Scientific Advisory Board of the Supreme Court of the Kyrgyz Republic. She is accredited by the Kyrgyz Ministry of Justice as a legal and human rights expert. Natalia Alenkina took part in the development of the Civil Procedure Code and the Law on Mediation in Kyrgyzstan. She is a co-author of commentaries to the Kyrgyz Civil Code and Code of Civil Procedure.

Speaker : Diana Bayzakova

Diana Bayzakova is the Director of the Tashkent International Arbitration Centre (TIAC), the arbitral institution delivering zero admin fee state-of-the-art arbitration services under the unique conflict-free operational framework. As a multilingual dispute resolution expert, Diana acted as a sole arbitrator, chairman, on a panel of arbitrators and as counsel in international arbitral proceedings under a variety of arbitration rules (DIAC, DIFC-LCIA, ICC, SCC, ADCCAC and others) and is the only arbitration practitioner from Uzbekistan ranked by Legal500 in "Arbitration Powerlist: CIS and Caucasus". In 2020, Diana was appointed to the ICSID Panel of Arbitrators.



Highlights From AIADR's Past Events

Pictures from the AIADR In-Person Mediation Training Course (8th - 13th December 2023)

Highlights From AIADR's Past Events

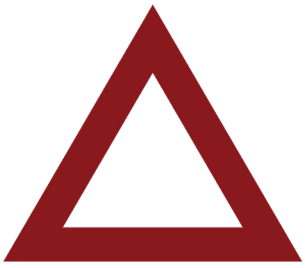
Pictures from the AIADR Networking Dinner

Upcoming Events.

23 February 2024
Wbinar : Blockchain and Smart Contracts, A Game Changer in Mediation?

1 March 2024
Workshop : Dispute Resolution Practice Series, Dispute Resolution Board (DRB)

14 - 17 March 2024
11th edition of NLUO-International Maritime Arbitration Moot Court Competition (IMAM), 2024.



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 March 2024
Journal : 15th April 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