## KEYNOTE SPEAKERS:

**LORD GOLDSMITH QC, PC**

Former Attorney General, UK;
*Global Elite Thought Leader for Arbitration and Litigation*

**JOHN TACKABERRY QC**

*"One of the doyens of international arbitration"*

AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE

ASIA ADR WEEK 2021
VIRTUALLY VIA BRELLA

# ADR IN A KALEIDOSCOPE

## BEYOND WHAT MEETS THE EYE

When Elton John sang "the twisting kaleidoscope moves us all in turn", there is perhaps little chance he was thinking about commerce and dispute resolution. Yet the metaphor is starkly applicable. The kaleidoscope takes us all back to our past: a toy to transform the mundane mechanical to a splash of infinite and vivid patterns. Taken apart, the coloured pieces are themselves of little value, but when put together, a single twist creates infinite and constantly transforming patterns. It is a tool which translates the occupation of the hand to pleasures of the eye.

The changes in ADR are as fast-paced as the changing visions in a kaleidoscope. Throughout its evolution, the naked eye has so far viewed commercial interests of efficiency and cost as the primary drivers. However, the future will require a perspective that understands how the other coloured pieces oft-overlooked: the social, political and economic interplay with the commercial to create meaningful and ever-changing patterns. Although the patterns are new, they use the same pieces over and over again. It becomes critical therefore to look at the arrangement of the pieces themselves, and how they can be placed and rotated to engineer a vision that is acceptable.

**AT ASIA ADR WEEK 2021, AIAC'S EMBLEMATIC TRIANGLE HOPES TO BE THE EYE PIECE WHERE WE MOVE AWAY FROM A MYOPIC EMPHASIS ON PROCEDURE AND ENFORCEMENT, TO A KALEIDOSCOPIC VISION OF DIVERSITY AND SUSTAINABILITY.**

Mark Twain strongly believed that there are no new ideas: we simply put the old ones in a mental kaleidoscope and give them a turn until they make curious combinations. Political events in the West which may push parties to look East, the dismantling of the ISDS Era, or the push for diversity in arbitration can only be understood by appreciating their larger context of similar changes in national priorities and society. By acknowledging these changes, the discussion will map their impact of 21st century values on private justice, and how the community of institutions, arbitrators and practitioners, akin to the hand that twists the kaleidoscope, can act together to create a beautiful vision for the future.

**Admission Fee:**

**Virtual Conference Pass – MYR 200 / USD 50 ONLY!**

Supporting Organisations:

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# PROGRAMME

ASIA ADR WEEK 2021 VIRTUALLY VIA BRELLA

ADR IN A KALEIDOSCOPE
BEYOND WHAT MEETS THE EYE

## DAY 1 (THURSDAY, 19TH AUGUST 2021)

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| 08:00 - 09:00 | Registration |
| 09:00 - 09:15 | **Opening Remarks** |
| 09:15 - 09:30 | **Special Address** |
| 09:30 – 10:45 | **Keynote Session** - *The Epoch of Contemporary ADR: The Global Interplay of International Law, Social-Politics, Human Rights, and the Economy* |
| 10:45 - 11.00 | Launch of **ASIA ADR WEEK 2021: "ADR IN A KALEIDOSCOPE"** |
| 11:00 – 11:30 | Networking Break |
| 11:30 - 13:00 | **Session 1 - Impact of Sanctions on Arbitration: Shift to the East?** |

The world continues to witness the occurrence of transnational disputes on a daily basis and the consequences arising from them have been the subject of discussion not just by politicians but, the men on the street. A recent example of such large-scaled disputes includes the economic sanctions imposed upon Iran and Russia by the United States of America, which has impacted the world's oil production and energy sectors. Notwithstanding this, parties are nevertheless determined in their continued engagement of cross-border business, with ADR often being seen as a cushion to preserving their relationships in the event of a dispute. To this end, parties originating from the West have exponentially begun to prefer resolving such disputes in ADR hubs located in the East. Is there an element of distrust towards the West contributing to this phenomenon?

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| 13:00 - 14:00 | Lunch |
| 14:00 - 15:00 | **Session 2 - Starting In-House: The Role of General Counsel of Multinational Corporations in ADR** |

The role of an in-house counsel in shifting the focal point on dispute resolution from the traditional standpoint of litigation to the innovative vigor of ADR has resulted in the majority of Fortune 1000 companies preferring to use ADR as a means of resolving both international and domestic disputes. This session focuses on the multi-faceted role of in-house counsel in spearheading ADR as a principle means of resolving disputes.

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| 15:00 - 16:30 | **Session 3, Breakout 1 - Alternative Dispute Resolution: A Creative Resolution Tool for Capital Markets** |

Capital markets play a pivotal role in international investments as a place where medium and long-term finance can be raised. Traditionally, such disputes have been resolved in national courts, but recently the use of ADR has been on the rise. By providing an effective and autonomous means of resolving disputes, ADR has become a useful tool in the resolution of capital market disputes. With parties able to control the procedure, industry players are beginning to mould ADR mechanisms into their specific needs. But are such mechanisms fit for disputes arising from capital markets?

**Session 3, Breakout 2 - Preconditions to Arbitration: Potential Concerns of Hybrid and Pathological Clauses**

Common law and civil law jurisdictions have encouraged businesses to incorporate arbitration and mediation into their contracts as an initial means to kickstarting negotiations to resolve disputes. This has contributed to the rise in popularity of hybrid clauses such as Med-Arb and Arb-Med-Arb clause. However, recent business dealings have arguably rendered hybrid mechanisms to be unfit due to both exceedingly unreasonable time-frames to resolve disputes and pathological clauses. Hence, various issues are raised as to the relevancy of these clauses in business contracts.

**Session 3, Breakout 3 – Quo Vadis, Malaysia? Revisiting Third Party Funding**

Third party funding was once proposed as part of the reform to the Malaysian Arbitration Act 2005 back in 2018 in order to push Malaysia as an internationally preferred seat of arbitration. However, it never made the final cut and reasons of its illegalities under the common law doctrine of maintenance and champerty were brought to the surface. Now, with more than two years since the implementation of the amendments to the Arbitration Act 2005, the question arises as to whether Malaysia is ready to revisit third party funding and legalize it? Comparison with jurisdictions like Hong Kong, Australia, Singapore, and the United Arab Emirates who have had history with third party funding can serve as a primer to Malaysia's initiatives to legalize third party funding.

16:30 - 17:00 Networking Break

17:00 - 18:30 **Session 4 – Extending the Roots of Arbitration: Environment, Animal Conservation, and Climate Crisis**

With sustainable development goals being placed at the forefront of corporate responsibility in both private and public sectors, it is high time that corporate stakeholders and arbitral institutions promote ADR as a viable means of facilitating the demands of environmental disputes arising from investment, business and commercial agreements. This session focuses on the multiple dimensions of ADR in serving as not just a platform to resolve disputes, but also a strong ally that raises the awareness of pressing environmental, corporate responsibility and climate crisis issues.

## DAY 2 (FRIDAY, 20TH AUGUST 2021)

08:30 - 09:30 Registration

09:30 - 11:00 **Session 1 – Cross Border Collaboration and Partnership of Different Arbitration Institutions Worldwide**

The issue of cross-border collaborations and partnerships are not novel concepts to arbitration institutions. A recent example can be seen with the ICC's and AIAC's MoU aimed at promoting Malaysia as a safe seat and venue for arbitration. Another significant progress is the cross-border collaboration taking place between JAMS and the Beijing Arbitration Commission, whereby they jointly organised a summit in each jurisdiction and discussed the opportunities for arbitration institutions worldwide to resolve commercial difficulty, with particular focus in Sino-American ADR. Despite these first steps, more arbitration institutions should be actively involved in promoting partnerships across different regions and institutions, not only with different arbitration bodies, but also with expert associations, universities, firms, business councils and other stakeholders. What are the various avenues for collaboration and how can harmonization be promoted through these efforts?

11:00 - 11:30 Networking Break

11:30 - 13:00 **Session 2 – *Propria Persona* in International Commercial Arbitration: Does the Robe Matter?**

The choice of arbitrators involves many tangible and intangible factors. When parties to a disagreement belong to different legal, economic and social systems, these factors grow in importance. The advantage gained by having an arbitrator who is an industry expert can be disparaged by his/her lack of legal training and knowledge. This begs the real question: shall the court apply an interventionist approach in cases where non-lawyer arbitrators have erred in their interpretation and findings of the law? Is legal experience the most important characteristic in an arbitrator's professional repertoire?

13:00 - 14:30 Lunch

14:30 - 16:00 **Session 3 – Watts in Arbitration? The Development of Energy Arbitration**

With the ever-changing landscape of the energy industry, the development of energy arbitration too is changing exponentially. With both public and private sectors' emphasis on alternate/ renewable energy, it is inevitable that such development will impact energy arbitration by implicating different types of contracts and national regulations. This session will focus on the significance of energy arbitration today in disputes based on renewable/ alternative energy.

16:00 - 16:30 Networking Break

16:30 - 18:00 **Session 4 - Rapid Fire Debate**

1) **The Waves of Merlion: The Future of Mediation Post-Singapore Convention**
Arbitration has always boasted itself as being the preferred form of ADR. Nonetheless, in light of the recent global economic developments whereby mediation has the opportunity to attain prominence in resolving commercial disputes, and the creation of the Singapore Mediation Convention, which globally promotes the enforceability of mediation settlement agreements, it is questionable whether arbitration can still enjoy its glory days. Can mediation avenge itself to defeat the current title-holder by reaping the benefits of the ongoing trade war and of the Convention?

**House A**: *This house believes that the Singapore Convention is redundant in view of the enforceability of settlement agreements as contracts which otherwise can be achieved through other hybrid mechanisms.*

**House B**: *This house believes that the Singapore Convention was necessary to further legitimize mediation as an ADR mechanism with its main goal of promoting mediation over arbitration with a view of reducing costs to parties if they settle.*

2) **Are We Out of a Job? Relevance of Arbitration with the Emergence of Specialised Courts**
In the era of transparency, judiciaries across the world are striving to achieve great lengths in improving efficiency, transparency and being more cost-effective. Some judiciaries have even established niche and specialized courts, i.e. construction courts, in facilitating the ongoing demands of fast and efficient dispute resolution. Thus, it begs the question, will ADR be fossilized within the setting of modern judicial systems?

**House A**: *This house believes that the rise of ADR is an integral part of the modern Judicial System in achieving an effective administration of justice.*

**House B**: *This house urges to preserve the status quo of ADR in the judicial system to avoid lengthy litigious disputes.*

3) **Chasing Down the Rabbit Hole: An Elusive Appeal over Principle of Finality in Arbitration**
One of the benefits of arbitration over litigation is that it does not allow for appeals. Arbitration has always encouraged finality, to ensure that parties can resolve their disputes swiftly and with certainty. Critics, who tend to discourage resolving disputes via arbitration, may argue that justice cannot truly be achieved without an appeal process. Some institutions have expressed an interest in an appeal process subject to two broad conditions: that the consent of all parties is obtained at an early stage, and ensure justice for parties in arbitration that certainty is not undermined. While the first of these is achievable, it will be difficult, if not impossible, to achieve certainty if an appeal process is introduced. **(i.e. Section 42 of the Arbitration Act 2005)**

**House A:** *This house believes that appeal mechanisms are necessary for the preservation of parties' rights and legitimacy of awards.*

**House B:** *This house believes that appeals contradict the main principle of arbitration, that is, finality.*

4) **The Tension between Transparency vs. Confidentiality in International Arbitration**

Confidentiality is often one of the key benefits of arbitration as opposed to litigation. Yet, many people fail to understand and appreciate the importance of confidentiality in business relations. Words like transparency are often thrown at debates by those who are against confidentiality. A fine distinction can be made by having a nuance approach to confidentiality, which may help preserve the values of arbitration while at the same time enhance competing values to be gained by greater transparency.

**House A:** *This house believes that transparency promotes communication, openness and accountability and thus should be given preference over confidentiality.*

**House B:** *This house believes that confidentiality is an essential principle of arbitration and should be given greater priority over transparency.*

5) **Conflicts of Interest based on Nationality and Social Circles: Is Big Brother Watching?**

As the world becomes more globalized and technology increases interconnectivity across borders, many have begun to question whether nationality and social circles should be considered when appointing arbitrators. Various arbitration rules state that the appointing authority should consider the nationality of the parties and arbitrator when appointing a sole or presiding arbitrator, but is nationality something that can really give rise to a conflict of interest? Additionally, as social media becomes a growing means to connect and stay informed with our peers, should we consider an arbitrator's and party's "connection" on a social media platform and their interaction on such grounds for a challenge based on a conflict of interest?

**House A:** *This house believes that an assessment of an arbitrator's nationality and social circle, which includes a consideration of an arbitrator's social media history, is crucial in considering the independence and impartiality of arbitrators.*

**House B:** *This house believes that the nationality and social circle of an arbitrator, including the arbitrator's social media involvement, should not have any bearing on the independence and impartiality of arbitrators.*

6) **Master Recordings Disputes: Arbitration as a Remedy to Perennial Malady**

The entertainment industry is a creative sector in which the paramount of success is centred on the recognition of awards given to artists. But what happens when artists like Taylor Swift, Prince, Frank Ocean cannot "fire" their labels for refusal to transfer the ownership rights to artists' work when a contract is terminated? Recording companies are rarely willing to give up ownership of masters and disputes are very rampant in the music industry which constantly resorts to litigation. Arbitration as a dispute resolution mechanism is rarely used in this industry even though arbitration is rapidly becoming applicable to settlement of entertainment disputes world-wide, particularly in the areas of intellectual property and artist management. This debate will delve into the inculcation of the practice of arbitration in entertainment disputes.

**House A:** *This house believes that arbitration is the most relevant pathfinder for entertainment disputes and the incorporation of the entertainment sector into the Arbitration Act is necessary.*

**House B:** *This house believes that embracing ADR in entertainment disputes is unattainable due to the nationalist approach, amongst others, when it comes to intellectual property and licensing rights.*

# DAY 3 CIPAA CONFERENCE (SATURDAY, 21ST AUGUST 2021)

08:30 - 09:30 Registration

09:30 - 09:45 Opening Remarks

09:45 - 10:30 Keynote Address

10:30 - 11:00 Showcase of the **CIPAA Statistics**

11:00 – 11:30 Networking Break

11:30 - 13:00 **Session 1 – Adjudication 2020: Recalibrating Practice and Procedure with Judicial Decisions**

This session is dedicated to outlining the recent and most important judicial developments in the construction industry. The recent decisions of the Federal Court including *Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd*, *Ireka Engineering & Construction Sdn Bhd v PWC Corporation Sdn Bhd* and a host of recent decisions by the Malaysian Courts have left the adjudication community divided. What are the consequences of these decisions and how do they impact adjudication practice and procedure going forward?

13:00 - 14:00 Lunch

14:00 - 15:30 **Session 2 - Rights and Duties of Adjudicator: Remedies Available for a Challenge**

To render an enforceable decision, adjudicators are required to adhere to certain principles whether under CIPAA or the equivalent laws in other jurisdictions. However, compliance with such stringent duties has sometimes proven itself difficult in practice. This session will explore various grounds on which an adjudicator can be challenged and the instruments for challenges available to the parties.

15:30 - 16:00 Networking Break

16:00 - 17:30 **Session 3, Breakout 1 - CIPAA: Matter, Manner and Method**

The CIPAA has made adjudication more prominent in Malaysia. This session will highlight the intricacies of the adjudication process, such as the kind of disputes that can be adjudicated, stages of adjudication, common claims and defences as well as the delivery of an adjudication decision.

**Session 3, Breakout 2 - Interpreting Section 25 of CIPAA: Are the Parameters Undefined?**

Section 25 of CIPAA outlines a list of various powers of an adjudicator. However, what are the scope and ambit of those powers? For instance, some of the provisions of Section 25 of CIPAA have been given extensive application, as was done by the High Court in *Milsonland Development Sdn Bhd v Macro Resources Sdn Bhd*. This session will give a perspective on the content of the adjudicator's powers and its implications for participants of the adjudication process.

**Session 3, Breakout 3 - Shopping for Adjudicators: A Search for a More Favourable Decision**

There is a growing trend for aggrieved parties to withdraw and re-submit a fresh claim until obtaining an outcome favourable to them in the appointment of an adjudicator. This is quite apart from the right available to parties to appoint an adjudicator of their choice by agreement. To what extent do parties consider the experience of an adjudicator, including their past decisions, as impacting and playing a part in the adjudicator's ability to deliver a fair and just decision? Is this an abuse of process or a mere exercise by the party of its procedural rights?

17:30 - 18:30 **Session 4 - A Voyage around an Adjudicator's Jurisdiction**

The jurisdiction of an adjudicator has been changing, both in terms of limits on and extensions of jurisdiction. It has acquired particular importance at the enforcement stage when a party to an adjudication argues that a violation of the rules of natural justice has occurred. For instance, in *Tenaga Poly Sdn Bhd v Crest Builder Sdn Bhd*, it was held that liquidated and ascertained damages claims are not within the meaning of payment claim under Sections 4 and 5 of the CIPAA 2012. Whereas, under New South Wales' Building and Construction Industry Security of Payment Act 1999, the courts have a more liberal interpretation of payment dispute and have enforced adjudication decisions relating to termination costs and liquidated damages. Against this background, a look from the practices in various other States can provide guidance to parties in Malaysian-based adjudication disputes.

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