

# ASIAN INTERNATIONAL ARBITRATION CENTRE

## Response to the questionnaire from the International Law Commission's Special Rapporteur on the topic "Settlement of international disputes to which international organisations are parties"

12 May 2023

This note provides the response of the Asian International Arbitration Centre ("AIAC") to the Commission's questionnaire on the topic "Settlement of international disputes to which international organisations are parties", pursuant to the request from the Office of Legal Affairs of the United Nations vide Note Verbale no. LA/COD/73 dated 2 December 2022 for information and views from Member States and international organisations for the preparation of a memorandum on the practice of States and international organisations which may be of relevance to the Commission's future work on the above-mentioned topic.

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### QUESTION 1

#### What types of disputes/issues (cf. paras. 6 and 7 above) have you encountered?

1. Paragraphs 6 and 7 focus primarily on disputes arising under **international law** from three perspectives:
  - (a) disputes between international organisations;
  - (b) disputes between international organisations and States; and
  - (c) disputes between international organisations and private parties, including individuals and legal persons, such as corporations or associations.
2. For the avoidance of doubt, there are no past nor existing cases against the AIAC under **international law** which involves disputes under categories (a), (b) and (c).
3. There are also no known contractual disputes involving international law, between the AIAC and their service providers, other procurement-related disputes, or labour disputes between the AIAC and their employees. The same applies to disputes involving victims of harmful activities attributable to the AIAC as there is none who have brought disputes whilst maintaining a contractual relationship with the AIAC.

## QUESTION 2

What methods of dispute settlement (cf. para. 9 above) have been resorted to in cases of disputes with other international organisations, states, or private parties? Please provide any relevant case law, or a representative sample thereof. If you cannot provide such information for confidentiality reasons, could you provide any such decisions or awards in redacted form, or a generic description/digest of such decisions?

4. Within the international law scope and for the purposes of this questionnaire, as mentioned in (1) above, the AIAC has not encountered any disputes with parties under categories (a), (b), and (c). The AIAC has, however, encountered disputes with private parties i.e. corporations, under Malaysian **domestic law** in the course of its work/business of provision of dispute resolution services.

5. The AIAC faced a labour dispute, and the Malaysian Court of Appeal later declared the AIAC to be immune from suit and legal process. This was in the case of *Regional Centre for Arbitration v Ooi Beng Choo & Anor Civil Appeal No W-01-160 of 1998* (Court of Appeal decision dated 2 August 1999) entailing a reference to the Industrial Court of a complaint of a dismissal under the Industrial Relations Act 1967.

6. A more recent case against the AIAC is the Malaysian High Court case of *One Amerin Residence Sdn Bhd v Asian International Arbitration Centre & Ors [2019] MLJU 540* where the dispute involved a judicial review application of the AIAC's administration of cases under the Construction Industry Payment and Adjudication Act 2012. The AIAC has also encountered several other cases of this nature which are not reported in Malaysian case law reports.

7. Nonetheless all these cases invoked the immunity of the AIAC which is embodied in the national legislations; the Diplomatic Privileges (Vienna Convention) Act 1996 (Act 636), International Organisations (Privileges and Immunities) (Act 1992), and the Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 (P.U. (A) 120/1196).

### **QUESTION 3**

**In your dispute settlement practice, for each of the types of disputes/issues arising, please describe the relative importance of negotiation, conciliation, or other informal consensual dispute settlement and/or third-party dispute resolution, such as arbitration or judicial settlement.**

8. In so far as it relates to disputes encountered by the AIAC with private parties under Malaysian domestic law, the AIAC has settled most of its litigation disputes through the practice of negotiation and/or conciliation during the course of litigation. Where a settlement has not been successful, litigation has proceeded and often concluded favourably for the AIAC. In so far as preferred dispute settlement methods utilised by the AIAC in these matters, the AIAC considers negotiation and conciliation key mechanisms in both, preventing the escalation of conflict in the court and to settle disputes once they have arisen.

#### QUESTION 4

**Which methods of dispute settlement do you consider to be most useful? Please indicate the preferred methods of dispute settlement (cf. para. 9 above) for different types of disputes/issues (cf. paras. 6 and 7 above).**

9. The answer to this question is drawn from the AIAC's knowledge and experience from our observations in the provision of and administering of dispute resolution services such as negotiation, conciliation, mediation and arbitration generally.

10. From the AIAC's observation of administering cases, parties have advocated arbitration as a preferred form of dispute resolution after failing to achieve a middle ground during negotiations and/or conciliation. A contributing factor is that arbitration is enforceable under countries that are signatories to the New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards 1958. The parties have, time and again, considered this factor as the benefit of opting for arbitration.

## QUESTION 5

**From a historical perspective, have there been any changes or trends in the types of disputes arising, the numbers of such disputes, and the modes of settlement used?**

11. The AIAC has, for the last 40 years, been a dispute resolution provider in alternative dispute resolution (ADR) services such as mediation and arbitration. The AIAC has witnessed the impact of ADR in both international and domestic law settings.

12. Regarding arbitration, in 2018 the AIAC registered 90 cases<sup>1</sup>. In 2019, 125 cases were registered while 2020 had 100 registered cases<sup>2</sup>. In 2021, the AIAC registered 117 cases<sup>3</sup>. Of the latest number of registered cases, 88.88% of cases are domestic while 11.11% are international<sup>4</sup>.

13. Mediation cases have been on the rise, with only one (1) registered case in 2015, three (3) in 2019, four (4) in 2020 and eight (8) in 2021<sup>5</sup>.

14. The highest number of Domain Name Disputes appointments was registered in 2018, when the AIAC listed 12 cases. In 2019 11 cases were registered, 8 in 2020, and 7 in 2021<sup>6</sup>.

15. In an exclusively domestic setting, the introduction of the Construction Industry Payment and Adjudication Act 2012 (CIPAA) brought adjudication to the center stage, and from 2014 to 2019 the AIAC saw a sharp and constant increase in its usage for parties in the construction industry, registering 816 cases at its highest point<sup>7</sup>. In this sense, in 2020 the AIAC registered 537 cases, and 530 in 2021. Overall, this shows a 34.19% reduction in registered cases<sup>8</sup>. 76.5% of AIAC administered arbitrations in 2019 were in construction. The remaining 23.5 encompasses matters of banking, finance, insurance, company, and energy law<sup>9</sup>.

16. It is important to note that the statistics above do not contemplate a situation where the AIAC was a party to those disputes.

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<sup>1</sup> AIAC Annual Report 2018, pg 18

<sup>2</sup> AIAC Annual Report 2019 - 2020, pg 12

<sup>3</sup> AIAC Annual Report 2021, pg 12

<sup>4</sup> supra

<sup>5</sup> AIAC Annual Report 2015 pg 8, AIAC Annual Report 2019 & 2020 pg 12, AIAC Annual Report 2021 pg 20

<sup>6</sup> AIAC Annual Report 2021, pg 20

<sup>7</sup> AIAC Annual Report 2019 & 2020, pg 19

<sup>8</sup> supra

<sup>9</sup> AIAC Annual Report 2019 & 2020, pg 16

## QUESTION 6

### **Do you have suggestions for improving the methods of dispute settlement (that you have used in practice)?**

17. There is insufficient data to provide suggestions to improve the methods of dispute settlement from treaties/contracts involving the AIAC per se. From the viewpoint of an administrative authority, the cases administered by the AIAC evince that parties incorporate third-party dispute settlement i.e. multi-tiered dispute resolution clauses which allow the parties to show their best efforts in adhering to the pre-conditions of a third-party dispute resolution before proceeding to arbitration or litigation, which are more generally more binding in its form. Oftentimes, parties are inclined to a private negotiation/conciliation process before the conclusion of a matter.

18. In this sense, a suggestion to improve methods of dispute settlement is to consider specialisation as a key component in the efficiency of handling cases through the establishment of specialist tribunals. On the international level, the AIAC is already an alternative hearing venue for specialised tribunals formed under the Court of Arbitration for Sports, the introduction of the AIAC i-Arbitration Rules which governs disputes based on Shariah-guided principles, and the AIAC also acts as the Kuala Lumpur office for disputes relating to generic top-level domain names (gTLDs) approved by the Internet Corporation for Assigned Names and Numbers. Through our experience administering cases, we have witnessed the positive impact that specialised members in arbitration panels have had in case handling. In this sense, introducing specialised tribunals conformed by experts and with specialised rules would improve dispute settlement.

19. Closer to home, the introduction of the Construction Industry Payment Adjudication Act 2012 ("CIPAA 2012") empowers the AIAC to administer and appoint specialised members of the construction industry to adjudicate construction disputes within the statutory timeframe of 106 working days from the service of the Payment Claim. The AIAC also introduced the AIAC Adjudication Rules and Procedure to meet the requirements of adjudication procedures as set out in the CIPAA 2012.

## QUESTION 11

**Have you developed a practice of agreeing ex post to third-party methods of dispute settlement (arbitration or adjudication) or waiving immunity in cases where disputes have already arisen and cannot be settled otherwise, e.g. because no treaty/contractual dispute settlement has been provided for?**

20. There is insufficient data as the AIAC has not encountered a situation that warrants a waiver of immunity in an international dispute setting. In a domestic setting, the AIAC has never waived its immunity and the Malaysian Courts continue to uphold the same.