

The last quarter of 2009 was full of Branch activities and hopefully this – the first – issue of the Newsletter for 2010 to some extent properly reflects and does justice to all the various events.

As previously, news items and letters from the readership are most welcome. Contributions on events taking place outside Hong Kong are especially welcome as they might sometimes not be covered otherwise. Readers are also encouraged to submit articles, book reviews or letters relating to dispute resolution to Asian Dispute Review. Please visit [www.asiandr.com](http://www.asiandr.com) for submission guidelines.

As usual, the forthcoming Branch events programme is found on the back page of the Newsletter, and an up to date programme can always be found on [www.ciarbasia.org](http://www.ciarbasia.org).

I wish the readership a Happy and Prosperous 2010!

*Paulo Fohlin*

## **Evening Talk by Stephen Ruttie on “Mediation – A better dispute resolution?”**

**Hong Kong, 24 September 2009**

Mr Stephen Ruttie, QC gave an enthusiastic speech on mediation to a full house at Hong Kong Club in which he provided some clear answers to the above rhetorical question as he has successfully mediated hundreds of commercial disputes.

Among the relative advantages of mediation, he stressed not only that it is quick and cheap but also that it provides a certain outcome if the disputing parties reach a settlement. He described the boom of mediation in London and its high success rate there as a result of the heavy expenses following from litigation and arbitration and of the uncertainty of litigation and arbitration with respect to the outcome of the dispute. In addition, the management time of a party required to conduct litigation or arbitration and the stress suffered by parties or their legal representatives when litigating or arbitrating made mediation attractive.

Following Mr Ruttie’s talk the topic was open to discussion and he was asked many questions from the floor.

## **Evening Talk by Richard Barton on “The role of media relations in ADR”**

**Hong Kong, 13 October 2009**

Mr Richard Barton, Managing Partner Asia (ex-Japan) at Kreab Gavin Anderson, gave a speech to Branch members at Hong Kong Club on how to use the media or respond to others using the media in connection, inter alia, with dispute resolution.

Among other things, the thought-provoking speech dealt with the handling of communications issues surrounding litigation and arbitration matters. Mr Barton covered cases where the “court of public opinion” matters to disputing parties and where the loss of reputation may be as damaging to a party as losing the juridical case. Further, for various reasons it might be important to a disputing party to have full knowledge of the information – or allegations – provided to its various stakeholders in the media, and it could not be ruled out that an arbitrator or judge might even be swayed by contents in the media.

Mr Barton explained that a rule of thumb for a party was to actively engage and not to leave a media vacuum for the opponent to fill in. He also gave some examples of active media use as well as of international press strategies. His speech prompted questions from the floor and discussions during the ensuing drinks.

## Evening Talk by Nicholas Longley on "Future Trends and Innovations in Dispute Resolution"

Hong Kong, 22 October 2009



*Nicholas Longley speaking at the HKIAC.*

Hon Secretary of the Branch Committee, Mr Nicholas Longley gave a speech on the captioned topic at the HKIAC which developed into an interesting and lively debate. He touched upon the new Arbitration Ordinance, expected to be adopted in Hong Kong in 2010, the Hong Kong Civil Justice Reform and the new HKIAC Administered Arbitration Rules.

Nick explained that the new Arbitration Ordinance adopts a unitary regime for domestic and international arbitration. It allows however an "opt-in" with respect to certain current domestic features, which means that parties who want to retain such features will have to express this in their arbitration agreements. One of the domestic features that parties will be able to opt for is the judicial review of awards with respect to questions of law.

As regards the Civil Justice Reform and the new Civil Procedure Rules effective from 2 April 2009, Nick explained the underlying objectives and described the new rules on active case management, pleadings and discovery, and also made comparisons with the conduct of arbitrations. He suggested that the new rules may mean that court proceedings will become more competitive in relation to other dispute resolution mechanisms, although arbitration may still have some advantages, particularly relating to overseas enforcement of arbitral awards under the New York Convention.

Nick briefly described the "light touch" administered arbitration under the new HKIAC rules effective from 1 September 2008 and thereafter also briefly covered adjudication in Hong Kong. He spent some time discussing mediation and the Hong Kong Practice Direction which will come into force on 1 January 2010. Its provisions on unreasonable failures to participate in mediation potentially resulting in adverse costs orders were already having a practical effect on solicitors and clients.

Nick concluded that the Civil Justice Reform could have a significant impact upon the speed of the administration of justice and that arbitrators would need to consider how to add value to disputing parties. In addition, arbitration clauses would need to be reviewed following the coming into force of the new Arbitration Ordinance.

## Reflections on common issues in international arbitrations with PRC parties – by Kaj Hobér

Hong Kong, 1 December 2009

Mr Kaj Hobér, partner at the Swedish law firm Mannheimer Swartling, delivered an interesting evening talk at Hong Kong Club on the above topic. Mr Hobér is also a Professor of East European Commercial Law at Uppsala University and a Professor of International Law at the University of Dundee's Centre for Energy Petroleum and Mineral Law and Policy. In addition, he is a Vice Chairperson of the Arbitration Institute of the Stockholm Chamber of Commerce.

Based on his experience as counsel and arbitrator in China-related international arbitrations, Mr Hobér touched upon some issues he had come across. For instance, even where English was the (only) language of an arbitration, language problems materialized in different ways and it was not easy to find good interpreters. As regards appointment of arbitrators, he had found that PRC parties and arbitrators from the PRC sometimes seemed to misunderstand the true role of a neutral arbitrator in international arbitration and that this fact did not necessarily benefit the PRC party in the arbitration. He had also noted some Chinese arbitrators' inclination to act *ex officio* in a way unfamiliar to arbitrators from other countries.

When acting as counsel to PRC parties Mr Hobér had found it to be of special importance to build trust with the client and to explain carefully in what way an international arbitration is conducted outside mainland China. Further, it was not unusual to have to negotiate fees with PRC clients to some extent. With respect to evidence, his experience was that PRC corporate clients more often than clients from other countries were unable to provide complete sets of written evidence and that the preparation of oral evidence to be given by PRC witnesses or PRC experts required more time than in other cases. Common legal issues, both on arbitral jurisdiction and on the merits, were following from PRC parties more often than most other parties taking the position that the disputed contract was not signed by an authorized person.

Mr Hobér concluded his speech with a few words on enforcement of arbitral awards in the PRC and on state immunity from execution of awards.



*Professor Kaj Hobér delivering his talk at Hong Kong Club.*

## Talk by Paulo Fohlin on “Introduction to investment treaty arbitration and its potential relevance to foreign investments in mainland China”

Hong Kong, 24 November 2009



From left, Branch Hon Treasurer and Vice Chair Joe Gilfeather and Committee member Paulo Fohlin at the HKIAC.

Mr Paulo Fohlin delivered an evening talk to CIArb members at the HKIAC on the topic of investment treaty arbitration.

Paulo started his speech by explaining the concept of bilateral investment treaties (“BITs”) and touching upon the modern history of state-to-state arbitration and its follower investor-state arbitration. BITs usually entitle the foreign investor of a contracting state to arbitrate against the host state in a third country if the investor claims that the host state has breached the promises made in the BIT. Paulo also described the public international background law to BITs by referring to relevant parts of the Statute of the International Court of Justice of 1945, the Vienna Convention on the Law of Treaties of 1969 and the UN International Law Commission Articles of 2001

on the Responsibility of States for Internationally Wrongful Acts. He then turned to the BITs as such and went to details of the usually wide definition of protected “investments” and the substantive as well as the procedural protection provided in BITs.

Paulo further explained the situation with respect to the PRC and the differences between the investor-state arbitration clauses found in the “old” generation compared to the arbitration clauses in the “new” generation PRC BITs. He dealt with two potential approaches to be taken by foreign investors investing in the PRC or Chinese investors investing outside the PRC protected by an “old” generation BIT to enable them to arbitrate against the host state. One of these approaches dealt with the proper interpretation of the scope of the investor-state arbitration clauses in the “old” BITs. The other approach dealt with the potential possibilities to invoke the so-called Most Favoured Nation treatment clauses found in “old” BITs in order to be able to arbitrate under wider arbitration clauses found in “new” BITs. Paulo’s summary conclusion of the two approaches was that investors protected by “old” generation PRC BITs should not rule out the possibility of arbitrating questions of liability as well as quantum against the host state.

To many but not all among the audience this was a fairly new topic. The speech was well prepared, informative and well presented. Hopefully, an updated version of the speech will be presented again next year.

Yeung Man Sing

## PSDAS Scheme – Branch Arbitration Seminar (Part III)

Hong Kong, 26 November 2009

On 26 November an arbitration seminar, being Part III of the PSDAS Scheme, was organised by the Branch in Cantonese at Jardine House in Central. Part I was a mock arbitration hearing held in June whilst Part II was also an arbitration seminar but conducted in English in July. In addition to the Branch and the Hong Kong Government, there are ten co-supporters of the Scheme, namely, HKIS, HKIA, HKIE, ICWCI, ACoStE, HKIIE, AIOB, Law Society of Hong Kong, Hong Kong Bar Association and Hong Kong Productivity Council.

Speakers at the seminar were Branch Vice Chair Yeung Man Sing and Committee member Richard Leung. First, Mr Yeung covered the UNCITRAL Model Law, the existing Hong Kong Arbitration Ordinance and the Hong Kong Consultation Bill. He identified the salient parts and explained them in detail. Thereafter, Mr Leung concentrated on the conduct of arbitral proceedings, the law and rules applicable, interim measures, representation, the requirement of procedural justice, the arbitral award and relevant Rules of the High Court.

The seminar was well attended by about 100 people from various professional bodies. Positive feedback was received and ensuing discussions among the speakers and the audience extended well beyond the scheduled time. All attendees received a DVD of the previous mock arbitration hearing. *The DVD is now available free of charge to all CIArb (East Asia Branch) members. Please arrange collection at HKIAC, 38/F Two Exchange Square, Central.*

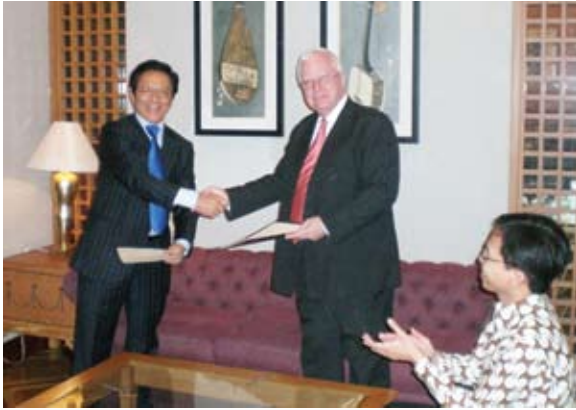


From left, Branch Committee members Cheryl Je and Richard Leung and Branch Vice Chair Yeung Man Sing at the PSDAS arbitration seminar.

Cheryl Je

## Indonesian Chapter Activities

Jakarta, 3-5 December 2009



*From left, Frans Hendra Winarta, Colin Wall and co-organiser of the Jakarta events, Ilman F Rakhmat at the signing ceremony between the ICC National Committee of Indonesia and the East Asia Branch.*

On the 3rd December 2009, the Indonesian chapter held a members' gathering in Jakarta, at the J W Marriott hotel, immediately prior to running an arbitration entry course at the same venue. The Indonesian chapter continues to grow in strength and influence in the region and the opportunity was taken during the members' gathering for Frans Hendra Winarta, on behalf of ICC National Committee of Indonesia, and Colin J Wall on behalf of the Branch to sign a co-operation agreement between the two organisations. The agreement relates to continued support between the two bodies related mainly to arbitration matters and appointments.

On the 4th and 5th December there was a very successful arbitration entry course which was again ably led by Branch Committee member Tony Houghton SC, who has special responsibilities for the regional development within the Branch. This was the third such entry course since the chapter formation in 2006. The chapter was fortunate to have as tutors Mr Rajendra Navaratnam, an experienced lawyer and arbitrator, and former chair of the Malaysian Branch, Ms Karen Mills, the Indonesian chapter co-chair and local organiser and Colin J Wall, the East Asia Trustee. The entry course was well attended, attracting some 46 participants, of whom 27 were lawyers, including some quite senior figures. The opportunity was also taken to further the Institute's charitable work and amongst those participating were several scholarship participants, including four students from the University of Indonesia. As usual, the entry course, which combined lectures with interactive tutorials, was based upon the UNCITRAL Model Law, with Karen Mills providing the expert advice on Indonesian arbitration law. Upon successful completion of the written assignment, it is to be hoped that the Indonesian chapter will acquire several new Associate members. There are plans in 2010 for the Branch to run a higher-level course in Indonesia.

*Colin Wall*

## Lunchtime Talk by Dick Bayer on "Project ReAlignment"

Hong Kong, 16 December 2009

In a break with the tradition of early evening talks, the Branch invited Mr Dick Bayer to give a lunchtime talk hosted by Lovells in their Hong Kong office. Dick is an experienced construction and environmental lawyer and a distinguished neutral having mediated over 200 cases. As president of the ReAlignment Group based in La Jolla, California he specialised in realigning the diverse interests, systems and resources of diverse organisations with troubled projects to get them back on track.

In his talk Dick Bayer gave an overview of the evolution of construction dispute resolution arising from disillusionment with litigation leading people to adopt arbitration where arbitrators gave no reasons for their awards. However, this approach was seen by some players as sacrificing such certainty as the law provided in order to achieve finality. In the early 1990s people moved towards tiered dispute resolution systems and developed partnering as a way to avoid disputes or to try to achieve early settlement. Mediation in particular has been widely utilised to resolve construction disputes but even mediation was not a panacea for all ills and many critics see mediation on the one hand as being forced settlement because one party cannot afford to take the matter further or on the other hand as an idealistic and unrealistic process in which people "hold hands and hope the world will become a better place".

Project ReAlignment, Dick explained, requires all of the people involved in the procurement of a construction project to work with their opposite numbers in the other organisations to resolve issues at the appropriate level rather than each organisation working vertically and separately from the other participating organisations. The process included identifying essential disputes (usually only about 10% of all disputes) and dealing with them at the appropriate level of the various hierarchies. This is done with the assistance of an experienced neutral who gives his or her views of the disputes to aid settlement. Dick noted that the process works best when combined with project partnering undertaken when the project starts.



*Dick Bayer giving his speech at Lovells Hong Kong.*

*Peter Caldwell*

## Branch Young Members Group Activities

Hong Kong, August to December 2009

### Visits to the elderly

As part of a series of events with the aim to contribute to the disadvantaged people in society, the YMG jointly organised, with young professionals of the Hong Kong Institution of Engineers, Hong Kong Institute of Surveyors, Chartered Institution of Building Services Engineers and Institution of Civil Engineers, two visits to the elderly in Hong Kong on 15 August and 29 September.

With the kind co-operation of the Hong Kong Sheng Kung Hui (Anglican Church), we visited the elderly at its Tseung Kwan O Aged Care Complex to share with them ways to stay healthy. At the other event, we visited homes of the elderly living alone in Choi Wan Estate. At both occasions, volunteers delivered gift bags and chatted with the elderly to ascertain their needs and concerns. The participating young professionals also benefited from the events in recognizing their abilities and responsibilities to society.

### Talk at City University

Similarly to previous years, the YMG organised an introductory talk about CI Arb at the City University of Hong Kong on 2 November. About 40 Year One students studying the Master of Arts in Arbitration & Dispute Resolution attended.

YMG Committee Chair Ir Johnson Lee kicked off by introducing the structures of CI Arb and the YMG and the role of CI Arb as a non-profit organisation, existing for the global promotion, facilitation and development of all forms of private dispute resolution. Thereafter, YMG Committee member Mr Timmy Cheung introduced the routes to membership and activities of YMG. He recommended the students to join as a stepping-stone to their career development.

### Evening Talk – “Public Speaking: Practice Doesn’t Make Perfect”

On 5 November, a talk was organised by the YMG on public speaking at the HKIAC. The speaker was Mr Sean Lin, recognized as one of Hong Kong’s Ten Outstanding Young Persons in 2006 and currently the Division Governor of Hong Kong, Toastmasters International and the Director of Corporate Communications of the Hong Kong Institute of Marketing. He is a Crisis Negotiator by profession.

Mr Lin demonstrated how to conduct a presentation without using visual aid, which – when used – was supposed to be there only to assist the presentation. He stressed that practice alone doesn’t make perfect because one may develop a bad practice without even being aware of it. Only practice with effective evaluation could improve the skill of delivering public speeches. Whether a talk had been successfully delivered depended on three elements, namely, content, tone and body language, and surprisingly the body language was the most important element. Mr Lin also emphasized the importance of eye contact and pause.

### UNICEF Charity Run 2009 – Run for Children

The YMG formed a team of 22 comprising members and their colleagues and friends to participate in the 10km and half-marathon (21km) races in UNICEF Charity Run 2009. The event was held on the Sunday of 29 November at HK Disneyland Resort.

Through generous support from members of YMG and the Branch Committee, the YMG raised a sum of \$20,000 as part of all funds raised from the Charity Run which will go towards the rebuilding of Sichuan following the devastating earthquake in May 2008. We thank all donors, runners and helpers for their contribution to YMG’s participation in this meaningful event.



The YMG Team participating in the UNICEF Charity Run.

### YMG Annual Party 2009

The YMG held this year’s Annual Party on 4 December at Club Pi, Central, Hong Kong. This year’s party was another huge success - a full-house event from beginning to end with over 160 participants. We had in our midst engineers, architects, medical professionals, accountants, solicitors, barristers and of course arbitrators and mediators, both seasoned and new and everyone in between.

The YMG was honoured to be joined by the Chair of the East Asia Branch, Mr Timothy Hill and grateful for the support of other Branch Committee members. The party began with a welcome address by Ir Johnson Lee, the YMG Chair for Session 2009/10, followed by a short speech on the development and activities of the Branch and its YMG by Timothy Hill. A highlight was the two lucky draw sessions with an attractive assortment of lucky draw prizes.



From left, Mr Sean Lin and YMG Chair Johnson Lee at the HKIAC.

We express our sincere gratitude to the sponsors for their generous support to the event, including the Diamond Sponsor, Gammon Construction, Gold Sponsor, BK Asia Pacific, Silver Sponsors, Brian E Rawling & Associates, Mallesons Stephen Jaques and cash and lucky draw sponsors, ADR Partnership, Baker & McKenzie, Gall & Lane, Merrill Legal Solutions, Yokee Gems Diamonds, Mulberry Moment and Kr+.

Johnson Lee, Avan Fan, Duncan Ho, Cheryl Je

## Evening Talk on "The Development of Mediation in the UK" by Danny McFadden

Hong Kong, 3 November 2009

Mr Danny McFadden, a CEDR Accredited Mediator and CEDR Director as well as Interim Director of Mediation at the United Nations, delivered this well prepared and vivid talk to CIArb members at Hong Kong Club. Mr McFadden is also a member of CEDR's training faculty. "CEDR" stands for the Centre for Effective Dispute Resolution. Again, the turnout among Branch members was large.

After touching upon CEDR's track record (see [www.cedr.com](http://www.cedr.com)), and the varying use of mediation around the world, Mr McFadden provided insights that might be useful to mediators and party representatives involved in mediations in Hong Kong. He covered the differences between mediation and litigation and arbitration, and gave some reflections on why negotiations may fail. He also testified to the high success rate of mediations entered into by disputing parties, even when mediation is mandatory.

Similarly to another distinguished and experienced speaker on mediation mentioned in this issue of the Newsletter, Mr McFadden stressed that the extensive time involved in litigation and arbitration which a disputing party could otherwise spend on its usual business as well as the stress felt by parties when litigating or arbitrating made mediation an attractive option. His speech was followed by questions and views expressed by many of the present members.



*From left, Branch Hon Treasurer and Vice Chair Joe Gilfeather and Mr Danny McFadden at Hong Kong Club.*

## 2009-2010 East Asia Branch Events Programme

Unless stated otherwise, events are free to members, are held at the HKIAC and start at 6.00 pm, with drinks and snacks being served prior to the commencement of the presentation at 6.30 pm.

### Monday 25 January 2010

A talk by Colin Wall on Challenge to Arbitrators (Part 2).  
Hong Kong Club.

### Tuesday 26 January 2010

YMG talk by Jessica Fei on enforcement of an arbitral award in mainland China.

### Saturday 30 January 2010

YMG site visit to Lai Chi Kok Drainage Tunnel project, jointly organized with Young Members Committee of HKIE. Details to be advised.

### Saturday 6 February 2010

YMG joint institute one-day seminar on Contract Management. Hong Kong Polytechnic University. Time to be advised.

## CIArb East Asia Branch

The East Asia Branch provides a regional organisation for members of the Chartered Institute of Arbitrators who are resident in the geographical area of Hong Kong, mainland China, Indonesia, Japan, Korea, Macau, Mongolia, the Philippines, Singapore, Taiwan and Vietnam. Thailand, formerly part of the Branch, was constituted as a separate branch in 2003. It is anticipated that Singapore will soon become a separate branch. The objectives of the Branch are to promote, encourage and facilitate the practice of settlement of disputes by arbitration, mediation and other means of dispute resolution, and generally to support and promote the status and interests of the Institute.

### CIArb East Asia Branch Committee

**Raymond Au Koon Shan** – Public Relations Officer, **Paul Barrett** – Professional Development, **Peter Caldwell**, **Sacha Man Cheong**, **John Cock** – Immediate Past Chairman, **Jayems Dhingra**, **Paulo Fohlin**, **Joe Gilfeather** – Hon. Treasurer/Vice Chairman, **Timothy Hill** – Chairman, **Anthony Houghton**, **Cheryl Je**, **Johnson Lee** – co-opted, **Richard Leung**, **Nicholas Longley** – Hon. Secretary, **David Sandborg**, **Yeung Man Sing** – Vice Chairman

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