This issue of the Newsletter briefly covers an extraordinary mix of topics dealt with by excellent speakers at events in Hong Kong and Singapore. Sadly, it also contains an obituary of former Branch committee member Ching Nam Fung.

We would be pleased to publish news items and letters from the readership. 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 for submission guidelines.

The forthcoming Branch programme schedule is found on the back page, and an up to date schedule can always be found on the Branch website www.ciarbasia.org.

Paulo Fohlin

Obituary of CN Fung

CN Fung lived and worked in Hong Kong and Taiwan all of his life. He served on various committees including the CIArb (EAB) as the Public Relations Officer from 2006 to 2009 and prior to that as a committee member from 1997 to 1999. He had just completed his pupillage training at the end of last year.

Just over 2 years ago he contracted cancer of the lung and since that time he has been having a daily battle with it to survive. However, against the odds he survived and continued to live his life as normal as possible. He never complained throughout the whole period of his illness.

One of the most consistent memories of CN was his ability to do the right thing at the right time. Thereafter, once he made a decision he would then stand by it. A number of months before his death, he returned to work with MTR on the Regional Express Rail Line determined to live every moment of his life. Yet then, as always, he settled into the team and into his work with the attitude of “life and business as usual”.

Yet above all else CN put his commitment to his family first and never lost sight of this. He was a committed and devoted husband and father whose loss to all is a tragedy.

It is with great sadness that a good friend has passed away. CN was 56 years.

Joe Gilfeather

Singapore Chapter Launches Monthly Events: Evening Talks by International ADR Experts

From June 2009 the Singapore Chapter of CIArb East Asia Branch organises not-to-be-missed Evening Talks cum Consultative Sessions with international dignitaries visiting Singapore and willing to volunteer their time and share their expertise with CIArb members based in Singapore. The Chapter intends to hold such events once a month to be scheduled according to the availability of the invited speakers.

Singapore Chapter Chairman, Christopher Lau, SC encourages all members of the Institute to take an active role in the development and enhancement of their professional expertise through participation in these monthly sessions. The details of the events are updated regularly on the website www.ciarbasia.org.

Jayems Dhingra
Speech by Doug Jones on “Challenges for International Dispute Resolution in the Global Financial Crisis”

Hong Kong, 4 May 2009

CIArb Vice President, Professor Doug Jones, delivered an evening talk on the above subject to Branch members at the HKIAC at the beginning of May. He illustrated the increase in institutional arbitration filings globally, including in investment treaty arbitration, during 2008 and dealt with its likely relation to the state of the global economy. His inference was that the credit crunch has likely impacted positively on the use of international commercial arbitration and investment treaty arbitration. However, against the background of the increase in international arbitration, Jones also illustrated end users’ criticism of the current state of affairs in international arbitration, which was often thought to be too expensive and time consuming. Therefore, reform of the international arbitration process was critical.

Prof Jones kindly contributed his full paper to Asian Dispute Review, where it is available for the interested reader in two parts in the July and October issues of this year.

The Fourth Winnie Whittaker Memorial Lecture presented by Andrzej Cierpicki

Hong Kong, 3 September 2009

At this Memorial Lecture at the Hong Kong Club Mr Andrzej Cierpicki, an Executive Director of Gammon Construction Ltd, presented “A Brief History of Dispute Resolution”.

After some words about Winnie Whittaker, Mr Cierpicki commenced his lecture in Mesopotamia, and pointed out that there is little doubt that disputes were handled with the assistance of a third party already tens of thousands of years ago. Records of events made on stone tablets showed that Assyrian merchants made use of mediation and arbitration as an alternative to an otherwise well developed system as early as 2000 BC. Cierpicki then elaborated on a series of historical texts evidencing the early use of arbitration and mediation, including, to mention a few, on the Judgment of King Solomon of Israel in the 10th century BC, Homer’s Iliad in Ancient Greece, papyri from Ptolemaic Egypt (305-30 BC) and the laws of ancient Rome. Cierpicki also talked about pre-modern China and Confucianism, and thereafter covered more “modern” examples, such as the Laws of Aethelberht (King of Kent) 560-616 AD, the Treaty of Kalisz ending the Polish-Teutonic war (1326-1332), and records on John Shakespeare (William’s father) submitting a dispute to arbitration in 1582. This was a most memorable evening.

YMG Seminar “Dear Client: Are you being served?” by Jean Peter Ho

Hong Kong, 23 June 2009

The Branch YMG had the pleasure of having Mr Jean Peter Ho, Partner of EC Harris LLP, to conduct a talk under the title of “Dear Client: Are You Being Served?” Peter’s talk was aimed to discuss about whether services provided to the client are value for money and the attitudes in sharing problems between stakeholders and the service providers.

Peter started his talk in defining “genuine and authentic service”, where the service providers need to place the client’s interest above their own and to do things right the first time with the best result being delivered. He then pointed out that it has now become more common to spend time with clients in getting feedbacks to help improve services and building strategic business relationships, and that the emphasis has shifted from service oriented total quality management (TQM) to “chit chat” style small talks with clients.

Peter said that whilst the credit crunch and banking crisis starting in September 2008 has brought significant changes to the market, consistent service excellence was taken as one of the strongest differentiator amongst competitors in the market. Hence it was important for any advisors to empathize with their clients, by firstly identifying and articulating the issues and secondly dispelling confusion and focusing the mind on what is most important.

Peter concluded his talk by highlighting that, whilst clients will pay for quality with a proven track record, it is extremely important that advisors should provide “best in class” service by engaging with the clients, understanding the issues confronting them and designing solutions with services that align to their objectives.

Justin Wong
Evening Talk by Peter Leaver on “Challenges to Arbitrators and Conflicts of Interests”

Singapore, 23 June 2009

At the first monthly evening talk organised by the Singapore Chapter, on 23rd June 2009, Peter Leaver, QC, Chairman of the LCIA Board of Directors, honoured the event by sharing intricate issues on the subject of Challenges to Arbitrators and Conflicts of Interests. Peter highlighted that various institutions, for example, American Bar Association, CIArb, ICC, LCIA, etc, publish sets of guidelines for arbitrators and emphasize the good practice of disclosure from the very beginning. But if such guidelines were to be taken literally it might create an impression that the arbitrators are being asked to go on the stage of parade, for “Beauty Pageant”, before being considered for appointment.

Further, in spite of all guidelines issued and disclosures made, the statistical fact remained that challenges to arbitrators’ appointments or jurisdiction, or awards, are not uncommon in the ADR sector in this context. For example, as per the published statistics of ICC, from 1996 to 2008 there were 376 challenges to arbitrators out of which only about 20 were upheld. Though statistics provided a rough overview of the challenges, unlike in appeal court judgments, there was no public guidance on how such challenges are dealt with by the institutional committees in administered arbitrations. Peter further stressed that any amount of disclosures or signing of declarations on sheets of paper were not going to tell the arbitrator how to behave or change the behaviour.

According to Peter, “independence” was concerned with the relationship between the party and the arbitrator, and “impartiality” - whether actual or apparent - was bias assessed on a fact based enquiry in each case and not on a signed declaration of the arbitrator. Further, the concept of independence should not be misconstrued as a sub-part of the concept of impartiality. Peter also noted that the basis of irregularity in the arbitral proceedings as per the English Arbitration Act, Section 68, does not appear in the IBA guidelines.

Peter Leaver advised members present practising or aspiring to practice as arbitrators to use reference cases, like decisions to challenges published by LCIA and appeal court judgments, and, above all, to focus on self-discipline and not signed declarations alone. The Chapter Chairman, Christopher Lau, SC thanked Peter Leaver for sharing his invaluable experiences with the members at this successful event.

Jayems Dhingra

Evening Talk - “Who do you want? Who do you get” - by Paul Darling

Hong Kong, 2 July 2009

Paul Darling, QC gave a much appreciated speech to CIArb members at the Hong Kong Club on the two above questions concerning “The qualities of the best arbitrators for major construction and engineering disputes”. Mr Darling, based in London, has more than 25 years’ experience as a barrister.

It is not easy to render justice to Darling’s extensive speech in a few lines. He stressed the importance of the identity of the arbitrator to each case. He talked on different types of tribunal, different selection procedures in respect of arbitrators, such as e.g. list-procedures, as well as the desirable qualities and characteristics of an arbitrator, also touching upon the conundrum that may perhaps sometimes exist when choosing between a completely impartial arbitrator and an arbitrator that might be more in your client’s interest. Among other things, he further covered advantages and disadvantages of arbitrating before a sole arbitrator compared to arbitrating before a panel consisting of three arbitrators. Finally, in general, he found it to be advantageous to appoint the individual arbitrator already in the arbitration agreement of the contract.

Mr Darling’s speech prompted many questions from the interested audience.
Speech by Bernard Hanotiau on “Extending the Arbitration Clause to Non-Signatories – Where do we stand?”

Singapore, 7 July 2009

CIArb members and guests gathered together to welcome Professor Bernard Hanotiau to his recent visit to Singapore where he talked on extension of arbitration clauses to non-signatories. He received a standing ovation to the expertise shared during the session. Prof Hanotiau is the author of “Complex Arbitrations: Multi-party, Multi-contract, Multi-issue and Class Actions” (Kluwer, 2006) and of more than 120 articles, most of them relating to international commercial law and arbitration.

Against the background of general principles of formation of an international arbitration agreement, requiring the parties’ consent to arbitrate and written form, and limiting the arbitration agreement to the initial parties to the contract / arbitration agreement, Prof Hanotiau dealt with questions like why a party would like to arbitrate when it is not a signatory and in what circumstances that would be possible. Prof Hanotiau systematically traversed through the variety of situations, in which there may be a need for the extension of the arbitration clause to non-signatories, such as under principles of third party beneficiaries, principal-agency relationships, estoppel, alter ego, fraudulent conduct, piercing the corporate veil, etc. He explained how non-signatories can be categorised into three groups, namely (1) Group of Companies, (2) Group of Contracts between same parties and (3) Notion of extension through implied consent or by adherence.

Prof Hanotiau presented several case authorities from different jurisdictions including relevant legislation. The key observation from his extensive research shared with the audience was that the decision on extension is fact specific and depend on the circumstances of the case. Further, arbitral tribunals often looked to transnational norms to decide the issue instead of referring to an applicable national law.

The conclusions drawn from Prof Bernard Hanotiau’s research were worthwhile lessons to be learned by international ADR practitioners. Interested members who are keen to learn more about this increasingly important and complex subject in the context of global trade may have to wait for his book hereon to be published very soon.

Jayems Dhingra

Annual General Meeting of the East Asia Branch’s Young Members Group

Hong Kong, 10 July 2009

At the Annual General Meeting of the Young Members Group (“YMG”) of the East Asia Branch, the chairperson for session 2008-2009 Ms Rendy Ng reported the successful organization of a wide range of events during her chairmanship.

Following the meeting, the new Committee Members for the 2009-2010 session are as follows: Chairperson Ir Johnson Lee, Immediate Past Chairperson Ms Rendy Ng, Vice Chairpersons Ms Jessica Chan and Mr Justin Wong, Honorary Secretary Mr Samuel Ho, Honorary Treasurer Mr Duncan Ho, Committee Members Mr Avan Fan, Ms Cordia Yu, Mr Nicky Cheng, Ms Frances van Eupen, Mr Timmy Cheung, Ms Cheryl Je, and Mr CW Tang.

Another highlight of the evening was a speech delivered by EAB Chairman, Timothy Hill, providing his perspective on the future of young arbitrators and how they could succeed in their careers.

YMG has planned a full programme of activities for the 2009-2010 session, comprising of technical seminars, interactive site visits, personal development programmes, university talks and community services. As with previous years, we will continue our close collaboration with other young professional groups. We welcome members’ comments and feedback as this is vital for the continual improvement of our services to the members of CIArb.

Johnson Lee
PSDAS Scheme - Arbitration Seminar

Hong Kong, 16 July 2009

On a Thursday evening seminar at Jardine House in Central, Hong Kong, East Asia Branch Committee members Peter Caldwell and Paulo Fohlin presented two papers on, inter alia, an Introduction to Arbitration and the proposed changes to Hong Kong’s Arbitration Ordinance. The seminar was a part of the Professional Services Development Assistance Scheme run by the East Asia Branch and partly funded by the Hong Kong Government. The primary aim of the PSDAS Scheme is to introduce arbitration to a wider audience. The arbitration seminar was the second part of the PSDAS Scheme. The first part was a mock hearing held on 6 June 2009.

Mr Caldwell and Mr Fohlin between them presented two papers which gave a thorough introduction to arbitration and which allowed the audience to benefit from their broad experience. Caldwell’s lecture provided an overview of methods of dispute resolution starting on one extreme of using physical force and ending on the other side of the spectrum; mediation. He described the essential features of arbitration and introduced the UNCITRAL Model Law and Hong Kong’s Arbitration Ordinance. Peter Caldwell also summarised the key points from the new Arbitration Bill, which is intended to simplify Hong Kong’s arbitration law. The new Arbitration law will in particular abolish the current distinction between domestic and international arbitration and replace the current system with a unity system based on the UNCITRAL Model Law. He also explained the basic requirements for arbitration agreements and for a notice of arbitration.

Mr Fohlin’s talk concentrated on the conduct of arbitration proceedings (including important features such as party autonomy, pleadings, amendments of claims and ascertainment of facts) and the law applicable to the arbitration agreement. Fohlin also described the interim measures that an arbitration tribunal can order, including injunctions, securing money in dispute and preservation of property. Fohlin’s talk provided examples gathered widely from international arbitration across the world reflecting his international experience, including examples from his native Sweden, as comparisons to the Hong Kong Arbitration Ordinance and the new Arbitration Bill.

Both speeches were extremely well prepared, highly informative and well presented. It is intended that the speeches will be presented again later this year. This time, the presentations will be in Cantonese. The final part of the PSDAS Scheme is the preparation of a DVD of the mock arbitration hearing. This is currently in the final stages of production. Further information about the availability of this DVD will be available shortly.

Nicholas Longley

Evening Talk by David Owen on “International Arbitration & Facilitating Settlement: Traps & Opportunities”

Singapore, 17 August 2009

The mere statement “arbitrators to facilitate settlement” is in some jurisdictions as alarming as asking arbitrators to be the conciliators. However, Singapore International Arbitration Act, Section 17, provides the power to the arbitral tribunal to act as conciliator, subject to written agreement between the parties. Similar provisions are also found in the Hong Kong Ordinance, mainland China, India and Japan. David Owen, QC discussed how important it is, in international arbitrations, for the arbitrators to encourage settlement, and shared his research work and experiences with the CIArb members and guests at this evening event. The session was also graced by the CIArb Vice President, Doug Jones.

David Owen said that no doubt it is a controversial topic, and many assume that promotion of settlement by arbitrators is heretical, dangerous and wrong, but he challenged this assumption. David stated that parties, lawyers and arbitrators need to think creatively about the settlement within the arbitration process, despite the expected difficulties.

David took the audience through series of scenarios with lively discussions and participation, in expounding the concepts of “impartiality” and “due process”, “confidential meetings” and “mediation style process” and “third party mediation”. No doubt the arbitrators had to take necessary precautions, but above all, the underlying concept of speedy and cost effective resolution should be the driving force for arbitrators to facilitate settlement.

In concluding remarks, David made a very encouraging exhortation to the Singapore ADR community and said: “Singapore is well-placed to deal with these issues. It is already a centre of excellence for dispute resolution. It has an expanding role in international arbitration. Its laws recognize the potential for conciliation within arbitration. There is a real opportunity for Singapore to take a lead on this topic in coming years. It will be fascinating to see if it does so”.

Jayems Dhingra
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.

**Tuesday 13 October 2009**
A talk by Richard Barton on “The role of media relations in ADR”. Hong Kong Club.

**Thursday 22 October 2009**
A talk by Nicholas Longley on “Future Trends and Innovations in Dispute Resolution”.

**Tuesday 3 November 2009**
A talk by Danny McFadden, CEDR, on mediation. Hong Kong Club.

**November 2009**
A talk by Paulo Fohlin on investment treaty arbitration. Date and venue to be advised.

**November 2009**
YMG Annual Party. Date and venue to be advised.

**November 2009**
YMG Leadership Training Workshop. Date and venue to be advised.

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**November 2009**
YMG Leadership Training Workshop. Date and venue to be advised.

**Talk by Michael Charlton on “Quantity Surveyors as Expert Witnesses”**

Hong Kong, 21 July 2009

On 21 July, Mr Michael Charlton was kind enough to give an evening talk for the Branch on “Quantity Surveyors as Expert Witnesses” at the Hong Kong International Arbitration Centre in Central, Hong Kong. Mr Charlton is a chartered quantity surveyor who has extensive experience in acting as a quantum expert. He has given evidence in numerous arbitrations and litigations.

At the outset, Mr Charlton highlighted some interesting court cases involving the use of experts in various areas such as, for example, the controversial case Sir Roy Meadow and the Cot Death Cases (2005). He then enlightened the present members on the most important attributes an expert should have. This covered impartiality, experience, knowledge, expertise, as well as the resources required to complete the task. He also reminded members that the principal duty of an expert is owed to the tribunal as opposed to the paying client. Further, he shared with the audience the practical issues an expert will encounter, including the sensitive issues regarding getting paid and disputes on fees.

Mr Charlton’s interesting presentation on the topic attracted many questions from the floor which were dealt with in the ensuing Q & A session.

Cheryl Je

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 become a separate branch later this year. 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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