



East Asia  
Branch

**CI Arb**

# Newsletter

July 2006

The Branch has had a busy time since the publication of the last issue of the Newsletter, with many educational and social events, not least of all the AGM and the Annual Dinner, both of which were held in May. This year's election for the EAB committee was hotly contested, with 17 candidates vying for the 12 available positions. Details of the make-up of the newly elected committee can be found on the back page. Following the election, Glenn Haley was unanimously elected by the incoming committee to continue to act as Branch chairman.

Finally, as a reminder, we will be pleased to publish any items that will be of interest to our membership relating to dispute resolution generally. To that end, your contributions, be they items of news, short articles, book reviews or letters, should be sent to the Editor, contact details per the back page.

*Andrzej Cierpicki*

## **Conference on Arbitration for the Judiciary** Manila, March 2006

The Branch was very pleased to present an arbitration seminar jointly with the Philippine Dispute Resolution Center, Inc. and the Kuala Lumpur Regional Centre for Arbitration on 23-24 March 2006 at the Bahia Room of the Hotel Intercontinental Manila, Makati City, Philippines.

The event was intended to familiarise Court of Appeals justices and Regional Trial Court judges with some aspects of both domestic and international arbitration, with emphasis on how domestic courts can assist arbitral tribunals, and how they can enforce or vacate arbitral awards. It was exclusively for senior justices of the Philippine Court of Appeals and executive judges and presiding judges, respectively, of the several salas of the Regional Trial Court and commercial courts in the cities making up Metro Manila.

The seminar was held under the auspices of the Philippine Supreme Court's Philippine Judicial Academy (PHILJA), which aims to foster excellence in the Philippine Judiciary by providing quality judicial and legal education to members of, and aspirants to, the Philippine judiciary.

Speakers on the substantial topics were drawn, other than for KLRCA's Dato' Syed Ahmad Idid, from members of the Institute, namely Robin Peard, Philip Nunn, Mario Valderrama and Eduardo Ceniza of the East Asia Branch and Chong Thaw Sing and Kevin Woo of the Malaysian Branch. Reactions were delivered by Philippine Stock Exchange President Francis Ed Lim, Mr. Justice Lucas P. Bersamin of the Philippine Court of Appeals, and Eduardo P. Lizares of the Padilla Law Office. PHILJA ADR Department Chair Alfredo F. Tadiar presented the PHILJA perspective and talked about studies on the possibility of court-annexed arbitration as a supplement to PHILJA's court-annexed mediation.

The proceedings were opened on 23 March 2006 by PHILJA Chancellor Mme. Justice Ameurфина A. Melencio-Herrera and were closed on 24 March 2006 by the Inspirational Message of the Chief Justice of the Philippines, the Honorable Artemio V. Panganiban.

The Branch would like to record its thanks to Dean Eduardo D. de los Angeles for his support of the Branch's participation in the event, a first in the history of the Philippine judiciary.

*Mario E Valderrama*

## **The Inaugural Winnie Whittaker Memorial Lecture** Hong Kong, April 2006

The first Winnie Whittaker Memorial Lecture entitled "Must Arbitration be a Bloodbath?" was presented on 18 April 2006 by Peter Caldwell. He considered various aspects of the procedure commonly adopted in arbitration and suggested that many of the unnecessary costs arise from the adversarial system. He criticised the piecemeal manner in which evidence is collected after the case had been formulated and argued that this process leads to attempts to make the evidence fit the case rather than the case being derived from the evidence.





Mr Caldwell expressed the view that the court's willingness to allow parties to amend their case was against the interests of the efficient administration of justice and suggested that amendments should only be allowed on rare occasions.

He commended stricter control of the length of hearings. He compared arbitration proceedings with adjudication under the statutory regimes adopted in the UK and elsewhere but concluded that the availability of review of adjudicator's decisions in arbitration to correct errors of both law and fact made the very tight timetables workable.

In conclusion he suggested that a two-tier arbitration system, with the first tier similar to adjudication but with a limited right to review by a second tier of arbitration, could provide the benefits of statutory adjudication without legislation and would give the added advantage that first tier arbitration awards, if not successfully reviewed, would be enforceable both domestically and internationally.

*Doug Wardale (Centre) presenting Entry Course certificates to Kurt Skelton and Andrew Li following the Memorial Lecture*

## Loyola of Los Angeles Wins Third Vis East Moot Hong Kong, April 2006

The week-long third annual Willem C Vis (East) International Arbitration Moot wrapped up on 2 April 2006 with a Gala Awards luncheon at the Hong Kong Club.

Before an eminent tribunal composed of Dr. Robert Briner, former Chair of the ICC Court of Arbitration, barrister Anthony Neoh and American attorney Sally Harpole, Loyola University Law School of Los Angeles excelled to take the prize as the prevailing team in oral arguments, and Loyola's Lily Liu won the Neil Kaplan Award for Best Oralist. Ludwig Maximilians University of Munich took awards for both Best Claimant Memorandum and Best Respondent Memorandum, among the 32 law schools in nine countries competing this year.

This year's dispute concerned a claim for substantial damages allegedly caused by the failure of a printing machine to work as promised, and the 1980 Vienna Convention on the International Sale of Goods was, as usual, the governing law. Although Hong Kong is not a party to the CISG, most of our trading partners are, so knowledge of the CISG is an important element in a law student's education. After six months of research, writing and rehearsal, students, coaches and professionals gathered for a grueling programme of practice, performance and parties.

Nearly 300 students, coaches and professional arbitrators took part in this year's Vis East. The Chartered Institute of Arbitrators has been the underwriter of the Vis East since its inception in 2003, and many CIArb members have joined the event as arbitrators. Hong Kong law firms and the Bar Association have also been supportive both in judging the arguments and in providing hospitality for the visitors.

The full results of the competition, along with dozens of pictures recording all the excitement, are available at the new Vis East website: [www.cisgmoot.org](http://www.cisgmoot.org).

Next year the fourth Vis East will take place from 19 – 25 March, and arbitrators from the region are most welcome to assist with arguments. Registration forms for both teams and arbitrators will be available on the website from September onward.

*Louise Barrington*

## Nuts and Bolts Hong Kong, April, May and June 2006

This six-part series of practical talks on arbitration has proved very popular with members as it addresses practical issues that arise regularly in arbitrations. It is particularly suited to those young or new members who wish to gain additional knowledge and experience of the "nuts and bolts" of the arbitration process.



*A Cock & Wall story - Writing the Award*



Part 3 of the series, Writing the Award, was presented by John Cock and Colin Wall on 25 April, and was followed by a talk on 18 May by John Molloy on Calderbank Offers and Payments-in. June's talk addressed the question of Taxation of Costs in Arbitrations, and was presented jointly by Glenn Haley and Mike Charlton. All of these talks were well attended and were followed on each occasion by a lively and informative Q&A session.

As with all the 'Nuts and Bolts' evenings, in addition to the educational value of the presentation, there is an opportunity to socialise with other members over snacks and a glass or two of your favourite beverage. Part six of the series, Conflicts of Interest and Other Challenges to Appointment, will be presented by Robin Peard on Thursday 11 July 2006. A further six-part series is planned to commence later in the year.



## Social Events

A cocktail party was held 6 April 2006 to welcome the successful candidates from our November 2005 Entry Course.



The social events associated with this year's Vis East Moot once again provided our members with the opportunity to mix with and exchange ideas with the eager young minds who will become the arbitrators of tomorrow.

The EAB's major social event of the year, the Annual Dinner, was held at the Hong Kong Club on Friday 12 May 2006. This year's distinguished guest speaker was Tony Fitzgerald QC, who shared his experiences of alternative dispute resolution in Australia, particularly mediation, which he noted is the growth area of Australian ADR, principally because of its

flexibility and the opportunity it provides parties to find their own quicker, cheaper, confidential solutions to their disputes. Mr Fitzgerald, who has held the position of President of the Queensland Court of Appeal (1991-1998) and was a member of the NSW Court of Appeal (1998-2001), and now works as a consultant undertaking commercial mediations and arbitrations, held the view that mediation is fast becoming an essential step in, or adjunct to, court proceedings in Australia. This will, of course, be of interest to many local practitioners, particularly in view of the advent in Hong Kong of a court-attached construction mediation pilot scheme later this year.



ABOVE LEFT: James Kwan (left) and three successful Entry Course graduates at the cocktails  
ABOVE: Entry Course winners (left to right): Au Yeung Ho Wing, Anna Koo and Patricia Nandwani

## The ICC's Pre-arbitral Referee Procedure

Talk given by Jean-Yves Garaud at the Young Members Group International Conference, Paris June 2005

### Introduction

The pre-arbitral referee procedure is a procedure relating to provisional measures which are intended to be combined with another method of dispute resolution, for example, a clause of alternative dispute resolution and/or an arbitration clause or even a jurisdiction clause.

The ICC Rules for Pre-Arbitral Referee Procedure (the "Rules") have existed since 1990. Although being widely commented on at the time of their introduction, they have been barely used for 10 years. To date, there have been only 5 pre-arbitral referee procedures undertaken.

The pre-arbitral referee procedure is a procedure under which the parties may request a third party (the "referee") to order provisional and/or conservatory measures. Unlike the Expedited Procedure under the Swiss Rules of International Arbitration, it is not aimed at the acceleration of the arbitration. Nor does it concern the merits of the disputes or decide the litigation on the substance.

The Rules are autonomous and are separate from ICC Rules for Arbitration. As a result, the Rules only apply when the parties have explicitly agreed to them.

### **A flexible and speedy procedure**

A request for a referee is subject to a minimum of formalities, comparable with those provided by the ICC Rules for Arbitration for a request for arbitration. In the absence of agreement between the parties, the Chairman of the International Court of Arbitration appoints the referee and decides the location of pre-arbitral proceedings.

The referee conducts proceedings freely. He or she has wide powers of investigation. The wide powers and the flexibility allow him or her to manage effectively any difficulty which may arise during the proceedings. From the delivery of the file, the referee has thirty days to pronounce his or her decision.

### **An effective procedure at lower cost**

Under the Rules, the referee may order a great variety of provisional and/or conservatory measures. His or her order is not subject to appeal. Although the order only has the authority of an agreement instead of a judgement, it does have strong moral authority. In practice, the referee's order may also serve as a point of departure for an amicable resolution of the dispute.

The pre-arbitral referee procedures help to maintain the classic advantages of arbitration. Provisional and conservatory measures play a decisive role in arbitration because, if they are not adopted rapidly, the final award may lose all its practical interest. The flexibility and speed of the Rules are therefore major assets. Another classic advantage is that the referee may order a vast range of provisional measures without territorial limit. Given the neutrality of the procedures under the Rules, it is an ideal resolution method where the dispute involves states or state bodies. The procedures are also informal and less adversarial.

Finally, the pre-arbitral referee procedures are inexpensive. The request for referee needs to be accompanied by US\$4,000. The amount of the referee's fees and costs are fixed by the General Secretary. While the referee divides the costs between the parties in his or her order, nothing appears to prevent the referee from granting one party an indemnity to recover its costs from the other.

### **Conclusion**

Joining pre-arbitral referee procedure to an ICC arbitration clause will create a very effective combination which preserves the effectiveness and strengths of the classic advantages of arbitration. The success of the first pre-arbitral referee procedure should encourage international commercial players to integrate this procedure into dispute resolution clauses.

*James Kwan*

## **2006 East Asia Branch Events Programme**

### **Thursday 11 July**

Part 6 of our 'Nuts and Bolts' series: "Conflicts of Interest and Other Challenges to Appointment" presented by Robin Peard. Venue HKIAC.

### **Saturday 18 - Sunday 19 November**

Members' Conference. Venue Selsdon Park Hotel, Surrey, United Kingdom.

A new events calendar is currently being prepared by the incoming programming committee for the coming year and will be published in the next issue of the Newsletter.

## **CI Arb East Asia Branch**

The Branch provides a regional organisation for members of the Chartered Institute of Arbitrators who are resident in the geographical area of China, Vietnam, The Philippines, Korea, Singapore and Indonesia (Thailand, formerly part of the East Asia Branch, was constituted as a separate branch in 2003). The objectives of the Branch are to promote, encourage and facilitate the practice of settlement of disputes by arbitration and other means of dispute resolution, and generally to support and promote the status and interests of the Institute.

### **CI Arb East Asia Branch Committee**

**Glenn Haley** – Chairman, **Doug Wardale** – Hon. Secretary, **Joseph Gilfeather** – Hon. Treasurer, **Louise Barrington**, **Paul Barrett**, **K K Chan**, **Andrzej Cierpicki**, **John Cock**, **Julian Cohen** – co-opted, **Gavin Denton** – co-opted, **C N Fung**, **Timothy Hill**, **Anthony Houghton**, **Christopher To**, **Andy Yiu**

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