



The East Asia Branch was busy in this quarter particularly after the Chinese New Year. This issue of the Newsletter covers inter alia several events since the previous issue, which includes evening talks given by Her Honour Judge Sharon Melloy, Mr Joe Gilfeather and Ms Louise Barrington, as well as the arbitration course conducted in Shanghai PRC.

As with the previous quarters, the Branch Young Members Group was active in organizing events attracting considerable interest, which covers the Annual Party and various promotion talks.

As always, news items for the Newsletter and letters from the readership are most welcome. Readers are also encouraged to submit articles, book reviews or letters relating to dispute resolution to Asian Dispute Review. For submission guidelines please visit [www.asiandr.com](http://www.asiandr.com).

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

*Cheryl Je*

## Evening talk on “Family Arbitration For Children Cases?” by Her Honour Judge Sharon D Melloy

**Hong Kong 17 February 2014**

On 17 February 2014, HH Judge Sharon D Melloy gave an evening talk on “Family Arbitration For Children Cases?” at the Hong Kong International Arbitration Centre.

Judge Melloy began the talk by discussing the Family Law Arbitration Scheme in England and Wales. The Scheme is based upon rules and procedures drawn up by the Institute of Family Law Arbitrators Limited (IFLA) and administered by IFLA with support from the Chartered Institute of Arbitrators.

The scope of the Scheme was explained in detail by Judge Melloy. Generally, the Scheme applies to arbitrations for any financial or property disputes arising within the context of a family relationship, excluding the care and parenting of children.

There are substantial benefits in pursuing family arbitration for these disputes under the Scheme, as pointed out by Judge Melloy. These benefits include flexibility, speed, less formality, choice of arbitrator, privacy and confidentiality.

Judge Melloy commented on the future prospects of family arbitration in Hong Kong. She also shared the current progress on the development of introducing similar rules and process in Hong Kong.

This interesting and informative talk finished with a question and answer session. Following this, Judge Melloy was entertained to dinner by the Institute.



*HH Judge Sharon D Melloy at the HKIAC*

*Gina Leung*

## Evening talk on “Arbitrator Liability” by Ms Louise Barrington

Hong Kong 3 March 2014

On 3 March 2014, Ms Louise Barrington offered an evening talk on “Arbitrator Liability”, a topical issue that raises important questions for the future development of arbitration. Arbitrator liability is already a live issue, particularly for arbitrators involved in international disputes, however it is an issue that to date has received little attention among the arbitration community in Hong Kong and the wider region.

Ms Barrington began by discussing the traditional approach of the courts in common law jurisdictions and the promotion of judge-like immunity for arbitrators. This allowed for a discussion of some of the key distinctions between the role of the arbitrator and the role of the judge generally. The speaker also highlighted the protection afforded arbitrators both in Hong Kong and under the rules of many of the leading arbitral institutions globally. The idea that arbitrators perform a quasi-judicial role, and that judge-like immunity from lawsuits offers broader advantages, are notions strongly supported in Hong Kong; and yet, as Ms. Barrington warned, increasingly arbitrators must consider not only the seat of the arbitration. Disappointed parties may increasingly be weighing the possibility of suing the arbitrators and in a transnational legal environment, and given the cross fertilization of legal ideas, Ms Barrington suggested that local arbitrators cannot afford to turn a blind eye to wider international developments.

Of course, few jurisdictions have sought to impose as strict a regime as that applicable in the PRC. Ms Barrington discussed briefly the position in China under the 1994 Law and the 2006 Amendment, which allows for the imposition of stiff criminal sanctions against arbitrators, before turning the spotlight on Europe. She warned that increasingly judge-like immunity for arbitrators is far from guaranteed in a number of European civil law jurisdictions. The audience heard how, for example, under the Spanish Arbitration Act, arbitrators may be found liable in the civil courts for bad faith, recklessness or wilful misconduct. It is clearly difficult to determine the meaning of open textured terms such as ‘bad faith’, ‘recklessness’, etc and the fact remains that courts have had little opportunity to flesh out their meaning. Moreover, anticipating the potential for civil claims, the Spanish law requires arbitrators and arbitral institutions to be protected through insurance. The audience learned too that in France, where an arbitrator resigns without just cause, or fails to apply applicable rules, for example, there the potential exists for a disgruntled party to bring a claim for breach of contract against the arbitrator. Other European civil law jurisdictions appear to be moving in a similar direction.

The Evening Talk considered some of the drawbacks of arbitrator immunity and Ms Barrington briefly highlighted a concern that in practice it may encourage a degree of carelessness. She also cited the example of the six month rule in ICC arbitrations for the rendering of a final award. Ms Barrington noted that the rule is virtually never honoured in practice, leading some to call for the timeframe to be extended. The rule remains however for fear that any extension would simply encourage greater delay. Recent legislative developments in Europe should therefore encourage arbitrators to re-evaluate key questions such as whether an arbitrator should be legally obliged to render an enforceable award, for example, and to reassess the impact of a failure to render an award within a specific timeframe. Ms Barrington noted that arbitrators in the US and Canada tend to anticipate the potential for litigation more readily but going forward arbitrator liability is an issue that may increasingly gain traction at the international level. The speaker highlighted in particular the Meydan legal action currently before the Dubai courts. That dispute concerns a three-member tribunal appointed by DIAC and the court action arises out of an arbitration involving Arabtec Construction and WCT Berhard. Meydan is seeking damages in the courts of AED 60m (US\$16.3m) against the three leading and high profile arbitrators involved in the dispute. As the speaker noted, the case brings into sharp focus the reality that even highly experienced arbitrators must be aware of the potential risk of litigation.

In closing, Ms. Barrington suggested a number of steps for arbitrators concerned about potential liability, particularly those engaged in international disputes. She highlighted in particular the importance of disclosure, not just at the point of nomination but rather throughout the entire proceedings. She also warned about the use of social media and suggested that arbitrators should assume that their conduct and connections, both past and present, are open to careful scrutiny. Ms Barrington further suggested that arbitrators should check their insurance and whether it provides adequate coverage. She noted in particular that ‘global’ coverage often excludes the US and Canada and she suggested that the Chartered Institute of Arbitrators in particular can play a crucial role going forward in working with insurance companies to ensure ever more comprehensive and robust insurance coverage for arbitrators working internationally.

*Martin Doris*

## Evening talk on 'Know Your Contracts' by Joe Gilfeather

Hong Kong 25 February 2014



Joe Gilfeather at the HKIAC

On 25 February 2014, Mr Joe Gilfeather, the EAB's immediate Past Chairman, delivered an evening lecture on 'Know Your Contracts' at the Hong Kong International Arbitration Centre.

'Disputes seem to be part of the construction process nowadays', stated Mr Gilfeather. The lecture commenced with a discussion of some common potential causes for disputes on typical construction projects, such as differences between a client's brief and budget and differences between a client's brief and his expectations.

Mr Gilfeather explained that the Engineer needs to have a good understanding of the dispute resolution process to help them to do a better job.

Aside from the arbitration costs, the Engineer needs to consider many aspects when deciding whether to commence arbitration. One of these important aspects is allocation of resources, which may be diverted to from a dedicated team for dealing with claims rather than project delivery.

Furthermore, Mr Gilfeather added that the lessons learned in the dispute process can provide feedback to do better procurement in future projects. Some of these lessons learned may include creating an audit trail for procurement, preparing in-house procedures for tender assessment, peer review of tender documents, in-house procedures for contract administration and procedures for reporting and monitoring claims.

A pro-active approach can be developed by engineers to drive better procurement and contract administration, as explained by Mr Gilfeather. This in turn reduces the likelihood of disputes and their magnitude if they do arise.

Mr Gilfeather went on to discuss the fundamentals of contract administration, including the documents forming the contract and the precedence of these documents. Although the documents exist in the contract for different purposes, 'they must be able to be read across in the contract and talk to one another', as he simply described it.

'The impact of delay on projects should not be underestimated', said Mr Gilfeather. The cost implications involved could be much wider than anticipated. Mr Gilfeather further commented on the measures in dealing with delays, which can be varied dependent on the project requirements and whether it is a public or private sector client.

As for delays on government contracts, the client usually accepts prolongation. In comparison, private sector clients would more willing to adopt acceleration measures to get works completed on time. For rail projects particularly, in which the commissioning of trains relies on timely completion of several independent station contracts, the client is determined to go for acceleration measures in the event of delay to one or more of its contracts.

While Mr Gilfeather explained in the lecture how better procurement and an audit trail for contract documents could help to reduce disputes, he also highlighted how the use of 'Supplementary Agreements' can help to avoid disputes, especially for instances where ambiguities exist in contracts.

The attendees posed a number of challenging questions at the end of the lecture. In closing, Mr Gilfeather emphasized that the key rule to avoid disputes is by good procurement and sound contract documentation – it is important to 'Know Your Contracts'.

Gina Leung

## Promotional Talk to YPG of Leighton Asia Construction Limited

Hong Kong 29 November 2013

On 29 November 2013, our YMG committee members – Lawrence Lee, Andrew Chin and Allen Lai jointly gave an evening talk to the members of the Young Professional Group of Leighton. The talk was related to dispute resolution methods covering arbitration, mediation and the implementation of Dispute Resolution Advisor in the Hong Kong construction industry. After the talk, our YMG committee member gave a brief introduction of the CIArb (EAB). The seminar was well received with over 30 young professional staff from Leighton. There were enthusiastic responses from the audiences in the Q&A session.

*Allen Lai*



*The speakers and the attendees*

## Promotion of CIArb at The Chinese University of Hong Kong

Hong Kong 15 January 2014



*Jessica Chan and Lawrence Lee at the CUHK*

With the commencement of the academic year 2014, the CIArbYMG conducted a university promotion talk on 15 January 2014 at The Chinese University of Hong Kong (CUHK). The chairperson of the CIArb EAB YMG, Lawrence Lee, together with three committee members, Jessica Chan, Helen Au and Andrew Chin, conducted the talk. They explained the brief history and objectives of the Institute as well as the student affiliates scheme to about 15 students of the PCLL. After the promotion talk, Helen gave a brief talk on Introduction of Arbitration to the students and many students proactively on asking many questions at Q&A session. The YMG committee members had a chance to meet the students and encourage them to apply for student affiliates online using the computers provided.

The YMG committee would like to especially thank Martin Doris for arranging the promotion sessions.

*Lawrence Lee*

## Introduction to International Commercial Arbitration Course

Shanghai PRC 1-2 March 2014

On 1 and 2 March 2014, the Chartered Institute of Arbitrators (East Asia Branch) held an "Introduction to International Commercial Arbitration" course in Shanghai PRC. The course would enable candidates upon successful completion to become an associate member of the Institute. Last year, the Branch held a similar course in collaboration with Shanghai Arbitration Commission. As regards the course held this time, the Branch would like to express gratitude to Messrs. Young-Ben Law Firm by allowing the Branch to use their room facilities for holding this training course. The Branch Vice Chairman Mr. Richard Leung was the course director and he was assisted by Mr. David Fong. The Branch thanked Mr. Leung and Mr. Fong for spending their time and efforts in running this course.

The course was well attended by 15 persons, with 12 from the Mainland and 3 from Hong Kong. Comments and feedbacks from candidates were very positive as they looked forward to attending further enhanced/advanced training courses run by the Chartered Institute or the Branch.



Group Photo



*Richard Leung*

## YMG Annual Party

Hong Kong 17 January 2014



The YMG Committee

The CI Arb (EAB) YMG Annual Party for 2014 was held on Friday 17 January 2014 at Bisous in LKF Tower. The party was well attended with more than 190 attendees. Members enjoyed complimentary drinks, a sumptuous dinner buffet, lucky draws and a night of great fun! Zenneth Kok of Hong Kong Magicians entertained the party to great laughter and amazement to build up the suspense to the announcement of the winner of the top lucky draw prize, a 16GB iPad Air worth HK\$3,688! Many thanks to our Gold Sponsors such as the CI Arb Main Committee, Gammon Construction and Herbert Smith Freehills, amongst others, without which such an exciting evening would not have been possible.

*Andrew Chin*

## 2013-2014 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.

### Friday 17 January 2014

YMG Annual Party. Details circulated.

### Monday 17 February 2014

Evening Talk on "Family Arbitration for Children Cases?" by Her Honour Judge Sharon Melloy. Details circulated.

### Friday 21 February 2014

YMG Evening Talk on "The Nightmare of Mediating Complex International Disputes – A Practitioner's Experience" by Mr Christopher To. Details circulated.

### Tuesday 25 February 2014

Evening Talk on "Seminar on Know Your Contracts" by Mr Joe Gilfeather. Details circulated.

### Saturday to Sunday 1 – 2 March 2014

Introduction to International Commercial Arbitration Course in Shanghai PRC. Details circulated.

### Monday 3 March 2014

Evening Talk on "Arbitrator Liability" by Ms Louise Barrington. Details circulated.

### Tuesday 11 March 2014

YMG Evening Talk on "Key Principles of Private International Law Applicable to International Arbitration Practice" by Mr Paul Mitchard QC. Details circulated.

### Thursday 13 March 2014

EAB Annual Dinner. Details circulated.

### Saturday 22 March 2014

YMG Charity Function. Details circulated.

### Sunday 6 April 2014

Talk in Taiwan. Details to be circulated.

### Tuesday 8 April 2014

Evening Talk on "HKIAC Arbitration Rules" by Mr Dean Lewis & Mr Vincent Connor. Details circulated.

### Friday 11 April 2014

PARDCI Talk. Details circulated.

### Wednesday 30 April 2014

AGM and Evening Talk by Mr Frank Poon. Details to be circulated.

### Monday 19 May 2014

9th Annual Winnie Whittaker Memorial Lecture Talk by Mr John Molloy. Details to be circulated.

### More Upcoming Events:

- Evening Talk on Container Terminals Development and Disputes by Mr Horace Lo, Development Director, Modern Terminals
- Nuts & Bolts of Construction Arbitration Series
- Visit of East Asia Trustee Mr Colin Wall to various Chapters
- Visit of CI Arb President Mr Michael Stephens to Hong Kong and various Chapters
- CI Arb Centenary Celebration

## CI Arb (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, Taiwan and Vietnam. Thailand and Singapore, formerly part of the Branch, were constituted as separate branches in 2003 and February 2010 respectively. 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.

### CI Arb (East Asia Branch) Committee

**Paul Barrett** – Professional Development & Training/ Editorial/ Vis East Moot, **Louise Barrington, Jessica Chan** – Universities Promotion, **Kanice Chan, Martin Doris, David Fong, Joe Gilfeather** – Regional (Mongolia, Vietnam & Cambodia), **Menachem Hasofer** – Programming / IT, **Cheryl Je** – Honorary Secretary/ Newsletter/ Website, **Houchi Kuo, James Lau** – Faculty List, **Johnson Lee** – Public Relation Officer/ Mediation & Adjudication, **Lawrence Lee** – YMG, **Richard Leung** – Vice Chairman/ Regional (China), **William Leung, Mary Thomson** – Regional (Korea, Taiwan, Indonesia, Philippines & Japan), **Christopher To** – Vice Chairman/ Professional Development & Training, **Man Sing Yeung** – Chairman, **Cordia Yu** – Honorary Treasurer

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