



## The EAB Committee resumed the first in person monthly committee meeting in December 2021

from left to right: Mr Lawrence Lee, Mr David Luk, Mr Stephen Chu (back); Mr Nicholas Turner (back), Mr Richard Leung (front), Mr David Fong (Chairperson EAB), Mr Micky Yip, Ms Saniza Othman, Mr Paul Barrett (EAB Trustee), Mr Donovan Ferguson, Mr Ronald Pang and Ms Gina Leung.

Other Committee members (absent from the photograph) include Mr Christopher To, Mr John Cock, Mr Glenn Haley, Mr Mingchao Fan, Ms Karen Mills, Mr Albert Yeu, Mr Tim Liu and Mr Jagmeet Makkar.

Happy New Year! Welcome to the first edition of CI Arb Newsletter for 2022.

Following the success of the “Covid-19 and Arbitration” series of articles in the 2020 editions, we are pleased to introduce a new series on “Fast Dispute Resolution Methods” for 2022. This edition features the first article on “Emergency Arbitration” by Mr Paul Starr.

On behalf of the editorial team, we wish you a happy Chinese New Year!

*Gina Leung*

## “Cultural Diversity and ADR: Present and Future” webinar by Mr Rimsky Yuen

9 December 2021, Hong Kong



On December 9th, the Honourable Rimsky Yuen, SC and former Secretary for Justice for HKSAR Government, spoke about “Cultural Diversity and ADR: Present and Future”. The event was moderated by Saniza Othman. The webinar marks the first in a series which will focus on diversity and inclusion in the context of ADR.

Rimsky discussed cultural diversity in the context of negotiation, mediation and arbitration. The webinar was comprehensive and insightful and it was well attended. A valuable takeaway was “Parties do not communicate in a vacuum. Instead, they bring their individual conflict management preferences, negotiation styles and cultural values to the table.”

Looking into the future, Rimsky shared his thoughts on what can and should be done to improve cultural diversity. He focused on three aspects. Firstly, he encouraged our ADR community to give more thoughts on the issue of culture in the context of negotiating and settling disputes. Secondly, he asked us to consider the impact that culture plays in dispute resolution training. Thirdly, he emphasised the need to enhance cross-disciplinary research, studies and training to upskill dispute resolution practitioners. As a Christmas gift, Rimsky gave us a comprehensive list of reading materials in this subject area.

Thank you Rimsky for this inaugural talk. We look forward to bringing impactful dialogue in this series to our members on this important topic.

*Saniza Othman*

## “Introduction to Investment Treaty Arbitration” webinar by Mr Antony Crockett

5 October 2021, Hong Kong

The Branch has delivered a webinar on the topic of investment treaty arbitration, discussing the following issues:

- A brief history of international investment law and dispute settlement
- Some trends of investment treaty arbitration
- Key provisions of a typical investment treaty such as fair and equitable treatment
- Investment treaty arbitration in practice and similarities and differences against commercial arbitration

The presentation was well-received and a few questions were raised at the end. The event was attended by approximately 30 members.

*David Luk*

## Fast Dispute Resolution Methods

### “Emergency Arbitration - A View from the Trenches” by Paul Starr



#### Introduction

If this (usually) 15 day procedure can be regarded as trench warfare, then I am blessed to have seen action from within three entirely different trenches: representing claimants, respondents and as an emergency arbitrator (“EA”). What have I seen and how best can parties and arbitrators emerge unscathed and victorious?

#### View from the Claimant’s Trench

Claimants should not be too proscriptive in the relief which they seek. There is well-settled legal authority that arbitrators (not just EAs) must not stray beyond the four corners of the prayed-for relief, to impose their own sensible and fair solution. Thus, claimants should craft their applications to consider all permutations of what they might like an EA to decide.

More than ever with this type of fast-track arbitration, claimants should think right at the start about settlement of the subject matter that is being emergency-arbitrated. This is because the Rules pursuant to which the emergency arbitration is being conducted usually provided that the EA’s decision will stand (inter alia) unless and until displaced or varied by the full tribunal once constituted. Thus, a claimant who may be ecstatic at having achieved 100% of what it asked for via the EA may find only a few weeks later that the EA’s relief is overturned, wholly or part, by the tribunal proper (no sleight intended).

Careful thought should be given as to the application for legal costs. To me, it is not good enough for claimants to draft that they want all of their costs. Claimants need to think carefully about what if they only succeed partially with their application, and draft their costs request accordingly.

Claimants should also consider how the content of their actual Notice of Arbitration (“NOA” - a document distinct from their EA application) might best be drafted to assist a good EA result. Under the HKIAC Administered Arbitration Rules 2015, submission of the NOA is a mandatory requirement for emergency relief. The CIETAC Arbitration Rules do not require a NOA. Nevertheless, I have found it useful for the EA to have sight of the NOA, to enable the EA to view the emergency relief requested in the context of the case as a whole.

#### View from the Respondent’s Trench

Faced with a 15-day emergency arbitration, the most immediate questions for a respondent are likely to include: whether and how it should participate; and whether it should honour any EA Decision made against it. Both from my experience and based upon observations made by practitioners at conferences, respondents do tend to adhere to EA Decisions, even though in many jurisdictions they are not strictly speaking enforceable. Why respondents behave so cooperatively is open to debate. My own view is that they have the prospect of the full tribunal hanging over them. Most respondents (and good legal advisers) would not

want to face the opprobrium of that tribunal being gleefully told by the claimant, at every possible opportunity, that the respondent has refused to comply.

Once it decides to participate, a respondent has many of the same considerations as a claimant. With settlement, respondents need not always insist on settlement only until early review by the full Tribunal – they may be content to allow a compromise position to last until the full Tribunal’s Award.

#### View from the EA’s Trench

Out of all participants, I believe that the EA has the most daunting task. If many of the steps which I recommend above are adhered to, the EA is likely to receive a barrage of documentation from each party and will need to digest the same, and publish a Decision, within 15 days of appointment.

The first step in the process should be to ensure that the respondent has been properly notified, such that it can appear or appoint advisers if it so wishes. That in turn leads to EA planning. While calling a procedural meeting for, say, Day One or Two, the EA should work backwards, from Day Fifteen, to allow themselves sufficient time to draft the Decision, and then hopefully allocate fair tranches of time for the Defendant’s response, any reply from the Claimant, and quite often a short hearing.

The EA can help particularly with any settlement. In an example where I acted for respondents, the EA (a Beijing lawyer) was absolutely tremendous at reviewing both parties’ consent draft and probing us with questions into better drafting. Where I acted as EA, I found that the arbitration institution (there CIETAC HK) had requirements and recommendations which had not been appreciated by the parties; for example, the need to draft a provision for refund to the claimant of that part of its deposit that happily became unused as a result of the settlement. The parties had also provided for the respondent to bear half of the EA costs, but had understandably not realised that CIETAC’s practice is still to deal only with the claimant.

The biggest conundrum for the EA is surely what legal tests to apply when deciding whether or not to grant relief. The EA is likely being asked to maintain or restore the status quo pending determination of the dispute, often via a Decision to preserve assets or evidence, sometimes via the equivalent of a mandatory injunction. When considering the applicable legal test for such relief, the Claimant is likely to commend to the EA general principles of international law and say the test is quite generous and broad. The Respondent will inevitably argue for application of the same stringent common law tests as the Hong Kong courts use when deciding whether or not to grant interim relief.

It would be more than my career as an EA is worth to express a view here! Let me just suggest this. A canny EA will first ask themselves whether all potential tests are satisfied. If so, any need to decide between the competing viewpoints disappears. I shall leave it there and disappear into my trench.

*Paul Starr*

## “Hot and Emerging Legal Topics in Climate Change” evening talk

21 October 2021, Taipei

The Taiwan Chapter was honored to co-host, along with the Chinese National Federation of Industries, the Taiwan Impact Investing Association, and the iADR®, a virtual evening talk on “Hot and Emerging Legal Topics in Climate Change”.

Dr Helena Chen first invited a special guest, Mr David Tawei Chang, to give the welcome remarks. This is followed by the pre-recorded welcome video of a further special guest, Ms Emily Chiu. Furthermore, Ms Alison Chang joined the talk and encouraged all of the attendees to explore the possibilities of the use of arbitration in the emerging field of energy disputes.

The talk was then organised into three parts, with each keynote speaker sharing his/her experiences, insights, and advice on one specific topic. Dr Pijan Wu presented the topic on “When Ms Energy Meets Mr Carbon”, which focuses on the preparation of the businesses for the low-carbon economy. Prof Wen-Chen Shih discussed the development of and draft regulations on the establishment of a Carbon Border Adjustment Mechanism

(CBAM). Dr Helena Chen then described the prevailing structures of Corporate Power Purchase Agreements (CPPA), and has also identified pre-contractual challenges frequently encountered by interested parties in CPPA transactions as well as key issues for negotiating a CPPA. The talk was concluded with an enthusiastic Q&A session.

Monica Wang



from top left to bottom right: Dr Helena Chen, Ms Alison Chang, Mr David Tawei Chang, Dr Pijan Wu, Prof Wen-Chen Shih and Ms Emily Chiu.

## “Winning Strategy for Asian Parties and In-house Counsel with Civil Law Background” conference

26 October 2021, Taipei

The Taiwan Chapter was honored to co-host with the ICC YAF, iADR®, and Chinese Arbitration Association (CAA) in a special conference on the topic of “Winning Strategy for Asian Parties and In-house Counsel with Civil Law Background” during the 2021 Taiwan Arbitration Week. The conference was held in a hybrid style, in which some participants attended the event in person at CAA’s Taipei Office while the others joined the meeting online virtually.

The conference started with the opening remarks by Ms Alison Chang, this was followed by the welcome note given by Mr Chen-Gang Yen. Mr Shilin Huang then delivered his speech to the in-house counsel participants based on his 30-years of experience in legal service to corporate clients.

Ms Emily Hay explained the differences in the approach to evidence between the common law and civil law jurisdictions. Ms Monica Wang provided guidance on the operation of document production in the context of international arbitration and Mr Alex Lo, discussed the “must-knows” in presenting witness evidence.

Dr Helena Chen thanked the speakers of the conference, who gave their valuable time for this event to share their decades-long experiences to the participants. Mr Steven Lim debunked the long-existing myths of the popularity of common law procedural practice in international arbitration and explained why he, as a common-law trained practitioner, would prefer to use some of the civil law procedural practices in conducting an arbitral proceeding.

Dr David Fong (Chairperson EAB) gave an enlightening speech on the topic of witness evidence in international arbitration and advised the participants on the key considerations when presenting witness evidence before the tribunal. Ms Chiann Bao concluded the session by providing the participants ten important tips to remember when engaging in an international arbitration and to best present their cases before the tribunal.

The conference was well-attended and received many positive responses from the participants after conclusion of the conference.

Monica Wang

## “Crime & Arbitration” seminar by YMG EAB

7 September 2021, Hong Kong

The YMG EAB hosted a seminar entitled “Crime and Arbitration” at the HKIAC. This was the first YMG in-person event since the outbreak of global pandemic more than a year ago. The event was also attended by participants virtually around the world.

The panel comprised Mr Phillip Rompotis, Mr Eric Ng and Mr John Lee, and the session was moderated by Ms Victoria Yue.

During the seminar, the panel shared their perspectives on the key issues arise from the intersection of criminality and arbitration. A wide range of topics was covered during the discussion, ranged from

the matters of arbitrability to the question of confidentiality; the powers and duties of the tribunal before and after handing down of the award; the evolving role of arbitral institutions in monitoring proceedings and the potential duties they have in relation to anti-money laundering, bribery, and organised crime legislation.

Our thanks go to Mr Nicholas Tam, Mr Edward Chin, Mr Lavesh Kirpalani and HKIAC for their efforts in delivering this first in-person event for the YMG successfully.

Nicholas Tam

## Vis Moot Coaching Clinic – YMG EAB

14 November 2021, Indonesia



This online “clinic” was attended by 42 students, whom have recently competed in the current edition of the Willem C. Vis International Commercial Arbitration Moot. The team members come from Universitas Indonesia, Universitas Padjadjaran, Universitas Gadjah Mada, Universitas Diponegoro, Universitas Airlangga, Universitas Katolik Parahyangan, Universitas Bina Nusantara and Universitas Prasetya Mulya.

The online clinic was opened by Mr John Lumbantobing (Chairman of YMG EAB Indonesia). The speakers at the clinic include Dr Navin Ahuja, Mr Dioputra Oepangat, Ms Sharifah Shazuwin and Ms. Tatiana Polevshchikova. The speakers shared their insights and practical experience, and the discussion was moderated by Mr Daniel Pakpahan (Secretary of YMG EAB Indonesia).

The YMG EAB Indonesia would like to thank all the speakers and participants for their time and enthusiasm in supporting this event. This clinic focused on research and drafting written memoranda. A further clinic on oral pleadings is planned for early next year, as part of a series of events organised by the YMG EAB Indonesia.

*John Lumbantobing*

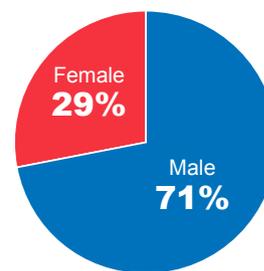
## Current Branch Membership

### Distribution by Membership Grade

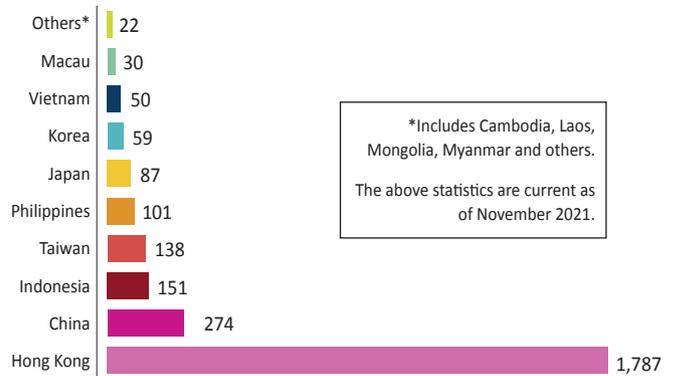
(excluding the Retired Members and Students)



### Distribution by Gender of Members



### Distribution by Region



## CIArb East Asia Branch

The East Asia Branch provides a regional organisation for members of the Chartered Institute of Arbitrators who are residents 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.

## CIArb East Asia Branch Committee 2021/22

Chairperson – **David Fong**, Vice Chairperson and Honorary Secretary – **Donovan Ferguson**, Vice Chairperson – **Christopher To**, Honorary Treasurer – **John Cock**, Immediate Past Chair – **Nicholas Turner**, Professional Development and Training – **Christopher To** assisted by **Stephen Chu**, Programme – **David Luk** assisted by **Tim Lui**, Mediation – **Lawrence Lee**, Adjudication – **Albert Yeu**, Membership and Website – **Micky Yip**, ADR Editorial – **Christopher To**, Newsletter – **Gina Leung**, Regional (PRC) – **Mingchao Fan** assisted by **Richard Leung**, Regional (Taiwan, Korea, Japan, Indonesia & Others) – **Glenn Haley**, LinkedIn and YMG Chairperson – **Ronald Pang** (co-optee), Communications within CIArb and Communications with outside bodies / Public Relations Officer – **David Fong**, Diversity – **Saniza Othman** (co-optee) assisted by **Jagmeet Makkar** (co-optee), Vis East Moot – **Karen Mills**, EAB Trustee- **Paul Barrett** (observer)

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