

The second quarter has been an eventful one for the East Asia Branch enriched by several major events. This issue of the Newsletter covers the 'Introduction to Arbitration' courses, the 'YMG Annual Party' and various insightful and interesting talks. In the 'Up Close and Personal' section, we continue to feature prominent individuals in the alternative dispute resolution industry and in this issue we feature Mr Neil Kaplan CBE QC SBS.

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 Asia Dispute Review. For submission guidelines, please visit 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.

Jessica Chan and Kanice Chan

Evening talk by Dr Fan Yang on 'The Proper Law of the Arbitration Agreement: English and Mainland Chinese Cases Compared'

Hong Kong 12 January 2015



On 12 January 2015, Dr Fan Yang delivered a seminar on 'The Proper Law of the Arbitration Agreement: English and Mainland Chinese Cases Compared'. Through examining English and Mainland Chinese judgments, Dr Yang discussed the contrast in the way English and Mainland Chinese courts determined the proper law of an arbitration agreement.

Dr Yang explained that English law allows parties' selection of applicable law to be either express or implied, whereas Mainland Chinese statutory provisions require parties to make an explicit (clear and specific) choice of law and gave no consideration to any implied choice of law. However, the approaches taken amongst the English cases (for example, *Abuja*, *Sulamérica* and *Arsanovia*) in the determination of the parties' implied choice of the law governing their arbitration agreements have not been consistent.

In the absence of the parties' implied choice of law, the English courts adopt a "closest connection

test". In doing so, the courts recognised that an arbitration agreement would normally have a close and more real connection with the seat of the arbitration than with the place of the law of the underlying contract. However, there was also dicta by Lord Neuberger MR in the *Sulamérica* case that the surrounding circumstances and commercial common sense must be taken into consideration as well.

A survey of the Mainland Chinese cases showed that in the absence of parties' explicit choice of law governing their arbitration agreement, the Mainland Chinese courts tend to apply the law of the place of arbitration, followed by the law of the court of action and rarely applied the law of the place of the arbitral institution or the law governing the underlying contract.

Furthermore, under English law, once the proper law of an arbitration agreement is ascertained, that law would apply to the validity, interpretation and scope of the arbitration agreement, unless

parties agreed otherwise. However, this is much more unclear under the Mainland Chinese law.

Dr Yang proposed that an explicit adoption of the 'pro-validation principle' in English and Mainland Chinese courts could help clarify the courts' approaches in determining the proper law of international arbitration agreements and ensure that the presumptive validity of international arbitration agreements is upheld consistently.

In closing, Dr Yang suggested that in the absence of explicit statutory provisions and a consistent approach in the determination of the place of arbitration and the proper law of foreign-related or international arbitration agreements in English courts, as well as Mainland Chinese courts, parties negotiating international arbitration agreements are recommended to carefully consider and explicitly designate the place of arbitration as well as the proper law of their arbitration agreements.

Jessica Chan

Up Close and Personal with Mr Neil Kaplan CBE QC SBS



In this section of the Newsletter, we feature prominent individuals in the alternative dispute resolution industry in a question and answer format to reveal lesser known aspects of their background and experiences. In this issue, we feature Mr Neil Kaplan CBE QC SBS.

Neil has been a full-time practising arbitrator since 1995. During this period he has been involved in several hundred arbitrations as co-arbitrator, sole arbitrator or chairman.

Called to the Bar of England and Wales in 1965, Neil has practised as a barrister, Principal Crown Counsel at the Hong Kong Attorney General's Chambers and served as a Judge of the Supreme Court of Hong Kong in charge of the Construction and Arbitration List. Neil has also been president of the Chartered Institute of Arbitrators, chairman of the Hong Kong Branch of the CI Arb, chairman of the HKICA, chairman of the disputes review board for Hong Kong's new airport at Chek Lap Kok and chairman of the Telecommunications Appeal Board.

Personal

Q: Tell us about yourself in two sentences.

A: I am excessively optimistic and enjoy most things I do.

CI Arb

Q: Where do you hope CI Arb will be in 10 years' time?

A: As its first overseas vice-president and first president from Hong Kong I hope to see an even greater membership outside the UK. Hong Kong has set the way and I hope we will see growth in other important regions. International arbitration needs to gain more acceptance in places where it is still viewed with suspicion and I believe the Institute can achieve this.

Q: What are your hopes and expectations for the CI Arb Centennial Celebrations?

A: We have some fascinating topics and great speakers. I hope the debate format will be popular. I hope everyone will find the topics interesting. It is a showcase for Hong Kong arbitration and I am pleased the Institute chose Hong Kong.

ADR

Q: How did your career in ADR begin?

A: In 1979 my pupil persuaded me to join the Institute. I knew nothing about arbitration. He also persuaded me to apply to be a fellow. A few weeks later I was called for an interview and welcomed as a new fellow. I asked whether they wanted to ask me anything as I had been studying madly. Fortunately in those days there was only one book on the topic! But they added that the rules were changing next week and even Lord Denning would have had to take the exams! When I arrived in Hong Kong arbitration was a hot topic. The AG asked me to be on a number of committees and the rest is history.

Q: What aspect(s) of your ADR work do you enjoy most?

A: Obviously I like working with clever and interesting people. I like the challenge of knocking a case into shape. Apart from document requests I like the procedural

side. I like finding a solution where one eludes the parties and counsel.

Q: What is your advice for people who would like to have a career in ADR?

A: I think the best advice is to be a legal assistant to a busy arbitrator. Also never underestimate the importance of being in the right place at the right time.

Other

Q: What are your interest(s) outside of ADR and law?

A: I love art and collect among other things 17th century Dutch prints. I also collect glass both 18th century and art nouveau. I like golf, walking and reading. And most importantly, being with my grandchildren.

Q: What is your favourite quote?

A: "There is nothing new under the sun" (the Bible). Groucho Marx "You don't like my principles? Don't worry – I have others!", and also "Every cloud has a silver lining".

Talk by Justice Gao Xiaoli on 'The Mainland Court's Support and Supervision of International Commercial Arbitration'

Hong Kong 23 January 2015

In January 2015 Justice Gao delivered a talk on the support and supervision of international commercial arbitration by courts in the People's Republic of China ('PRC').

This event was hosted by the International Chamber of Commerce – Hong Kong, China, and supported by the Hong Kong Institute of Arbitrators and CI Arb (EAB).

Justice Gao focused on the following areas in her 3-hour talk:

1. Determination of the validity of arbitration agreement involving foreign matters.
2. Taking property preservation; setting aside a people's court's arbitration award involving foreign elements; and enforcement of an arbitration award.

Justice Gao first explained Article 1 of the 'Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations' (no. 24 of 2012), which empowers a people's court to consider civil relations in a number of situations as foreign-related civil relations, for example, where one or both parties

are foreign citizens or where the subject matter is outside of the PRC.

Justice Gao also outlined cases where arbitration agreements were invalidated by applying Article 7 of the 'Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Arbitration Law of the PRC' (no.7 of 2006), where arbitration agreements are deemed to be invalid where an arbitration agreement provides parties with the option of resolving disputes either by institutional arbitration or litigation through the people's courts. An exception to this rule applies if after one party applies for institutional arbitration the other party fails to raise any objection within the time period prescribed by the Arbitration Law.

During the talk, Justice Gao illustrated the current practice of the PRC courts by a number of cases and various scenarios with legal authorities, which the audience found very interesting and informative.

The talk was very insightful and attracted a number of questions from the floor throughout the talk.

Man Sing Yeung

Evening Talk by Mr Jeremy Nicholson QC on 'Expert Evidence – Hazards & Opportunities'

Hong Kong 10 February 2015



(from left to right) Mr Jeremy Nicholson QC and Ms Kim Barton of the CI Arb EAB Main Committee

On 10 February 2015, Mr Jeremy Nicholson QC delivered an evening lecture on 'Expert Evidence – Hazards & Opportunities' at the Hong Kong International Arbitration Centre and attracted a full house of audience.

Mr Nicholson QC commenced the talk by a discussion on the importance of the qualities of the expert to the value of the expert evidence. The hazards which the client should watch out in appointing experts include: the lack of

independence; the lack of qualifications; giving opinion in an area beyond his/her expertise; giving evidence without full analysis; and experts not being precise and concise.

He then discussed some key criteria which a client should use when appointing an expert – availability; proficiency at writing expert reports; capability to give oral evidence; objectivity; qualifications in the subject field; and experience as an expert.

Mr Nicholson QC also explained how to find a suitable expert and how to instruct an expert. He pointed out the situations when expert evidence is required, and shared his experience on the IBA Rules on the Taking of Evidence in International Arbitration 2010.

The talk was well received and concluded with a Q&A session.

Gina Leung

Introduction to International Arbitration Courses

Hong Kong 5 December 2014 and Shenzhen 19 December 2014

On 5 December 2014, the Branch held an Introductory Course in Hong Kong with a post course assignment. Over 40 candidates participated.

The Branch is grateful for the assistance of Mr Julian Cohen, Mr Richard Leung, Mr Stephen Mau and Mr Man Sing Yeung as lecturers, and Dr Christopher To as the course director. Results for the course are expected to be released shortly.

In addition, another Introductory Course was held on 19 December 2014 at the Shenzhen Court of International Arbitration with the support of the Guangdong Lawyers Association and Shenzhen Lawyers Association. Sincere thanks are due to Mr Paulo Fohlin, Mr David Fong and Mr Man Sing Yeung as lecturers, and Mr Richard Leung as the course director.

A cocktail reception for all of the candidates from the Introductory Courses is anticipated. All Branch members are most welcome to join.

Man Sing Yeung

CI Arb YMG Annual Party

Hong Kong 23 January 2015

The YMG annual party this year was held on 23 January 2015 at Club Levels in Central, Hong Kong.

Same as the previous years, the annual party proved to be a success. The party has received enthusiastic and jovial participation of prominent guests from the arbitration profession, representatives from a wide spectrum of young professional organisations, and members of all grades of the CI Arb.

The annual party again proved to be a great networking event for young professionals and sponsors as well. Thanks to all guests and sponsors, the annual party was well-received with zest. The YMG also wishes to thank the main committee for its continuous support, without which the annual party would not have been such as success.

The YMG looks forward to organising its next annual party.

Helen Au



CIArb (EAB) YMG Joint Society Christmas Party 2014

Hong Kong 13 December 2014



CIArb (EAB) YMG Joint Society Christmas Party

The members of the CIArb YMG jointly celebrated the holiday session with young professionals from 6 other institutions on 13 December 2014. The Joint Society Christmas Party 2014 was held at the rooftop of QRE Plaza, where over 100 professionals including architects, engineers, planners, solicitors, surveyors and lawyers networked over fine wines and a festive Christmas atmosphere. The event was jointly organised by AES-YES, ASHRAE-YMC, ICE HKA G&S, IET-YMS, IMechE-YMS and HKIE-YMC.

Patrick Ng

2015 East Asia Branch Events Programme

Unless stated otherwise, events are free to CIArb members, 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.

Thursday 23 April 2015

Branch Annual General Meeting. Details circulated.

Wednesday 29 April 2015

Branch Annual Dinner. Details to be circulated.

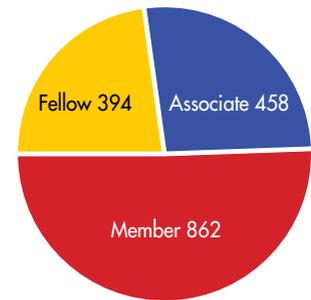
May 2015

Evening talk by Mr Peter Lever QC. Details to be circulated.

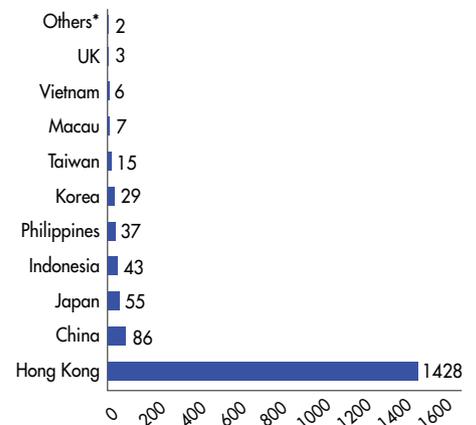
May/June 2015

10th Annual Winnie Whittaker Memorial Lecture by Mr Michael Charlton. Details to be circulated.

Current Branch Membership – Distribution by Membership Grade



Current Branch Membership – Distribution by Region



*Includes Australia, New Zealand and Singapore

The above statistics are current as of March 2015

>>> Advertisement opportunities available.

For further information, please contact the Branch at ciarb@hkiac.org

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, 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

Christopher To – Chairman/ Professional Development & Training, **Richard Leung** – Vice Chairman / Regional (China), **Justin Wong** – Honorary Secretary/ Public Relation Officer, **Cordia Yu** – Honorary Treasurer/ Membership, **Paul Barrett** – Professional Development & Training/ ADR Editorial Board/ Vis East Moot, **Louise Barrington** – Professional Development & Training, **Kim Barton** – Programme/ Charitable Status, **Jessica Chan** – Newsletter/ Website/ Vis East Moot, **Kanice Chan** – ADR Editorial Board/ Newsletter/ Vis East Moot, **Martin Doris** – Professional Development & Training/ Universities Outreach, **David Fong** – Universities Liaison/ Faculty List, **James Lau** – Mediation & Adjudication, **Lawrence Lee** – YMG, **Mary Thomson** – Regional (Other than China), **Fan Yang** – Professional Development & Training, **Man Sing Yeung** – Immediate Past Chairman/ Sponsorship/ Centennial Events

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