



The EAB seems to have quickly raced through the second quarter of the EAB term. The new main Committee and the new YMG Committee have been busy in administering the EAB and have arranged a number of fruitful events over the Summer break. There is much to share in this edition and I hope you enjoy this update.

One of the most notable events took place in the summer is the 12th Annual Winnie Whittaker Memorial lecture, delivered by the EAB Honorary Treasurer Paul Barrett.

Following the appearance of our Chairlady Mary Thomson in the 'Close Up Q&A' of the last issue, you will find in this Newsletter our interview with another renowned CIARB female member, Louise Barrington.

Special thanks to Nicholas Turner, EAB Vice Chairperson for his contribution of articles in this Newsletter. Readers are encouraged to submit articles for the Newsletter or book reviews relating to dispute resolution for the Asian Dispute Review. For submission guidelines please visit [www.asiandr.com](http://www.asiandr.com).

*Calvin Cheuk and Gina Leung*

## **"Allegations of Bias and Conflict of Interest against Arbitrators: Recent Developments" by Mr David Thomas QC and Ms Jane Lemon QC**

**8 June 2017, Hong Kong**

The branch had the honour of hearing from Mr David Thomas QC and Ms Jane Lemon QC, of Keating Chambers, on the topic of "Allegations of Bias and Conflict of Interest against Arbitrators: Recent Developments" at the HKIAC.

David and Jane provided a timely reminder that challenges of arbitrators on the basis of bias and conflict are becoming ever more prevalent. The obligations in relation to bias and conflict are set down in institutional rules and/or national laws. Depending on the rules or laws, arbitrators are required to be independent and impartial. The Hong Kong Arbitration Ordinance 2011, which has adopted the UNCITRAL Model Law, requires an arbitrator to be impartial and independent. Likewise the HKIAC Administered Arbitration Rules 2013. A useful reminder of an arbitrators continuing obligation to disclose any conflict of interest, is the recent case of *Cofely v Bingham and Knowles*.

The International Bar Association (IBA) guidelines on conflicts of interest in international arbitration promote common standards of independence and impartiality, regardless of

legal culture or jurisdiction. David and Jane helpfully summarised the IBA guidelines and its useful 'traffic light' list of categories of conflicts of interest – starting at the non-waivable red list, progressing to the waivable red list (only waivable by the parties), then the orange list (those matters which give rise to doubts depending on the facts), and finally the green list (no appearance of and no actual conflict of interests exist from an objective point of view). It was noted that these guidelines are highly respected and used by arbitrators and lawyers alike. As such it is recommended parties refer to these guidelines in their arbitration agreements. However, it was noted that the guidelines have recently come in for criticism in the recent case of *W Ltd v M Sdn Bhd*.

Jane rounded off by summarising the main grounds of challenge, being connectivity with a party, connection to legal representatives, and issues.

Overall, the event was well-received and attended by approximately 40 members.

*Nicholas Turner*

## **The Fellows' Cocktail Party**

**30 August 2017, Hong Kong**

Approximately 50 Fellows' enjoyed a convivial evening as they met the new Branch Committee of this session.

Prior to the start of the evening a group of committee members conducted peer interviews of 15 candidates from a broad range of professional backgrounds.

*Nicholas Turner*



*Participants at the Fellows's Cocktail Party*

## Close Up Q and A with Louise Barrington



Louise Barrington is a dispute resolver with 30 years of experience. Her career includes private practice, teaching, consulting and sitting as a chartered arbitrator

and accredited mediator, legally qualified in Ontario, New York and England.

She founded and directs the annual Vis East Arbitration Moot ([www.cisgmoot.org](http://www.cisgmoot.org)) and is the founder and honorary co-president of ArbitralWomen ([www.arbitralwomen.org](http://www.arbitralwomen.org)). She is a member of the ICC Arbitration Commission (Paris), the International Law Institute and the Chartered Institute of Arbitrators, having held elected office for years in Asia and currently serving on the Education and Membership committee in London.

**Q:** Can you tell us about yourself and your past involvement in CIArb (EAB)?

**A:** After being called to the Ontario Bar, I practiced law for nearly five years, but then headed for adventure in Europe. It was the “big trip” before settling into a looming law career and eventual partnership. Little did I know as I boarded that plane that my “year abroad” would last seven years, and result in a long term move to Paris.

In the 90’s, while working as Director of the ICC Institute of World Business Law (as it’s now known) I was invited to a CIArb dinner in Lille, France. I believe it was Neil Kaplan who actually invited me, but the group included Neil, Harold Crowter, Geoffrey Beresford Hartwell and Tony Canham. They were all very charming and welcoming and persuaded me to join the Institute. I came in as a Member, but shortly afterward did the Award Writing Exam and got my FCIArb. I hadn’t actually sat as an arbitrator at that point, but had spent years at the Institute, learning from the best. Then, a few years later, when the Chartered Arbitrator designation went live, and I had a few awards and orders under my belt, I interviewed and got that too. I was one of the first arbitrators in Asia to be Chartered.

**Q:** What is your most memorable experience during your involvement in CIArb (EAB)?

**A:** There are several memorable experiences connected with the Institute, some better than others. For example, East Asia Branch underwrote that very first Vis East Arbitration Moot in 1992-93, supporting me in the creation of what was then a novelty for Asia.

But the very best memory was at the 1996 CIArb conference in Boston. Geoffrey Beresford Hartwell had invited me to present the findings of some research I’d undertaken to investigate the dearth of women in international arbitration. It was my very first presentation to an international conference, before all those “gods of arbitration” and a hundred or so others. Despite the fact that no one was planning to take me very seriously, the presentation was a hit. I became infamous as “the little [sic] lady plotting to replace us men,” and that was really the origin of Arbitral Women. AW would never have come into existence without the efforts of my friend and ICC colleague Mireze Philippe, but the seeds were sown in Boston. Today ArbitralWomen number in the hundreds, and our programmes and events promote women in dispute resolution on every continent but Antarctica.

**Q:** What do you think about Hong Kong as an arbitration centre in the future?

**A:** This is my 20-year anniversary in Hong Kong, and being in the centre of its development has been fascinating and at times challenging. Hong Kong has acquired an excellent reputation as one of the world’s top arbitration seats. As the second jurisdiction to adopt the Model Law, it got a jump start with Justice Kaplan making some seminal decisions three decades ago. Today our modern law, the pro-arbitration judiciary, the active arbitration bar, experienced arbitrators and Hong Kong’s geo/political situation as the gateway to China – are all factors that make it an attractive arbitration destination. However, I am concerned that Hong Kong risks losing its current status in the face of competition – from Singapore, from Kuala

Lumpur and from Shanghai and Shenzhen. Governments of those jurisdictions are far more active in promoting themselves than Hong Kong. If we stand still, we will be surpassed. Keeping Hong Kong ahead by fostering and publicizing its many attributes is a job that needs constant attention and investment by the government, business and legal communities.

**Q:** What do you hope to achieve in the next 5 years?

**A:** It’s shocking to think that I’ve been a lawyer for 35 years, and an arbitrator for 20. At this point, I can look back on so many different experiences: in legal practice, as a law professor and professional trainer on every continent, founder of ICC Asia, creator of the Vis East Arbitration Moot and its foundation, taking our Capacity Building Programme to Cambodia and of course, working as a dispute resolver in hundreds of mediations and arbitrations.

Frankly most of the people I went to law school with in Toronto and Paris are either retired, or planning to retire soon. I have the incredible fortune to love my work, which offers tremendous intellectual stimulation and personal satisfaction. So, unless some even more exciting challenge arises, five years from now will look pretty much the same as now. I have fantastic help now with running the Vis East Moot, and have been grooming younger people to take over much of the short-term teaching. The idea is to reduce the frequency of my travels. But hopefully, in five years or in ten, you’ll still find me arbitrating – and mentoring the next generation of arbitrators. I promise a big party for that 50th anniversary!

**Q:** What do you do in your spare time?

**A:** When I’m not working on arbitration cases or education in dispute resolution, my activities depend on where I happen to be. In Hong Kong it’s hiking our fabulous trails, or going to the theatre or films. In Paris, it’s the museums and the markets, or just wandering along the Seine. In Canada, family predominates, and I love my rambling garden and my bees.

## **“A Miscellany of Recent Construction Cases in Hong Kong” by Mr Paul Barrett**

17 August 2017, Hong Kong

The 12th Annual Winnie Whittaker Memorial Lecture on “A Miscellany of Recent Construction Cases in Hong Kong” was held at The Hong Kong Club. The speaker was Mr Paul Barrett, an arbitrator and barrister specialising in construction (with a quantity surveyor background). Paul started the lecture by recalling his personal friendship with and memory of Winnie as a quantity surveyor and an arbitrator.

Paul went on to discuss the recent case of *Maeda, Hitachi, Yokogawa, Hsin Chong Joint Venture (JV) v HKSAR*, an appeal from an arbitral award concerned with re-rating under GCC 59(4)(b) of the General Conditions of Contract for Civil Engineering Works 1999 Edition. Paul considered the conditions whereby a rate in a contract would be rendered unreasonable or inapplicable as a result of the actual quantity of work executed being substantially greater or less than that stated in the Bills of Quantities, leading to determination of an appropriately increased

or decreased rate. During his examination of the issue, Paul also referred to the cases of *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* and *Secretary for Justice v Sun Fook Kong (Civil) Ltd*.

The issues thrown up by these cases were examined at length, which included:

- the factors to be taken into account when determining a new rate?
- Should a party or the tribunal be entitled to go behind the rate (and look at its build-up) and the extent to which this case could provide an authority for all re-rating cases?
- Would the fact that the rate had been arrived at by mistake impact the determination, but if the rate was deliberately inflated to take advantage of what the contractor saw as a pricing opportunity (to gain a ‘windfall’), would this change the deliberation?
- Is a contractor entitled to do so as part of “the thrills and spills” of contracting?



Mr Paul Barrett (EAB Honorary Treasurer)

Paul encouraged the audience participation in the debate by encouraging questions and asking for a show of hands to consider whether the court got the answer wrong in the *Maeda* case.

Paul rounded off his lecture by visiting the age old topic of concurrency, by considering the case of *Saga Cruises v Fincantieri Spa* as well as the recently updated SCL protocol.

The lecture was well attended by approximately 70 members.

Nicholas Turner

## **The 9th Annual General Meeting of the CIARB (EAB) Young Members Group**

15 June 2017, Hong Kong



The 9th Annual General Meeting of CIARB (EAB) Group took place on 15 June 2017 at the Hong Kong International Arbitration Centre.

The AGM was well attended by approximately 30 members. New committee members, Mr Mac Chan and Mr Fred Ho, were endorsed, and Mr David Luk was elected to be the new Chairperson of the Young Members Group for the 2017/2018 session at the AGM.

The AGM was followed by a talk on “Why are there so many sets of arbitration rules?” by Mr Ian Pennicott QC SC.

Linda Wong

## **“Why are there so many sets of arbitration rules?” by Ian Pennicott QC SC**

15 June 2017, Hong Kong

On 15 June 2017, Mr Ian Pennicott QC SC gave a talk on “Why are there so many sets of arbitration rules?” at the Hong Kong International Arbitration Centre. Mr Pennicott began the talk by introducing the different sets of arbitration rules developed by UNCITRAL, ICC, HKIAC, SIAC and others. Mr Pennicott then identified the similarities and differences of UNCITRAL, ICC, HKIAC and SIAC arbitration rules in terms of the commencement of arbitration, number of arbitrators, time limit for challenging arbitrators, time limit for issuing award and costs allocation. Other features on multi-party arbitration and consolidation, expedited procedures, scrutiny of awards and terms of reference were also discussed by the speaker.

Mr Pennicott then shared with the audience his view on the advantages and disadvantages of having different sets of arbitration rules from the perspective of a contracting party,

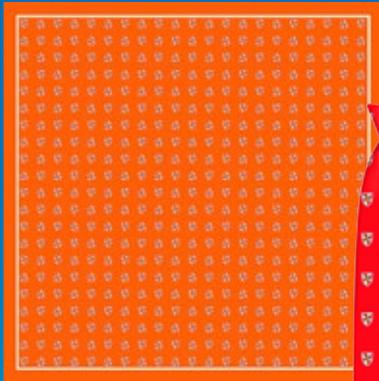


(from left to right) Mr David Luk and Mr Ian Pennicott QC SC

an advisor and an arbitrator. The talk ended with a discussion on whether there is a need to have a unified set of rules, and its challenges such as consensus on different subject matters and administrative support. The talk was well attended, and concluded with a question and answer session.

Albert Yeu

## EAB Ties/Scarves



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Please contact the Branch for more details

### Correction

The editorial team would like to make the correction below in the July Newsletter:

INSERT 'Christopher To' in the CI Arb East Asia Branch Committee 2017/2018

## 2017 East Asia Branch Events Programme

### 21 – 29 October 2017

CI Arb Diploma in International Commercial Arbitration

### 30 October 2017

2nd of a series of seminars considering the guidelines and rules for administering arbitrations and other dispute resolution processes  
By Professor Anselmo Reyes

### 9 or 10 November 2017

Accelerated Course to membership

### 10 November 2017

ARM Course

### November 2017

Mediation or ARM Course – Taiwanese Chapter

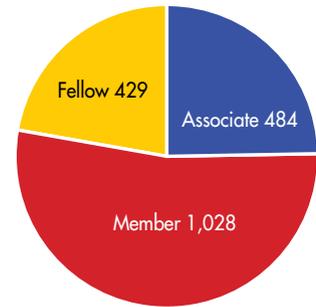
### Second semester 2017

Fast-Track entry course; in association with the Shenzhen Bar Association

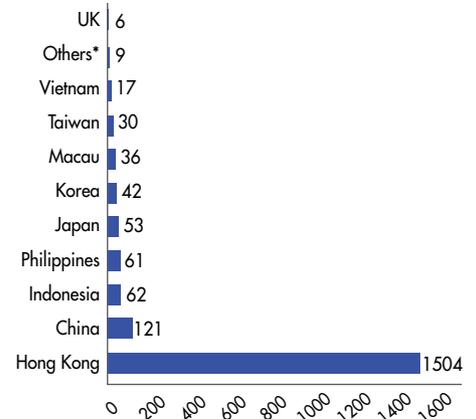
### Second semester 2017

Fast-Track entry course; in association with Hangzhou Arbitration Commission

## Current Branch Membership – Distribution by Membership Grade



## Current Branch Membership – Distribution by Region



\*Includes Cambodia, Canada, Malaysia New Zealand, Singapore and UAE.

The above statistics are current as of August 2017

## 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 2017/2018

**Mary Thomson** – Chairperson, **David Fong & Nicholas Turner** – Vice Chairpersons, **Donovan Ferguson** – Honorary Secretary, **Paul Barrett** – Honorary Treasurer, **David Fong** – External Communications, **Glenn Haley** – Professional Development and Training, **Louise Barrington** – Diversity; Vis East Moot, **Lawrence Lee** – Mediation and Adjudication, **Calvin Cheuk** – Newsletter, **Cordia Yu** – Membership; **Helen Au** – University Promotion, **John Cock** – Website; **Edward Chow** – Incorporation / New Branch Rules, **Nicholas Turner** – Programme; **Christopher To** – ADR Editorial and Faculty List, **Joseph Leung (co-op)** – Adjudication, **Gina Leung (co-op)** – Newsletter

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