



“Unconscious Bias in International Arbitration” webinar by Dr. Mariel Dimsey 15 March 2022, Hong Kong



On March 15th, Dr. Mariel Dimsey spoke on the topic of “Unconscious Bias in International Arbitration” via Zoom. Dr. David Fong (Chairperson EAB) made the opening remarks and Saniza Othman moderated the event.

Mariel’s presentation focused on what unconscious bias meant, how to identify it, how it impacts a career in international arbitration for women and how unconscious bias could be managed. The webinar was timely as it came on the back of International Women’s Day (“IWD”). This year’s IWD comes with a call to “BreakTheBias”.

Mariel was engaging and she conducted a poll before and after her presentation. The poll question was “Do you have unconscious bias?”. Before her talk, only 57% of attendees acknowledged they had unconscious bias, while 13% said no and 30% did not know. At the end of her talk, she managed to raise an understanding of the topic and 80% of attendees agreed they had unconscious bias. We also had time for a lively Q&A. Approximately 50 attendees attended. She shared a quote that one had to “act with the heart, the head and the hand” as one of the ways to manage unconscious bias.

The webinar marks the second in a series, which focuses on diversity and inclusion in the context of ADR. The CI Arb EAB Diversity subcommittee looks forward to bringing more impactful dialogue in diversity and inclusion.

Saniza Othman

Welcome to the April edition of the Newsletter.

This edition features the second article of our “Fast Dispute Resolution Methods” technical series on “Adjudication” by Mr Ian Cocking.

The Branch had a very good start to 2022 and held a number of online events, including the second webinar of the Diversity series and the fourth webinar of the Past Branch Chairs Nuts & Bolts Series on “Emergency Arbitration, Joinder, and Consolidation” by Mr Paul Barrett.

I hope you will find this Newsletter a good overview of the events happened in the last quarter.

Happy Easter!

Gina Leung

Past Branch Chairs Nuts & Bolts Series 4: “Emergency Arbitration, Joinder, and Consolidation” by Paul Barrett

24 February 2022, Hong Kong



The Branch is delighted to have Mr Paul Barrett, an EAB Trustee and also a former Branch Chair, to deliver the fourth session of the Past Branch Chairs Nuts and Bolts Series.

Mr Barrett discussed the following topics in the

webinar by reference to the Arbitration Ordinance and HKIAC Administrated Arbitration Rules 2018:

- Emergency arbitration and the criteria
- Joinder of arbitrations
- Consolidation of arbitrations

The presentation was well-received and the event was attended by over 40 members.

Stay tuned for the rest of the series.

David Luk

Fast Dispute Resolution Methods

“Adjudication” by Ian Cocking



Overview

This is the second article in the technical series, “Fast Dispute Resolution Methods”. We will be looking at “adjudication”, a topic which drew the attention of many following the introduction of Security of Payment (“SOP”) Provisions into public works contracts in Hong Kong from 31 December 2021.

Adjudication is a simple and expeditious method for resolving payment disputes. It is commonly associated with construction disputes, but not necessarily so. It adopts a “pay now, argue later” approach which aims at improving the cash flow situation among sub-contractors, consultants and suppliers. The adjudication decision is binding pending referral to arbitration or court.

There are two types of adjudication, namely statutory and contractual adjudication. Statutory adjudication is a mandatory step included in SOP legislation for construction disputes in a number of jurisdictions, such as the UK and Singapore. Contractual adjudication is based on parties’ mutually agreed terms.

SOP Legislation

Since SOP is a new initiative for Hong Kong, the Development Bureau (“DEVB”) issued a Technical Circular (Works) No. 6/2021 on 5 October 2021 to incorporate mandatory SOP conditions into all new public works contracts and sub-contracts. Additional Conditions of Contract (“ACC”)/ Special Conditions of Contract (“SCC”) amend the General Conditions of Contract (“GCC”), including NEC forms accordingly. Through the experience gained in the public sector, it is hoped that legislation (which is being drafted) can be implemented smoothly covering the public and private sectors.

The main differences between Hong Kong’s contractual adjudication and SOP legislation are:

1. Court enforcement is replaced by a right to apply to the employer for direct payment;
2. Adjudication decisions will not be set aside by the Court. An aggrieved party must challenge the decision in arbitration, which will not be until after completion;
3. There is no statutory register of adjudicator nominating bodies (“ANBs”). The selection of ANBs is from DEVB’s Register.

Payment and Adjudication Process

The ACC/SCC include the following “Four Mandatory Requirements”:

1. Payment response and payment shall be made within 30 and 60 days respectively from the date of payment claim;
2. Conditional payment provisions shall be rendered ineffective and unenforceable;
3. Claimant may refer a payment dispute to adjudication and the adjudicator shall deliver a decision within 55 working days from the date of his appointment;
4. Claimant may exercise a right to suspend/ slow down if an admitted or adjudicated amount is not paid.

There has been some controversy as to whether the scope of adjudication should extend to extension of time awards (“EOT”) as well as time-related payment issues. Under the present scheme, it has been decided that:

1. An adjudicator shall have the jurisdiction to decide time-related costs forming part of the payment dispute;

2. In so doing, the adjudicator shall have the jurisdiction to decide EOT entitlement;
3. The adjudication decision on time-related costs forming part of the payment dispute is binding on an interim basis, but the EOT so decided by the adjudicator is not;
4. A party shall not usually be liable for liquidated damages if the works have been completed within the EOT decided by the adjudicator. However, the parties’ right to challenge EOT decisions through arbitration remains unaffected.

HKIAC’s Security of Payment Adjudication Rules

The Hong Kong International Arbitration Centre (“HKIAC”) is one of four ANB’s, and the first to publish its rules. On 23 February 2022, HKIAC’s “Security of Payment Adjudication Rules” (“Rules”) came into force. The Rules are tailor-made for adjudications where the parties have agreed that:

- a. *“the SOP Provisions for Public Works Contracts shall apply to their contractual relationship and HKIAC shall act as the ANB or words to similar effect; or*
- b. *the Mandatory Subcontract Conditions for Security of Payment – SOP Provisions for Relevant Subcontracts shall apply to their contractual relationship and HKIAC shall act as the ANB or words to similar effect.”*

(see Article 1.1 of the Rules)

The Rules provide complementary procedures for the conduct of adjudication, such as the communication methods between the parties and the adjudicator and govern relevant fees and expenses. If the Rules conflict with the SOP Provisions or a mandatory provision of any applicable law, the SOP Provisions or law shall prevail.

NEC Contracts

Under SOP, a contractor is entitled to suspend works if there is a non-payment of an adjudicated sum. This is added as a new compensation event in Clause 60.1. The dispute resolution provisions are also amended. Note that the NEC 4 dispute resolution clauses (W clauses) incorporating adjudication provisions are not used in Hong Kong public works NEC contracts. The Hong Kong Government has drafted its own dispute resolution clause – ACC Clause G1B. This Clause G1B is also amended to tie-in with the mandatory SOP Provisions. If any party is aggrieved at the SOP adjudication decision, it may refer the dispute to mediation, and if mediation fails or is refused, then to arbitration.

In Hong Kong, NEC sub-contracts are rarely used even in projects adopting NEC main contracts. NEC main contracts have a shorter cycle (35 days). Therefore, a project with an NEC main contract but other forms of sub-contract may have different payment cycles. This will create cashflow challenges that have to be carefully managed.

Enforcement

For the reasons explained above, if unpaid, enforcement by a sub-contractor of an adjudication decision will rest on direct payment by the employer. This depends upon an unbroken chain of contracts incorporating the SOP Provisions. If direct payment is not made for any reason, a sub-contractor will have to rely upon the pressure it can bring to bear on the defaulting party by exercising a contractual right to suspend/ slow down its works. The sub-contractor will not be liable for any loss and damages suffered by others, and will be entitled to EOT and prolongation costs as a result of the suspension. However, the rest of the supply chain will be left to deal with the consequences.

Whilst voluntary contractual adjudication has existed in public sector contracts since 2005, very few have eventuated. However, the stage is finally set for adjudication to come to Hong Kong.

“How to get into arbitration (a beginner’s guide) - Part I: Ins and Outs of a Tribunal Secretary” – a webinar by Joe Liu, Tim Robbins and Kitty Zheng

1 March 2022, Hong Kong

On 1 March 2022, the CIArb (EAB) YMG held the first of three talks in a series which is geared towards young practitioners on how they can get into the arbitration practice. Unlike the previous talks which emphasised on the first appointments, this talk primarily focuses on other aspects and experiences needed to start a career in the field of arbitration - as the counsel, a tribunal secretary or a member of an arbitral institution - all in addition to the role of being an arbitrator.

The evening talk focused on the topic of tribunal secretaries, which was delivered by Mr Joe Liu (Deputy Secretary General of HKIAC), Mr Tim Robbins and Ms Kitty Zheng. The CIArb (EAB) YMG Committee members Mr Edward Chin (EAB YMG Co-Vice Chair) and Lavesh Kirpalani (EAB YMG Co- Optee) moderated the discussion. Mr Vincent Cheung (HKIAC Deputy Counsel) also assisted with the organisation of this evening talk.

The discussion focused mostly on the importance of a tribunal secretary in the arbitral process, as well as an insight to the tribunal secretary’s role, both of which are invaluable experience to be shared with the audience given the typical confidential nature of arbitration.

More importantly, the panel discussed the key characteristics of a good tribunal secretary, such as the importance of attention to detail, the ability to build a good rapport with the arbitrator/tribunal, and how a tribunal secretary should be on top of the papers and well versed with the proceedings. Generally, the panel gave valuable insights from different perspectives drawing from each panellist’s background and experience.

The panel also discussed whether a tribunal secretary can be a good arbitrator. The panellists felt that there is no direct connection between being a good tribunal secretary and a good arbitrator. Instead, they require a different skillset and a tribunal secretary’s experience can be regarded as an advantage, given their ability to interact with the arbitral process and the arbitrators.

Finally, the panel considered the best way of getting appointments as a tribunal secretary is by “asking” the senior practitioners as to whether they would require tribunal secretary services. For those interested individuals who are solicitors, they may approach the partners at their firms, and for those whom are practicing barristers in chambers, they may approach their senior barristers for the opportunity of the role of being a tribunal secretary.

Edward Chin

“Emerging Legal Topics Regarding Trademark and Copyright” Lunch Talk

15 March 2022, Taipei

The Taiwan Chapter was very honored to co-host, along with the Taiwan Trademark Association, National Taipei University Department of Law, and iADR® on 15 March 2022, a lunch talk on “Emerging Legal Topics Regarding Trademark and Copyright” through a virtual meeting.

Dr. Helena Chen (Convenor of the Taiwan Chapter) began the lunch session with a review of the talks held by the Taiwan Chapter last year, which involved several discussions of hot and emerging legal issues for the industries in Taiwan. She then invited two special guests, including Ms Ching-I Lu (Secretary-General of Taiwan Trademark Association) and Dr. Chi-Yang Lin (Assistant Professor of National Taipei University Department of Law) to give welcome remarks. Ms Lu gave several examples of the legal issues that remain to be clarified in the trademark application as well as enforcement in the Metaverse world, followed by Dr. Lin’s presentation regarding the most current Japanese studies as a reference on how intellectual property issues in the Metaverse world may be viewed under the laws of Japan.

The talk was then organized into three parts, with each keynote speaker sharing his/her experiences, insights, and advice on one specific topic. Mr Parkson N.H. Hsu presented the topic “Case Analysis of Trademark Validity Maintenance”, in which he dissected the inter-disciplinary relationship among trademark, trade dress, and copyright. Ms Ann Lai discussed new challenges that may be brought to the trademark field with the advent of Metaverse. Ms Monica Wang (Secretary-General of the Taiwan Chapter) shared her insights on copyright-related issues with respect to the currently heated transactions of NFT.



The talk was attended by almost 200 participants, which was concluded with an enthusiastic Q&A session.

Monica Wang

“CIArb Taiwan Chapter’s Evening Talk on Offshore Wind M&A” webinar

21 December 2021, Taipei

The Taiwan Chapter was very honored to co-host, along with the Taiwan M&A and Private Equity Council (“MAPECT”), WindTAIWAN Magazine, and the iADR® on 21 December 2021 a special evening talk on “Offshore Wind M&A”, which wrapped up a series of four talks dedicated to green power in the latter half of 2021.

The talk began with a warm introduction by Dr. Helena Chen and Dr. Kevin Lo, together with a pre-recording by Ms Xin-en Wu.

The talk was then organised into two parts based on the topics of

M&A and competition law issues relevant to M&A transactions. Ms Alison Chang (former Head of the Taiwan Chapter YMG) and Mr David Lin provided their discussion on the M&A topic, while Mr Matt Liu and Dr. Li-Dar Wang focused on competition law issues relevant to M&A transactions.

The talk was another successful event which wrapped up the 2021 programme by the Taiwan Chapter.

Monica Wang

“CIArb Vietnam Chapter Moving Forward”

25 February 2022, Vietnam

On 25 February 2022, the CIArb Vietnam Chapter (the “Vietnam Chapter”) held a New Year Gathering event for members and friends in Ho Chi Minh City. This event marked a wonderful start of the new year for the CIArb Vietnam Chapter and the opportunity to look back its key milestones.

At the hybrid meeting, the CIArb Vietnam Chapter Committee reviewed the events conducted in 2021, which highlighted the achievement of some important milestones and their tireless journey to put Vietnam on the world’s arbitration map.

The past events that were highlights of the year include those which were conducted by the CIArb Vietnam in collaboration with Vietnam Academy for Arbitration-VAARB. On 8 September 2021, an insightful discussion among heads of prominent arbitral institutions and the ADR community in Vietnam was jointly held by CIArb Vietnam and VAARB with the participation of the Prof Gary Born, the then President of Court of Arbitration, SIAC and his counterpart, Prof Shin, Chairman of KCAB INT, the Director

General of LCIA, and the secretary general of HKIAC. This is the very first time the thought leaders of these prominent institutions gathered together to discuss about the arbitration landscape in Vietnam. The audience obtained first hand knowledge and stories on the recent reform and how these changes affect the manner that parties would arbitrate to build appropriate strategies for their arbitration. On 8 December 2021, a thought-sharing corner among ADR users joined by the President of CIArb Ms Ann Ryan Robertson took place, where co-speakers exchanged thoughts and experience about key decision drivers in planning and preparation for an arbitration case.

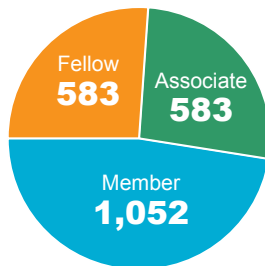
“Moving forward to the future and realising its goal of building a strong ADR community, the CIArb Vietnam Chapter welcomes the collaboration and engagement from its members and potential partners from law firms, universities, and other professional bodies, especially VIAC to whom a MOU was signed by CIArb Regional Office” Trinh Nguyen (Chairperson of CIArb Vietnam Chapter) said.

Linh Do and Trinh Nguyen

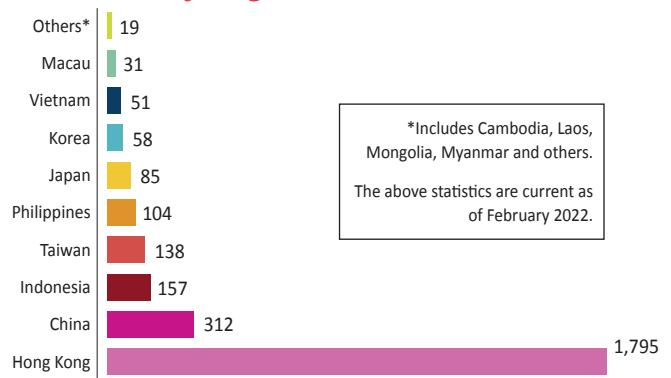
Current Branch Membership

Distribution by Membership Grade

(excluding the Retired Members and Students)



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

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