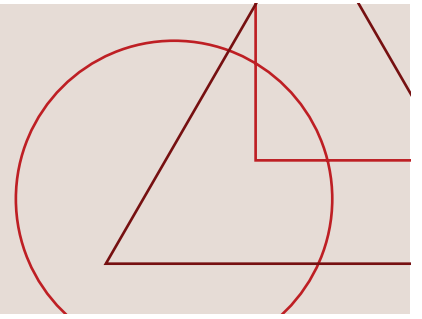


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East Asia Branch

Newsletter



Indonesian Chapter Event: Road to International Professional Certification 30 November 2023



On 30 November 2023, the Chartered Institute of Arbitrators (East Asia Branch) – Indonesian Chapter, in collaboration with ICC Indonesia, conducted a webinar entitled “Road to International Professional Certification.” The webinar was hosted by the Indonesian Advocates Association (AAI) and was attended by more than seventy members of AAI from all over the jurisdiction.

The event was intended to introduce international arbitration to Indonesian practitioners and to spark their interest in learning further about the matter and to become members of Ciarb.

Windri Marieta (Partner of Marieta and Mauren, Co-Chair of the Chapter) opened the session as moderator and announced that the webinar is a start of courses to be offered to AAI members. Susy Tan (International Relations Division of AAI) provided a welcoming remark appreciating CIARB and ICC in their joint efforts.

As the first speaker, Ilman Rakhmat (Partner of RSA Advocates and Co-Chair of the Chapter) presented slides and provided an explanation on Ciarb, the history thereof and where it stands today, and concluded with explaining the advantages of joining Ciarb, urging AAI members to take the courses and obtain their membership.

Ajinderpal Singh (Partner of Dentons Rodyk, Singapore) continued with giving a talk on international commercial arbitration, including the NY Convention and UNCITRAL Model Law, grounds for setting aside, *ad hoc* vs. institutional arbitration and arbitration procedures.

Happy New Year! All the best in the year 2024 from Ciarb EAB.

We kick off the new year with a round-up of events across the EAB including Indonesia, Taiwan and Hong Kong.

This month, we also feature an interesting article penned by Sui Hang Hui and Tiffany Fung of Sidley Austin on the topic of Litigation Funding after the UK Supreme Court judgment in *PACCAR v Competition Appeal Tribunal*.

As for events around the region, I am pleased to say that the EAB Branch has been operating at full force since the end of the pandemic and we have had many events across the regions with many members participating.

Lastly, as always, a big thank you to all contributors and our editorial team.

Happy reading!



Ronald Pang

The third speaker, Indiana Rai (ICC Deputy Director Arbitration and ADR, Indonesia) concluded the session with delivering information on arbitration under the ICC Rules with an explanation of some of the salient features thereof.

A lively discussion ensued, in which participants asked questions on the Institute and how to qualify as members as well as issues on the difference between practice in international arbitration as compared with Indonesian commercial litigation.

Feedback has been very positive and we do hope it will result in more Ciarb members in Indonesia.

Ilman Rakhmat

Vietnam Chapter ARM

From July to September 2023, our Vietnam Chapter had its first Accelerated Route to Member Course (ARM) with 21 participants; all of whom passed.

EAB is proud to welcome its new Vietnam members and look forward to their journey in the field of ADR.

Ciarb EAB organizes various training courses around the EAB region, please keep an eye out on our monthly emails and website for updates regarding future courses!

Litigation funding after PACCAR¹

In *R (on the application of PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, the UK Supreme Court held by a 4:1 majority that litigation funding arrangements (“LFAs”) constitute damages-based agreements (“DBAs”). Accordingly, the LFAs in question were rendered unenforceable because they failed to satisfy the regulatory requirements for DBAs.

Background

PACCAR concerned collective proceedings before the Competition Appeal Tribunal (“CAT”) for damages arising out of breaches of European competition law. To obtain a collective proceedings order from the CAT, the claimants had to demonstrate they had adequate funding arrangements in place to meet their own costs and/or any adverse costs orders. The claimants relied on LFAs, whereby “the funder’s maximum remuneration is calculated with reference to a percentage of damages ultimately recovered”.²

The issue before the Supreme Court was whether LFAs, which allow the funder to recover a percentage of the damages awarded, constitute “damages-based agreements” (“DBAs”) within the meaning of Section 58AA of the Courts and Legal Services Act 1990 (“CLSA”). If the LFAs in question constituted DBAs, they would be rendered unenforceable as they were not in compliance with the formality requirements under Section 58AA.

The answer to that question turned on the meaning of “claims management services” as referenced in the definition of a DBA. In this regard, Section 58AA provides that:

“(a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or **claims management services** and the recipient of those services which provides that—

- (i) the recipient is to make a payment to the person providing the services **if the recipient obtains a specified financial benefit** in connection with the matter in relation to which the services are provided, and
- (ii) the amount of that payment is **to be determined by reference to the amount of the financial benefit obtained**.

...

(7) In this section—

... “claims management services” has the same meaning as in the Financial Services and Markets Act 2000 (see section 419A of that Act)” (emphasis added)

It was argued on behalf of the claimants that the funders did not provide any “claims management services” as they did not exercise any control or influence over the conduct of the claims. As such, the LFAs should be treated as any ordinary contract. The claimants succeeded before the CAT and the

Divisional Court of the High Court, which dismissed a judicial review of CAT’s ruling. The defendants subsequently appealed to the Supreme Court under the leapfrog procedure.

The Supreme Court Decision

The Supreme Court allowed the appeal, with Lord Sales giving the leading judgment. Approaching this as a matter of statutory interpretation, Lord Sales observed that the definition language of “claims management services” is put in wide terms and not “tied to any concept of active management of a claim”.³ Even though the likely consequence in practice is that most third party funding agreements would be rendered unenforceable,⁴ the majority did not view such public policy consideration as a reason for deviating from the conventional approach to statutory interpretation.⁵

Lady Rose dissented, observing that the litigation funders were not managing claims but “funding the litigation and advocacy services or claims management services provided to the claimants by others”.⁶ It was not Parliament’s intention to render these LFAs unenforceable.

Potential Implications and the Way Forward

The Supreme Court’s decision has undoubtedly caused quite a stir in the industry, as prior to the decision it was always assumed that LFAs would not constitute DBAs requiring separate regulations.

Notwithstanding this, this decision is unlikely to have any impact on the funding space in Hong Kong. In Hong Kong, litigation funding is generally not permitted save for the limited exceptions identified in *Unruh v Seeberger* (2007) 10 HKCFAR 31.⁷ There is no regime here similar to the English DBA regulations, and the closest parallel one would find is in the funding regimes applicable to arbitration.

Following amendments to the Arbitration Ordinance (“AO”, Cap. 609), Hong Kong has permitted: (a) third party funding for arbitration (since 1 February 2019); (b) outcome related fee structures for arbitration (“ORFSA”, since 16 December 2022).

Section 98ZD of the AO expressly defines a DBA as follows:

“A damages-based agreement is an agreement, made between a client and a lawyer of the client for a matter, under which—

- (a) the lawyer agrees with the client to be paid for the matter only in the event the client obtains a financial benefit in the matter (DBA payment); and
- (b) the DBA payment is calculated by reference to the financial benefit that is obtained by the client in the matter.”

In particular, as one commentator has observed,⁸ Section 98H(2) expressly provides that “a funding agreement is not to be construed to include an ORFS agreement for arbitration within the meaning of Part 10B”. Consequently, the issue that arise for consideration in PACCAR has little relevance in Hong Kong.

Instead, users of funding arrangements will find guidance in the “Guidance Note and Checklists for ORFSA” recently published by the Department of Justice in November 2023. The objective of the Guidance Note is to provide practical and user-friendly information to assist users who wish to enter into ORFSA agreements. The Checklists also serve as quick and concise tools for users to ensure that their ORFSA agreements to be entered into are valid and enforceable as required under the relevant legislation.

**All views are expressed in the authors’ personal capacity and do not represent the views of the firm which they are associated with.*



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- 1 The authors wish to express their thanks to Mr. Martin Hui for his assistance with the preparation of this article.
- 2 [6], [2023] UKSC 28.
- 3 [63], [2023] UKSC 28.
- 4 [13], [2023] UKSC 28.
- 5 [90], [2023] UKSC 28.
- 6 [215], [2023] UKSC 28.
- 7 The exceptions include: (i) persons with a legitimate common interest in the outcome of litigation; (ii) cases involving “access to justice” considerations; and (iii) certain miscellaneous categories of practices.
- 8 Dr. Wing So (Barrister at Rede Chambers) in his LinkedIn post dated July 2023.

Update in Arbitration, evening talk by Mr Timothy Hill 21 September 2023



On 21 September 2023, Ciarb EAB welcomed Mr. Timothy Hill, Arbitrator/Mediator at Arbitra, to deliver an evening talk on “Update in Arbitration”.

During the talk, Timothy gave a riveting talk on the recent developments in the field of arbitration. In particular, he went through recent caselaw developments around the APAC region, including the recent HK Court of Final Appeal case of *Guy Lam*, the English Commercial Court case of *Raddison Hotels*, and SG International Commercial Court decision in *CZT v CZU*.

Timothy also fielded various questions from the audience regarding the future of arbitration around the region and what to expect in judicial developments in the area.

The event was well attended both physically and online with nearly 60 participants.

Ronald Pang

Taiwan Chapter Collaborated with Soochow University School of Law in Holding a Seminar on the Indonesian Legal System 25 November 2023



(Top right) Mr. Bob Tseng; (bottom left to right) Prof. Gung-Yeu Jeng (Dean, Soochow University School of Law), Dr. Pei-Jung Li MCIArb (Head of Ciarb (EAB) Taiwan YMG) and Dr. Helena Chen C.Arb FCIArb (Convener of Ciarb (EAB) Taiwan Chapter).

Ciarb (EAB) Taiwan Chapter is pleased to have collaborated with Soochow University School of Law, the ADR Committee of the Taiwan Bar Association, Thanlwin Legal Law Office and Chen & Chang, Attorneys-at-Law in holding a seminar on ‘Indonesian Legal System’ on 25 November 2023, as part of the “Series Talk on Comparative Legal System Studies”. The seminar was moderated by the Chapter Convener, Dr. Helena Chen C.Arb FCIArb, and the topic was presented by the Chair of Ciarb (EAB) Taiwan Chapter’s Young Members Group, Dr. Pei-Jung Li MCIArb.

The event was preceded by the opening remarks of two distinguished guests, Prof. Gung-Yeu Jeng (Dean of Soochow University School of Law) and Mr. Bob Tseng (Managing Partner of TWL Law Group). In the opening remarks, Prof. Jeng addressed the importance of comparative legal studies and various efforts that Soochow University School of Law has been putting into, aiming to equip the students with cross-border visions. Mr. Tseng began his opening remarks with a brief introduction of Southeast Asia in general and illustrated the complexity of the legal systems in the region.

Following the opening remarks, Dr. Li began by reflecting on the needs of mutual understanding among different legal systems and the complex nature rooted in Indonesian legal system. Just like other states in the region, the laws of Indonesia have long been influenced by various historical and cultural elements, such as colonialization, religions, and customs. Dr. Li introduced the impacts of all these elements on the development of modern Indonesian laws and provided a few examples in public and private laws respectively. She further illustrated the legal environment for international commerce and investment, as well as the dispute settlement mechanism in Indonesia.

The seminar was conducted in Mandarin Chinese and was joined by nearly forty participants attending online and in person. In the Q&A session, the participants raised questions regarding the impacts of religions on private law, language requirements in contracts, and current issues on economy and political environment in Indonesia.

Pei-Jung Li

YMG Event: Procedural Strategy in Arbitration – Tips, Tactics and Traps 27 September 2023

On 27 September 2023, the YMG of the Ciarb East Asia Branch and London Branch jointly hosted a Webinar on the topic of Procedural Strategy in Arbitration – Tips, Tactics and Traps.

The panel featured Jennifer Wu (Partner, Pinsent Masons – Hong Kong), Kate Parlett (Barrister, Twenty Essex – London) and Mathew Briggs (Senior Legal Counsel, Leighton Asia – Hong Kong). The panel was moderated by Elizabeth Montpetit (Senior Counsel, Taylor Wessing – London).

The panel sought to draw on their experience as arbitrators, counsel and in-house counsel for clients in arbitration proceedings to address issues arising in arbitration. Of particular note were the panels observations on different approaches to arbitration commonly adopted in Europe compared to Asia, the importance of early identification (and resolution of procedural issues) and challenges arising where parties cannot agree procedural matters.

The East Asia Branch YMG looks forward to continuing to collaborate with YMG's from other branches and encourages all members to look out for details of upcoming events.



Current East Asia Branch Membership

The Branch currently has under 3,000 members in the region. Find out the composition of the Branch membership in the diagrams below.

Distribution by Membership Grade

(excluding the Retired Members and Students)



Distribution by Gender of Members



Distribution by Region



The above statistics are current as of October 2023.

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 2022/23

Chairperson – **Donovan Ferguson**, Vice-Chairpersons – **Lawrence Lee & Gina Leung**, Honorary Secretary – **Micky Yip**, Honorary Treasurer & Finances – **John Cock**, Immediate Past Chair – **David Fong**, Professional Development & Training – **Stephen Chu**, Regional (PRC) – **Mingchao Fan & Tim Liu** assisted by **Jerry Zhang**, Regional (Taiwan, Korean, Japan, Indonesia & Others) – **Glenn Haley**, Adjudication – **Nicholas Turner**, Membership – **Richard Leung**, Mediation – **Lawrence Lee & Albert Yeu**, Programme – **David Luk**, Vis East Moot – **Karen Mills**, IT – **Lawrence Tam**, Communications within CI Arb and Communications with outside bodies/Public Relations Officer – **Donovan Ferguson**, Diversity – **Caroline Thomas** (co-optee), YMG – **Jennifer Wu** (co-optee), Newsletter/Website/Social Media – **Ronald Pang** (co-optee)

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