Kluwer Arbitration Blog

Kick Off: HK Arbitration Week 2018

Andrew Chin, Eugene Thong and Edern Coënt (Kim & Chang) · Tuesday, October 30th, 2018

The week-long series of events for Hong Kong Arbitration Week 2018 kicked off with a seminar hosted by Latham & Watkins entitled "Ensuring Efficiency in International Arbitration Proceedings: Tips for Asian Users". The seminar consisted of two roundtable discussions with practitioners and professionals in the field of international arbitration.

The first roundtable featured Mr. Bernard Hanotiau and Mr. Ng Jern-Fei QC, and was moderated by Mr. Philip Clifford QC.

Mr Hanotiau said that quality can never be compromised, and questioned what it means to have a speedy arbitration if both sides agreed to have six months to serve memorials. While the expedited arbitration facility is provided for under the rules of many arbitral institutions, he has not encountered many cases where it has been used. Mr. Ng agreed that the expedited facility would be favoured by users who prize speediness, but he also noted that expedited arbitrations are not necessarily simpler, explaining that the expedited procedure often leads to what would otherwise have been a typical arbitration being crammed into a shorter timeframe. The usual consequence of this is an extension of the six-month time limit.

Powers of early dismissal of claims or defences that are manifestly unmeritorious and/or over which the tribunal lacks jurisdiction have emerged in the upcoming HKIAC Arbitration Rules (2018 edition) and the SIAC Rules (2016 edition). Mr. Ng considered these powers to be a useful tool that gives comfort to arbitrators that they can summarily deal with such claims or defences without breaching a party's right of due process, particularly in view of recalcitrant respondents who run unmeritorious defences to filibuster the arbitral process.

Mr. Hanotiau also shared some personal tips on how to conduct arbitrations efficiently. Whilst telephone conferences save travelling time and costs, in-person meetings are often helpful to defuse tensions. He also tends to impose page limits on submissions, having once received a post-hearing brief of 3,000 pages following a hearing in Dubai.

On whether there should be shorter awards, Mr. Hanotiau emphasised that the main objective in investment treaty arbitrations is to ensure that an award is not annulled, after sharing that one of his awards, at 280 pages, was challenged with annulment because he did not deal with one argument. Mr. Ng had similar views: he expressed the view that a well-reasoned award dealing with the losing party's arguments is "therapeutic" for the losing party, who will want to know why it lost, because such an award reassures the losing party that it had a full and fair hearing.

As to whether there should be more sole arbitrator tribunals, Mr. Ng likened arbitrators to elephants, and quipped that both move better in herds. He explained that while there is no one-size-fits-all approach, collective wisdom and experience can be drawn on with a three member tribunal.

The second roundtable featured Ruth Stackpool-Moore (Harbour Litigation Funding) and Wang Wenying (CIETAC HK, CMAC).

Ms. Wang shared some innovations in the CIETAC Arbitration Rules (2012 edition) to promote efficiency. The CIETAC Arbitration Rules allow for expedited procedures and provide mechanisms such as joinder and consolidation to deal with multi-party arbitrations. Further, med-arb is often used in CIETAC arbitrations and these procedures have found favour with CIETAC users.

Ms. Stackpool-Moore expressed optimism for the third party funding landscape in Hong Kong as the draft Code of Practice is already available for consultation. Meanwhile, third party funding has been available in Singapore for 18 months and the future looks bright for the region. Ms. Stackpool-Moore also agreed that arbitrations must be efficient as this affects when the third party funder can get its returns. The key factor for third party funders in deciding whether to fund cases is detailed information about the merits of the case. It is not sufficient to expect a funder to base its decisions on the pleadings alone. The funder will then analyse the chances of success and prepare a budget for the case. Although a funder does not normally dictate how a case is run, a funder will usually provide some advice on strategy.

The identity of the lawyers involved are also important to the funder. As the funder will not have active control of the case, the funder will want to ensure that competent lawyers are on board, otherwise they may either decide not to fund the case or may want to engage co-counsel to assist.

To end the event, Mr. Yang Ing Loong noted that it is the responsibility of the arbitral institutions, arbitrators and parties to ensure that arbitrations are efficiently conducted.

COMMENTARY

Discussing efficiency from different perspectives, the two panels hosted by Latham & Watkins showed that arbitration, like any craft, relies heavily on the tools available and the people that use them.

Expedited Procedures

The first and most familiar tool related to procedural efficiency is expedited rules. These have been inserted in the latest revisions of institutional arbitration rules that users are most likely to encounter in Asia, *i.e.*, CIETAC, HKIAC, ICC and SIAC. The discussion from the first panel pointed to two typical issues with expedited procedures.

First, they are still not used that often, even though most of them have been in place for some time now. Given that most of these provisions are triggered by default when the amount in dispute falls below a certain amount, it can be inferred that in a fair number of cases where expedited procedure provisions should apply, the parties agree to opt out. The tool is there, but people are reluctant to pick it up.

Second, expedited procedures are not necessarily simpler. As discussed several times since

institutions started to apply these provisions, a low amount in dispute is no guarantee of low complexity. Institutions have an interest in attracting more cases by providing services tailored to smaller disputes, and users are also keen generally to see straightforward issues decided rapidly, but these rarely mirror each other. Even when they do, and the parties agree that an expedited procedure is preferable, conducting the matter efficiently might well rely on how experienced the arbitrator is. Yet institutions will tend to use smaller disputes to promote new arbitrators, to give them experience and expand the pool and therefore the options available to the parties in the future, even though it might take a more seasoned arbitrator to conduct an expedited procedure efficiently and use it to its fullest potential.

Early Dismissal and Long Awards

Another tool available for increased efficiency, which is newer, is early dismissal. Included in the latest versions of HKIAC and SIAC rules, this option does not depend on the parties opting in or out. This does not mean, however, that we will see it more often used or that it will drastically improve efficiency. If the now familiar emergency arbitrations, another tool arguably orientated toward speedy resolution, are any indication, the manifestly unmeritorious nature of a claim or the tribuna's evident lack of jurisdiction is never so obvious as to be so promptly dealt with. Parties will argue those points extensively and exhaustively, and arbitrators will want to make sure that they cover every argument.

This procedural economy resonates with another point made by the panels with respect to the length of awards. A shorter award might be delivered more quickly, from the tribunal's drafting to the institution's scrutiny and the parties' receipt, but can efficiency be measured by speed here? The parties will of course want to present every possible argument that might improve their case, tribunals will have to tackle and address all of them and institutions will make sure that they do. At the end of the day, the award has to resolve the dispute and it has to be enforceable in order to do so. For all involved, the question is not really to balance efficiency and quality, but to combine them.

Institutions and Third Party Funders

Parties and tribunals have to work towards a combination of efficiency and quality, and other players in the field can help them achieve just that. It is apparent from these two panels that institutions are pushing new tools and procedural devices in order to meet their users' needs and market expectations. Third party funders provide a budget, advice on choice of counsel and strategy, which will make sure that the tools available are properly used. Time is money, but so is an enforceable award.

In that respect, hearing about efficiency yesterday morning raised familiar questions. Do parties push for unreasonably long pleadings and proceedings? Are arbitrators too busy or conservative? Should institutions be more hands-on? Less so? What about funders? Are they too close to the action? These issues are likely to fuel debates within the arbitration community for the foreseeable future. All in all, this session was a proper kick-off to the Hong Kong Arbitration Week.

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