Hong Kong Arbitration Week Recap: Making Arbitration Fit for the Future

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Hogan Lovells hosted an event yesterday, 30 October 2018, at its Hong Kong office, as part of the Hong Kong Arbitration Week, titled "Making Arbitration Fit for the Future". The event was graced by the presence of Bernard Hanotiau as the keynote speaker, followed by speeches from HKIAC's Sarah Grimmer and Hogan Lovells' James Kwan, Julianne Hughes-Jennett and Dan González.

Keynote Speaker: Bernard Hanotiau

Bernard Hanotiau kicked off the seminar by noting its fascinating theme of making arbitration fit for the future, which in his view is to make arbitration as efficient as possible by adapting it to match the evolution of society. Hanotiau believes that there is still room for institutional rules to be improved from an efficiency standpoint, such as expanding grounds for complex arbitrations, introducing summary or early determination procedures and providing secured online repository where documents can be uploaded.

To make arbitration fit for the future, Hanotiau said that practitioners and arbitrators need to step up to the plate by adapting and improving their practice of the arbitral process. This can be done by making use of modern and appropriate technology, and take the initiatives to shorten the procedure where possible. On technology, Hanotiau highlighted its importance to shrink a large number of files, and suggested that site visits may possibly be replaced by 3D models or augmented reality very soon.

When met with an audience question on how to balance party autonomy against a party's demand for a 40-page post-hearing briefs, Hanotiau said that the Tribunal should first discuss with the parties on the way forward. If the parties are in total disagreement and the Tribunal considers them to be unreasonable, it will need to make a final decision. Hanotiau thought that parties should approve of Tribunals that put their foot down to make decisions.

Innovation: Improving Institutional Rules as the Answer

HKIAC's Sarah Grimmer then took the floor and introduced the audience to the brand new HKIAC Administered Arbitration Rules, which will come into effect on 1 November 2018. Grimmer explained that there were three key objectives behind the amendments in essence: time and cost saving measures, efficiency in complex arbitrations and relevance to developments in international arbitration.

Some of the noteworthy amendments that Grimmer highlighted include: a cap on the total fees charged by an emergency arbitrator; introduction of an early determination procedure; imposition of a three-month time limit to render an award after close of proceedings; amended deadlines to appoint an emergency arbitrator and to render an emergency decision; possibility to file an emergency arbitrator application before commencing an arbitration; express reference to concurrent proceedings; encouraging the effective use of technology and delivery of documents through an online repository system.

Artificial Intelligence in International Arbitration

James Kwan, an international arbitration partner at Hogan Lovells' Hong Kong office, spoke about the tongue-twisting concept of "AI in IA". Drawing on the 2018 Queen Mary University of London International Arbitration Survey, Kwan pointed out that there is a sentiment towards the greater use in the future of artificial intelligence ("**AI**") technology, with 61% of the survey respondents noting that "*increased efficiency, including through technology*" is the factor that is most likely to have a significant impact on the future evolution of international arbitration. Kwan then highlighted for the audience how AI is used in international arbitration, ranging from enhancing case management to predictive justice and even having AI arbitrators.

While enhancing case management is quite innocuous, predictive justice and AI arbitrators are certainly the more heated topics. Some of the concerns highlighted by Kwan include the failure for predictive justice to take into account the "human factor", due process and the right to be heard. On AI arbitrators, while the idea is tempting, Kwan said that such concept is unlikely to happen in the immediate future given the various hurdles such as: whether machines can be qualified as arbitrators; nationality and security of AI arbitrators; and whether AI arbitrators are capable to render reasoned awards or suitable to decide disputes at all, given their lack of understanding of emotions. As such, Kwan foresees that although AI is here to stay, in its current form AI can only assist and facilitate, but is nonetheless useful and will play an increasingly significant role in arbitration. Referring to the *Terminator* series, Kwan concluded that lawyers and arbitrators can be assured that their services are still needed until the judgment day comes.

Human Rights and Arbitration

Julianne Hughes-Jennett, a partner at Hogan Lovells' London office, then took the stage to talk about the relationship between businesses and human rights ("**BHR**") as well as international arbitration. Drawing from both soft laws (such as the OECD Guidelines) and hard laws (such as national legislations), Hughes-Jennett said that states have the duty to respect, fulfil and protect human rights while corporations have the responsibility to respect the same. In the context of investment treaty claims, human rights can be used both as a sword (*e.g.*, breach of access to justice and due process obligations) and a shield (*e.g.*, claimant's breach used to either mitigate the compensation owed).

Hughes-Jennett pointed out that the types of BHR disputes referred to arbitration will either involve a victim against a business, or a business against another business. However, there are certain challenges to overcome for this type of dispute such as consent to arbitrate, applicable law, public policy, inequality of arms and spurious claims. Notwithstanding these challenges, BHR disputes have already been filed previously, such as the arbitrations brought before the Permanent Court of Arbitration based on the Accord on Fire and Building Safety in Bangladesh. Hughes-Jennett concluded that BHR arbitration is undoubtedly a welcome initiative, but it would be important to carefully consider the legal, practical and policy challenges as well as to continue to consult stakeholders on this matter.

Increasing Efficient Access to International Arbitration

Last, but certainly not least, Dan González (Global Head of Hogan Lovells' International Arbitration practice) spoke about increasing efficient access to international arbitration. González pointed out the consistency from different surveys that arbitration is the preferred tool for dispute resolution, but that the top complaints about international arbitration from these surveys include costs, delay and time taken to resolve the dispute.

On technology, he noted that electronically stored information ("**ESI**") is overwhelming practitioners, as an average employee now generates around 800 megabytes of electronic information per year. González then shared some tips for promoting better efficiency in arbitral proceedings, which include:

- Working with the opposing counsel at an early stage. To improve efficiency, parties should try to agree on the procedural order, reduction in the number of pleadings and the discovery procedure. Parties could consider putting mediation on the schedule, as this may lead to early resolution of the dispute, or narrowing down of the issues.
- Avoid raising every dispute with the arbitral tribunal. Parties should attempt to reach an agreement with the opposing counsel on some issues, and avoid the temptation of raising every disagreement to the Tribunal. However, González reminded the audience that it may be appropriate in some cases to raise significant disputes, which may provide an opportunity to advance one's own case.
- Conduct the discovery process in a more efficient manner. Counsel should only ask for the documents we need, rather than engaging in a fishing expedition. González also pointed out the need to identify key custodians, develop intelligent search terms, understand ESI and use technology assisted review (predictive coding) wherever possible.

Questions and Answers

As a parting gift to the audience, Hogan Lovells' Kent Phillips asked each of the speakers to look into their crystal balls and predict on the future of international arbitration.

Kwan was of the view that there will be a greater influence by Chinese parties in international arbitration, which is evident from the increase in caseload across arbitral institutions such as HKIAC, SIAC and ICC. He also said that this influence can be felt by the recent amendments to institutional rules like the "med-arb" procedure.

Both Hanotiau and Hughes-Jennett agreed with Kwan, with Hughes-Jennett noting that the bulk of her caseload now involves Chinese parties in commercial arbitrations. Her prediction, however, is that there will be a rise in BHR disputes. This is because there are already clauses in place for these disputes, and that it all takes is for them to spring.

González thought that more ADR processes will surface alongside international arbitration, which was traditionally thought to be a form of ADR in the United States but now became the method of dispute resolution. While it is possible that there will be more and more mediations being conducted by necessity and to save costs, it may be challenging to conduct mediation in other parts of the world due to cultural diversity.

Finally, Grimmer shared González's view that arbitration will continue to be utilized by more and more parties, which is clear from the arbitral institutions' recent case load performance and improvement in case management quality. Grimmer agreed with Kwan that Chinese parties will be engaging more frequently in the arbitral process, and that arbitration – from across the spectrum of dispute resolution – will remain absolutely strong.