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2018 Taipei International Conference: Competitive, Collaborative or Cooperative Relations between Litigation, Arbitration and Mediation?

Winnie Jo-Me Ma (Chinese Arbitration Association, Taipei) · Tuesday, October 23rd, 2018

Are litigation, arbitration and mediation competitive, collaborative or cooperative? Is litigation becoming an "alternative" to "alternative dispute resolution", especially keeping arbitration on top of its game? Are mixed processes or combined regimes becoming the preference?

These questions were part of the timely and timeless theme for this year's Taipei International Conference on Arbitration and Mediation on August 27-28, the 12th annual conference co-hosted by CAA (Chinese Arbitration Association, Taipei) and ACWH (Asian Center for WTO & International Health Law and Policy, College of Law, National Taiwan University) since 2007.

There was near-unanimous consensus among conference speakers that the tables are turning and a storm is brewing. This resonates with the "growing ecosystem" and "changing culture" as described by Eunice Chua.

Several meaningful bases of comparison and choice are emerging from the proliferation of international commercial courts and dispute resolution hubs, together with the increasing accession to the Hague Convention on Choice of Court Agreements and the new UNCITRAL Convention on International Agreements Resulting from Mediation. They include: enforceability; efficiency (especially containment of cost and delay); expertise, availability and diversity of decision-makers; appellate review versus institutional scrutiny; transparency versus confidentiality; and flexibility versus predictability (Janet Walker, Osgood Hall Law School; Gary F. Bell, National University of Singapore). Languages and legitimacy were also raised (Ling Yang, HKIAC), which were the recurring and dominating themes of the 2016 Taipei International Conference and this year's 2018 ICCA Congress respectively.

One may conclude from these considerations that many of the so-called "international commercial courts" are not really "international", and that arbitration already has their international features (Stephan Wilkse, Gleiss Lutz). In any event, there is room for co-existence and even partnership between international commercial courts and arbitration, as both are fishing in the same pond while enlarging the pie. However, *res judicata* in litigation and arbitration remains an unresolved problem, risking double recovery and conflict of laws (Philip Yang, Independent Arbitrator).

Another ongoing debate in some jurisdictions is whether international and domestic arbitration regimes should be combined or bifurcated, which requires delicate balancing of party autonomy,

arbitrability and public policy (Doug Jones, Independent Arbitrator). For instance, CAA is currently working on a legislative bill to reform Taiwan's Arbitration Act, which will be based on UNCITRAL Model Law on International Commercial Arbitration and modified by Taiwan-specific features.

Mediation is another source of complexity – be it another choice, contender or challenge. And change is needed, as confirmed by the latest Queen Mary International Arbitration Survey, as well as the four global themes of the Global Pound Conference series (Kathryn Sanger, Herbert Smith Freehills). First, efficiency is the parties' key priority in their choice of dispute resolution processes. Yet efficiency will not always be the quickest and cheapest. Furthermore, Asia represents a regional trend of preferring enforceability (through increased regulation) over efficiency.

Second, many parties desire pre-dispute protocols and hybrid processes. Yet the debate about whether and when an arbitrator can act as mediator persists. Efficiency cannot compromise impartiality. We need innovative combinations of the existing models such as med-arb, binding mediation and *amiable composition* to achieve a more informed and just resolution of disputes (Joe Tirado, Garrigues). The dual roles of mediator and arbitrator can create the most dilemmatic conflicts but also the best decisions. In addition, effective use of *ex aequo et bono* and *lex mercatoria* may counteract the over-judicialisation of arbitration without over-complicating arbitral procedures (Nobumichi Teramura, UNSW Law Faculty; Horia Ciurtin, EFILA).

Third, the parties expect greater collaboration from their representatives – the traditional role as warriors in battle may be out of step with their needs. This leads to the fourth observation that external lawyers stifle change whereas in-house counsel enable change, fueling further controversy and disparity.

More challenges and opportunities arise from innovative technology and online dispute resolution (Kim Rooney, Gilt Chambers). Artificial intelligence, Blockchain, smart contracts and eBRAM are already well-known work in progress.

Coincidentally, the brewing storm of international tax disputes relating to bilateral tax treaty Mutual Agreement Procedure may be the litmus test or a niche for the competitive/collaborative/cooperative relations between litigation, arbitration and mediation (Michelle Markham, Bond University Faculty of Law). As at July 2018, only 28 of the 83 signatories to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting have adopted the mandatory binding arbitration provision. The main controversy concerns the perceived loss of sovereignty, the ability for revenue authorities to veto arbitral decisions. Mediation is relatively untested, but if it can foster collaborative working relationships and thereby facilitate arbitration, it may be used as an addendum to arbitration, rather than as a stand-alone process. On the other hand, litigation is unlikely to remain costly, complex and time-consuming for taxpayers and tax authorities.

The ultimate goal, and also the ultimate test, is to reach a resolution and closure – to end, move on and away from the dispute. Anyone involved in any dispute resolution process can be expected to aim and strive for this goal.

We may continue to be challenged or comforted by several continuing questions after the 2018 Taipei International Conference. The first is enforceability: what are the prospects of the Hague

Convention on Choice of Court Agreements and the new UNCITRAL Convention on International Agreements Resulting from Mediation in comparison with the 60-year-old New York Convention? The second relates to efficiency: will competition truly reduce costs? Will collaboration improve the effectiveness or speed of dispute resolution (by combining the best rather than the worst of multiple worlds)? The third (re)explores legitimacy: what is the appropriate balance between over-regulation and under-regulation, particularly in the context of promoting or preserving public confidence? Will UNCITRAL continue its future work on the ethical regulation of arbitrators and even extend to party representatives or third party funders?

Most of us would agree that one size does not fit all. We are unlikely to predict the outcome, nor dispute the need to do (more) of the following in the meantime: provide integrated training for judges, arbitrators, mediators, practitioners and all service providers in dispute resolution, management and prevention; remove or reduce any legislative and institutional barriers to integrated dispute resolution processes; promote public awareness of all dispute resolution processes.

Turning point or brewing storm, a race to excellence has begun.

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