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Hong Kong Arbitration Week Recap: ADR in Asia Conference – The Vision in Revision

James McKenzie, Wilson Antoon (King & Wood Mallesons) · Thursday, November 1st, 2018 · HK45

Yesterday, participants at this year's Hong Kong Arbitration Week came together to attend the centrepiece ADR in Asia conference. The conference, titled "*The Vision in Revision*," featured a veritable smorgasbord of speeches, panels and mocks and was held again at the Four Seasons Hotel.

Welcome Address and Keynote Speech

The conference was kicked off with a welcome address by current HKIAC Chair Matthew Gearing QC who announced the appointment of seven new council members to the HKIAC Council: Jianan Guo, José-Antonio Maurellet SC, Andrea Menaker, Catherine Mun, Ronald Sum, Robert Tang GBM, SBS, QC, SC, JP and Rimsky Yuen GBM, SC, JP. Mr Gearing spoke to a number of positive developments at HKIAC, including the adoption of new rules which come into force on 1 November 2018 and a growing caseload.

Mr Gearing then yielded the conference floor to Professor George Bermann of the Columbia University School of Law who gave a keynote speech posing the question: why, when faced with recent scrutiny and an assortment of challenges, should the international arbitration community look to the future of arbitration with considerable equanimity? Professor Bermann had three reasons for this.

- *First*, he noted that the promised features of international arbitration had not receded in value. Confidentiality, party autonomy in constituting tribunals, finality of awards, ease of enforceability, and above all, the promise of neutrality, remain elementary advantages for arbitration that have not diminished over time.
- *Second*, in his view, international arbitration has delivered further benefits that were not part of the "original promise". These include an aptitude for procedural reform and adaptation that cannot be matched by national systems of litigation, the embrace of new technology, and the development of a dynamic and vibrant community of international arbitration practitioners.
- *Third*, he noted that international arbitration has been able, relatively speaking, to avert anticipated risks, including arbitrators cutting procedural corners and not faithfully applying the law chosen by the parties. Professor Bermann said that whilst these might be occasional problems, they are not chronic.

So whilst challenges abound there was, according to Professor Bermann, much for arbitration

practitioners (and indeed the day's attendees) to look forward to.

Who Governs, Who Decides, And How? Arbitral Institutions Under Review

The first panel of the day delved into the inner workings of arbitral institutions in Asia and Europe, attempting to open up the doors in the major institutions' decision making processes. The panel was composed of leading members of arbitral institutions: Mr Gearing; Judith Gill QC, LCIA President; Alexis Mourre, President of the International Court of Arbitration (ICC); and Lucy Reed, Vice President, SIAC Court of Arbitration (SIAC) and chaired by Neil Kaplan QC.

Mr Kaplan kicked off discussion about the levels of transparency at the institutions in the decision making process posing the question: who decides things at each of the panel members' respective institutions? Each of the panellists introduced the decision-making bodies in their centres, with Mr Gearing noting that its key governing body, the HKIAC Council, has just been "*revamped*" with new term limits for its members and the aforementioned broadening of the Council. Mr Kaplan questioned the panel about the transparency of these arbitral centres' decision making processes and quizzed the panel on what their organisations have and are doing to increase transparency in this area. All the panellists noted that their organisations publish decisions, particularly in relation to arbitrator challenges and (in most cases) where requested by parties with the ICC making these decisions available on its website. Ms Gill noted however that not all decision making processes are susceptible to publication and cautioned that a balance needed to be struck.

Mr Kaplan then turned the conversation to the composition of the administrations' governing bodies and the panellists' attitudes regarding individuals sitting on governing bodies of multiple institutions. Ms Gill pointed out the concern at the LCIA that, where there is functional matrix or similarity between roles held at different institutions there is a risk of conflict, though that each situation needed to be looked at individually.

After discussion of transparency in arbitrators' and counsel's rates, the panel discussed the topic of arbitration clauses in which parties agree a set of arbitration rules different from their usual administering institution. All the panellists agreed that this was a vexed topic and that institutions have tried to work together to try to ensure that parties didn't end up falling between the cracks of the institutions with a pathological clause and recourse only to the courts. A protocol agreement between institutions on how this should be dealt with was suggested by Mr Kaplan and welcomed by all the panellists. When queried from the floor whether the institution or the rules should be preferred in such a protocol the panel was unanimous: the rules should prevail.

One-On-One Session with Former Secretary for Justice Rimsky Yuen SC And Address by the Current Secretary for Justice

The first panel session was followed by two sessions with the former and current Secretary of Justices of Hong Kong: Rimsky Yuen SC and Ms Teresa Cheng GBS, SC, JP. Mr Kaplan remained on stage to interview Mr Yuen SC who said that in his five and a half years as Secretary for Justice, he had the privilege of participating in many interesting matters, both legal and political, including handling the Snowden case about which (when pressed by Mr Kaplan) he could unfortunately say very little! When asked about his interests outside of law, Mr Yuen SC said that he is partial to a cigar dipped in whisky, but (of course) after rather than before any court hearings! The session was rounded off with Mr Kaplan asking Mr Yuen a series of rapid-fire questions:

1. International arbitration or litigation? A. Arbitration.

2. Beatles or Rolling Stones? A. Beatles.
3. Rugby or soccer? A. Soccer.
4. Apple or Samsung? A. Samsung.
5. Hong Kong or Singapore? A. Hong Kong, of course!
6. Institutional or *ad hoc* arbitration? A. Institutional.
7. Fine dining or bowl of noodles? A. The latter.
8. If you were on desert island, what book would you take? A. A book on how to fish, in order to survive.
9. What one luxury would you pick? A. Cigar. (of course)

Ms Teresa Cheng then gave a forward looking address focussing on the future business and economic opportunities in Hong Kong, including the Belt and Road Initiative and the Greater Bay Area, and the Government's policies to promote Hong Kong as an international hub for deal-making and dispute resolution.

Options for Urgent Relief – Which Ones are Most Effective and When?

The first afternoon panel, moderated by Charles Manzoni SC, QC, was on urgent relief and the options available to parties and tribunals. Claudia T. Salomon outlined that the options available to a party seeking urgent relief include: (1) appointing an emergency arbitrator; (2) seeking interim relief once the full tribunal is constituted; or (3) applying to national courts for relief.

David W. Rivkin outlined a number of considerations in deciding between the three options: (1) confidentiality, (2) level of urgency, (3) degree of impartiality of a national court, (4) nature of the relief requested, (5) the kind of security it might have to provide in order to obtain the requested relief, and (6) the seat of the arbitration and whether an emergency arbitrator's award will be enforceable in that jurisdiction.

Taking on board these considerations, the second panel on this topic sought to demonstrate them in practice in case scenario showcasing a request for interim relief before the Hong Kong courts and a parallel request for interim relief before an arbitral tribunal operating under expedited proceedings. Christopher Moger QC introduced the scenario to the audience which involved an apprehended exercise of a contractual put option which was (on the Claimant's case) a danger to the subject matter of underlying arbitral proceedings. Simon Chapman appeared as Counsel for the Claimant, Sheila Ahuja as Counsel for the Respondent with Swee Yen Koh acting as arbitrator and José-Antonio Maurellet SC acting as judge. Catherine Munn was as a commentator to the proceedings.

The respective Counsel took the mock tribunal and court (and of course the audience) through the relevant tests demonstrating the not insubstantial room for argument on the interpretation of the tests for interim relief under the 2018 HKIAC Rules (which, although yet to be in force until the next day, were held to apply) and the Arbitration Ordinance in arbitral and court proceedings.

In the end, Mr Chapman was successful in obtaining part of his relief before Ms Koh, who emphasised her deference to maintaining the status quo over prejudice to the Respondent's contractual rights. In the court proceedings, Ms Ahuja was successful as Mr Maurellet SC was not persuaded that the applicant had properly exhausted his avenues through arbitration and was therefore minded to make no order on the basis that the Mr Chapman might come back to the court if it was unable to do so. Of course, Mr Maurellet SC noted, it would still be open to Ms Ahuja to

argue that the applicant could not meet the test for injunctive relief at that juncture.

Summary Proceedings and their Enforcement in Asia – Are They a Positive Development?

On the final topic of the day, a panel consisting of Caroline Kenny QC, Professor Anselmo Reyes SC and William D. Stone SBS, QC and chaired by Cameron Hassall discussed the addition of summary proceedings and whether or not they are a positive development. Ms Hassall introduced the newly introduced process for early determination under the HKIAC Rules and posed the question: if the Tribunal has wide powers to control and manage the arbitration why introduce an express provision for early determination. There was divergence on the panel on this.

Ms Kenny QC, on the one hand, conceded that while the provision was not strictly necessary there are two points recommending inclusion of the rule:

- *First*, having the rule meant in her view that it will be more likely to be used; and
- *Second*, the fact that the rule is expressly included in the rules will reduce the likelihood of challenged to awards on the basis of a lack of due process.

Professor Reyes SC, on the other hand, was less sure because by putting in the rule it might imply that in previous versions of the rules such relief is not available and might lead to additional challenges.

All of the panel raised concerns with meeting the particulars of the procedure and timetable, with Professor Reyes SC noting his worry about doing so under a recent SIAC procedure. He noted the difficulty, given the seriousness of the decision yet the brevity of timeframes under the SIAC procedure that formulating and providing the parties with adequate reasons for a decision was difficult. Ms Kenny QC noted that the strict process in a sense might be welcomed in that it forces the Tribunal to be more rigorous about setting deadlines for the parties and thinking differently about the application. The panel also discussed the differing legal tests under the summary determination procedures under the SIAC and HKIAC Rules and the meaning of "*manifest*" in that context with Mr Stone QC putting it somewhat tongue in cheek as "*you know it when you see it*". The panel concluded that whilst there were concerns about the adoption of the early dismissal proceedings in the new HKIAC Rules and indeed summary procedures in general, it was too early to tell their success or otherwise.

Closing Remarks

It fell finally to the current Secretary-General of HKIAC, Ms Sarah Grimmer, to close the conference by re-capping the day's events and detailing an exciting roster of activities for HKIAC in the coming year. Amongst these events: the renovation of HKIAC's premises; the launch of the inaugural HKIAC Lecture in Beijing; a legal summit focusing African arbitration; and (of course) next year's Hong Kong Arbitration Week, to be held from 21-25 October 2019 and in which, no doubt, another packed day of ADR in Asia will again be a centrepiece.

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