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Hong Kong Arbitration Week Recap: A Step Forward or Challenges for the 21st Century?

Vera He (ICC) · Wednesday, October 18th, 2023

On the second day of Hong Kong Arbitration Week 2023, the ICC International Court of Arbitration (ICC) and the International Chamber of Commerce – Hong Kong (ICC-HK) hosted an in-person event on "*Challenges of the 21st Century: Regulation of Use of AI in Dispute Resolution and Making ADR Work*." The event explored the appropriate techniques of arbitral proceedings in facilitating settlement of disputes and discussed the latest regulatory developments concerning artificial intelligence ("AI") in dispute resolution.

Panel Discussion on the ICC Report on Facilitating Settlement in International Arbitration

Arbitrators facilitating settlement is a common practice for some, but it is uncharted area for most. The ICC Report on Facilitating Settlement in International Arbitration published in July 2023 ("Report") proposes techniques that are known to be effective in facilitating settlement in arbitral proceedings to ultimately benefit the parties' business relationships. The first panel of the day delved into the evolving role of the arbitral tribunal in facilitating settlement, how settlement can be facilitated effectively, and the pitfalls to avoid.

The panel was comprised of Chiann Bao (Independent Arbitrator; Vice President of ICC Court), Nils Eliason (Partner, King & Spalding), Joanne Lau (Partner, Allen & Overy), David McArthur (Partner, Anderson Mori & Tomotsune), Jose Maurellet (Senior Counsel, Dex Voeux Chambers), and Xin Zhang (Counsel, ICC Court). The panel discussion was moderated by Rory McAlpine (Partner, Skadden; Chair, ICC-HK Arbitration Committee).

As the co-chair of the Report's Task Force, Ms. Bao opened the session by introducing the task force and its key users — in-house counsels, who were actively engaged in the drafting of the Report. The traditional viewpoint in most jurisdictions has been that the role of the arbitral tribunal is to decide the case in the form of an enforceable award. Ms. Lau shared this viewpoint but further underscored that the tribunal's mandate is shaped by the parties. The tribunal should be receptive to the parties' expectation in seeking out additional options that would facilitate more efficient dispute resolution, including increased cost awareness. Mr. McArthur concurred with her observation from the perspective of a practitioner in Japan. By applying ADR tools into arbitration, time and cost could be saved through early settlement, and a win-win business relationship can be maintained, which is more acceptable by Japanese parties.

The panel agreed with the observation of the Report that the debate has now moved from *whether* arbitrators should take steps to facilitate settlement to *how* that should be done. Mr. Eliason offered advice based on his soft skills in this regard, including inviting business representatives from both parties to the case management meeting in person, in order to generate settlement opportunities for both parties. One optimal occasion could be after the first exchange of memorials, when both parties have become acquainted with each other's cases but another round of memorials and hearing, including accompanying fees and costs, are forthcoming. Mr. Maurellet also underlined that arbitrators are hesitant to facilitate settlement since additional precaution is needed on neutrality and to reduce the possibility of an award being challenged.

Ms. Zhang offered an institutional angle to practice. Among all ICC cases that were withdrawn (before a final award could be rendered) in 2022, around 45% of cases were withdrawn before the constitution of tribunal, which indicates that the claimant has paid only the filing fee of 5,000 USD. Around 8% were withdrawn after the tribunal was constituted but before the first case management conference or terms of reference. Furthermore, about 37% were withdrawn after the terms of reference, and very few cases, around 7%, were withdrawn after the partial award was rendered. Ms. Zhang emphasized that the institution, as the neutral first point of contact, has advantages to promote settlement in arbitration as well.

Uncommon facilitating practices such as mediation windows, preliminary views, and settlement conference were also being explored by the panel. However, the panel holds the consensus that the enforceability of arbitral awards should be considered before taking these approaches.

Panel Discussion on the Regulation of Use of Artificial Intelligence in Dispute Resolution

The panellists included Gary Gao (Partner, Zhong Lun; Member of ICC Commission on Arbitration and ADR), Vikas Mahendra (Partner, Keystone Partners; ICC YAAF Representative), Kim Rooney (Arbitrator and Barrister; Member of ICC Court), and Todd Wetmore (Partner, Three Crowns; Vice President of ICC Court). The panel discussion was moderated by Simon Chapman (Partner, Herbert Smith Freehills; Member of ICC Court).

As the People's Republic of China is the only country with explicit regulations on the use of AI in dispute resolution so far, Mr. Gao delivered a brief introduction on PRC regulations and policies on AI related technology and observed that current regulations in the PRC have created an open and welcoming environment for AI's application in judicial fields. He highlighted key principles regulating the application of AI from the Supreme People's Court's Opinion on AI in the Judicial Fields*:*

- Principle of Supporting Adjudication, affirming the supportive role of AI in adjudication and drawing the bottom line that AI shall not replace judges in making judicial decisions in any case;
- Principle of Transparency and Credibility, ensuring that all links of AI systems, including the collection and management patterns of judicial data, the process of legal cognitive semantics, and the logic of assisting judicial presumptions, be under the court's examination;
- Principle of Security and Legality, particularly securing State secrets, network security, and data security; protecting personal information from infringement; and protecting personal privacy;
- Principle of Fairness and Justice, abiding by public order and good customs.

Ms. Rooney shed light on European regulation by introducing the EU's AI Act 2023 (now in

Trilogue), which is expected to come into force at the end of 2025 or 2026. She emphasized that the European Parliament's priority is to make sure that AI systems used in the EU are safe, transparent, traceable, non-discriminatory, and environmentally friendly. AI models have been classified into five risk categories, and AI systems that have a negative impact on safety or fundamental rights will be designated as high risk.

Mr. Mahendra gave a snapshot of India's practice in massive low-value cases where a significantly greater usage of AI is being encouraged. For instance, one institution uses AI for the purpose of allocating the dispute to arbitrators and allows parties to make submissions using AI. It potentially uses AI as a decision-making tool, subject to a manual layer of review.

Drawing the threads of different jurisdictions' practice together, Mr. Wetmore turned the conversation to the "black box" of AI. He outlined the major concern of ensuring that regulations be targeted so that they do not have unintended effects and interfere with AI that does not pose any serious issue that requires regulation.

Conclusion

The regulation of AI and the use of ADR are constantly evolving in response to the ever-changing demands of dispute resolution. Adapting to modern technology and making arbitration and other types of ADR work harmoniously in an acceptable and balanced way is a living topic to be addressed in the 21st century.

More coverage from Hong Kong Arbitration Week is available here.

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