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SINGAPORE CONVENTION ON MEDIATION
PANEL SESSION REPORT

Title of Panel: The Future of International Dispute Resolution: Challenges and Opportunities for Access to Justice
Date/Time: 7 August 2019, 1.50 pm
Venue: Island Ballroom, Shangri-La Hotel, Singapore

Speakers:

- Professor Gabrielle KAUFMANN-KOHLER, President, International Council for Commercial Arbitration ("**Prof Kaufmann-Kohler**")
- The Honourable Justice Anselmo REYES, International Judge, Singapore International Commercial Court ("**Justice Reyes**")
- The Honourable Justice Edward TORGBOR, Former Judge of the High Court, Kenya and Visiting Academic, University of Oxford ("**Justice Torgbor**")

Moderator:

- Mr George LIM SC, Chairman, Singapore International Mediation Centre ("**Mr Lim**")

Report on Panel

Main Themes

Mr Lim said that the central focus of the discussion would be on the future challenges of dispute resolution and the opportunities they present. There would be 3 main points of discussion, namely:

(a) First, the sources of dynamism in the international landscape and their impact on the use and shape of various dispute settlement processes ("**First Sub-Topic**");
(b) Second, the panellists' perspectives on mixed modes of dispute resolution and hybrid processes ("**Second Sub-Topic**"); and
(c) Third, how dispute resolution and views on it have changed and will change in the face of new technology ("**Third Sub-Topic**").

Arguments

First Sub-Topic

Justice Torgbor noted that the sources of dynamism principally include international legal instruments, such as the UNCITRAL Model Law ("**Model Law**"). While the Model Law has had a profound influence on arbitration, there are areas which it does not cover and these gaps create problems. As an example, he observed that there are gaps in relation to the underlying arbitrability of disputes and where national statutes do not define what is arbitrable, this increases judicial intervention rather than limiting it.

In Prof Kaufmann-Kohler's view, international dispute settlement is reactive to the changes in the world. She raised investor-state dispute settlement as an instance of this, and observed that with the progress of democracies which tend to trust in institutions, there appears to be a distrust in non-elected individuals as arbitrators. This has led to the emergence of structural institutional reforms in

recent years by the creation of an investment court or an appellate body over existing investment arbitration tribunals.

Justice Reyes expressed the view that the proliferation of conventions dealing with the recognition and enforcement of arbitral awards, judgments and mediated settlement agreements – such as the Model Law, New York Convention, Singapore Convention and the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("**Hague Convention 2019**") – is a source of dynamism. The interaction between these sources of dynamism is to be welcomed, as it increases competition amongst the various forms of dispute resolution and the international centres for arbitration, mediation and litigation.

In response to Justice Torgbor's point that the "gaps" in international legal instruments like the Model Law pose a problem, Justice Reyes suggested that these "gaps" were deliberately included, and this would increase competition amongst the different jurisdictions as to which jurisdiction can offer a better product. Parties should take advantage of the availability of different centres and modes of international dispute settlement, and this may eventually help in lowering the costs of international dispute settlement.

Second Sub-Topic

Prof Kaufmann-Kohler noted that arbitration has become so complex, burdensome and regulated that it is now similar to court proceedings, such that users are seeking more informal ways of resolving the disputes. She highlighted that this was the reason for the previous shift from court proceedings to arbitration, and in that context, she emphasised the importance of ensuring that mediation does not become over-regulated, such that users again start to seek new methods. Prof Kaufmann-Kohler noted that the hybrid dispute settlement mechanism of 'arb-med' where the arbitrator sits as a mediator is favoured in certain Asian jurisdictions, and there may be something to learn from this process.

Justice Reyes observed that various jurisdictions, such as Hong Kong, have been working towards building a "one-stop" platform for users, which allows parties to section off different aspects of their disputes to arbitration, mediation and litigation, as appropriate. However, the issue still remains as to who should determine how the dispute should be sectioned off, and this may see the rise of hybrid dispute resolution service providers who could advise on how a dispute should best be resolved.

Justice Reyes also questioned if law schools focus too much on adversarial means of dispute resolution, and suggested that it might be necessary to have a more holistic inter-disciplinary education which encourages lawyers to focus on resolving disputes rather than on winning.

Justice Torgbor shared that in his interactions with parties in England, they tend to prefer mediation to arbitration of commercial disputes. However, in the African context, negotiation and conciliation are rarely employed in commercial disputes as litigation is still considered by both lawyers and laypersons as paramount in Africa and the way to achieve finality in a dispute. Therefore, hybrid methods of dispute resolution like arbitration-mediation or mediation-arbitration have not gained currency in Africa.

Turning to comments from the floor, Mr Jeremy Lack (mediator, from Switzerland) pointed out that there still exists a separation between the arbitration and mediation system today, and suggested that

institutional bodies could design a dispute resolution team comprising both an arbitrator and mediator, who could work together to resolve a particular dispute.

Third Sub-Topic
The focus of the Third Sub-Topic was on the effect of artificial intelligence ("**AI**") on dispute resolution.

Justice Reyes expressed the view that AI cannot replace the role of a mediator. First, there is still a need for a human face in dispute resolution. Second, as there will be arguments as to which AI database or product is of a better quality or more appropriate for a dispute, AI may serve as a springboard to mediation but cannot replace a mediator. Third, there are also ethical concerns with the use of AI, as it is difficult to see how AI could influence the judgment of the judge – for example, would a judge challenge the predictions made by an AI?

In response to Prof Kaufmann-Kohler's query as to the difficulties of a human judge getting it more right than AI, Justice Reyes stated that while the human judge may have prejudices and biases, one may prefer the comfort of the human face to the perfection of AI, as there is a behavioural and human aspect to dispute resolution.

Turning to comments from the floor, Mr Rahim Shamji (CEO of ADR ODR International, from the United Kingdom) observed that in his line of work, he interacts with lawyers younger than 35 years old, and in this generation, there is no fear of AI and technology. However, he noted that the concept of reasoning which humans have is still absent in AI, and to this end, suggested that a hybrid process in AI is the future and AI cannot stand alone.

Conclusions

Mr Lim rounded off the discussion by highlighting that there have been numerous new international instruments in recent years, including the Singapore Convention and the Hague Convention 2019, which give parties more choices for dispute resolution. He agreed with Justice Reyes' view that it may be time to look at dispute resolution more holistically and at lawyers as problem solvers. Finally, Mr Lim indicated that there is no reason to fear technology as ultimately, the human touch remains the most important.

Written by: Koh Swee Yen, Partner, WongPartnership LLP
Hannah Lee, Associate, WongPartnership LLP

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