SINGAPORE CONVENTION ON MEDIATION | 6 - 7 AUGUST 2019 SHANGRI-LA HOTEL, SINGAPORE

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SINGAPORE CONVENTION ON MEDIATION
BREAKOUT SESSION REPORT

Title of Breakout Session: Foreign Investment in Dispute Resolution
Date/Time: 7 August 2019, 1.50pm
Venue: Hibiscus Room II, Shangri-La Hotel, Singapore

Speakers:

- Ms CHONG Chia Chi, Counsel, Mori Hamada & Matsumoto (S) LLP ("**Ms Chong**")
- Mr K. Minh DANG, Senior Partner, YKVN Law Firm ("**Mr Dang**")

Moderator:

- Associate Professor LIM Lei Theng, Faculty of Law, National University of Singapore ("**Prof Lim**")

Report on Breakout Session

Introduction

Many countries pursue economic development through encouraging cross-border investment through international, regional and multilateral foreign trade agreements and bilateral investment treaties. Investor-state arbitration has been adopted as the preferred dispute resolution mechanism for many investor-state disputes. Arbitration is also the preferred method of dispute resolution for many foreign investment disputes.

With the signing of the Convention on International Settlement Agreements Resulting from Mediation ("the Singapore Mediation Convention"), the question arises whether investors consider dispute resolution ("DR") options when making investment decisions, and if so, how they take DR options into account. These were the questions discussed by the panel and audience. Also considered was why mediation may be an appropriate mode of DR and how mediation could fit within the existing DR framework. As many in the audience were mediators, there was also an exploration of how, given the benefits of mediation, efforts could be made to promote mediation in different jurisdictions following the signing of the Singapore Mediation Convention.

Current view of DR clauses and processes

It was a common view in the panel that investors rarely ever think about DR clauses when negotiating a deal, as disputes are viewed to be contrary to the positive and forward-looking spirit of deal-making. Investors often only think about DR clauses when their counsels bring it to their attention, as part of the process of finalizing the deals, or when disputes actually arise.

When disputes do arise however, several factors stand in the way of mediation as a preferred mode of DR. As panel members represented more Asian views, particularly from Japan and Vietnam, it was agreed that for such investors, when disputes do arise, more informal means of attempting settlement are preferred to mediation. Parties often attempt to negotiate, and escalate negotiations to higher-level management when necessary. More often than not, negotiation would have taken place for some time before a party initiates formal legal proceedings. Also, legal counsel may be reluctant to

propose mediation to a client as it may be seen by the client as an admission that one's negotiating skills are not up to par. There is also a perception that the lack of success in negotiations between the parties themselves means that there is little that mediation can add to the resolution of the dispute. It is also common for parties to view a request for mediation as capitulation – that a party suggesting mediation is only doing so because it has a weak case.

Referral to mediation as an alternative to arbitration can be made by in-house counsel or by external counsel, but in either situation, there are negative connotations associated with the referral. As the discussion progressed, a consensus was reached that education and raising awareness among in-house counsel and investors of the benefits and advantages of mediation is key to promoting the use of mediation as one of the steps in the DR process for foreign investors.

Chief among the interests of foreign investors in considering DR processes are access, and fairness and transparency. Mr Dang was of the view that investors prioritise enforceability of agreements, leading to a preference for arbitration. Ms Chong agreed that enforceability is a key consideration and for this reason, international arbitration is the most preferred DR mechanism for Japanese investors. She also noted that amongst the arbitration institutions, the Singapore International Arbitration Centre ("SIAC") is the most popular due to the familiarity counsel and clients have with SIAC, as well as SIAC and Singapore's credibility. Other bars to the choice of DR include domestic legislation that requires adjudication in domestic courts, or a perceived lack of bargaining power to push for international arbitration in contracts with local authorities, who prefer DR through domestic courts or domestic arbitration.

Why mediation?

It was noted that mediation is a suitable DR mechanism for foreign investment disputes because mediation can cater to non-legal interests and address issues relating to bargaining power. Mediation is also efficient and can result in quicker resolutions compared to arbitration. Its "without-prejudice" nature allows parties to speak openly, and take direct control of the resolution of issues. Even when mediation does not succeed in resolving the entire dispute, it may help simplify a complex dispute by crystallising the issues to be referred to arbitration or litigation.

The panel agreed that mediation aligns with how parties often wish to avoid confrontation and adversarial proceedings. Mr Dang pointed out that one reason for this is the long-term nature of investment, such that parties are concerned about damaging long-term relationships. Thus, parties often put in a lot of effort into the negotiation process rather than immediately resorting to adversarial processes. He raised an example, from his own experience, where it took the disputing parties 20 years of unsuccessful negotiations before arbitration proceedings were finally commenced. The reluctance of parties to engage in adversarial proceedings can lend greater credence to trying mediation as an interim DR process before arbitration.

Ms Chong opined that the preference to avoid conflict may also stem from culture. For example, Japanese investors are often reluctant to litigate disputes because they value harmony and preserving commercial relationships between parties. Often, counterparties from other countries are more willing to take up litigation or arbitration against Japanese clients than the other way around. Therefore, mediation as a means of DR is actually consistent with the culture of Japanese clients who preferred to have amicable discussions of their differences in order to maintain harmony while trying to work out differences.

The panel also discussed how mediation may be particularly helpful where the conflict arises from differences in cultural thinking and languages. Even if cultural differences do not form the primary subject matter of the conflict, cultural differences may remain an impediment to successful negotiation if it prevents parties from understanding each other. Culture significantly impacts the process through which conflicts are resolved. In such cases, it would be valuable to have a mediator who understood the parties' different cultures, and how to address such cultural differences.

How mediation fits into existing DR frameworks

The panel considered how mediation might fit into existing DR frameworks. While it is possible for parties to agree on mediation post-dispute as a "stop-gap" measure prior to arbitration, the panel was of the opinion that in order for mediation to be binding between the parties, it is preferred to incorporate mediation clauses into agreements. This is because having mediation as a mandatory part of the DR process would circumvent parties' concerns that suggesting mediation would give the appearance of capitulation. In this respect, Ms Chong suggested the "arb-med-arb" process, which ensures that both parties are contractually bound to mediate before adversarial proceedings are commenced. Prof Lim noted that the Singapore Mediation Centre ("**SMC**") has a model dispute resolution clause promoting mediation.

The panel also discussed what might happen if the parties are unable to agree on a mediator. Prof Lim suggested two potential solutions. First, parties may opt for co-mediation, which is common in Singapore. Co-mediation could also address concerns regarding differences in culture, insofar as having two mediators who understood the parties' respective cultures could help "bridge the gap" between the parties. Alternatively, Prof Lim also suggested that similar to arbitration, a third party could appoint a mediator for the parties. For example, SMC or the Singapore International Mediation Centre can select a mediator for parties wishing to have their dispute mediated by an accredited mediator. In such cases, the mediator fees are fixed and generally lower than the mediator's own hourly fees. As between the two options, Mr Dang opined that co-mediation may be preferable, as it is unlikely that parties will appoint an unknown mediator or let a third party appoint a mediator.

Promoting mediation and mediators

In light of the above discussion, an important issue that followed was how to promote mediation and mediators, so as to encourage more clients and in-house counsels to incorporate it into their DR processes. Mr Dang highlighted that given the costs of DR, parties will not appoint a mediator unless they believe in the value that a mediator would bring to the DR process.

Preliminarily, the panel discussed some of the challenges faced in seeking to promote mediation. Prof Lim noted that promotion does not just entail highlighting the mediator's skill and professional standing, but also ensuring that mediators have that "personal touch" and are trusted by parties. However, the confidential nature of mediation means that in promoting their skills and effectiveness in resolving disputes, mediators have to be careful about disclosure of information. Ms Chong also commented that from the in-house counsels' perspective, a common sentiment is that mediation does not provide the assurance of a final outcome, as any agreement is contingent on both parties' agreement. Thus, counsels who recommend mediation face the possibility that they may eventually have to justify the additional costs of a mediation that was unsuccessful. This may be difficult unless the profile of mediation is raised and it becomes part of common practice.

Next, the panel discussed some of the ways in which mediation can be promoted. The panel agreed that a preliminary condition was that existing facilities, infrastructure and services have to be built up in order to, in Mr Dang's words, establish mediation as a "full-blown DR process" and a more "recognised form of dispute resolution". This would make it easier for counsels to persuade clients to attempt mediation. In that respect, the Singapore Mediation Convention is a good step forward, in terms of allowing mediated agreements to "have teeth", as Ms Neoh Sue Lynn, an in-house counsel and mediator from Singapore, described. In terms of services and facilities, Prof Lim noted that the SIMC already has an international panel of mediators, similar to the SIAC's international panel of arbitrators.

The panel and audience also discussed the importance of raising awareness and educating clients and in-house counsels on the value of mediation. Ms Chong noted that often, it is counsels who are best-placed to advise their clients to try mediation. For this to happen, counsels themselves must accept that mediation works. Mr Paul Gibson from Sydney, Australia, echoed this sentiment – given the trust that clients have in their counsel, counsel are often perceived as the "gatekeepers", controlling a mediator's access to disputes and clients. In a similar vein, Ms Neoh agreed that education should focus on in-house counsels because they understand their client's needs and interests. If counsels believe that mediation is effective in resolving disputes, then other issues such as reduced lawyers' fees become secondary. Recommending mediation can even be beneficial for counsels, insofar as it gives them the reputation of being effective and efficient problem-solvers.

In relation to awareness, another suggestion was to correct misconceptions of mediation. Ms Neoh noted the common misconception that mediation is only about "splitting the pie into half", with the mediator "hassling" both sides to agreement. Mr James Claxton from Kobe University, Japan, similarly noted that the term "mediation" is often understood to be what is practiced domestically, although this may be different from international mediation practices. Prof Lim agreed that clarifying the meaning of "mediation" would be helpful, given how there many types of mediations and mediation models available, depending on where the mediation is held and the identity of the mediator.

The panel and audience also discussed how awareness can be raised and who should be part of such awareness-raising efforts. In respect of the latter, it was suggested that a range of stakeholders could be or already are involved, including governments, mediators, mediation service providers, arbitration centres, and international organisations such as the United Nations Commission for International Trade Law ("**UNCITRAL**") and the International Chamber of Commerce ("**ICC**"). For example, Mr Dang shared that the Vietnamese government has strongly supported mediation, enacting a decree promoting mediation, as well as setting up a mediation centre. Similarly, Prof Lim noted that the SIAC promotes mediation alongside arbitration. As to the how, Prof Lim suggested that to reach out clients who are unfamiliar with legal jargon, counsels could present mediation in layman terms, framing it as a common practice that exists within all cultures. The importance of storytelling was also emphasised – mediators demonstrating the effectiveness of mediation and increasing a mediator's reputation through word-of-mouth. In that respect, activities such as mediation competitions and seminars would be beneficial.

Finally, the panel discussed the importance of providing culturally-sensitive mediators, given the international nature of foreign investment disputes. Ms Chong noted that her Japanese clients would generally prefer someone who understood the nuances of their culture and language. Similarly, Prof Lim noted that the languages in which the mediator is fluent may make a difference, in terms of

bridging cultural differences. She raised an example, from her own experience, where her ability to mediate in English and Chinese helped the parties reach agreement and gave the parties "the full benefit of mediation".

Conclusion

The breakout session covered various issues, ranging from current sentiments to hopes for the future. In light of the Singapore Mediation Convention, it is expected that mediation will gradually gain greater traction as a recognised and widespread DR mechanism, to be employed alongside investment arbitration.

Written by: Lim Lei Theng, Associate Professor, Faculty of Law, National University of Singapore
Leanne Cheng, Rapporteur Assistant

Date: 14 August 2019