adr WORLD

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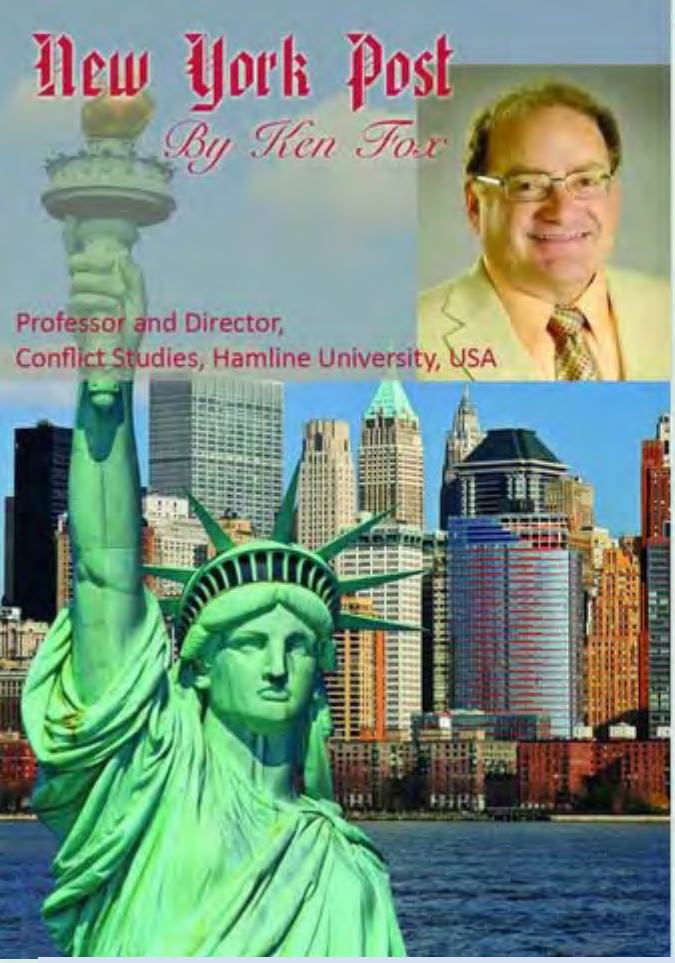
From the Editor .....

Since the formal inauguration of the India International ADR Association (IIADRA) in May 2013, we have been pondering on creating a global platform for exchange of views and ideas. The global climatic forces, plus other market developments have popularized ADR methods. The various stakeholders in dispute resolution need to be abreast about the development of ADR. There is a need for a global interaction among ADR practitioners for effective promotion and growth of ADR worldwide. People in jurisdictions where ADR is relatively under-developed should be able to inherit the emerging trends. The obvious option was to have an e-magazine with a global flair. We were fortunate to constitute a truly global editorial board with the "Who's Who" of ADR in the global scenario and it inspired us to name the magazine as "ADR World".

I must acknowledge all the members of the editorial board individually; without their valuable knowledge, experience and willingness to share their time, this would not have been possible.

I hope that the ADR world will wholeheartedly support and accept "ADR World" and we look forward to your active participation in sharing your contributions, views, opinion and comments, so as to make this a truly informative publication.

In this Issue:



POSTCARD
From
USA

To,

ADR World

Topic:

Federal Arbitration Act versus State Law - Back to Future at the Supreme Court

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The question of whether the Federal Arbitration Act (FAA) preempts certain state laws is again under the U.S. Supreme Court review. On October 6, 2015, the Court heard oral arguments in DIRECTV, Inc. v. Imurgia, to address the question whether a reference to state law in an arbitration clause required the application of that state law despite its application being preempted by the Federal Arbitration Act.

In this case, plaintiff Amy Imburgia, a customer of DIRECTV (a satellite television program service), filed a class action lawsuit against the company, arguing that the company had improperly charged an early termination fee to its customers. The U.S. Supreme Court had previously ruled in AT&T Mobility LLC v. Concepcion that the Federal Arbitration Act preempted previous precedent that held, in certain circumstances, arbitration clauses in customer agreements were not enforceable. In the current DIRECTV case, the lower courts had held that specific language in the customer agreement subjected the arbitration clause to California state law. This case again calls on the court to address the enforceability of class action waivers in arbitration agreements.

According to one observer of oral argument before the Court, "two things seemed clear: first, the majority of the Supreme Court Justices believed that the California Appellate Court's decision [to apply state law] was in error; and, second, the Justices were concerned about intruding on the role of state courts in interpreting contracts and were struggling to articulate a basis for reversing the decision below without turning every state court decision interpreting the scope of an arbitration agreement into a federal question." We will not know for a number of months

whether or not this observer is correct. The Court will likely not decide and release its opinion in DIRECTV until sometime in 2016.

This case continues to play out tensions between state and federal laws – and court decisions - regarding contracts that include arbitration clauses. Here, contract language that required claims related to the customer agreement or to the company's services to be decided by binding arbitration on an individual basis (the agreement specifically prohibited class based claims). The California Supreme Court had earlier held (in Discover Bank v. Superior Court) that such class action waivers were unconscionable but, in 2011, the US Supreme Court overturned Discover Bank when it held (in AT&T v. Concepcion) that the Federal Arbitration Act preempts California's rule classifying most collective arbitration waivers in consumer contracts as unconscionable.

The complicated business of sorting out where the enforcement of, and protections against, certain arbitration language continues to evolve in courts across the US – and to wind its way back to the Supreme Court.

POINTS TO PONDER

Is there a Culture of Arbitration?

"Is there a "culture" of arbitration? If so, has it developed through careful, deliberate analysis or simply through habit such as the adoption of common law and/or civil law litigation practices? The arbitration practice in India is generally considered to have adopted a more sophisticated version of court litigation and, this is perceived and practiced by most. Can the reason for such perception and practice be the abundance of ad hoc arbitrations which largely do not engage a systematic approach towards the arbitration proceedings and consequently lead to the adoption of court formats. Having said that is the lack of professional institution arbitration work affecting the culture of arbitrations in India? Want to contribute to this discussion?
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https://www.facebook.com/arbmedindia

Mediation goes Global in Singapore

: GEORGE LIM SC & EUNICE CHUA

Singapore has positioned itself as an international dispute resolution hub in Asia by providing a complete suite of services for international arbitration, Singapore International Arbitration Centre ("SIAC"), the Singapore International Commercial Court ("SICC") and the Singapore International Mediation Centre ("SIMC"). SICC and SIMC build on Singapore's reputation for quality legal services, including its status as the most preferred seat of arbitration in Asia and the third most preferred seat of arbitration in the world. They bring more options to parties facing cross-border disputes who need tailored solutions that meet their needs.

Mediation, in particular, is a key component of Singapore's ambitions as it complements both arbitration and litigation by offering an avenue for parties to amicably solve their problems with the aid of a professional facilitator. It can help parties fast-track their way to obtaining an enforceable arbitral award or order of court if used in conjunction with other modes of dispute resolution. How did Singapore embark on this journey and what does this mean for India?

Focusing on International Mediation

Recognising the potential to grow the international mediation space in Singapore, in April 2013, a Working Group, comprising local and international experts and co-chaired by Mr. Edwin Glasgow CBE QC and Mr. George Lim SC, was set up by the Chief Justice of Singapore Sundaresh Menon and the Ministry of Law to assess and make recommendations on how to develop Singapore as a centre for international commercial mediation.

In its report submitted later the same year, the Working Group recognised the need for enhanced and sophisticated dispute resolution services for cross-border disputes to support the rise in trade and investment in Asia. The Working Group made various recommendations, including: (a) the establishment of an international mediation service provider offering a panel of international med mediation and experts as well as user-centric products and services; (b) the establishment of a professional mediation standards body; and (c) the enactment of a Mediation Act to strengthen the legal framework for mediation.

These recommendations were welcomed by the Singapore Government and resulted in the establishment of SIMC and the Singapore International Mediation Institute ("SIMI"), which were both officially launched on November 2014. The Mediation Act is still a work in progress but will be designed

to address issues of confidentiality of mediation communications and enforceability of mediated settlement agreements.

SIMC and SIMI

SIMC and SIMI complement each other as SIMC is the mediation service provider and SIMI the vanguard for professional mediation standards. SIMC maintains a panel of over 65 international mediators from 14 jurisdictions who are experienced in cross-border dispute resolution, including four mediators from India – Sriram Panchu, Ashok Panikkar, Prathamesh Popat and Anil Xavier. SIMC mediators are required to be independently certified by SIMI, an independent professional body that requires its certified mediators to have competency in dealing with cross-cultural mediation and to publish a digest of feedback gathered from recent mediations.

SIMI is associated with the International Mediation Institute ("IMI"), a non-profit public interest initiative to drive transparency and high competency standards into mediation practice across all fields, worldwide. Obtaining SIMI certification will be equivalent to obtaining IMI certification. By requiring independent certification by SIMI, SIMC is able to distinguish itself from other mediation service providers who also train and accredit their own mediators and can offer to potential users an objectively determined high quality panel who are capable of facilitating complex cross-border dispute resolution.

SIMC also has a panel of technical experts, comprising independent consultants and key personnel of well-established companies from diverse sectors of industry, to assist in mediations which deal with complex technical issues. It is generally expected that the expert will not act as an adjudicator or a co-mediator, but may assist in providing a neutral and objective perspective to assist the mediator in the conduct of mediation. The SIMC can, in consultation with the mediator, provide assistance to the parties in their choice and appointment of a suitable technical expert.

SIMC is staffed by a professional secretariat that provides administrative and case management support services in accordance with the SIMC Mediation Rules. The SIMC Mediation Rules provide a framework for the initiation and conduct of the mediation and enables SIMC to assist parties to arrive at an agreement to mediate, appoint a suitable mediator where parties are unable to or do not wish to jointly agree on a mediator, and arrange pre-mediation meetings or conferences.

The SIAC-SIMC Arb-Med-Arb Service

In order to meet the needs of users looking for quicker and cheaper hybrid dispute resolution options, SIAC and SIMC collaborated to offer an arbitration-mediation-arbitration ("arb-med-arb") service. It is an innovation that deals with issues arising out of combining mediation and arbitration, including enforceability of mediated settlement agreements and maintaining the integrity of the mediation and arbitration process.

Using this service, parties first refer their dispute to arbitration at the SIAC. After the exchange of the Notice of Arbitration and Response to the Notice of Arbitration, as well as the appointment of the arbitral tribunal, the arbitration is held in abeyance so that parties can attempt mediation. If the parties enter into a settlement agreement during mediation, they have the option to request the tribunal to record the settlement agreement as a consent award. If the parties fail to resolve their dispute through mediation, they may continue with the arbitration proceedings.

The SIAC-SIMC Arb-Med-Arb Service is governed by an Arb-Med-Arb Protocol, which provides a clear framework for the smooth conduct of the Arb-Med-Arb process, including stipulating an 8-week maximum timeframe within which mediation must be completed. The Arb-Med-Arb Protocol aims to enhance process integrity and enforceability of the mediated settlement agreement by enabling its conversion into an arbitral award whilst providing control mechanisms to ensure efficient and effective dispute resolution. Parties wishing to avail themselves of the Arb-Med-Arb Protocol may insert a model Singapore Arb-Med-Arb clause in their contracts or subsequently agree to adopt the Protocol after the commencement of arbitration proceedings.

SIMC and India

India is a key market for Singapore dispute resolution services due to strong Singapore-India bilateral relations whether on a political, cultural, or economic level. Singapore is India's largest trade and investment partner in ASEAN and the seventh largest trade partner globally. The India-Singapore Comprehensive Economic Cooperation Agreement ("CECA") has helped to boost investment flows into Singapore, with foreign direct investment from India growing from S$1.3 billion in 2005 to S$20 billion in 2012. Trade between India and Singapore rose to S$25.5 billion in 2013 from S$16.6 billion in 2005 when the CECA came into force. About 6,000 registered "Indian" companies are estimated to be present in Singapore and nine Indian banks operate in the Republic – Bank of India, Indian Overseas Bank, UCO Bank, Indian Bank, Axis Bank, and State Bank of India, ICICI, EXIM Bank and Bank of Baroda.

The need in India for international commercial dispute resolution services available in Singapore is further evident from SIAC's case statistics, which show India as the leading source of new cases in terms of nationality of all parties – with 85 new cases in 2013 – and China following behind with 41 new cases. This was a dramatic increase from the 42 new cases in 2012 and 24 new cases in 2011 with Indian parties.

Recognising the demand by Indian parties for quality international dispute resolution services based in Asia, SIMC has made two forays into India to promote international commercial mediation and its benefits.

From 9-13 January 2015, SIMC participated in the 7th Vibrant Gujarat Global Summit alongside a Business Mission to Gujarat organised by the Singapore Business Federation. The Vibrant Gujarat Summit and business mission presented an excellent opportunity to speak with international

businesses about how mediation could support them by providing quick, effective and cost-efficient solutions to disputes that may arise. SIMC also met with various Indian government officials and business leaders through networking seminars and roundtable discussions.

Just a month later from 12-15 February 2015, the Asia-Pacific International Mediation Summit, organised by the American Bar Association Dispute Resolution Section and the UNCITRAL-RCAP in collaboration with other International ADR Leaders, including SIMC, was held in New Delhi. Reflecting how far India has come in receiving and practising mediation, the Summit attracted over 120 participants and covered a wide range of topics including developing sustainable mediation programs, mediation models in Asia, culture and mediation, enforceability of mediation agreements, commercial cross-border mediation, overcoming barriers to mediation, structuring effective commercial mediation programs, best practices and many others.

SIMC made its third trip to Delhi, Mumbai and Bangalore in September 2015. In Delhi and Mumbai, SIMC was joined by SIAC, SICC and the Singapore Law Society in events on 7 and 9 September. On 10 September in Bangalore, SIMC partnered with the Indian Institute of Arbitration and Mediation ("*IIAM*") and the Centre for Advanced Mediation Practice ("*CAMP*") to organise a seminar targeted at general counsel and corporate leaders that will help create awareness about the benefits of mediation and how it can be a crucial part of business strategy both domestic and international. SIMC will further be entering into a memorandum of understanding with IIAM to provide a platform for collaboration in the promotion of mediation as well as to enhance the ease of mediating between Indian and Singapore parties. IIAM and Meta-Culture are the only two organisations in India who run Qualifying Assessment Programs for IMI Certification.

The MOU between SIMC and IIAM being signed and exchanged between SIMC Chairman, Edwin Glasgow QC and IIAM President, Anil Xavier. Seen are Eunice Chua of SIMC and George Poothicote of IIAM.

Conclusion

Although it is often said that mediation has deep roots in Asia, it has yet to fully blossom and grow in its modern form and as a means of resolving commercial disputes whether domestic or international in nature. It is hoped that the SIMC can make a small contribution to the revival of the culture of mediation in Asia through its outreach efforts in the region and partnerships with other like-minded organisations.

The Authors—
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UNCITRAL VIEWS

By Joao Ribeiro

Head, Regional Centre for
Asia and the Pacific, UNCITRAL

The ratification of the e-CC by Sri Lanka: Opening opportunities for ADR in South Asia and beyond?

During this year's annual session of the United Nations Commission on International Trade Law (UNCITRAL), Sri Lanka announced its ratification of the United Nations Convention on the Use of Electronic Communications in International Contracts (e-CC). The e-CC entered in force on 1 March 2013 and aims at facilitating the use of electronic communications in international trade by assuring that contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents. The e-CC builds and strengthens at the treaty level pre-existing UNCITRAL texts on electronic commerce and electronic signatures that have been widely adopted in the world. Bangladesh, Bhutan, India, Pakistan and Sri Lanka are among the States enacting those texts.

The e-CC aims at facilitating the use of electronic communications in international trade by strengthening the harmonization of the rules regarding electronic commerce and fostering uniformity in the domestic enactment of UNCITRAL model laws relating to electronic commerce, as well as updating and complementing selected provisions of those model laws in light of recent developments in business practice.

In doing so, the e-CC effectively addresses a number of issues that are critical to developing cross-border electronic commerce. For instance, the e-CC provides rules on mutual recognition of electronic signatures that implement the provisions on technology neutrality contained in many bilateral and free trade agreements. Moreover, the e-CC may provide a solid and predictable legal framework for paperless trade facilitation measures, a topic that has recently been highlighted by the conclusion of the World Trade Organization Trade Facilitation Agreement.

One of the specific functions fulfilled by the e-CC is the establishment at the treaty level of the functional equivalents for form requirements contained in widely adopted international trade law treaties, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [the "New York Convention"; Arts. II (2) and IV], the Hague Convention on Choice of Court Agreements (Art. 13) and the United Nations Convention on Contracts for the International Sale of

Goods (CISG; Art. 12). Absent specific rules on functional equivalents, those formal requirements may pose obstacles to the wide use of electronic communications. Hence, the e-CC is an enabling treaty whose effect is to establish equivalence between electronic and written form.

It should be noted that the initial impulse to the preparation of the e-CC came from the ADR community, concerned about the written form requirements contained in the New York Convention. Indeed, the use of dematerialized commercial documents is already common business practice. Those documents often contain arbitration clauses. The possibility of rendering arbitral awards in electronic form, not only in the context of online dispute resolution, is appealing to many arbitrators who operate on a busy schedule across continents. Additional opportunities may include the possibility of recording the proceedings digitally, including with respect to taking of evidence.

From the perspective of the ADR community, the e-CC should become a text as fundamental as the New York Convention and complementing the UNCITRAL Model Law on International Commercial Arbitration, which was revised in 2006 to fully enable the use of electronic communications. However, there seems to be yet limited awareness in the ADR community of the benefits arising from the adoption of the e-CC and of its close connection with the Model Law. Of the States that are a party to the e-CC or have adopted its provisions domestically, only Australia and Singapore seem to be pursuing reform of both arbitration law and the law of electronic transactions.

Sri Lanka is the seventh ratifying State and the second in the Asia Pacific Region, following the ratification by Singapore in 2010. This shows the Lankan leadership in providing a sound legislative framework for the development of information and communications technologies based activities.

Among Asian signatories of the e-CC, China and the Republic of Korea aim at becoming leaders in providing ADR services, but have yet to ratify the e-CC. From the above, it is clear that any jurisdiction seriously interested in expanding the use of ADR in cross-border trade should consider adopting the e-CC in the near future.

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The IIADRA Interview

Michael McIlwrath
Chief Global Counsel - GE Oil & Gas
Director - International Mediation Institute

Q. *Mike, do you think the evolution of dispute resolution from litigation to arbitration and from there to mediation is just a natural phenomenon or a cultural evolution, where people are matured to take charge of decision making rather than delegating it to a third party to impose the decision on them?*

Michael: Anil, the question reminds me of a discussion I had with a senior manager, an engineer by training, about 15 years ago here in Italy. We were facing a large arbitration filed by an important customer. He and his team had tried everything to settle, but still the parties were far apart. I suggested we try mediation. He said, "I don't understand. Are we settling or are we arbitrating?" I explained again what mediation was, and he repeated his question, more slowly and emphatically this time.

It took me some years to understand the source of our miscommunication. In his world, disputes were black and white. You either settled, or you went to court or arbitration. There was no in-between. In the lawyer's world – mine – we tend to think of procedures as a workman thinks of tools, i.e., using one tool does not exclude the use of others to resolve a problem. There are times something new can appear. I had mistakenly assumed the manager saw legal procedures as I did, but in fact we saw the world in very different ways. This is a long way of answering, sorry…. I agree with your phrasing this as a question of cultural evolution. As you know, sometimes evolution works so that something new takes the place of a traditional way of doing things, like the automobile displacing the horse and carriage.

Other times, evolution can produce something that is complementary, so that the new and the traditional are coterminous, like shaving. Electric razors are a successful modern invention, but did not displace the blades that have been used for centuries. Both exist today, and often both are even used by the same people. And, by the way, we did succeed in taking that case I mentioned to mediation. The senior manager was very pleased with the settlement that was reached, both financially and in preserving the customer relationship, and also that we did not spend years in arbitration. In fact, some years later he had another large dispute, and this time he was the one who said, "arbitration might take a long time. Should we try mediation first?"

Q. *As the Chief Global Counsel of GE Oil & Gas, a large division of one of the world's largest companies, do you think mediation makes a better business sense in dispute resolution for companies?*

Michael: On this, I would go back to my answer above. "Better" is a term that implies a comparison with something else, and this is not an answer I can give in the abstract. I would say that mediation is almost always our preferred option when there are concerns about time, cost, and commercial relationships. It is also a preferred option when the goal is something that a judge or arbitrator simply cannot deliver, such as a restructured commercial relationship such as an outcome based on discounts or new orders.

Q. *When we talk about the advantages of mediation, don't you feel there is a lack of transparency with respect to the availability and credibility of efficient mediators and uniformity of the mediation process?*

Michael: First, the lack of transparency is not as big a problem in mediation as it is in arbitration. Mediators tend to be, as a class, generally better about disclosing how they manage cases and how they get results. Arbitrators tend not to disclose this sort of information, and rarely do they given details about how they conducted past cases or how long they took. Perhaps arbitrators believe that giving more information will tend to "define" them, and make them less appealing to many parties.

Second, the problem of transparency and competency in mediation is much less today, and also less controversial than when the International Mediation Institute (IMI) was created eight years ago. We have since then seen many countries beginning to enact certification requirements. There seems to be a general consensus building that if you are going to have lots of mediations in a country, then you should make sure the mediators are trained and subject to reasonably high ethical standards and disciplinary codes, as with any other profession.

Q. *Another important complaint raised by lawyers regarding mediation, especially international mediation is that the outcome is not enforceable and the better option of ADR is still arbitration as an arbitral award is internationally recognized and is enforceable in courts of law. Don't you think this is a major hurdle in the business community not accepting it?*

Michael: Well, I think it's a misunderstanding on the part of the business community. It's also dead wrong. The outcome of a mediation is of course enforceable. A settlement is a contract, a concept that business people are intimately familiar with. Whoever has been going around saying that mediation doesn't produce binding and enforceable outcomes needs to go re-read their Contracts textbook from their first year of law school.

In any event, UNCITRAL is currently exploring the possibility of an international convention for the recognition and enforceable of mediated settlement agreements, but them on par with the NY Convention with respect to

international enforceability. I think this would be terrific, and certainly help dispel the common misunderstanding about enforceability.

Q. *How could International Mediation Institute (IMI) contribute in creating the credibility and acceptance of mediation?*

Michael: Probably the greatest contribution from IMI to date has been the idea that standards can be developed and applied to mediation, transforming the practice into a genuine profession. Few reasonable people would ask an unlicensed physician to treat their children or themselves for a major problem, but until recently even leading companies were taking their largest cases to essentially unlicensed mediators. And I have some brutal experiences where a mediator was not competent or experienced and actually did more harm than good. Part of IMI's mission now is promoting standards, helping them get more traction in different legal systems.

Q. *To commemorate the 40th anniversary of the 1976 Global Pound Conference at Minnesota, the IMI is initiating a second Global Pound Conference series across various cities in the world in 2016. You being the Chair of the GPC organizing committee, can you please tell me the object of the GPC series?*

Michael: Is there a word limit for this interview? On a serious note, the GPC's dedicated website will have just launched by the time this interview. http://globalpoundconference.org . I would urge your readers to check the site and see how to get involved. At this moment we have 35 cities in 26 countries that will host conferences based on common "core" themes about many aspects of dispute resolution, not just mediation. The conference will kick off with a two-day event in Singapore on 17-18 March 2016 (http://singapore2016.globalpoundconference.org) and will conclude in London in July 2017. In all the conferences we will have broad stakeholder participation – users, counsel, mediators, judges, arbitrators, academics, government – and will gather information that can be used to shape the future of dispute resolution. It will be an amazing conversation. If you are involved in commercial dispute resolution, you will want to be involved in the GPC Series.

Q. *Do you think the GPC series would be a turning point in the shaping the future dispute resolution culture?*

Michael: Yes. In fact, even at this early stage in the organization of the GPC we are seeing people making new connections and talking about how disputes are conducted in their countries compared with others, and how things could be improved. The results of this conversation will be difficult to ignore.

Q. *The global arbitration community often says arbitration is different in India and rest of the world. To overcome this criticism the Arbitration Act is being amended based on the recommendation of the Law Commission of India,*

do you think just by amending the law, the arbitration process and culture in India can be improved or is there anything further that we need to do for improving it?

Michael: Here, I speak as a frustrated in-house lawyer with some experience with arbitration in India. There are a number of issues we could discuss, but there are two main ones from my point of view.
The first is that India's legal culture is relatively isolated from other parts of the world. Perhaps because foreign lawyers and firms cannot practice in India, innovation just seems to come slower. Local traditions tend to dominate, and still in India we see practices that disappeared decades ago in other countries, if they ever existed at all, such as the appointment of retired judges as arbitrators, or government-owned companies keeping their own lists of arbitrators that they require parties to accept. These practices are short-sighted, because they make resolving disputes in India look riskier to a foreign party, and companies expect to be compensated for taking increased risk, ie, what you get are higher prices.

I will give you an example of the problem of a local legal culture that I am talking about. Some years ago we were in the seventh or eighth year of an arbitration taking place in Calcutta. The arbitrators were all retired Indian judges, which was also my own fault for having agreed to appoint one of them. I would never do that again today, and would probably appoint someone from outside of India in most cases. But then I was naïve. At one of the many many "sittings" which took place over the course of several years, I stated that my company felt the proceedings were taking very long and we wondered if it would be possible to conclude them soon. One of the arbitrators scolded me and pointed out that while the arbitration might end in 10 years, this was much better than the 20 years it would take us in the Indian courts.

While I did not respond, I found his answer to insensitive and off-putting. We were not in the Indian courts. We had chosen arbitration. The comparison for us, an international company, was not the time it would take in an Indian court, but the 18 months to two years that comparable arbitrations take in other parts of the world, such as Singapore or Hong Kong. But there was no point in arguing. I was speaking to a retired Indian judge, and we had different baselines against which we measured our sense of a reasonable time to resolve things.

The second problem is simply the Indian courts and the inconsistency and at times poor treatment given to arbitration. We had a 1998 award from an ICC tribunal that we tried to get recognized in Delhi court against an Indian company. In 2013, after 15 years and having produced the available record from the arbitration (far more than other countries require), the court declined to allow enforcement to occur, a decision that was based on the judge's assessment of the merits addressed by the arbitrators.

Our counterpart in that particular case had a reputation of entering into many international commercial contracts to buy expensive equipment, and then refusing payment on baseless grounds. They lost all the arbitrations… I think I was told they something like 36 decided against them… but they kept the cases tied up in the courts, avoiding any enforcement of them. Similarly, we know of many privately held Indian companies that are

happy to accept arbitration in Singapore and elsewhere because they need to be able to enforce their own contracts.

When a company can make the inefficiency of the courts part of a business strategy of avoiding payments or domestic companies feel that going outside is the only way to have enforceable contracts, then just reforming a law or two is only a fraction of the work that will need to be done for India's courts to acquire a reputation for reliability.

Q. *The Government of India is planning to open up the legal sector and foreign law firms are eagerly waiting to open up their offices in India. Do you think this would enhance the quality of ADR practice in India?*

Michael: Yes. I think India will see many benefits from increased competition. It will take some years for the full benefits to be realized, but I suspect that even in the short term there will be more legal work moved to India as a result.

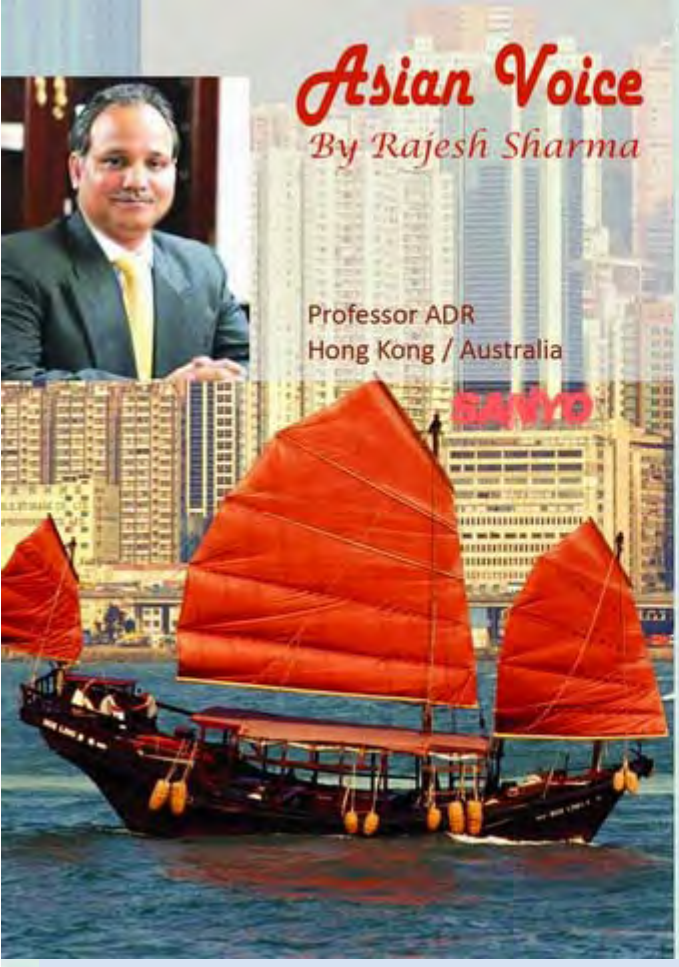
Anil : *Thank you Mike for talking about the latest trends in ADR happening worldwide. It was great talking to you.*

Michael: Anil, thanks for listening, and thank you ever more for all your hard work over the years to raise awareness about ADR, and to improve the quality of justice and access to it.

The People —

Michael McIlwrath is Global Chief Litigation Counsel, Litigation, for the GE& Gas division in Florence, Italy. His experience in international arbitration includes representing the company in disputes under the rules of various international and regional arbitrationand under ad hoc procedures around the world, and in coordinating the activities of outside counsel in domestic court and arbitral proceedings. He was Chair of the International Mediation Institute (IMI), in 2009. In addition, he was the co-vice chair with mediator Judith Meyer (and chair, Singapore ambassador at large Tommy Koh) of the IMI independent Standards Committee. He is also a member of the board of directors of the National Center for Science Education, in Oakland, California. Michael is a member of the European Advisory Committee of CPR, and acted as an industry representative to the European Commission (Justice) in the creation of a European ADR Code of Conduct. He can be contacted at michael.mcilwrath@ge.com

Anil Xavier is an advocate practicing in India. He is the President of Indian Institute of Arbitration & Mediation and the Vice-President of the India International ADR Association. He is an Executive Committee member of the ADR Law Section of the Indian National Bar Association. Xavier is the Chairman of the Accreditation Committee of the Asian Mediation Association (AMA) and a member of the Independent Standards Commission and Ethics Committee of the International Mediation Institute (IMI), at the Hague, Netherlands and the first IMI Certified Mediator from India. Xavier is a member of the International Advisory Board (IAB) of the Afghanistan Centre for Commercial Dispute Resolution (ACDR) and a member of the Advisory Council of Global Mediators Network, UK. He can be contacted at anilxavierindia@gmail.com



POSTCARD FROM CHINA HONG KONG

To,

ADR World

Topic:

Making Apology will be Easy in

Hong Kong

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Hong Kong, following the international trend, has decided to enact apology legislation to provide protection for full apology in all civil proceedings in general. In this regard, the government has issued a Consultation paper and sought public views.

It has been noticed that in a dispute following a mishap, a party causing injury may wish to convey his/her apology to the injured person however that person withhold himself or herself from apologizing because such apology may be used against him or her in any legal proceedings.

Thus, even in genuine cases where a statement of apology may avoid legal disputes, parties are ending up in dispute. Moreover, the legal implication of apology is prohibiting a party to show their humane side to the other party. Therefore, the main objective of the proposed apology legislation in Hong Kong is to promote and encourage the making of apologies in order to facilitate the amicable settlement of disputes by clarifying the legal consequences of making an apology.

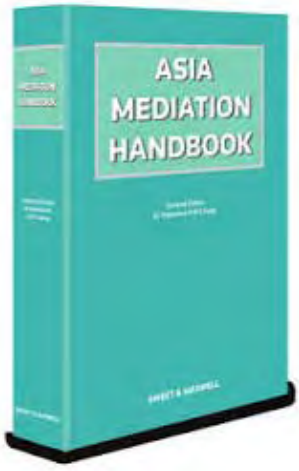
In the proposed legislation, it is recommended that only full apology as opposed to partial be covered and given protection. A full apology includes an admission of fault whilst a partial apology, such as an expression of regret or sympathy which does not include an admission of fault. This is fully in line with the current international trend.

However, no recommendation has been given on whether the apology legislation should also apply to statements of facts accompanying an apology. As statements of facts accompanying

apology will be inadmissible, it is feared that the case of Plaintiff may be adversely affected. Therefore, this issue has been left for the public to decide. The apology legislation will be a stand-alone legislation to make it visible leading to greater awareness of this legislation. It was considered to be part of Mediation Ordinance but it was rightly dropped out of Mediation Ordinance. It recognizes that apologizing is regarded by the law as important to the resolution of civil disputes from the time that an accident or injury happens not just once "without prejudice" negotiation or mediation have begun.

The apology legislation will also have spill over effect in the mediation. It is hoped that parties in mediation will now be more willing (certainly not worries) and forthright in apologizing because the his law will overcome the psychological barrier of a party in a mediation when a genuine word of "sorry" may facilitate resolution of disputes.

BOOK REVIEW



The Asia Mediation Handbook provides an insight into the state of modern mediation in a large number of Asian countries. It is unique in its ambit in that it analyses the historical development, process of accreditation of mediators, legislative framework, Government and Judicial support and success rates of mediation in the 15 major jurisdictions in Asia, viz., Australia, China, Hong Kong, India, Indonesia, Japan, Korea, Malaysia, Nepal, New Zealand, Philippines, Singapore, Taiwan, Thailand and Vietnam.

This is a must read for any mediator, lawyer, academic or business professional involved in cross-border disputes. The General Editor of the Handbook is Dr. Raymond H.M. Leung and is written by 29 mediation practitioners from 15 different jurisdictions. The book is published by Thomson Reuters Hong Kong Limited.

Introducing A Global Mediation-Friendly Star System

: Prof. Nadja Alexander

As mediation seeks to claim a larger slice of the international dispute resolution pie, an increasingly important question for lawyers is: where and according to which law would I choose to have the mediation of my clients matter conducted?

Say your client is a multinational corporation doing business with numerous organizations around the globe. Your advice is to insert a dispute resolution clause with mediation as a central component. Typically we select jurisdictions with which we are familiar to do business with. Smits explains the research that backs this up [*See,* Diversity of Contract Law and the European Internal Market]. This is sometimes referred to as the status quo bias. It might be our own jurisdiction or it might be another internationally well-known jurisdiction that has been the standard home for applicable law in dispute resolution clauses for decades.

But what if the jurisdiction we know best didn't have the best laws to support a mediation process? What if, for example, the laws on non-admissibility of mediation evidence in court were unclear? What if the attitude of the courts, while strong and clear in relation to arbitration, remains uncertain and unpredictable in relation to mediation? Making a choice about the applicable law for a mediation clause should never be a default reaction on your part. Clients expect you to offer reasoned, researched and rational advice.

And then there is the other situation where you find yourself committed to a mediation in another jurisdiction —thanks to a mediation clause or otherwise— and need to pretty quickly get a handle on what kind of regulatory environment you will be working in. As a professional, you need to have a good sense of the law applicable to mediation processes in other jurisdictions where you are likely to do be doing business. Easier said than done.

Mediation laws including codes, rules, practice directions, legislation are developing at a fairly fast pace around the world. And then there's the jurisprudence. How are courts dealing with attempts to enforce mediation clauses, applications to admit mediation evidence and challenges to mediated settlement agreements? It's simply too much to keep up with. So this got me thinking. What if there was something like a mediation friendly rating for countries? Sort of like a Michelin star system?

Now of course, something like this would not offer a comprehensive and complete analysis of the law on mediation on a jurisdictional basis. However, it could offer a starting point for professionals and others seeking to locate a mediation-friendly home to thrash out their disputes. For example, you might identify three jurisdictions with a high mediation friendly rating and where you generally feel comfortable doing business. This might provide a starting point for you to do some further research to look more closely at these jurisdictions.

If there were to be such a thing as a mediation friendly jurisdictional star system, what variables would be relevant? Here's my top 10 starter list.

- To what extent is the mediation regulatory framework transparent and clear? Consider soft law and hard law such as mediation laws, rules and codes.

- To what extent are cross-border and domestic mediation regulated within the same legal framework?

- To what extent can disputants access to mediation information and mediation service? Think in terms of socio-economic and geographical/physical access.

- To what extent can foreign mediators selected by the parties practise in the jurisdiction?

- How "effective" are the laws on confidentiality? Here "effective" might mean, inter alia comprehensive in relation to who is protected and what is protected, and precise in relation to exceptions. It might also refer to the extent to which courts recognise and enforce confidentiality.

- To what extent is there a real choice about the legal form of a mediated settlement agreement and effective options for enforceability?

- To what extent do the courts support mediation in terms of: a clear line of decision-making in cases brought before them; recognition of properly drafted mediation and multi-tiered dispute resolution clauses, mediated settlement agreements and other contractual documents; recognition of the importance of confidentiality as a central tenet of the mediation process, and so on?

- To what extent are there incentives on legal advisers to recommend mediation?

- To what extent does the law efficiently and effectively "suspend" litigation limitation periods when mediation commences in a pre-litigation matter?

- To what extent is mediation more cost effective than going to court?

Of course, each variable needs to be defined in much more detail, so that we all know what we're talking about. For example, what factors would demonstrate transparency and clarity in mediation laws? And what legal instruments would be included as "soft and hard laws"?

We would also need to be clear about what ranks highly on the star system and what doesn't. For example, in relation to confidentiality, we would need to set detailed guidelines about what is considered to be a good, comprehensive and practical law.

There is a subjective element determining what rating a jurisdiction receives. But that doesn't make it not worth doing. These are challenging questions – and that's precisely what makes them so interesting and worthwhile.

NADJA ALEXANDER is Professor and Director of the International Institute for Conflict Engagement and Resolution (IICER) at Hong Kong Shue Yan University. Previously she was Director of ADR at the Australian Centre for Peace and Conflict Studies. Professor Alexander edits the Kluwer Mediation Blog and the book series Global Trends in Dispute Resolution. Her work on negotiation and mediation has appeared in the English, German, French, Russian and Chinese languages. In 2011 her book, International Comparative Mediation, won the CPR Award for Outstanding ADR monograph. She can be reached at nadjaalexander@mac.com

VOICES & VIEWS

ADR ..... As they see it ....

ANIRUDH MALPANI, Executive Officer,
Mycon Constructions Company Ltd.

"I haven't had the privilege of experiencing Mediations yet but, I have been an User of arbitrations. I think it is faster, although more expensive,resolvingthan approaching the courts. For contractors or construction companies such as us who are typically the 'Claimants' in most cases, we do not mind spending more as long as the disputes are settled faster. Time and 'value for money' is very important to us.

Most of our experience, arbitrating with Public Sector Undertakings (PSU), have unfortunately been one sided. No party to an arbitration agreement should have an advantage in nominating the arbitration panel. It is simply, "unfair". This also a fundamental reason why institutional arbitration must take-off to cancel such biased view points and unfair, yet largely practiced, mechanisms. Institutional arbitrations must be encouraged and they must have the infrastructure set-up as per best international standards. Having faced unpleasant under-performing arbitrators, their performance must be tracked and their poor performance must face deterrence."

Singapore Times

By Eunice Chua

Deputy Chief Executive Officer
Singapore International
Mediation Centre, Singapore

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Topic:

Singapore – Reflecting on the Development of the Domestic Mediation Scene

Get in touch with Eunice –
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Amidst all the attention that Singapore has attracted as an international dispute resolution hub with the recent launches of the Singapore International Mediation Centre ("SIMC"), Singapore International Mediation Institute ("SIMI") and the Singapore International Commercial Court, it is appropriate to pause to reflect on how far the domestic mediation scene has come in order to support these global ambitions.

The need for something other than litigation became apparent in Singapore in the 1990s. This was a time when society grew increasingly litigious and the courts faced a growing backlog of cases. Both the judiciary and the government then began taking steps to examine what needed and could be done. The leadership role of then Chief Justice Yong Pung How was instrumental in the development of court-based mediation by specially trained judges in the State Courts. Outside the courts, in typical Singapore fashion, a cross-profession committee of experts known as the Committee on Alternative Dispute Resolution was formed in 1996 to study how mediation could be promoted and to implement mediation beyond the courts.

The resulting three-pronged mediation movement leading to the development of: (1) court-based mediation in the State Courts and Family Justice Courts; (2) private commercial mediation conducted by the Singapore Mediation Centre ("SMC") and now SIMC; and (3) community and other forms of domestic forms of domestic non-commercial mediation taking place in the Community Mediation Centres and various tribunals and government agencies, has been well documented.

What is interesting is that although mediation is largely institutionalised in Singapore, private non-institutional mediation has been growing in recent years, signalling progress in the development of mediation as a profession. There are today more private mediators devoting themselves to mediation as a full-time occupation rather than a hobby and they deal with not only family and community disputes but also larger commercial disputes.

The establishment of SIMI, a professional body that aims to drive transparency and high competency standards into mediation practice is another important move in this direction. SIMI's introduction of a transparent and tiered system of accreditation, although cumbersome to existing mediators, will enable potential users of mediation to obtain quality, objective information about potential mediators without any costs.

In short, much has been done and accomplished and that was needed in order for Singapore to credibly offer itself as an international mediation hub. However, there is always still further to go and much to learn along the way. In that regard, the Global Pound Conference Series in 2016 will be something to look out for. Overseen by the International Mediation Institute, this series of conferences to be held in over 40 cities around the world will provide a platform to collect user data from the various players in alternative dispute resolution which can help to inform the future direction of mediation. The first of the series will kick off in Singapore on March 17-18, 2016 and this author is very much looking forward to it!

WE
need to be
the
CHANGE!

I never saw an ugly thing in my life: for let the form of an object be what it may, - light, shade, andalways make it beautiful.
~ John Constable, Painter (11 Jun 1776-1837) ~

HAPPENINGS

AROUND THE WORLD

The ***Nobel Peace Prize*** has been awarded to Tunisia's National Dialogue Quartet for helping the country's transition to democracy. The Quartet is made up of **Mediators** from Four Tunisian Organizations.

The Mediators' Prayer

Lord, Teach me to be patient with life, with people, and with myself.
I sometimes try to hurry too much, and I push for answers before the time is right.
Teach me to trust Your sense of timing rather than my own and
to surrender my will to Your greater and wiser plan. Amen

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"Look...This mediation's deadlocked. Let's quit ignoring him and see if we get somewhere."

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