CEDR Centre for Effective Dispute Resolution

Mediate First – Advance with the times

Friday, 13 May 2016

1st session – A Review of the
Latest Global Development

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Content

- A few notable and important features in the latest mediation development

and

- The use of the Med-Arb, particularly in Asia where it is more prominently used

Notable features in the latest mediation development

- The ad hoc approach to the growth of mediation has created a push in many jurisdictions towards regulation and more cohesion within the mediation field.
- The really new ideas in this regard seem to be emerging from Asia.

Notable features in the latest mediation development

- Supporters of the ad hoc approach common in the US and the UK suggest that the potential for over regulation could destroy the flexible nature of mediation and result in mediation simply becoming another process undertaken before litigation.
- This however does not appear to be shared in Asia.

Notable features in the latest mediation development

- Hong Kong & Singapore in particular are investing considerable time and energy in the creation of new institutions, rules and infrastructure to support mediation in the region.

Notable features in the latest mediation development

- Australia has also been a global front runner in mediation law and practice and regulation of the mediation industry and in 2009 established a National Mediation Accreditation System with a new revised version having come into effect from 1 July 2015.

Notable features in the latest mediation development

- In China there has been a lot of interest over the last few years in the current international model of mediation that has led to the creation of new mediation organization alliances and an increasing emphasis on mediation training.
- The Beijing Mediation Alliance ("the BMA") was established in April 2015 co-initiated by 16 organizations. The aim of BMA is to enhance co-operation between the various organizations and promote the quality of mediation.

Notable features in the latest mediation development

- Southern China in order not to be left behind also in 2015 established the *"Commercial Mediation Alliance"* in Qianhai in Shenzhen between Guangdong, Hong Kong and Macau.
- The aim of this mediation alliance was to enhance the exchange and co-operation in order to promote the quality of mediation services in the Qianhai region.

Notable features in the latest mediation development

- Singapore has revisited its mediation services especially in the international area.
- Singapore continues to promote Med-Arb and the new Arb/Med-Arb/Arb Protocol refreshes an earlier offering of a hybrid dispute resolution model.

Notable features in the latest mediation development

- In just 10 years Hong Kong has created what is today an increasingly sophisticated mediation infrastructure and probably the most notable latest development has been the establishment of the Hong Kong Mediation Accreditation Association Ltd ("HKMAAL") in 2013 as an umbrella regulatory body for mediation in Hong Kong.

Notable features in the latest mediation development

- HKMAAL was the first jurisdiction in Asia to bring mediation under one roof and as of July 2015 85% of Hong Kong's mediators had become members.

Notable features in the latest mediation development

- In summary, it appears to be Asia where most new activities and ideas are happening. In particular, it is in China, Hong Kong and Singapore where new mediation bodies and organizations have been created, mediation legislation is being introduced and training for both lawyers and new mediation is quickly gaining pace.

The advantages & challenges in the use of Med-Arb

What is Med-Arb?

- It is a combination of mediation and arbitration, and in short-hand is a reference to the mediation-arbitration procedure.
- In med-arb the parties to a dispute mutually agree to mediate the dispute with an undertaking that if the issues are not settled through the mediation they will resolve the dispute by arbitration. They also agree that the same person will act as both mediator and arbitrator.

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The advantages & challenges in the use of Med-Arb

- Med-Arb offers parties the ability to a participate in a mediation having agreed in advance that if unable to reach a settlement, the process will shift to arbitration.
- The process gives the parties the opportunity to rely on a decision by a neutral if there are issues on which no agreement can be reached.

The advantages & challenges in the use of Med-Arb

- The neutral:
  - can serve as both mediator and arbitrator in an "integrated process", acting to facilitate negotiations and also making binding decisions on stalemate issues along the way;
  - in a "separate" process will attempt to achieve a mediated settlement before "switching hats" to decide any unresolved issues;

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The advantages & challenges in the use of Med-Arb

- The neutral (cont'd):
  - acts as either the mediator or the arbitrator if the local rules do not allow the same person to act in both roles, and
  - can make a binding settlement decision between the final offer or final demand given in a final offer.

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The advantages & challenges in the use of Med-Arb

- The biggest potential difficulties to the same person acting in both roles:
  - the knowledge that the mediator may eventually act as arbitrator may cause parties to be more restrained in revealing their real needs and position;
  - particularly challenging is the question of how to treat information obtained in confidence during private meetings;
  - Given the last point, it is often considered desirable for a different neutral to arbitrate on the outstanding issue or issues even though this will involve a further presentation of the parties' cases and further costs.

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The advantages & challenges in the use of Med-Arb

- Med-arb is commonly offered as part of arbitration practice in different jurisdictions in South East Asia and included in some European arbitral practice with some provisos.
- The use of med-arb varies from being regularly employed in China to infrequently used in places like Hong Kong.

The advantages & challenges in the use of Med-Arb

- Singapore has well established med-arb procedures used in conjunction with the Singapore Mediation Centre and Singapore International Arbitration Centre and parties who wish to make use of the Med-Arb service are able to incorporate the SMC-SIAC Med-Arb clause in their contracts.

The advantages & challenges in the use of Med-Arb

- CIETAC allows for Med-Arb in Article 45 of its Arbitration Rules and the joint med-arb practice is a feature of arbitration in all Chinese local arbitration commissions.

The advantages & challenges in the use of Med-Arb

- In Hong Kong under the Arbitration Ordinance, a member of an arbitral tribunal is permitted to serve as a mediator after arbitration proceedings have begun, provided all parties have given their written consent and it is provided that no challenge can be made against an arbitrator solely on the grounds that he has acted previously as a mediator.

Notable features in the latest mediation development

- What should be noted is that the Hong Kong provision on med-arb is different from both Singapore and the Mainland because under the Ordinance if mediation fails, the arbitrator turned mediator is required to disclose to all parties any confidential information obtained during the mediation which he or she considers to be material to the arbitration proceeding.

Notable features in the latest mediation development

- This requirement was included to deal with the due process concerns of Hong Kong lawyers who would balk if not outright refuse to engage in any process which allows private session where statements are made where their client has no right of reply of is able to challenge.
- Notwithstanding the above safeguard, med-arb is still very rare in Hong Kong compared with other processes like stand-alone mediation.

The advantages & challenges in the use of Med-Arb

Advantages

- Familiarity of the arbitrator with the case, and he or she is better placed to help settle the matter and when to hold a mediation.
- Can result in an early settlement, avoiding substantive hearings and cost
- Any settlement during med-arb can then be rendered into a formal award by the tribunal.

Disadvantages

- The risk of an appearance of bias on the part of a mediator when the mediation fails and he or she turns again into an arbitrator.
- The parties will be less likely to reveal weaknesses in their case.
- Wearing 2 Hats – the neutral may find it difficult to switch roles from facilitator to decision maker and back.
- A party may find pressure to agree with the neutral a settlement in case he or she might issue an unfavourable award.

The advantages & challenges in the use of Med-Arb

Advantages

- If the parties do not reach an agreement in mediation, there is no need to spend time having to agree to a new potential arbitrator, since the same person will serve as the arbitrator.
- The Med-Arb process is flexible and allow the parties to switch between mediation and arbitration.
- Some remedies which cannot be used in arbitration, might serve as alternatives for mediation agreements.

Disadvantages

- The arbitrator may find it difficult not to be influenced by "without prejudice" disclosures during settlement negotiations.
- A risk if the mediation is used by the parties as a test run for their strongest arguments.
- Due process issues and not giving the other party the opportunity to challenge the facts and circumstances obtained by the Med-Arb during caucus sessions.

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The advantages & challenges in the use of Med-Arb

Suggestions for engaging with Med-Arb

- In 2008 the CEDR Commission on Settlement in International Arbitration Co-Chaired by Lord Woolf and Gabrielle Kaufmann Kohler was convened and consulted with mediation and arbitration bodies from around the world.
- The Report included some suggested Med-Arb guidelines and safeguards for arbitrators who use private meetings with each party as a means of facilitating settlement.
- The Commission suggested that it is best not to use the 2 Hats Med-Arb model and that the same person should not act as the mediator and the arbitrator.

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The advantages & challenges in the use of Med-Arb

- However, acknowledging that in jurisdiction like China med-arb is widely used, in the event the med-arb is used, it suggested some safeguards to avoid challenges to the arbitrator award.
  - The parties' consent to the mediator resuming as arbitrator should include consent as to the way in which the arbitrator is to deal with information learnt in confidence by the arbitrator during the mediation.
  - Whenever the parties' consent is required, that consent should be recorded in writing.
  - The parties should give their consent in writing both before the mediation and after the mediation has concluded and before the mediator resuming in the role of arbitrator.

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The advantages & challenges in the use of Med-Arb

- The consent should include a statement that the parties agree to the arbitrator meeting with each privately during the mediation/conciliation phase and withholding from the other party information disclosed during their private meetings.
- The consent should include a statement that the parties will not at any time later use the fact that the arbitrator has acted as a mediator/conciliator as a basis for challenging the arbitrator or any award which the arbitrator may make (either alone or as part of a tribunal).
- If as a consequence of his or her involvement in the mediation/conciliation phase, any arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceeding, then the arbitrator should resign.

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The advantages & challenges in the use of Med-Arb

The Keeneye Case [Gao Hai Yan v Keeneye Holdings Ltd – 2011 CFI, 2012 CA]

Here the Hong Kong Court of First Instance refused to enforce an arbitral award made in mainland China on public policy grounds.

Specifically, the court held that the conduct of the arbitrators who also acted as mediators in the case would *"cause a fair minded observer to apprehend a real risk of bias".*

The advantages & challenges in the use of Med-Arb

The Keeneye Case (cont'd)

This was overturned by the Hong Kong Court of Appeal decision who said it was not for the Court of First Instance to express an opinion on the correctness of the arbitral tribunal and that such an award would be contrary to public policy under the Hong Kong Arbitration Ordinance and held the arbitrator award could be enforced in Hong Kong based on two main grounds:

The advantages & challenges in the use of Med-Arb

The Keeneye Case (cont'd)

(i) The Waiver – C of A took the view that a party to an arbitration that wishes to complain of non-compliance with the rules governing the arbitration must do so promptly and not proceed with the arbitration keeping the point of non-compliance up its sleeve for later use.

(ii) No Apparent Bias

- The Mainland court was better able to decide whether holding a mediation over dinner in a hotel is acceptable
- There might be unease about the way the mediation was conducted because mediation is normally conducted differently in HK but whether this would give rise to an appearance of bias may also depend on a full understanding of how mediation is normally conducted on the Mainland.

The advantages & challenges in the use of Med-Arb

The Keeneye Case (cont'd)

The C of A stressed that enforcement of an award should only be refused if to enforce it *"would be contrary to the fundamental concept of morality and justice"* of the forum and one should not be too quick to block enforcement of an award on the basis of one's notion of what amounts to apparent bias. The C of A will consider both local mediation/arbitration practices when deciding whether to enforce an award.

The advantages & challenges in the use of Med-Arb

The Keeneye Case (cont'd)

The C of A decision reinforced the view that Hong Kong courts are keen to support the enforcement of arbitration awards and challenging enforcement on grounds of public policy and apparent bias remains an uphill task.

The advantages & challenges in the use of Med-Arb

Conclusion (cont'd)

The decision in Keeneye is unlikely to dispel the concern of common law lawyers and their clients regarding "med-arb". Parties are likely to remain reluctant to disclose confidential information during mediation to an arbitrator who will ultimately be called upon to rule on their case.

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The advantages & challenges in the use of Med-Arb

Conclusion (cont'd)

Further, s.37(4) of the Hong Kong Ordinance, which requires a mediator/arbitrator to disclose confidential information that it deems *"material to the arbitral proceedings"* before the proceedings re-commence following an unsuccessful mediation, may also make parties reluctant to participate in med-arb.

As a result, it is likely that the use of med-arb can be expected to remain relatively rare in Hong Kong, although will continue to be used in Singapore and of course China.