Industry Thoughts

Martin Bragg, Business Development Manager at Hodef & Partners highlights the importance of open and honest dialogue between law firms and their clients.

In this issue ...

- Clyde & Co’s views on key amendments to UAE Anti-Commercial Fraud Law
- Lee International’s commentary on Foreign investment into casino-resorts in Korea
- Kroll’s take on the importance of forensic accountants in commercial disputes
- Latest career opportunities
Should you mediate, arbitrate or litigate?

With contributions from industry experts including some home-grown mediators and barristers as well as external counsel, ASIAN-MENA COUNSEL looks at current issues in the dispute resolution space which have impacted the legal landscape in Hong Kong and China.

As an alternative to litigation, mediation and arbitration can sometimes represent attractive alternative options for disputing parties. The reasons to choose mediation over litigation may seem obvious at first, but it is best going in with ‘both eyes open’ regarding any dispute resolution mechanism that you may favour, as is explored in detail below. There are a number of reasons to choose mediation, chiefly; affordability, efficiency, confidentiality, flexibility, informality and the sense of empowerment that these mechanisms can bring to the parties. Mediation is a consensual process. The mediator, a neutral third party facilitates negotiations and determines the prospects of success without the delivery of a binding decision, whereas arbitration can produce a binding or non-binding decision and the weight that can be attached to the decision can be the same as a court judgment.

Mediation

When parties lock horns, mediation provides a voluntary tool and forum through which the dispute may be resolved. The mediator is an impartial third party who listens to the aspects of the dispute and assists in helping the parties finalise an amicable settlement which responds to their needs and is acceptable to all sides. The mediator is tasked with finding a solution to the breakdown between the parties and unlike the scenario in court, mediation is less adversarial and leaves the final outcome/decision-making to the parties.

The advantages to mediation over litigation are manifest, however some of these benefits have been watered down in recent years, as discussed in more detail below. Mediation offers an expedient method by which to resolve conflicts, given that it saves both the time and costs associated with often protracted litigation. Given that confrontation is also avoided; mediation is often seen as a less harrowing form of resolution than litigation, which is inherently adversarial. The terms of the settlement are private and confidential. Mediation also offers the parties solutions which are tailor-made to their unique situations and the remedies available are often able to transcend the usual recourse offered by the courts.

Does compulsory mediation work?

Though mediation is not compulsory in Hong Kong, it is firmly entrenched and the judiciary is making a “concerted and increasingly public push” for mediation to be the method by which disputes are resolved between parties, according to senior Hong Kong barrister and mediator, Sanjay Sakhrani. Evidence of this can be seen in the various incentives to mediate which have been implemented. For example, as a deterrent, adverse cost measures are imposed for any unreasonable refusal to try mediation. In addition, as part of the new Civil Justice Reform, under a recent practice direction, (Practice Direction 31) ‘parties and practitioners are prompted to focus their minds on the exploration of mediation at

Chi Ho Kwan

“… parties should be aware of the ‘declaration of independence’ between CIETAC Shanghai and CIETAC Shenzhen, and their subsequent re-naming and re-branding”
an early stage of litigation, and assist the Court insofar as directions are concerned regarding the mechanics of mediation.

In other words, “it is mandatory for every case to address the viability of mediation and it is certainly expected that parties attempt it, but if there is a good reason not to go through with it, the court cannot force a party to do it, particularly bearing in mind the underlying objectives. The courts must take into account that there are some disputes where parties will refuse to be in the same room with each other and it will be impossible to settle (e.g. protracted probate proceedings) and it would not be efficient to waste time for this,” according to Sakhrani.

Attempts in other jurisdictions, e.g. Italy to make mediation mandatory have been met with resistance. When Italy issued a legislative decree in 2010 to make mediation compulsory, in the context of banking and insurance disputes, dissent from the legal community led to a repudiation of the decree in 2012. Following the reversal of the 2010 decree, Italy returned to voluntary mediation as the norm again.

Interestingly, there has been push back on the notion of compulsory mediation for various reasons, these include an unwillingness on the part of the parties to enter into negotiations when the protagonists are convinced that the matter could be resolved between themselves, without reference to or intervention by a third party. There is also, at times, entrenched skepticism about the process itself and the suitability and expertise of a particular mediator. This skepticism has been fuelled by, increasingly, the complexity of the issues raised by the conflict. Cross-border elements leading to numerous parties and a growing number of technical issues has meant that the settlement/outcome may not be reached until weeks or months after the mediation has taken place.

Having regard to the above, the intricacy of the matters and consequently the length of the negotiations can serve to undermine, to some extent, two fundamental goals of mediation, i.e. that it is both a time and a cost saving method of alternative dispute resolution (ADR.) Notably, the general economic climate has also resulted in parties leaning more towards a preference for monetary settlements; a distinct trend post 2007.

That being said, even if monetary gain is the endgame, when emotional tensions lie at the core of a dispute, a forum which enables the parties to meet and air their grievances can bring a more satisfactory resolution to the conflict.

As Hong Kong’s Chief Justice Ma recently commented, “the beauty of a mediation process, if carried out conscientiously and properly, is that protagonists are able – sometimes for the first time and perhaps on the only occasion after a dispute has arisen – to meet and discuss on neutral ground, with an impartial person (the mediator), their real problems. Often, the real problems … are matters with which other forms of dispute resolution cannot adequately cope.” According to Justice Barnabas Fung, “one of the reasons for the growing popularity of mediation is that it generates a more effective, satisfactory, harmonious and less expensive way to resolve disputes.” He commented at a mediation conference held in Hong Kong in Q4 of last year, that “the areas for undertaking mediation are ever expanding. Mediation was originally used in labour and consumer disputes and in international negotiations, but it has now become a formal complement to the judicial process. It is widely used in divorce, civil and commercial proceedings and even in public law disputes.”

The judiciary’s drive to motivate parties to mediate is evidently working given that the rate of success is up and the cost to mediate is down. According to Hong Kong’s judicial website, compared to 2012, the success of mediation rose by 7 percent in 2013.

**Arbitration**

Arbitration is a method for resolving disputes between parties in private, as an alternative to litigation in the courts. The decision to arbitrate can be agreed by the parties before or after the dispute arises. The arbitration agreement is usually incorporated as part of the contract from which the dispute arose. However, even when there is no arbitration clause in the contract in dispute, an arbitration agreement can also be made after a dispute has arisen if the parties prefer not to go to court. If there is no arbitration agreement, mutual agreement is necessary, as one cannot force another party to ‘arbitrate’ a dispute if there is no arbitration clause.
The landscape in China and Hong Kong

According to Latham & Watkins’ partner, Ing Loong Yang and associate Chi Ho Kwan, “arbitration in China is progressively being recognised as an effective and efficient method of dispute resolution by multinational companies.”

The new arbitration rules under the China International Economic and Trade Arbitration (CIETAC) came into force two years ago. According to Yang and Kwan, “these rules reflect the most recent developments in arbitral practice: these include provisions for consolidation of arbitrations as well as the arbitral tribunal’s power to order interim measures it considers necessary, such as requesting that the parties provide security. CIETAC opened its Hong Kong Arbitration Centre in Hong Kong in 2012. However, parties should be aware of the ‘declaration of independence’ between CIETAC Shanghai and CIETAC Shenzhen, and their subsequent re-naming and re-branding. Parties should state expressly in the arbitration agreement that disputes shall be submitted to the ‘China International Economic and Trade Commission (CIETAC) and that the seat of arbitration shall be Beijing.’”

“In a speech made by Judge Luo Dongchuan of the Supreme People’s Court (who is in charge of enforcement) at the 2013 Hong Kong Arbitration Conference, he underscored the commitment of the Supreme People’s Court towards recognition and enforcement of foreign arbitral awards in the PRC,” according to Yang and Kwan.

The road ahead

At the tail end of 2013, Hong Kong’s Secretary for Justice, Rimsky Yuen commented that Asia was well on its way towards establishing an international arbitration culture. In addition, he highlighted the importance of Hong Kong and China as hubs for investment, and subsequently the need for access to justice in the form of mediation when parties were deadlocked.

This is especially important, the Secretary for Justice noted, as Asia-Pacific is the top target for international investors and China the most favoured destination within Asia. The importance of international arbitration as a form of access to justice is important now and crucial for both Asian and global development, according to Yuen.