

A conference presented by the IBA Arbitration Committee and Mediation Committee, supported by the IBA Asia Pacific Regional Forum. Hosted by the Hong Kong International Arbitration Centre



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Mediation v Arbitration: Best Friends or Best Enemies? A View from Asia

1–2 December 2016

Mandarin Oriental Hong Kong and HKIAC, Hong Kong SAR

Topics will include:

- Drafting/negotiating/enforcing ADR clauses and the role of counsel, including in-house: from old to new?
- Mediator v arbitrator: Dr Jekyll and Mr Hyde?
- Articulating mediation and arbitration proceedings: mission impossible or a piece of cake?
- Enforcing a settlement reached through mediation or enforcing an award: a race for efficiency?



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Programme

Conference Co-Chairs

Jawad Sarwana *Abraham & Sarwana, Karachi; Co-Chair, IBA Mediation Committee*

Andy Soh *Debevoise & Plimpton, Hong Kong SAR; Litigation Committee Liaison Officer, IBA Asia Pacific Regional Forum*

Gaëtan Verhoosel *Three Crowns, London; Vice Chair, IBA Arbitration Committee*

Thursday 1 December

1730 – 2000 **Registration**

1800 – 1840 **Welcome reception**

Mandarin Oriental, Hong Kong

5 Connaught Road, Central, Hong Kong

This event is open to all delegates and registered guests.

1840 – 1845 **Welcome address**

Jawad Sarwana

1845 – 1850 **Introduction to the speaker**

Andy Soh

1850 – 1925 **Keynote address**

Wesley Wong SC *Solicitor General, Department of Justice, Hong Kong SAR*

1925 – 1930 **Q&A session and closing address**

Gaëtan Verhoosel

1930 – 2100 **Conference dinner**

This event is open to all delegates and registered guests.

Friday 2 December

0800 – 1730 **Registration**

0900 – 0930 **Welcome remarks**

Jil Ahdab *GMPV, Paris; Co-Chair, IBA Mediation Committee*

Gaëtan Verhoosel

0930 – 1100 **Session one**

Drafting/negotiating/enforcing ADR clauses and the role of counsel, including in-house: from old to new?

This panel will focus on how best to tailor an ADR clause, be it a mediation, arbitration or med-arb clause and will address the different issues that may be encountered in negotiating such stipulations. The panel will discuss the role of counsel in proposing ADR clauses and how to 'sell' such clauses within companies, by focusing on techniques for moving beyond obstacles – including old standbys and the impasse strategies, whether early in negotiations or later in the game.

Issues discussed will include:

- Managing communication and negotiation for mediation clauses
- Enforceability of mediation and conciliation clauses
- Bargaining a mediation clause versus an arbitration clause: is this the same 'ADR' dynamics?
- Drafting multi-tier and escalation clauses: what is the best med-arb clause in a contract?
- Common issues that may be encountered when negotiating and drafting an ADR clause: confidentiality, seat, flexibility, costs, number of neutrals, preserving a business relationship, search for security/certainty
- Legal framework of the agreement: law requirements for recording the agreement
- How binding are mediation clauses compared with arbitration clauses?
- Is there a need for an international convention to address international commercial mediation and conciliation, and if so, what shape should it take?
- How can/should parties be encouraged to use mediation and conciliation in international commercial disputes?

Conference dinner sponsor



GALL

Friday continued

Moderator

Andy Soh

Panellists

Josephine Hadikusumo *Legal Counsel, Texas Instruments, Singapore*

Neil Kaplan CBE QC SBS *Arbitration Chambers, Hong Kong SAR*

Tat Lim *Aequitas Law, Singapore; Secretary-Treasurer, IBA Mediation Committee*

Harpreet Singh Nehal SC *Clifford Chance, Singapore*

Robert Pé *Gibson Dunn & Crutcher, Hong Kong SAR*

Jianlong Yu *Vice Chairman and Secretary General, CIETAC, Beijing*

1100 – 1130 **Coffee/tea break**

1130 – 1300 **Session two**

Mediator v arbitrator: Dr Jekyll and Mr Hyde?

While mediation is an out-of-court amicable way to settle a dispute and relies on dialogue, arbitration is a private adjudicative dispute resolution process based on a contractual agreement. The neutral's role is therefore different in each case, but to what extent. Being a mediator and an arbitrator: are we talking about the same skills? Does a good mediator make a good arbitrator and vice-versa? Does an arbitrator have the duty to try to reconcile the parties? Can a mediator settle, rather than resolve, a legal dispute as efficiently as an arbitrator? Is there a common culture for mediation and arbitration? How does culture interfere in each ADR?

This session will examine:

- The key skills of an international mediator v the profile of well-known arbitrator
- The dynamics in a mediator's and an arbitrator's mind – similar or opposed?
- What is being a 'neutral'? The notion of bias in mediation and arbitration
- The market of mediators v the market of arbitrators – the same or distinct?
- The mediator's and the arbitrator's fees – two different worlds?
- Ethics, gender and nationality among mediators and arbitrators
- The role of culture in mediation and arbitration
- Should lawyers be both litigator and an arbitrator? A litigator and a mediator?

Moderator

Jawad Sarwana

Panellists

John M Barkett *Shook Hardy & Bacon, Miami*

Judith Gill QC *Allen & Overy, Singapore*

Edwin Glasgow *39 Essex Street Chambers, London*

Christopher Newmark *Spenser Underhill Newmark, London*

Yoshimi Ohara *Nagashima Ohno & Tsunematsu, Tokyo; Co-chair, IBA Asia Pacific Arbitration Group*

Lawrence Teh *Dentons, Singapore; Council Member, IBA Legal Practice Division*

Jody Sin Kar Yu *The Resolution Mediation Consultants Limited, Hong Kong SAR*

1300 – 1430 **Lunch**

1430 – 1600 **Session three**

Articulating mediation and arbitration proceedings: mission impossible or a piece of cake?

Mediation usually precedes arbitration. But it may sometimes intervene during arbitration, before an award is given, or even afterward, to facilitate the enforcement. In these situations, can the arbitrator also be the mediator? Can the mediator become the arbitrator in the case where the mediation fails? These concerns raise serious questions about whether there are inherent threats to the impartiality of med-arbitrators. Indeed, conflict may arise between these two different positions that require different duties and standards. Should counsel's advocacy skills required in mediation be the same as they would be during arbitration?

Issues discussed will include:

- Comparing UNCITRAL Model laws and rules as well as institutional rules of mediation and arbitration: any common grounds? (HKIAC/ICC/SIAC/KLRCA)
- The best timing for a mediation during an arbitration
- The GAO Haiyan v Keeneye case - yesterday, today and tomorrow
- Dispute boards and escalations clauses – are you bound to try to mediate first?
- Is mediation moving in the direction of arbitration and what implications flow from this phenomenon?
- Costs and cost allocation in mediation v arbitration
- Third-party funding in arbitration v third-party funding in mediation
- Efficient caucuses v necessary due process
- Cultural approaches to mediation and arbitration – is there a European/US/Asian culture to mediation? One in arbitration?

Conference luncheon sponsor

**Debevoise
& Plimpton**

Exhibitor



Friday continued

Moderator

Gaëtan Verhoosel

Panellists

Cavinder Bull SC *Drew & Napier, Singapore*

Sarah Grimmer *Secretary General, Hong Kong International Arbitration Center, Hong Kong SAR*

Danny McFadden *CEDR Asia Pacific, Hong Kong SAR*

Diana Paraguacuto-Maheo *Ngo Jung & Partners, Paris*

Jamsheed Peeroo *Chambers of A.R.M.A. Peeroo SC GOSK, Mauritius*

Kim Rooney *Gilt Chambers, Hong Kong SAR*

1600 – 1630 **Coffee/tea break**

1630 – 1800 **Session four**

Enforcing a settlement reached through mediation or enforcing an award: a race for efficiency?

Settlement agreements reached through mediation might be more difficult to enforce than arbitral awards. Then, how can the parties enforce a decision or a settlement reached through an alternative mode of resolving disputes? Another problem may arise with escalation clauses, when a party decides it wants to go straight to arbitration or litigation, cutting out the agreed intermediary stages.

This session will examine:

- Measuring the success of a mediation v the success of an arbitration – what is ‘success’ and which one is the most effective?

- Enforcing an award today in Asia and China – some statistics
- The remaining weaknesses of a settlement at the stage of enforcement
- Settlements reached through a mediation and consent awards – different creatures?
- The current UNCITRAL draft treaty on the enforcement of mediation-related settlements – the next New York Convention for mediation?

Moderator

Jil Ahdab

Panellists

Justin D’Agostino *Herbert Smith Freehills, Hong Kong SAR*

Natalie Morris Sharma *Legal Advisor, Permanent Mission of Singapore to the UN, New York; Recent Chairperson of UNCITRAL Working Group on Arbitration & Conciliation*

Ariel Ye *King & Woods Mallesons, Beijing, Asia Pacific Region Liaison Officer, IBA Arbitration Committee*

Alvin Yeo *WongPartnership, Singapore*

1800 – 1820 **Closing remarks**

Jawad Sarwana

Andy Soh

Continuing Professional Development/Continuing Legal Education

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