Feel The Earth Move – Shifts In The International Dispute Resolution Landscape

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On 25 July 2018, I was privileged to be part of a conference panel moderated by the inimitable Professor Nadja Alexander, CEO of the Singapore International Dispute Resolution Academy and my colleague at the Singapore Management University School of Law. The panel's inspired title was "Feel the Earth Move – Shifts in the International Dispute Resolution Landscape". The panel comprised, as Nadja put it, "pracademics"—practical thinkers and thinking practitioners. In the former category were Nadja and I, and Ms Anna Howard, who is presently working on her doctorate at Queen Mary University and no stranger to readers of this blog. In the latter category were Ms Nina Mocheva, Senior Financial Sector Specialist in the World Bank Group, USA; Mr Lok Vi Ming, SC, Managing Partner of LVM Chambers LLC, Singapore; and Mr KC Lye, Partner of Norton Rose Fulbright, Singapore.

We were all specialists in different international dispute resolution processes—mediation, arbitration and litigation—but two common themes emerged from the panel discussion. First, the idea of a growing ecosystem; and, second, a changing culture.

A growing ecosystem

The panel observed that the international dispute resolution ecosystem had grown rapidly. Many jurisdictions are positioning themselves as international dispute resolution hubs to attract dispute resolution work emerging from cross-border conflict, giving rise to the phenomenon of international dispute resolution tourists, who are able to pick and choose their destinations. These tourists could be users, legal advisors, and service providers (mediators, arbitrators, international judges).

What would make a place an ideal international dispute resolution tourist destination? Answers included a quality legal framework to support different dispute resolution processes (i.e. a good, clear map for the tourist); convenience and accessibility (tourists, especially those who are more senior, may not wish to travel long distances); and a good range of services to meet the tourists' needs and wants (even a good milkshake parlour nearby if that was so desired).

Why work on becoming an ideal international dispute resolution tourist destination? Nina shared that a study by the World Bank Group showed that in the context of arbitration, the adoption of the New York Convention led to increased levels of bilateral foreign direct investment. Conversely, using Vietnam to illustrate the negative consequences of a flawed arbitration regime, Nina shared that a number of deals had been retracted due to the high risk of contract breach and challenges enforcing arbitration awards. In the cotton industry, for example, the International Cotton Association publishes a list of firms that default on arbitration awards and members of the Association cannot trade with the listed firms. This has limited the economic growth of the garment and textile industry in Vietnam. One can easily imagine these benefits and costs to apply in the mediation context as well.

Turning to examine the different international dispute resolution processes in detail, KC expressed that international arbitration remained the default process for international disputes despite its perceived weaknesses, notably the high costs and lengthy time taken to go through the process. Vi Ming added that the recent proliferation of international courts like the Singapore International Commercial Court was an attempt to address some of the limitations of international arbitration, including the lack of an avenue of appeal and a lack of transparency. Nevertheless, the impact of international litigation has still not been greatly felt due to the challenges of enforcing the judgments of international courts. The Hague Convention on Choice of Court Agreements has 31 contracting parties (the majority being European Union member states), far fewer than the New York Convention's 157. However, given the 60-year history of the New York Convention and the relative youth of the Hague Convention on Choice of Court Agreements, it may be some time before the impact of international litigation is truly felt.

In the international mediation space, Anna spoke from her research on the EU Mediation Directive to suggest that perhaps the reason for the lower uptake in mediation was the lack of understanding of what users really wanted. She shared that her interviews with in house counsel showed that an important factor to them in dispute resolution was confidentiality, and this was more so than enforceability. Perhaps it was this aspect of mediation regulation that needed attention before mediation could become more widespread.

My contribution to the panel was to offer a perspective from Asia. What Asia most needs to grow the use of mediation might differ from Europe. A regional comparison of the data gathered through the Global Pound Conference Series showed that in Asia, more than in any other region, there is a desire for increased regulation of mediation. In response to a question about what would most improve commercial dispute resolution, 64% of Asian respondents chose the option "legislation or conventions that promote recognition and enforcement of settlements, including those reached in mediation". Only 48% of Continental European respondents chose this option. The uniqueness of Asia is further bolstered by results from all other regions indicating that a demand for increased efficiency would have the most significant impact on future policy-making in commercial dispute resolution; this was not true for Asia. In Asia, the top response from 65% of respondents was a demand for certainty and enforceability of outcomes. This suggests to me that the UNCITRAL Convention on International Agreements Resulting from Mediation (the Singapore Mediation Convention) could have greater significance for Asia compared with other regions in the world. Asia has a long way to go before achieving the standards contained in the Convention due to a large diversity in the practice of and experience with international commercial mediation. Nevertheless, recent developments in the two largest Asian economies—China and India—as well as two major Asian financial centres—Hong Kong and Singapore—demonstrate a willingness to enact and amend legislation as well as implement policies to support commercial mediation. This is probably because mediation is viewed as being able to facilitate international trade and promote the achievement of Asia's ambitions in economic growth through projects such as the Belt and Road Initiative and the Regional Comprehensive Economic Partnership.

A changing culture

The panel discussed that the international dispute resolution ecosystem was more than ever before responding to demands of the users rather than being dictated by service providers, resulting in a change in culture. Most notably, there was a blurring and mixing of processes that had traditionally been quite distinct. This was true of international arbitration and litigation where processes and institutions have been borrowing from each other. For example, the Singapore International Commercial Court borrowed from arbitration by permitting the parties to apply for simplified rules of evidence to govern the proceedings as well as for confidentiality of proceedings; and many international arbitration institutions borrowed from litigation by amending their rules to include provisions for summary or expedited processes and joinder.

Mediation is increasingly combined with arbitration to resolve international commercial disputes, challenging the narrative of arbitration being the preferred mode of resolving international disputes. The two most recent Queen Mary International Arbitration Surveys provide an excellent illustration of the growing importance of mediation for international commercial disputes. In 2015, 56% of respondents indicated that they preferred international arbitration and 34% international arbitration together with ADR to resolve cross-border disputes. In 2018, more respondents indicated a preference for international arbitration together with ADR (49%) as compared with international arbitration on its own (48%). More importantly, the 2018 survey broke down the responses into subgroups of private practitioners, arbitrators and in-house counsel. When we look only at the in-house counsel group's responses, a hefty 60% preferred international arbitration together with ADR and 32% international arbitration on its own. Evidently, the preferences of arbitrators and private practitioners do not align with that of in-house counsel; this was a point the Global Pound Conference Series had also made. Practitioners are now beginning to see and respond to the preferences expressed by clients to remain competitive in the international dispute resolution marketplace. Clients expect advice from practitioners on a range of dispute resolution options even if they may specialise in one. This is a positive development for the ecosystem.

Concluding thoughts

The panel appropriately concluded with considering the impact of the Singapore Mediation Convention, the key provisions of which have been summarised in an earlier post. The panel recognised the Singapore Mediation Convention as an earth-shaking development in international dispute resolution. The Singapore Mediation Convention will give greater visibility to international commercial mediation, provide a carefully calibrated model for countries to adopt, and address any perception of mediation as a less robust way of resolving disputes. However, until the Singapore Mediation Convention gains sufficiently widespread acceptance, Arb-Med-Arb could be the best way to enjoy the benefits of mediation whilst taking advantage of the enforceability afforded to arbitral awards.