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The Arb-Med hybrid in Hong Kong – Much ado about nothing?

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The recent decision in Gao Hai Yan & Anor v Keeneye Holdings Ltd & Others [2011] HKEC 514, (the "wining and dining" mediation case) has generated a considerable amount of interest in the murky depths of the Arbitration-Mediation ("Arb-Med") facility. Practitioners and academics are still engaged in deep discourse nearly two months after the case was concluded in the Hong Kong Court of Appeal and some are even questioning whether the Arb-Med facility should be available at all. However, the Arb-Med provision has been seldom used in Hong Kong – and on this basis some critics complain that all of the surrounding fuss really is not warranted. Is the Hong Kong Arb-Med debate much ado about nothing?

The Arb-Med provision found in Section 33 of the new Hong Kong Arbitration Ordinance (Cap 609) is neither peculiar nor new to Hong Kong. Other arbitration legislation, such as Article 38(4) Japanese Arbitration Law, and many other civil law jurisdictions including Germany and the Netherlands offer the Arb-Med facility. Notably, the former Arbitration Ordinance (Cap 348) of Hong Kong also offered this form of dispute resolution. It is widely accepted that keeping the Arb-Med provision in the new Arbitration Ordinance (Cap 609) is a positive step in Hong Kong however, the reason why this process has only been used once before requires further exploration.

Why is Arb-Med infrequently used in HK?

In Hong Kong, the culture of mediation is still relatively novel. Arbitrators are not yet comfortable with mediating, and this is something that even some arbitrators (but not all) are willing to admit. However, this attitude may change as more arbitrators and lawyers receive formal mediation training. Following the recent Civil Justice Reform ("CJR") in Hong Kong, civil disputes must be mediated before parties can litigate. This has lead to the development of both the availability and quality of mediator education, training and accreditation.

The merits of Arb-Med

The pros and cons of Arb-Med have been debated for years although the favoured view is that Arb-Med should be recognised as a process with merits. The combination of arbitration and mediation allows the parties to potentially settle the final stages of the dispute quicker by consensual means, possibly saving time and further costs. Allowing the parties to mediate the final stages of their dispute also provides an opportunity for parties to attempt to create a final settlement that they can both live with. This solution could possibly assist with harmonising business relations to some degree, which is considerably important within a business village such as Hong Kong. The Arb-Med provision is also intended to act as a safety-net in that it allows for arbitration to be resumed immediately if the matter cannot be settled by consensual means.

Increasing the viability of Arb-Med in Hong Kong

Despite the controversy surrounding the Keeneye litigation, it is clear that the Arb-Med provision is a useful facility, however, further measures will need to be taken to increase the viability of this provision in Hong Kong. Increased training for arbitrators in mediation practice will help to facilitate awareness of the advantages of the provision. Further promotion of the Arb-Med provision by counsel to notify their clients about the possibility of using this provision should also be encouraged. However, the main stumbling block to hinder the use of the facility in Hong Kong revolves around confidentiality issues within the mediation phase, which prove to be problematic for facilitative mediation. According to the current Hong Kong Arbitration Ordinance, any issues that are raised during the caucus, which are material, must then be imputed in the arbitration hearing. It is thought that this would discourage parties from participating fully because they would become cautious of divulging any issues that might later be used against them. Many commentators believe that this is the main reason that the Arb-Med option has been so underutilized.

The 'sealed envelope' option has been promoted as a potential solution by some. However, this process may be somewhat counter-effective since, it involves the arbitration running its full course and then at the conclusion of the hearing the award is placed in an envelope. The parties then mediate; if the mediation is successful the award is not disclosed, however, in the event that the parties cannot successfully settle by mediation the award is divulged to the parties. Although this method avoids the issue of confidentiality, there are other perils that could frighten away parties looking for a speedy and efficient method of dispute resolution.

A perhaps more effective method which would be an appropriate way of dealing with such confidentiality issues is that the mediation should be conducted in the absence of a caucus; all information would be divulged in open session and there would be no need for parties to worry about whether something that they said in caucus would impinge them later should the mediation fail. Another plausible option might be to appoint a neutral mediator who is not the arbitrator. However, the downside to this would be that the mediator would need time to familiarize with the case thereby extending the time and cost of proceedings. A similar option, with similar downfalls, might be to allow the same arbitrator to mediate but if mediation fails, a new arbitrator should be appointed.

The Future

Maintaining the Arb-Med provision in the Hong Kong Arbitration Ordinance is a positive, but not widely adopted facility, and it appears as though it will remain that way if active steps are not taken by arbitrators and counsel to facilitate its use. It seems that one of the most effective ways in which the facility could be popularized in Hong Kong is by removing the confidentiality fear-factor and this could be achieved by active intervention of arbitrators and counsel. Previous ICC hearings adopting the Arb-Med facility have resulted in settlement and there is no reason why some of the practices that were adopted could not be incorporated here in Hong Kong.

Whilst some of the discussion surrounding the Keeneye Arb-Med issues may not have promoted Arb-Med as a positive option it has unquestionably raised awareness of the facility. Further discussion surrounding the use of the Arb-Med facility should be encouraged in Hong Kong and certainly should not be regarded as much ado about nothing. The Arb-Med provision is a useful tool within the settlement of disputes and hopefully the recent exposure stemming from Keeneye will encourage wider use of this facility in Hong Kong.

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