ASIAN INSTITUTE OF ALTERNATIVE DISPUTE RESOLUTION
Delivering Excellence in ADR

ADR CENTURION

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AUGUST 2022
Volume 3
Issue 19

The AIADR shall be a repertoire of global jurisprudence, formed by professional membership, recognized by international institutions, striving for the advancement of alternative dispute resolution methodologies, for amicable conflicts management and effective dispute resolution.

The ADR Centurion is the Bimonthly Newsletter of AIADR published six times per year by the Editorial Committee of AIADR for the members of the AIADR (the "Institute") and general readers interested in ADR subject and practices.

Electronic Version Available at: https://www.aiadr.world
eISSN: 2735-0800

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"Failure is the
begin again mo


opportunity to
re intelligently."
Henry Ford

AIADR Young Members Group (YMG) Committee

Membership

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Members are welcome to reach out to the Secretariat for assistance or collaboration in organizing webinars on ADR topics of their choice. No charges are levied. Do not miss out on this great opportunity to enhance your resume by delivering a webinar for the benefit of other members and the ADR fraternity. Email us to register your interest!

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Message from the President

Datuk Professor Sundra Rajoo

Dear Members,

On behalf of the Asian Institute of Alternative Dispute Resolution (AIADR), it is my great pleasure to present you with the 19th Issue of the ADR Centurion.

If you had followed the institute's progress over the past few months (via email, social media accounts, or joining our events), you would have noticed that our activities had been ever-increasing and we hope that it had some impact or benefits on your professional journey in the realm of ADR. We would like to thank all individuals for the constant support and trust in the work of the institute to achieve our vision of building a global platform in ADR.

I would also like to take this opportunity to thank the AIADR Secretariat, Office Bearers, PDECs, partner organizations and our newest subscribers for driving AIADR towards its goals. Please keep an eye out for our updates and posts on various social media platforms including Facebook, LinkedIn, Twitter and Instagram.

I set out some of our recent and forthcoming initiatives as follows:

1. On 16th June 2022, AIADR organized a webinar on the topic of "Development of Online Dispute Resolution under the Impact of Pandemic". We had an esteemed list of speakers including Ddr. Adolf Peter, Prof. Carrie Shang, Sameer Shah, Jay Patrick Santiago with Jern-Fei Ng as our moderator to discuss the issues brought by pandemic and the future of online dispute resolution. The recording of the webinar is uploaded to AIADR's YouTube channel; please do check it out if you are interested.

2. Moreover, in AIADR's continuous effort in building young talents, AIADR was also the partnering organization for the JECRC National Mediation & Negotiation Competition 2022. A few AIADR members went to Jaipur to judge the semi-finals and finals of the competition at the end of July.

3. Other than that, AIADR was the supporting organization for the Colombo Arbitration Week 2022 organized by United Nations Commission on International Trade Law (UNCITRAL). I was also invited to share my knowledge on the topic of "Multi-tiered Dispute Resolution Clauses in Construction Disputes".

4. As the president of AIADR, I was also invited to give an opening remark at the 2022 China High-level Dialog on Maritime and Commercial Arbitration (CHDOMACA) organized by the China Maritime Arbitration Commission (CMAC). This dialog seeks to provide a platform to discuss the frontier innovations and development trends of international maritime and commercial arbitration in a different jurisdiction. We at AIADR, are honored to be part of this significant initiative.

5. AIADR was also the supporting organization for the CIPAA Conference 2022 organized by Legal Plus and L2 i-CON. I was invited to share my perspective on the "Reforms to CIPAA 2012" to explore the possible reforms to Malaysia's statutory adjudication regime for it to achieve a more effective dispute resolution system. At the same time, AIADR's Head of Secretariat, Heather Yee Jing Wah was also invited to be the moderator of one of the parallel sessions for this Conference on the topic of "Covid-19 Prevention & SOP: Is The Contractor Entitled to Claim?".

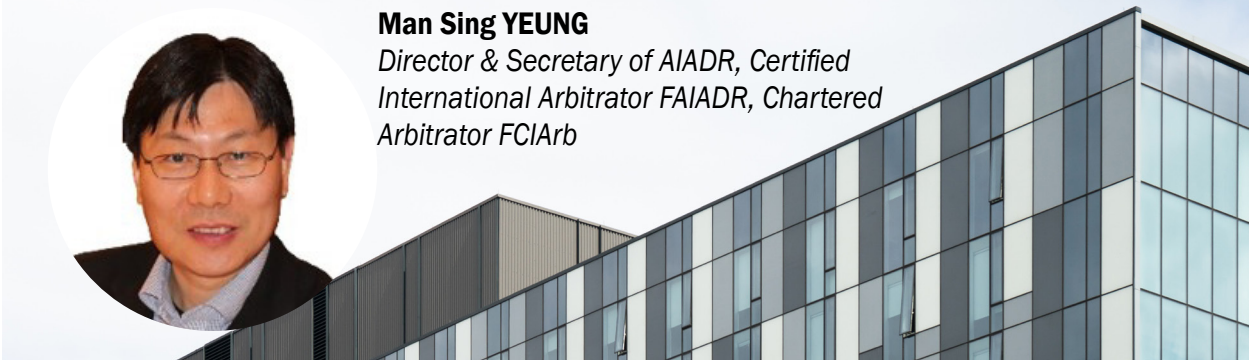
6. On 13th July 2022, AIADR in collaboration with Thailand Arbitration Center (THAC) hosted a webinar for the 4th THAC Arbitration Week. The topic of the webinar is "Impact of Cybersecurity Measures on International Arbitration". AIADR members, Sagar Kulkarni, Randolph Koo, and Dr. Kabir Duggal participated in the panel and discussed how technology continues to be widely used in international arbitration and the impacts of cybersecurity with all these technologies being used.

7. On the 15th July 2022, AIADR organized our inaugural in-person practical workshop on the title "Interpreting Dispute Resolution Clauses" in Kuala Lumpur. The aim of this workshop is to allow legal practitioners or non-legal practitioners to understand the interpretation of various dispute resolution clauses in contracts.

8. Lastly, on 22nd July 2022, our Head of Secretariat, Heather Yee Jing Wah was invited to speak for an adjudication seminar titled "Adjudication as an Effective Tool for Construction Disputes" organized by the Institute of Construction Industry Arbitrators (ICIARB). In this seminar, she explored the statutory adjudication regime in Malaysia, and how it helps to resolve Malaysia's construction industry cash flow problem in providing a quick dispute resolution process.

To conclude, I would like to extend my utmost gratitude to all of our members for all that we have achieved together. Please spread the work we do here to your close friends and colleagues. Stay safe, healthy, and sincere good wishes.

Applicability of Evaluative Mediation in Hong Kong with reference to the experience in the USA



Man Sing YEUNG
Director & Secretary of AIADR, Certified International Arbitrator FAIADR, Chartered Arbitrator FCIArb

Abstract

In Hong Kong, mediation users are to adopt a non-adjudicative, i.e. facilitative approach in the mediation process under Hong Kong's Mediation Ordinance (Chapter 620, 2013). It was revealed in a survey conducted in Hong Kong that construction practitioners wished to use evaluative mediation rather than facilitative one. In the USA, there is no statutory restriction to forbid evaluative mediation. Some overseas academics described mediators as evaluating in a way for assessing people, issues and options throughout the process, and some suggested a majority of mediators use an evaluative approach in construction mediation. The writer envisages mediation users in Hong Kong may consider adopting the evaluative approach in mediation, which is widely used in some foreign jurisdictions, with potential limitations and challenges in using it. It is generally applicable in complex cases upon the parties' request, in which the mediator may take both evaluative and facilitative skills in the process provided that the parties' prior written consent or agreement is given. But upon evaluation, perception of bias by either party may arise, and professional indemnity insurance should be procured for adjudicative exercise after all.

Introduction

There are generally two approaches to mediation in the global context, i.e. facilitative and evaluative. For the former, the mediator objectively facilitates the parties' communication and negotiation of disputes without giving an opinion on merits. Whereas in the latter, the mediator attempts to convince parties to settle disputes by rendering views on law, facts and evidence of disputes.

In Hong Kong, there is a statutory requirement for use of the facilitative approach within the ambit of Section 4 of later Hong Kong's *Mediation Ordinance (Chapter 620, 2013)* in which mediation is required to be, among other things, "*without adjudicating a dispute or any aspect of it*"[1].

An attempt was made by the Hong Kong's Department of Justice to review the recent development of mediation, which had established a special committee on evaluative mediation in 2017 to study the feasibility of using evaluative mediation[2]. The Department of Justice has been investigating the subject.

Evaluative mediation has however been widely used in some foreign jurisdictions. For this article, experience in the USA, wherein there is a long history of mediation and no statutory restriction to forbid evaluative mediation, is to be drawn for considering the applicability of the approach in Hong Kong.

How commentators and stakeholders view the effectiveness and limitations of the two approaches

Leung and Yip pointed out that for many years, disputes related to construction contracts in Hong Kong mainly concerned quantum arising from different issues, i.e. work done, workmanship, payment and time in completion, and the negotiation skills among the disputants engaged by construction practitioners were often primarily positional bargaining. Therefore, the adoption of a facilitative approach in which a mediator could not express any opinion on the merits of the cases nor give any advice to the parties, sometimes may not meet the parties' expectations of how the mediator may assist in reaching a settlement[3].

In the USA, Riskin identified a gap that appeared to exist between lawyers, their clients, and mediators in their various expectations, and characterized mediators as having two principal styles of orientation each against narrow and broad concerns of problems: evaluative and facilitative. Therefore, Riskin suggested that *"The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps better than their lawyers. Accordingly, the parties can develop better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and enhance communication between the parties in order to help them decide what to do"*. He added that *"The evaluative mediator who evaluates assumes that the participants want and need him to provide some guidance as to the appropriate grounds for settlement, based on law, industry practice or technology and that he is qualified to give such guidance by virtue of his training, experiences, and objectivity"*[4].

In a keynote speech by Hong Kong's Secretary for Justice at the Global Pound Conference in 2017, Mr. Yuen SC addressed a common complaint of mediation in Hong Kong was that mediators were perceived to be too passive, whereas parties often wanted and needed some sort of evaluation to check their cases and assist with the settlement. In the survey done at the conference, it was found that there was a high preference for combining adjudicative and un-adjudicative processes in Hong Kong as financial outcomes in terms of damages, compensation or indemnities were judged to be the top priority by all stakeholders, i.e. parties, advisors, academics and policymakers[5].

In another survey by Leung and Yip on construction practitioners and mediators, the authors found that the majority of the interviewees were generally satisfied with the facilitative approach. However, some expressed that the facilitative approach may only be effective in the resolution of disputes on a relatively small scale, and it was not effective when the mediator did not give advice at all and the parties may not perceive being assisted adequately. Therefore, it was perceived as a waste of time and monies. The parties in construction disputes usually did not have emotional or relationship problems as in matrimonial cases, normally understood clearly what they needed, and may not usually need a facilitative mediator to uncover their underlying needs and concerns, particularly when the negotiation started with an unreasonably wide gap in quantum. Despite 65% of the respondents supporting the use of evaluative mediation, many expressed concerns over the possible perception of bias by the parties and the potential negligence claims against mediators, if an evaluative approach was adopted[6]. In such a case, under the *Hong Kong Mediation Code 2010*, a mediator shall consider whether appropriate to be covered by professional indemnity insurance and if so, shall ensure that he is adequately covered before taking instructions[7]. That said, local insurers rarely provided insurance products for mediators due to the pool of active practising mediators was not large enough for an appropriate insurance coverage thereby, and it was not cost justifiable for mediators to procure even if there was any, whilst lawyers could cater for it by solicitor professional indemnity schemes[8].

Potential advantages of evaluative mediation

In a keynote speech by Ms. Cheng, SC Secretary for Justice in Mediation Conference, she pointed out that facilitative and evaluative mediation might not be viewed as mutually exclusive. Based on her experience in mediation, certain evaluative skills inevitably would have to be deployed in the process as encouraging parties to be realistic about their strengths and weakness, re-assessing alternatives to having no settlement, leading to focus on their interests. The interaction of using facilitative and evaluative skills reflected the essence of mediation, i.e. flexibility[9].

Barkai described that in the USA, mediation might also have an opening statement by each of the mediator and parties, and there was a caucus session with each party. The actual style of the mediation, what the mediator performed in the mediation, and the best practices of mediation, may vary depending upon the type of dispute that was being mediated, the orientation of the mediator, and the type of parties involved in the mediation, as well as participation by lawyers. He suggested that a vast majority of mediators used an evaluative approach in their mediation of construction disputes, and mediators in construction cases would start by using a facilitative approach to mediation but might move fairly quickly to using an evaluative approach to mediation[10]. A survey of approximately two hundred advocates in the greater Metropolitan Detroit area, found that most of them in commercial disputes expected a mediator to use a combination of facilitative and evaluative approaches. They recognized that the early part of the mediation would likely be conducted on a facilitative model, as the closure was approached, however, they expected and wanted the mediator to move towards an evaluative approach[11]. It is because once an opinion is provided, the mediator may be perceived as exhibiting favoritism or no longer being neutral so evaluative mediation generally takes place toward the end of the parties' negotiations and after they have truly failed to reach a consensus[12].

Aaron and Golann suggested the benefits of evaluation in that a mediator's explicit evaluation could help parties overcome impasses caused by divergent views of the likely adjudication outcome of a particular legal issue or the entire case. Even if a mediator's evaluation did not persuade someone to entirely change his assessment, it could infuse uncertainty or reduce confidence. If a lawyer had previously dismissed his doubts about a legal argument, a mediator's opinion that echoed those doubts may prompt him to rethink. If a lawyer had avoided raising any doubts to a client for fear of being perceived as disloyal or insufficiently attentive, he may use a mediator's evaluation as cover, without having to own it himself. A non-binding opinion from a respected person who had listened carefully to arguments could give a disputant the feeling of a day in court that was as close as most litigants would ever get to conventional justice. And much safer, a neutral opinion could also help a party to get approval from a corporate supervisor because they can use it to deflect criticism of their decision to settle[13]. Evaluations could help to resolve internal disagreements within a bargaining team, for instance by assisting a litigator who sees serious risks in a case to convince an unrealistic client of the need to settle[14]. It could be a useful tool where parties are unable to generate options and would like the mediator to offer recommendations at the end of the negotiation[15].

Golann suggested by applying the definition of "evaluate" in the *Oxford dictionary* which means to assess, analyze, consider, value, weigh, judge, size up or form an opinion, most mediators evaluated constantly from their first contact with a dispute. They assessed parties, lawyers, issues, options, and potential avenues for agreement throughout the process, forming opinions not only about legal issues and likely case outcomes, but also about personalities, bargaining tactics, and the conflict's impact on people's lives and businesses[16]. Sometimes it is hard to distinguish facilitative and evaluative approaches from the perspectives of using mediation skills of reality testing[17].

Parties can do a reality check for the findings and may comment on the evaluation and submit further documents and information for review to advance their respective arguments in order to convince the mediator to revise the views presented in the evaluation. However, it is easier for an unfavourable party to envisage itself as a "losing" party in the process which was primarily conducted in an adversarial manner. It is therefore in the USA practice, mediators may incline to give evaluation toward the end of the process to avoid any perception of bias by either party. That said, if it is the procedures specifically requested/ agreed by parties to assist them and the mediator simply bases on the materials provided by both parties in reaching an evaluation, the perception for such might be lessened, which is analogous to a facilitative approach that participants may reflect their willingness to any option proposed on the spot.

As far as the parties' legal positions and interests are concerned, the evaluation from the mediator may be different from the parties' original legal positions and may create uncertainty in the respective arguments, causing the parties to review their respective stances, and enabling the parties to use the evaluation as an option to adjust their quantum. In doing so, it may assist the parties to overcome impasses of their divergent positions in the liability issues in the case. Both parties may be benefited from the evaluation exercise to come closer to a consensual settlement.

A mediator should have gleaned benefits from engaging the evaluative acumen. The users may expect the mediator to be professionally competent to evaluate on his own who should at the same time have procured adequate insurance coverage for the users' interest in running an adjudicative process.

The evaluative approach could be advantageous to both parties to have a preliminary view from an independent neutral, i.e. the mediator in the first instance for a reality check. Upon evaluation, the parties have to review their legal stances and adjust the quantum claimed or defended about their best alternative(s) to a negotiated agreement. Even if mediation is terminated without settlement on entire issues including quantum, any disposal of the disputes between the parties in the near future might happen from an evaluation. Adopting an evaluation approach may assist a mediation process in the end.

It is therefore revealed that the evaluative approach taken by the mediator may benefit the users, mediator and the process itself and might be considered generally applicable for mediation proceedings in Hong Kong in this respect although legislative constraints may have to be reviewed.

Way forward of evaluative mediation in Hong Kong

The question is the extent and when the assessment of the merit of the case would be engaged in the mediation. Parties ought to trigger an evaluative mediation at the start of the process if it is both parties' intention to seek a mediator to evaluate the merit of the case. Parties should label the entire process as evaluative mediation applicable for their own disputes to be adjudicated by a mediator. The perception of an alleged "bias" by the unfavourable party may be inevitable as it is an adversarial procedure and one party may have become a "loser". Importantly, both approaches may be taken by the mediator in mediation even labeled as evaluative, which he may adopt whenever necessary in the process. In the end, a settlement may be reached at a time after an evaluation, which enables the parties to make a reality check helpful for parties' enforcement in long run.

The challenge ahead in the process would be to ensure the availability of professional indemnity schemes, particularly for non-lawyer mediators. It may be an area for further exploration by the Hong Kong mediation stakeholders. Provided an appropriate review of current local legislation on mediation, it could be expected that the evaluative approach used in some foreign jurisdictions might be applicable in the Hong Kong mediation community, particularly in the construction industry.

[1]Mediation Ordinance, Cap. 620, 2013, section 4

[2]Cheng, T. (2018) 'Keynote Speech'. Mediation Conference 2018, Hong Kong, 18 May. Department of Justice.

[3]Leung H.F. and Yip S. (2018) Mediation of construction disputes: a step closer to evaluative model. Surveying & Built Environment, 26(1), pp.40-60.

[4]Riskin, L. L. (1996) Understanding mediators' orientations, strategies, and techniques: a grid for the perplexed. Harvard Negotiation Law Review, 1, pp.8-51.

[5]Copeman, J., Phillips A. & Tai, M. (2017) Mediating Commercial Dispute: A Call to Action in Hong Kong. Asian Dispute Review, April 2017, pp.72-78.

[6]Above 3

[7]Working Group of Accreditation and Training, Department of Justice (2010) Hong Kong Mediation Code. Hong Kong: Department of Justice.

[8]Law Society of Hong Kong (2009) From the Council Table, Hong Kong Lawyer 2009.

[9]Above 2

[10]Barkai J. (2008) Mediation of Construction Disputes in the United States.

[11]Weisman M. C. (2010) Mediators should be facilitators and evaluators. Michigan Lawyer's Weekly, 15 February.

[12]Archerd E. R. (2020) Evaluating Mediation's Future. Journal of Dispute Resolution, Vol Issue 1, Art. 6.

[13]Aaron M. C. and Golann D. (2019). Beyond Abstinence: The Need for Sale, Impartial Evaluation in Mediation. Dispute Resolution Magazine 24.

[14]Aaron M. C. and Golann D. (2010). Using Evaluations in Mediation. In American Arbitration Association (2nd ed). AAA Handbook on Mediation, USA: Juris Net, LLC. pp. 327-341.

[15]Above 12

[16]Above 13

[17]Above 14

RCEP Agreement from the Alternative Dispute Resolution Perspective

Cheng Wan Yng
AIADR Legal Executive

1. What is RCEP Agreement?

On 18th March 2022, the Regional Comprehensive Economic Partnership (RCEP) Agreement has finally come into force in Malaysia, paving the way for the country to integrate into the world's largest free trade agreement that involves 15 countries, namely Australia, Brunei, Cambodia, China, Indonesia, Japan, South Korea, Laos, Malaysia, Myanmar, New Zealand, the Phillipines, Singapore, Thailand and Vietnam. This represents a significant milestone in the vibrant growth and revitalization of economies.

The RCEP agreement aims to establish a mutually beneficial economic partnership that will facilitate the expansion of regional trade and investment that could contribute to global economic growth and development. It takes into account the different levels of development among the Parties, the need for appropriate forms of flexibility, including provision for special and differential treatment, especially for Cambodia, Lao PDR, Myanmar, and Viet Nam as appropriate, and additional flexibility for Least Developed Country Parties besides considering the need to facilitate the increasing participation of Least Developed Country Parties in the agreement so that they can more effectively implement their obligations under the agreement and take advantage of the benefits from the agreement, including expansion of their trade and investment opportunities and participation in regional and global supply chains.

Generally, the key features of the RCEP Agreement are[1]:

(a) Modern

The RCEP Agreement updates the coverage of the existing ASEAN Plus One Free Trade Agreements (FTAs) (ASEAN's FTAs with the six dialogue partners, namely China, Japan, Republic of Korea, India, Australia and New Zealand) and takes into consideration changing and emerging trade realities, including electronic commerce, the potential of small enterprises, regional value chains, and the complexity of market competition.

(b) Comprehensive

The RCEP Agreement is comprehensive where it comprises 20 Chapters which cover areas that were not previously covered in the ASEAN Plus One FTAs. The RCEP Agreement has specific provisions on trade in goods, including rules of origin; customs procedures and trade facilitation; sanitary and phytosanitary measures; standards, technical regulations and conformity assessment procedures; as well as trade remedies. There are also chapters on investment; intellectual property; electronic commerce; competition; small and medium enterprises (SMEs); economic and technical cooperation; government procurement; and legal and institutional areas including dispute settlement.

(c) High-Quality

The RCEP Agreement contains provisions that go beyond the existing ASEAN Plus One FTAs. The RCEP Agreement addresses the issues on Parties' engagement in global and regional supply chain and market access commitments. Business-facilitating rules are enabled while preserving legitimate public policy objectives. The RCEP Agreement strives to boost competition and productivity which is sustainable, responsible, and constructive. The added value is to bring together a single rulebook to help facilitate the development and expansion of regional supply chains.

(d) Mutually beneficial

The RCEP Agreement brings together countries with diverse levels of development and recognises that its success will be determined by its ability to mutually bring benefits. The RCEP Agreement is designed to achieve this objective through appropriate forms of flexibility and provisions for special and differential treatment especially for Cambodia, Lao PDR, Myanmar, and Viet Nam, as appropriate, and additional flexibility for the least developed Parties.

[1]Kindly refer to the Summary of the Regional Comprehensive Economic Partnership Agreement available via https://rcepsec.org/wp-content/uploads/2020/11/Summary-of-the-RCEP-Agreement.pdf.

In summary, the RCEP Agreement provides the following benefits to its signatory countries:

i. Tariff elimination and reduction for merchandise goods, including the facilitation of export and import of goods among the RCEP countries;

ii. Opening markets to welcome the services providers within the RCEP region for sectors, including financial services, telecommunications services and movement of natural persons;

iii. Promotion, facilitation and protection on investment within the region;

iv. To ensure a level playing field to ASEAN countries while recognising the importance of special and differential treatment among RCEP countries especially the developing countries; and

v. information exchange and promotion of transparency measures to facilitate business and investment within the region including providing economic and technical cooperation especially to SMEs.

2. Potential Disputes that could arise from cross border trade

However, there are always two sides to every coin. Despite the benefits of cross border trades, one of the main reason of people avoiding cross border trade was due to the complexity of its disputes. The common disputes that arise includes:

1. Cross-border debt recovery Complications can arise when a party seeks to recover debt from another party from a different jurisdiction, due to the differences of the currency and laws of the countries. Parties normally would have to go through many procedures to recover the debt.

2. Insurance claims Most companies only rely on domestic insurance coverage alone when dealing internationally, resulting in foreign claims possibly not covered by the domestic policy.. In such situation, parties usually would have to handle the claims and deals with foreign legal and regulatory requirements with limited assistance from their domestic insurer.

3. Manufacturing issues Manufacturing issues often arise especially in cross border trading among the automotive and electronics sectors. This is because the work of the factory is often affected by the government's policy change or safety standard changing. Taking a recent example, due to the impact from Covid-19, most factories have to adjust their manufacturing processes to follow domestic and international safety standard. And thus resuting into a delay in supplying the products.

4. Contractual disputes are the most common disputes that would arise not only in cross border trade but also in domestic trade. Contractual disputes rooted from many factors, including improper management of a conflict between parties in the project, misinterpretation of a condition of contract (CoC), lack of documentation, and discrepancies and ambiguities of documents which may lead to cost overruns, project delay and project cashflow.

5. Intellectual property disputes Intellectual property disputes are also another common type of disputes arising from cross border trade. This is because intellectual property related issues are usually governed and granted by individual states and different national legal systems treat the issues of infringement differently. Thus, the complexity revolves around the application of foreign laws and the involvement of parties from multiple jurisdictions.

Nevertheless, even with disputes arising from cross border trades, the RCEP Agreement has already provided its own dispute settlement mechanisms that could assist parties to resolve disputes in a cheaper and easier way.

3. Dispute Settlement in the RCEP Agreement

Chapter 19 of the RCEP Agreement provides the dispute settlement mechanism for disputes which arose between Parties regarding the interpretation and application of this Agreement and when a Party considers that a measure of another Party is not in conformity with the obligations under the agreement or that another Party has otherwise failed to carry out its obligations under the agreement.

The overall objective of Chapter 19 of the RCEP Agreement is to provide effective, efficient, and transparent rules and procedures for settlement of disputes arising under the RCEP Agreement.

Scope of Application

As provided under Article 19.3(1), Chapter 19 applies to the settlement of disputes between Parties regarding the interpretation and application or when a Party considers that a measure of another Party is not in conformity with the obligations under the agreement, or that another Party has otherwise failed to carry out its obligations under the agreement. It does not apply to other chapters that specifically rule out Chapter 19, such as measures of corruption which are supposed to be dealt with domestically under Article 17.9.

Salient Features

Chapter 19 reflects an emphasis on bilateral, regional, or plurilateral consultations [see Article 19.4(4)] before resorting to adversarial dispute settlement mechanisms. Salient features of the RCEP dispute settlement process include:

(a) Choice of forum

Complaining Party can select the forum within which to address a dispute that concerns substantially equivalent rights and obligations in the RCEP Agreement and another international trade or investment agreement to which the Parties to the dispute are party, to the exclusion of other possible for a or forums of resolving disputes.

(b) Consultations

Responding Party is first to enter into consultations with a Complaining Party, if requested in good faith and make every effort to reach a mutually agreed solution through consultation. To this end, the Parties to the dispute shall: (a) provide sufficient information in the course of consultations to enable a full examination of the matter, including how the measures at issue might affect the implementation or application of this Agreement; (b) treat any confidential or proprietary information exchanged in the course of consultations on the same basis as the Party providing the information; and (c) endeavour to make available for the consultations personnel of their government agencies or other regulatory bodies who have responsibility for or expertise in the matter. The consultations shall be confidential and without prejudice to the rights of any Party to the dispute in any further or other proceedings.

(c) Good offices, conciliation, or mediation

Parties to dispute may voluntarily undertake alternative methods to settle their disputes, including good offices, conciliation, or mediation. Procedures for such alternative methods of dispute resolution may begin at any time and may be terminated by any Party to the dispute at any time.

(d) Establishment of a panel

Complaining Party may request the establishment of a panel to resolve a dispute in circumstances where the Responding Party does not reply to a request for consultations or does not enter into consultations within the stipulated time line, or where consultations have failed to resolve the dispute within the stipulated time line.

Rules of procedures for panel proceedings are as follows:

(e) Rights for interested third parties

Interested third parties are entitled to participate in disputes so that their views can be taken into account during the panel process. According to Article 19.10.5, a Third Party shall have the right to: (a) subject to the protection of confidential information, be present at the first and second hearings of the panel with the Parties to the dispute prior to the issuance of the interim report; (b) make at least one written submission prior to the first hearing; (c) make an oral statement to the panel and respond to questions from the panel during a session of the first hearing set aside for that purpose; and (d) respond in writing to any questions from the panel directed to the Third Parties.

(f) Confidentiality

Under the RCEP Agreement it is stipulated that the written submissions to the panel shall be treated as confidential. No disclosure of statements or information submitted by a Party to the dispute or a Third Party to the panel which that Party has designated as confidential shall be disclosed to the public. Further, a Party to the dispute or a Third Party shall, on request of a Party, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

Arbitration Provision according to GATT Procedures only for Chapter 8: Trade in Services

Pursuant to Article 8.13, if a party wishes to modify or withdraw any commitments in Annex II (Schedules of Specific Commitments for Services) at any time after 3 years from date of commitment enters into force, the party has to enter into negotiations with any requesting party to reach agreement on necessary compensatory adjustment. If parties are unable to reach an agreement within 3 months, a requesting party may refer the matter to arbitration pursuant to Article 8.13.4, any party which wishes to enforce a right that it may have to compensation must participate in arbitration.

Compliance Review

The RCEP dispute settlement mechanism is also more elaborative on the compliance review procedures. After the panel makes its decision in the final report, if the Parties disagree on the existence or consistency of any measures in the report, they can settle through recourse to a panel reconvened for this purpose (hereinafter referred to as “Compliance Review Panel”). Where a request is made, a Compliance Review Panel shall convene within 15 days of the date of the request. The Panel shall, where possible, issue its interim report to the Parties to the dispute within 90 days of the date of its reconvening, and its final report within 30 days after the interim report. The period of time from the date of the request made until the date of issuance of the final report of the Compliance Review Panel shall not exceed 150 days in RCEP Agreement.

The RCEP Agreement also stipulates clearly on the constitution of a Compliance Review Panel and that the panel shall set out in its report: (a) a descriptive section summarising the arguments of the Parties to the dispute and Third Parties; (b) its findings on the facts of the case arising under this Article and on the applicability of the provisions of this Agreement; (c) its determinations on the existence or consistency with this Agreement of any measure taken to comply with the obligation under paragraph 1 of Article 19.15 (Implementation of the Final Report);

and (d) its reasons for its findings and determinations referred to in subparagraphs (b) and (c).

Special and Differentiated Treatment (SDT) for Least Developed Country Parties

Another important provision in Chapter 19 is the Special and Differential Treatment involving the Least Developed Country Parties under Article 19.18 whereby the Complaining Party is obligated to exercise due restraint in raising matters under this Chapter where a Least Developed Country Party is involved.

4. Potential Challenges under Chapter 19 of RCEP[2]

After reviewing the dispute settlement chapter 19 of RCEP, there are a few potential challenges regarding the dispute settlement that could be identified:

1. Absence of Investor State dispute settlement mechanism

Unlike most bilateral investment treaties or free trade agreements, the RCEP Agreement does not have an investor-state dispute settlement mechanism. In such situation, investors may only rely on state-to-state dispute settlement mechanism under Chapter 19 of the RCEP Agreement by requesting their home state to espouse their claims, which is relatively difficult to implement.

However, it is stated in Article 10.18 that the RCEP will enter into discussions of the Investor-State dispute settlement mechanism within 2 years after the date of entry into force of RCEP. Hence, I believe this could be anticipated in the near future.

2. Limited scope of application of Chapter 19 of the RCEP Agreement

The RCEP Agreement excludes disputes arising from anti-dumping and countervailing measures from the scope of application of the dispute settlement mechanism, disputes arising from investment facilitation, and the application of the dispute settlement mechanism to decisions by the competent authority of a Party, including foreign investment authorities, on whether to approve or recognize a foreign investment proposal, and on the implementation of any conditions or requirements that must be met for the approval or Any dispute arising out of the implementation of any conditions or requirements that must be met for the approval or recognition of an investment.

In the area of trade in services, disputes arising from the relevant transparency lists and disputes arising from subsidies are also excluded from the scope of application of the RCEP dispute settlement mechanism. Disputes between parties in the areas of electronic commerce, competition, SMEs, economic and technical cooperation, and government procurement are all excluded from the scope of application of the RCEP dispute settlement mechanism.

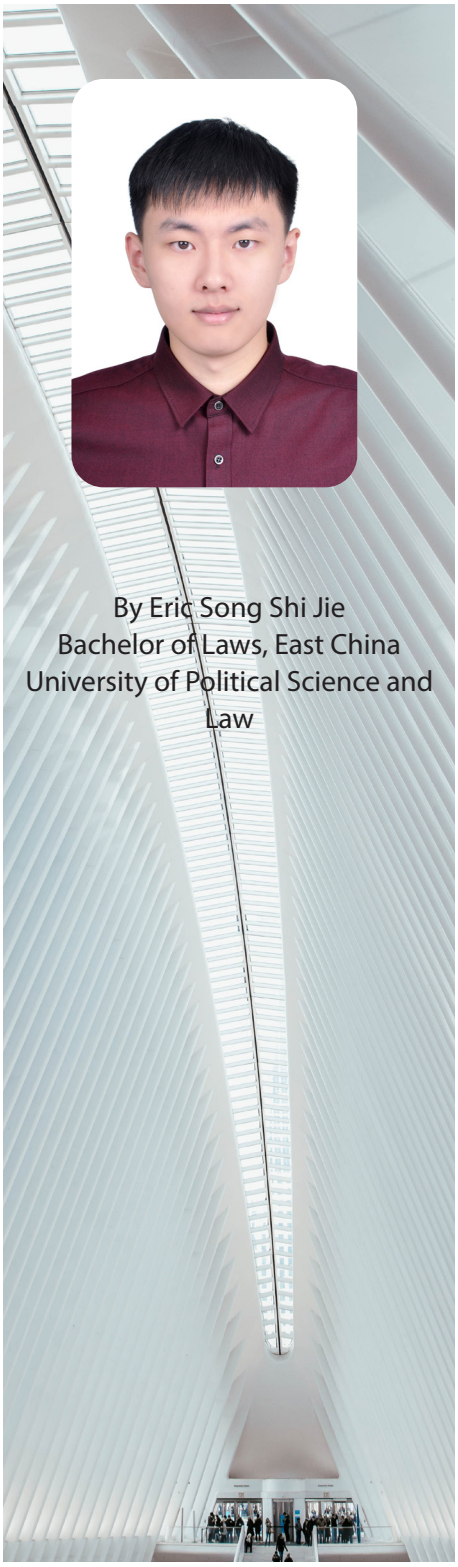
Therefore, the scope of application of RCEP's dispute settlement mechanism is actually very limited.

Conclusion

As a conclusion, in recognising the objective of launching the RCEP is to achieve a modern, comprehensive, high-quality and mutually beneficial economic partnership agreements among ASEAN member states and FTA partners. It is anticipated that the RCEP Agreement will have broader and deeper engagement with significant improvements over the existing arrangements amongst parties, while recognizing the individual and diverse circumstances of the participating countries.

[2] file:///C:/Users/these_cma65xg/Downloads/20210708_Mr.-Desmond-Ang_RCEP%20(1).pdf

Intern's View



By Eric Song Shi Jie
Bachelor of Laws, East China University of Political Science and Law

First of all, I would like to thank our President, Datuk Professor Sundra Rajoo, for giving me the opportunity to intern at Asian Institute of Alternative Dispute Resolution (AIADR). At AIADR, in addition to general secretarial duties, I served as an editor for the Editorial Sub-Committee (ESC), helping to publish the International ADR Forum - AIADR Journal (Volume 2, Issue 7) and the ADR Centurion - AIADR Newsletter (Volume 3, Issue 17), and as a liaison with authors and reviewers. At the same time, I helped to draft moot problem for the ALSA International Moot Court Competition (AIMCC) and worked as a teaching assistant for AIADR Introduction to Alternative Dispute Resolution (ADR) Course.

My sincere and hearty thanks and appreciations to Ms. Heather and Ms. Wan Yng for guiding and encouraging me during my internship. Although at the beginning I was not fully comfortable with the all-English working environment, it was your patience that allowed me to smoothly get into my work. The best moment with you was when we worked together and successfully held our ADR Intro Course last month, which demonstrated our good teamwork.

I am also extremely grateful to my other colleagues, Ms. Irin Tan and Mr. Chen Yu. I could really feel Ms. Irin's enthusiasm and kindness during the Coffee Session, and it was a pleasure to work with Chen Yu briefly at ESC. Mr. Lee Jie Kai, although I didn't work with you for a long time, every conversation with you was always a good one.

My acknowledgements also go to Ms. Joy Ji and Ms. Coco Xie, who started working at AIADR on the same day as me. Not only did we help each other in our work and exchange work experience, but we were also very happy to discuss our lives, ideals and hobbies, thus becoming good friends. I hope we can meet offline soon after the COVID pandemic.

I really hope our new babies, Mr. Tom Guo, Mr. Jimmy Zhou and Ms. Zoe Li, will learn something at AIADR, have an intimate relationship with our dear colleagues at AIADR and gain friendship with each other.

I don't think I will ever forget my short but colorful internship at AIADR. AIADR is definitely a highly professional and promising organization which provides a great environment and valuable chances for many young people like me to recognize and learn about alternative dispute resolution. I hope that AIADR will continue to grow and become a bigger platform to support more legal talents from Asia and even the world. Keep in touch, FAMILY!

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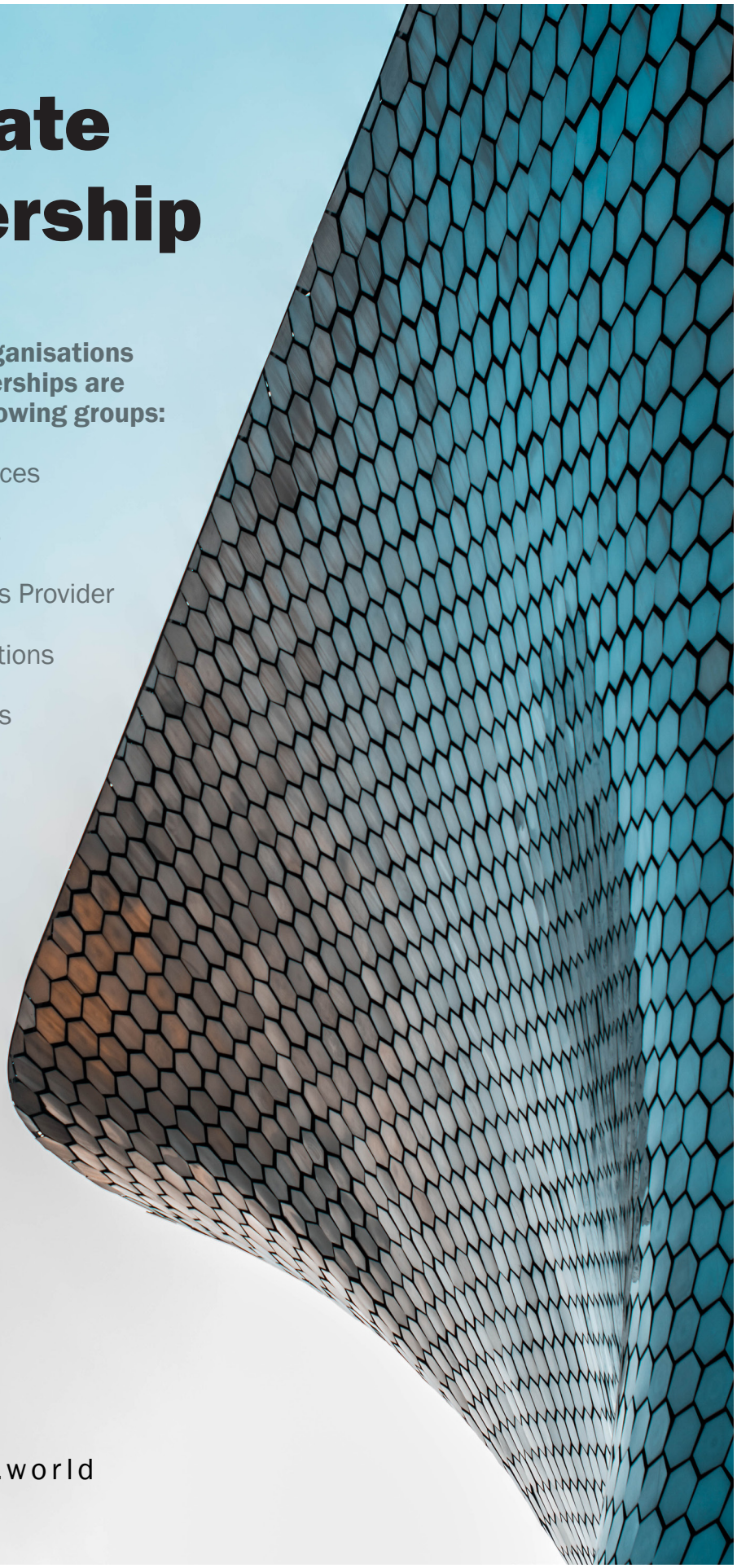

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Our Head of Secretariat Heather Yee Jing Wah, together with Fellows Dato' Ricky Tan and Ish Jain, judged the semi-final and final rounds of the I JECRC National Mediation and Negotiation Competition 2022.

23 - 25 July 2022, Jaipur, India

Datuk Professor Sundra Rajoo delivering an opening remark at the 2022 China High-Level Dialogue on Maritime and Commercial Arbitration.

ALSA International Mediation Competition (AIMC) 2022. Judged by Heather Yee and Cheng Wan Yng

Our esteemed members Dr Kabir Duggal, Randolph Khoo and Sagar Kulkarni, speaking on "The Impact of Cybersecurity Measures on International Arbitration" in our jointly organised session at the THAC International ADR Week 2022.

Webinar on "Adjudication as an Effective Tool for Construction Disputes" by The Institute of Construction Industry Arbitrators –ICIARB. Moderator: Emmanuel Dike. Speakers: Dr. Ing Maurice De Souzer, Engr. Basil Odigie, Julian Bailey and Heather Yee

Webinar on Development of Online Dispute Resolution under the Impact of Pandemic. Moderator: Jern-Fei Ng QC. Speakers: Adolf Peter, Carrie Shang and Sameer Shah

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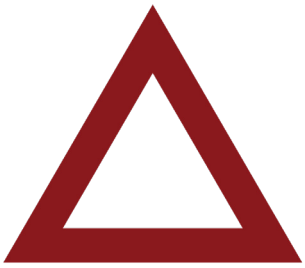
14 October 2022
India as the Next Hub of International Arbitration – Opportunities & Challenges

16 November 2022
Johor Bahru: Law Conference: Digital Economy in Legal Perspective & Medical Malpractice Development and Challenges



ADR Centurion is the bimonthly Newsletter of AIADR containing contributions from individual authors, for distribution to the members of AIADR, ADR practitioners, professionals from trade & industry and associated organizations. The constructive feedback and comments from the readers are most welcomed.

Next Cut-off Date for Submission of Contributions:
Newsletter: 15 September 2022
Journal : 15 August 2022

Direct your queries to aiadr.editor@aiadr.world.

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eISSN 2735-0800