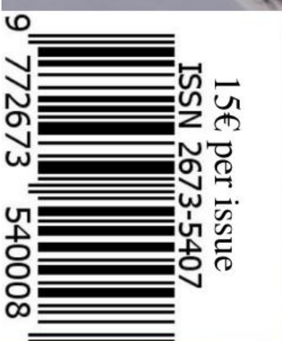
SCLA GLOBAL FORUM (ONLINE) OF INTERNATIONAL MEDIATION REPORT

9 TH SCLA GLOBAL FORUM REPORT

Additional Volume of Swiss Chinese Law Review Journal
ISSN 2673-5407



SCLA Swiss chinese Law Review Journal ANDERSEN

Report on the International Mediation Global Online Forum organized by the Swiss Chinese Law Association (SCLA) on 25th September 2020 13.00-15.45 CEST t

Prepared by Hermann Knott and Martin Winkler, Andersen, Cologne

Agenda

13.00-13.10 CET Time
Welcome Remarks: Communication and Connections Shapes a better Future (Tianze Zhang)
13.10-13.30 CET Time
Panel 1 Discussion: Mock Case Study in Online Mediation
Facilitated by Hermann Knott, Mauricio Gomm Santos, Pierrick Le Goff, Amadou Dieng
13.30-13.40 CET Time
Online Dispute Resolution: Mediation – Some Practical Thoughts (Robert Rhodes QC)
13.40-13.55 CET Time
Challenges towards the Online mediation (Godson Ugochukwu)
13.55-14.10 CET Time
Panel 2 Discussion: Cultures in Mediation
Facilitated by Mauricio Gomm Santos, Amadou Dieng, Hui Jia
14.10-14.15 CET Time
Break
14.15-14.30 CET Time
Med-Arb – an Alternative Dispute Resolution practice? (Amelie Huber-Starlinger)
14.30-14.45 CET Time
Singapore Convention and the International Investment Mediation (Frauke Nitschke)
14.45-15.00 CET Time
An overview of WTO dispute settlement system (Xiaobing Tang)
15.00-15.25 CET Time
Panel 3 discussion: Impact of the Singapore Convention
Facilitated by Peter Ruggle, Hui Jia, Godson Ugochukwu, Pierrick Le Goff
15.25-15.45 CET Time
Q&A

Speakers

Hermann Knott, Partner at Andersen (Germany)

Mauricio Gomm Santos, Foreign Legal Consultant at GST LLP (United States)

Pierrick Le Goff, Partner at De Gaulle Fleurance & Associés (France)

Amadou Dieng, Independent Mediator (Senegal)

Robert Rhodes QC, Barrister at Outertemple (United Kingdom)

Godson Ugochukwu, Partner at Fortress Solicitors (Nigeria)

Hui Jia, Partner at DeHeng Law Offices (China)

Copyright @2020 Swiss Chinese Law Association

SCLA Swiss chinese Law Review Journal ANDERSEN

Amelie Huber-Starlinger, Attorney at Northcote.Recht (Austria)

Frauke Nitschke, Senior Counsel at ICSID (Germany)

Xiaobing Tang, Senoir Counselor at WTO (China)

Peter Ruggle, Partner at Ruggle Partners (Switzerland)

Welcome Remarks: Communication and Connections Shapes a better Future

At the start of this Global Online Forum Mr. Tianze Zhang welcomed the speakers and participants and gave a presentation of the Swiss Chinese Law Association (SCLA).
Its vision is to be a forum and supporter of furthering the understanding and exchange between European and Asian countries. The two countries referred to in its name are a reference to the respective regions, thus not excluding, but inviting for lawyers, law firms, business enterprises and other organizations to join as members. In line with its vision the SCLA promotes exchange between its members and with International organizations. SCLA is applying for an observer status with UNCTAD. It is organizing online fora and – when possible again – in-person conferences to allow the direct exchange of views, estab-lishing personal contacts and share knowledge.
The SCLA also promotes the legal collaboration between China, Switzerland and European Coun-tries. It is the editor of the Swiss Chinese Law Review which publishes articles reflecting the up-to-date legal aspects e.g. covers brand-new topics such as the legal impact of the COVID 19-pandemic. To sum up: SCLA membership provides excellent networking and business opportunities plus the chance to widen substantive knowledge and conceive new legal products.

Panel 1 Discussion: Mock Case Study in Online Mediation

Context of the case study

Then, Mr. Hermann Knott presented the context of a case study on International Mediation with three panelists representing the different positions (Mr. Mauricio Gomm Santos the mediator's perspective, Mr. Amadou Dieng the plaintiff's position and Mr. Pierrick Le Goff the defendant's position). The case study relates to claims for damages under a Distribution Agreement between a manufacturer of 3D-Printers from China and the distributor in the US. These claims are also based on fraudulent inducement to enter into contract and breach of warranties – total amount of US-$ 1 million. The Manufacturer is accused of secretly reintroducing a clause of jurisdiction in favor of courts in China. The Distributor sued Manufacturer in the Western District Court of Wisconsin. This Court granted the Manufacturer's motion to dismiss because of the clause of jurisdiction. On appeal the Appellate Court issued an order to mediate.

Comments from the Mediator's perspective

Mr. Knott asked Mr. Gomm to comment from the Mediator's perspective. Mr. Gomm first pointed out that confidentiality means that everything that is put before the mediator cannot be used in subsequent litigation. However, the legal arguments may be used in later proceedings, but the Mediator cannot be called as witness. Since the Parties did not agree on mediation the mediator has to build up trust by addressing cultural issues such as different expectations by the Parties. To do so the Mediator should have separate calls with each side's attorney before the opening session.

Copyright @2020 Swiss Chinese Law Association

Comments from the Claimant's perspective (US distributor)

Mr. Dieng first highlighted that the Claimant no longer has any confidence in the Defendant because of the allegedly fraudulent acts. The Claimant does not want to discuss or to mediate in this case. He is upset and angry. However, the Claimant takes very seriously the request from the Court and is willing to engage in good faith in the mediation process. The Claimant has shown trust in mediation, it is an important issue for the Claimant.

Comments from the Defendant's perspective (Chinese manufacturer)

Mr. Le Goff first pointed out that (international) mediation offers the advantage of exploring solutions that are not strictly speaking monetary solutions. For instance, the Defendant may offer technical assistance to assess the defects and commercial assistance to extend the commercial network. In relation to the substantive issues the Defendant took the view that it was not part of Defendant's plan to resolve the dispute by mediation because the Distribution Agreement does not provide for a mediation phase. However, the Defendant takes very seriously the request from the Court and is willing to engage in good faith in the mediation process. Regarding confidentiality the Defendant asked the Mediator to clarify whether the Defendants understanding was correct that any offer made, or concession granted in a commercial effort to resolve the dispute is on a "without prejudice basis" and shall not be used subsequently in litigation. However, to the extent the Parties develop certain arguments, including legal ones, to justify their position and explain, for example, why they are reaching the limit of certain concessions, the Defendant assumes it shall not be prevented from using these arguments in litigation.

Online Dispute Resolution: Mediation – Some Practical Thoughts

Then, Mr. Rhodes gave his presentation on some practical aspects of Mediation. He first pointed out that the Covid-19 pandemic has led to an increase of online dispute resolution.

Getting the right platform

He stressed the importance of getting the right platform. He recommended Zoom. Security is the most important feature: Encryption is important i.e. making sure that data cannot be intercepted. Furthermore, one needs to hinder unauthorized persons to move in the meeting room.

The terms and conditions of the platform

It is also worth considering the terms and conditions of use of the platform especially whether data will be kept confidential.

Preparatory steps

Then, one should send the parties an invitation to the online mediation, specifying the date and time. It is important to set up breakout rooms in advance, where separate parties can be put when appropriate during the mediation.

Online meetings before the day might be helpful

Copyright @2020 Swiss Chinese Law Association

SCLA Swiss chinese Law Review Journal
ANDERSEN

It might be helpful to have separate online meetings with the legal representatives of the parties before the full mediation and to suggest to the lawyers that they have an online meeting with the client before the mediation to make them familiar with the online process.

Whether or not the lawyers have online meetings with their client in advance of the mediation, it can also be helpful for the mediator to have a preliminary online meeting with each client. This is not to discuss any of the issues in dispute, but just to take them through the technology so that the clients become comfortable both with the process and the mediator.

The Mediation Agreement

It is important to ensure that the mediation agreement covers confidentiality as well as the usual matters and that it is signed.

Settlement Template

It is also important to arrange for the claimant's solicitor to have a prepared template for settlement: people should be able to sign on the day.

Backup plan

It is also important to have a backup plan in case the technology fails somewhere: So mobile phone numbers and email addresses should be available in advance.

On the day

When the parties arrive, they go into the online waiting room. Different parties can see each other but can't speak to each other. If the mere fact of their seeing each other could cause problems, then one should ask them to come at different times. When the mediator is ready, he admits them all to the meeting. It is important to ensure that everyone apart from the mediator is muted on admission. The mediator clicks on the different people to admit them to their particular breakout room. Each breakout room has a private chat function, so all the representatives of one side (client, solicitor, barrister, expert) can communicate with each other. They can of course use WhatsApp or their mobiles, or email if necessary.

The meeting

The mediator will either need a second screen on which he can see the relevant documents, or a stand on which to put the hard copies of the documents. It is sensible to have fewer rather than more documents sent to you in advance. The mediator will be screen-sharing documents during the mediation, so he should close irrelevant documents on his screen. When everyone is in, it is important to lock the meeting so unauthorised people can't attend. The first thing to do is to ask people to be patient, and at the plenary agree that people won't overtalk or interrupt: they can raise a hand online if they want to say something. The mediator should ask everybody to be muted when not speaking. When discussing confidentiality, the mediator should tell the parties that the meeting is not being recorded and ask them not to take screenshots of people. It is also important to have breaks. A key practical distinction between online mediation and online arbitration or litigation, is that with mediation you do not have to worry about witnesses being coached by somebody out of sight or by being sent texts.

Advantages of Online-Mediation

Copyright @2020 Swiss Chinese Law Association

The key advantage of course is cost:

i. You don’t have travelling expenses for anyone.
ii. You don’t have the expense of office space.
iii. The lawyers don’t necessarily have to attend the mediation throughout: if the mediator is having a long private session with one side, the other side’s lawyers can be working on other matters.
iv. Parties can bring in experts or counsel for only part of the day if they wish.

Further advantages are speed and convenience.
It is less invasive for the parties: they are usually participating from their own homes, which will be more comfortable for them.

Disadvantages of Online-Mediation

Zoom fatigue: people do get tired at online meetings. The parties’ advisers are not physically together. It is difficult to read body language when you are online. It is simply not the same as physically being in the same room as someone else. Online mediation does not always bring the same level of engagement and commitment as a live meeting.

Challenges towards the Online mediation

Then, Mr. Godson Ugochukwu gave his presentation on the challenges towards the online mediation.

Copyright @2020 Swiss Chinese Law Association

SCLA Swiss chinese Law Review Journal ANDERSEN

Introduction

Mr. Ugochukwu first highlighted that Mediation is a method of dispute resolution whereby disputing parties engage a neutral third-party (the Mediator) to facilitate the possible resolution of the dispute by the disputants themselves through effective communication, negotiation and compromise. Therefore, Mediation is not an adjudicatory process involving the trial or determination of the merits of a dispute. The duty of the Mediator is to facilitate communication, negotiation and compromise between the disputing parties. A settlement agreement reached via mediation is a mere contractual document. Where a settlement agreement is violated by a party, the agreement could only be enforced by institution of a court action or arbitral proceedings. Advancements in information and communication technology (ICT), the rapid increase and sophistication of global trade and international commerce and the explosive growth in e-commerce, plus the current COVID-19 pandemic have made online mediation an interesting alternative to in-person mediation. Online mediation evolved from the concept of Online Dispute Resolution (ODR) which emerged in the early 1990s in the Western world (most notably, the United States) as the internet became more widely available to users.

ODR in Africa

The practice of online dispute resolution, including online mediation is a relatively evolving development in Africa, its use is gaining speed because of the Covid-19 pandemic.

Factors responsible for the late the development of ODR in Africa are:

- Lack of access to computers; high level of computer illiteracy;
- Poor broadband infrastructure;
- Late reception of formal ADR practices.

In Nigeria, the Courts and Alternative Dispute Resolution institutions were forced to conduct some of their proceedings remotely through videoconferencing apps like Zoom and Skype by the Covid-19 pandemic. South Africa is the only country in Africa with some form of ODR practice before the coronavirus pandemic: The Onlineombud – an online mediation and dispute resolution mechanism for consumer disputes involving less than one Million South African Rand.

The advantages of Online Mediation

The advantages of Online Mediation are:

- Cost efficiency & Speed
- Convenience & Choice of Personal Venue
- Improved Justice Delivery
- Ease of Access to Needed Expertise
- Conducive Atmosphere for Dispute Resolution

The Challenges of Online Mediation

The challenges of Online Mediation are:

- Susceptible to disruption as a result of bandwidth disruptions, power outages and other technological glitches
- Lack of human contact leads to loss of non-verbal communication

Copyright @2020 Swiss Chinese Law Association

- Increased risk of breach of confidentiality
- Higher potential for distractions whilst mediation is ongoing
- Dearth of Expertise: Mediator not = Online Mediator
- Settlements reached via mediation are not automatically enforceable. There must be recourse to the public courts for enforcement action if a Party fails to execute as agreed.

Coping mechanisms

The question of bandwidth can be helped only to the extent of the infrastructure available in the place to support internet access. This may be the least manageable challenge. This also extends to the challenge of the loss of non-verbal communications. In the latter situation, parties should be encouraged to put their thoughts in clear words. The confidentiality challenge can be managed by getting parties to empower the mediator to ask party at any time during proceedings to turn their camera to scan their surroundings, or share their screen, if there is reasonable suspicion that confidentiality is being actively compromised by a party. Mediator may also, with the consent of the parties, arrange access to the mediation to be via a “waiting room”. This controls and restricts access to only those let in by the Mediator, thus limiting the chances of invasions like zoombombing. The enforceability challenge has been greatly helped by the coming into effect of the Singapore Convention. Some countries have enacted legislations that provide for an expedited process whereby settlement agreements are converted into enforceable judgments or arbitral awards. See, for example, the Swiss Civil Procedure Code (Article 217) and the Italian Decree on Mediation in Civil and Commercial Disputes (28/2010).

Panel 2 Discussion: Cultures in Mediation

Mr. Tianze Zhang then moderated the Panel 2 Discussion on Cultures in Mediation. As Mr. Gomm Santos had to leave the Online Forum, Mr. Hermann Knott represented the perspective of the Western world. Mr. Amadou Dieng represented the African perspective and Mr. Jia Hui the Asian perspective.

First question

The first question related to what are the cultures on the mediation? What are the factors affecting individualist and collectivist behavior?

Mr. Knott answered that the previous relationship between the Parties as well as the person of the mediator are important factors. Also, the context of the Mediation needs to be considered i.e. whether it is court-ordered or not.

Mr. Jia explained that China has a long tradition of Mediation. Commercial mediation is growing in China nowadays. As the *Law of the People's Republic of China on People’s Mediation* does not apply to commercial mediation, it needs more attention. Confidentiality and the interest in maintaining a friendly relationship are main factors affecting individualist and collectivist behavior.

Mr. Dieng referred to a long African tradition of trying to maintain peace and a good relationship. However, mediation does not work in a formal court-ordered framework. There must rather be a link between the individual and the community to make the settlement work well.

Second question

Copyright @2020 Swiss Chinese Law Association

SCLA
Swiss chinese Law Review Journal
ANDERSEN

The second question relates to what does the mediator have to be mindful of during the mediation?

Mr. Knott explained that the mediator needs to understand the background of the Parties i.e. what behavioral rules exist to resolve disputes.

Third question

Then Mr. Zhang asked the third question regarding the expectations of Parties to mediators.

Mr. Jia explained that these expectations include the impartiality of the mediator, sufficient know-how and the ability to come up with a reasonable solution.

Med-Arb – an Alternative Dispute Resolution practice?

Then, Ms. Huber-Starlinger gave her presentation on Med-Arb and raised the question whether insofar an Alternative Dispute Resolution Practice existed already?

She mainly concentrated on the enforceability of the outcome of Med-Arb on an international level and in particular on the Singapore Convention on Mediation (SC) and the New York Convention (NYC). As regards the Singapore Convention it was signed by 53 States such as China, India and the USA but not signed by e.g. Switzerland, Russia and the EU and its Member States. On 12 September 2020, the Singapore Convention entered into force for Singapore, Fiji and Qatar. The New York Convention was ratified by 165 States including China, India, USA, EU and its Member States, Switzerland, Russia, Singapore, Saudi-Arabia etc.

To answer the question, whether Med-Arb can be established as Alternative Dispute Resolution Practice on an international level one needs to distinguish between different scenarios: The first scenario being that NYC and SC are both applicable e.g. where enforcement is sought in Singapore or Qatar. In this scenario, the outcome of a settlement reached in mediation will be enforceable due to the SC and a subsequent arbitral award dealing with those issues that could not be settled in mediation are enforceable under the NYC. What if the NYC, but not the SC is applicable (second scenario)? The problem then is that Article 1(1) of the NYC literally requires that a dispute exists at the time of establishing the arbitral tribunal. In case of a "normal" arbitral award by consent, this condition is not problematic as a settlement is reached within the already initiated arbitration. However, in case of Med-Arb this condition might cause troubles as the dispute has already been (partially) settled by mediation prior to initiating the arbitration. With regard to the partially settled issues no more differences between the Parties exists. It is argued that recourse to the NYC in that scenario only to make the outcome of the mediation enforceable is not in line with the wording and the underlying rationale of the NYC. In this case it might be advisable to initiate the arbitration first, then to have a so-called mediation window and then to go back to the already initiated arbitration and to get an award by consent (Arb-Med-Arb).

Singapore Convention and the International Investment Mediation

Then, Ms. Nitschke gave her presentation on the Singapore Convention and the International Investment Mediation i.e. Mediation involving a State-Party in the investment context.

What is ICSID?

Copyright @2020 Swiss Chinese Law Association

SCLA Swiss chinese Law Review Journal ANDERSEN

She first explained what is ICSID (International Centre for Settlement of Investment Disputes). ICSID was created as one of the five World Bank Organizations in the 1960s by the ICSID-Convention that allows Arbitration and Conciliation proceedings where both disputing Parties have a link to an ICSID-Member State to resolve investment disputes.

In 1978, the Administrative Council of ICSID adopted the so-called Additional Facility. Under the Additional Facility expands ICSID's service offerings to include *inter alia* arbitration and conciliation proceedings when only one disputing Party has a link to an ICSID-Member State and it also extends to fact-finding proceedings.

Other functions of ICSID are case & hearing administration under other Rules or Treaties e.g. UNCITRAL, with consent of the Parties ICSID serves as Appointing Authority or administers Mediation involving a State-Party or acts as Secretariat for Regional Trade Agreements.

ICSID & Mediation

In 2016 the Guide on Investment Mediation was adopted by the Energy Charter Conference. Recently, the Singapore Convention for enforcement of mediated settlements is intended to apply to settlements in investment disputes. Under ICSID Arbitration statistics since 1970s 35 % of the disputes are settled and 65 % decided by an Arbitral Tribunal. In 2018, ICSID proposed to its Member States a set of investment mediation rules.

Purpose of ICSID Mediation Rules

The ICSID Mediation are intended to:

- Provide States and investors with a neutral, trusted forum to engage in facilitated negotiations;
- Provide a party-driven, flexible process with tailor-made solutions;
- Offer a time and cost-effective dispute resolution process;
- Reflect formal requirements for settlement agreements in the Singapore Convention.

Nature of ICSID Mediation

As opposed to ICSID Arbitration, ICSID Mediation is entirely voluntary i.e. it requires party consent at the outset & throughout the process and either party may unilaterally withdraw at any time ("ongoing consent").

Differences to Conciliation

ICSID mediation is more widely available than ICSID Convention or Additional Facility conciliation. ICSID mediation begins immediately i.e. there are no "preliminary objections". In ICSID Mediation there is no Three Member Commission and No Report.

Scope of ICSID Mediation

The scope of ICSID Mediation is very broad in so far as the Secretariat is authorized to administer any mediation that relates to an investment, involves a State or an REIO, and which the parties consent in writing to submit to ICSID. There is no requirement of ICSID-Membership or nationality.

Copyright @2020 Swiss Chinese Law Association

Overview of the process of ICSID Mediation

ICSID Mediation starts with a Request which is then screened by the Secretariat which may register or refuse the Request. Then, there is the appointment of 1-2 Mediators. The Parties then file written initial statements which are not pleadings but describe the issues in dispute and the Parties view on these issues. During the First Session the Mediation Protocol is determined which is more formal than in commercial Mediation. Then, the Mediation is conducted with the Parties determining how to structure the process. In relation to the termination of the Mediation there are several options: Notice from the Parties that they have signed a settlement agreement; Notice of Parties' Agreement to terminate the Mediation, Termination prior to appointment of Mediator for failure of Parties to act etc.

ICSID Mediation: Costs

Unless the Parties agree otherwise, the costs of mediation are borne equally.

ICSID Mediation: Confidentiality and without prejudice

All information relating to the mediation, and all documents generated in or obtained during the mediation, shall be kept confidential, unless:

- the parties agree otherwise
- the information or document is independently available
- disclosure is required by law

And according to the without prejudice provision, any position taken, admissions or offers of settlement made, or views expressed by a party during the mediation is without prejudice to the legal positions it may take in any other proceeding.

ICSID Mediation: stand-alone or combinations

ICSID Mediation may be used as a stand-alone process or in combination with other processes which may take the form of "med-arb", "arb-med" or "arb-med-arb". ICSID Mediation may also be used prior or in parallel to an ICSID-Arbitration. Then the Parties would suspend the Arbitration during the Mediation. In relation to the enforcement options insofar, the Parties that reach full settlement in the Mediation may agree to discontinue Arbitration and enforce under the Singapore Convention or resume Arbitration and request the Arbitral Tribunal to embody the settlement in an award. Under the ICSID-Convention you have a simplified enforcement mechanism i.e. there is no recognition requirement. If a partial settlement reached, the parties may continue to arbitrate only in relation to the remaining issues in dispute. Ms. Nitschke explained that from the arbitration perspective there should be a clear separation of mediation and arbitration in the investment dispute settlement context.

ICSID Mediation and the Singapore Convention

The Singapore Convention has the idea of a broad scope of application. Art. 1 Singapore Convention sets out that this Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a <u>commercial dispute</u>. This raises the question whether the term "commercial dispute" also covers investment disputes. There seems to be a consensus that the answer is affirmative.

Copyright @2020 Swiss Chinese Law Association

An overview of WTO dispute settlement system

Then, Mr. Tang gave an overview of the WTO dispute settlement system.

The WTO Dispute Settlement Body mainly consists of the Panel and the Appellate Body. The Panel issues a report which may be appealed to the Appellate Body. Currently, the Appellate Body is paralyzed.

From 1 January 1995 to 30 June 2020 about 600 disputes have been brought to the WTO. Most of the disputes relate to the GATT. The Appellate Body upheld only 13 % of the appeals with 86 % being modified and 1 % reversed.

The WTO also has alternative means of dispute settlement like the Good offices, conciliation, mediation as well as Arbitration. These are voluntary processes as an alternative to compulsory adjudication. Arbitration often comes in at a later stage of the dispute settlement process i.e. when the amount of compensation is determined. Other alternative means of dispute settlement are the Textiles Surveillance Body (TSB) under the GATT Multi-fibre Agreement and the Textiles Monitoring Body (TMB) under the WTO Agreement on Textiles and Clothing. Most recently, a multi-party interim appeal arbitration arrangement has been put in place by a group of WTO-Members because the Appellate Body had become inoperational. There is also the Proposal on Procedures for the Facilitation of Solutions to Non-Tariff Barriers which seeks to resolve disputes in relation to Non-Tariff Barriers by mutually agreed solutions.

Panel 3 discussion: Impact of the Singapore Mediation Convention

Mr. Tianze Zhang moderated the Panel 3 discussion and started by asking Mr. Peter Ruggle for the Switzerland perspective. Mr. Ruggle explained that Switzerland is not part of the Singapore Mediation Convention. However, he took the view that for international as well as domestic disputes the Singapore Convention can help Parties to choose Mediation as a form of dispute settlement.

Then Mr. Wang explained the Chinese perspective: The Singapore Convention will have a great impact on Mediation in China. He reported from a case where the Parties to a dispute all wanted to use Mediation. They reached a settlement agreement which would not be enforceable as such. For purposes of international enforceability under the New York Convention, they needed to ask an Arbitrator to issue an award. This will not be necessary anymore once the Singapore Convention comes into effect. Furthermore, he considers online-Mediation more convenient than Online-Arbitration. He asked how promoting online-Mediation?

Then, Mr. Zhang asked Mr. Harrison Jia about the challenges from the Chinese perspective. Under the Belt and Road Initiative, China's outbound investment is growing rapidly. For many Chinese investors, International Arbitration might not be the best choice because in nine out of ten cases Chinese investors will lose. That is why International Mediation will be more and more important, it is not only because of the long tradition of Mediation in China. However, there is no Commercial Mediation Law in China. In the future, it is essential to promulgate a special law to regulate matters related to commercial mediation, especially in relation to details on training of mediators and the enforcement of mediated settlement agreements etc. Insofar there are currently three ways to recognize the settlement agreement: it may be recognized (1) in Court by judgement; (2) by an Arbitration Institution; or (3) by a notary office.

Then, Mr. Zhang asked Mr. Le Goff about the practical concerns in applying the Singapore Convention from a European perspective. Mr. Le Goff explained that there will be a need of clarification in relation to the code of conduct of mediators since Art. 5 Nr. 1 Singapore Convention refers to a serious breach of standards

Copyright @2020 Swiss Chinese Law Association

SCLA
Swiss chinese Law Review Journal
ANDERSEN

applicable to the mediator as a ground for refusal of enforcement. These standards are not defined in the Singapore Convention.

Then, Mr. Zhang asked Mr. Godson Ugochuku whether the coming into effect of the Singapore Convention would result in greater preference for Mediation over the regular courts and other Alternative Dispute Resolution Methods in relation to international commercial disputes. Mr. Ugochuku answered in the affirmative because of the lock-down of court systems everywhere. Mr. Ugochuku invited Mr. Idigbe to give his remarks. Mr. Idigbe first explained that in Nigeria it is required that the Singapore Convention becomes a domestic Law to come into effect. He then reported from a case where the Parties suspended Arbitration because they wanted to settle. The Arbitrators could not act as Mediators. For two years there is deadlock. This case illustrates the need to ensure that there is a proper administration of mediation.

Mr. Zhang went on asking Mr. KC Hue, a participant from Malaysia, about his perspective. Mr. Hue explained that court proceedings are more important than Mediation in Malaysia. Against this background he hopes that the Malaysian Bar Council will promote Mediation.

The next question by Mr. Zhang was whether the Singapore Convention can help alleviate the concerns regarding the cost in the determinative process? Mr. Zhang addressed this question to Mr. Robert Rhodes. Mr. Rhodes explained that the Singapore Convention will help saving cost by making it much easier to enforce a mediated settlement in jurisdictions (that have signed the Singapore Convention) and where the other Party has assets even though it does not reside there. Mr. Ruggle confirmed this analysis from the Swiss perspective.

Mr. Zhang then raised the question what industries will benefit from the entry into force of the Singapore Convention. He addressed this question to Mr. Le Goff. Mr. Le Goff explained that there is no specific industry that would particularly benefit from the Singapore Convention. Beyond, it will be interesting to see its impact on potentially new areas of Mediation such as Corporate Social Responsibility and disputes between NGOs and multinational corporations regarding Business Human Rights. Mr. Amadou Dieng added that the Parties to a settlement agreement now have two instruments for enforcement: The Singapore Convention and the New York Convention.

Closing remarks

Finally, Mr. Zhang invited Mr. Knott to give his closing remarks. Mr. Knott summarized that this Forum covered a variety of aspects of Mediation. He announced that the next Forum will deal with law firm management issues. He also highlighted that the organization of an institution for arbitration and mediation is being prepared by the SCLA. For mediation, such institution may provide training and be a platform for exchanging concepts. It may also facilitate the conduct of

Mr. Zhang invited the participants to join this institution and thanked everybody for participating in the Online Mediation Forum.

Cologne, October 23, 2020 sgd. Hermann Knott
sgd. Martin Winkler

Copyright @2020 Swiss Chinese Law Association