

IPBA MANILA 2009 – The Better Way of Resolving Disputes: Modern Settlement Processes and Recent Trends.

Rapporteur: Campbell Bridge

Session Moderator: Bernhard Meyer

Many excellent speakers from the United States, Japan, Hong Kong, Australia, Germany, Switzerland and the United Kingdom spoke about the rise of mediation as a separate stage or within arbitration and how it is becoming the dispute resolution mechanism of choice.

The stage was set by Katherine Gurun of JAMS. Her strong message was that mediation can only be a positive experience and that, if necessary, mediate early and mediate often. In her experience multi-million dollar litigation is now almost universally not tolerated because of its financial cost and the damage to relationships which ensues.

The issue of effecting an enforceable settlement and the problem in some jurisdictions as to how one can effect a final and binding settlement without a court order was addressed by Kaori Miyake. The views of Ms. Miyake highlighted the necessity of courts in diverse jurisdictions implementing and enforcing binding agreements between parties to a dispute however those disputes are resolved.

Mr Garry Soo explained the role of the Hong Kong International Arbitration Centre in the context of a special mediation/arbitration proceeding for “Lehman Brothers” claims. He dealt with the provision of efficient procedures and time limits including the concept of a paper only mediation/arbitration.

The change of culture in Australia from that country being almost totally litigation focussed 20 years ago to now having as strong a culture of mediation was explained by John West QC. Mr. West explained how commercial clients, including insurers, in

Australia, simply won't accept lengthy litigation in commercial matters. They are not prepared to pay the fees associated with lengthy litigation or commercial arbitration. The support of the Courts is critical to the change in culture. Parties are frequently directed to mediation even if all the parties oppose that course.

There is absolutely no reason why mediation could not and should not be successful in Asia as it has been in Australia and other common law countries. It is a procedure which makes economic sense and ought be more culturally acceptable than arbitration or litigation. Even if the entire dispute cannot be resolved, it is probable that a mediation will eliminate false issues and dramatically shorten any contested proceedings which subsequently occur. Mediations provide more flexible settlements because parties may arrive at solutions which cannot necessarily be reached within normal legal procedures.

The experience in relation to mediation in civil law jurisdictions was dealt with by 3 speakers from Germany and Switzerland. Dr. Peter Heckel addressed the German experience of why there is still little mediation in Germany. Many Germans seem to prefer the settlement process within the framework of a litigation or arbitration which has a long tradition. While few matters are mediated, of the matters which undergo mediation, between 70-90% resolve. Mediation is advantageous for 2 main reasons – the sustainability of the result and resolution of disputes enables the continuation of the business relationship.

The remaining panellists, Axel Reeg, Michelle Sindler and Urs Lustenberger furthered the discussion with a number of interesting analyses. Dr. Reeg spoke of how the civil law procedure in Germany involves constant case and defence evaluation by the judge. Judicial involvement in the proceedings amounts to institutional encouragement of settlement. The procedures involve a strong push towards settlement but are somewhat more driven by the role of the judge rather than by the litigant or by an independent mediator. When called upon to defend the good natured Teutonic assault upon the common law system upon the basis that it was "archaic", Michelle Sindler pointed out civil law in fact took its origins back to the Romans.

Finally, Urs Lustenberger addressed in the most enlightening way the shortcomings of the current arbitration process and examined in detail numerous hybrid forms such as Med/Arb functions in practice.

There was plenty of interesting and vigorous audience participation. Much debate focussed on the way in which mediation has overwhelmed all other forms of dispute resolution in many jurisdictions, particularly common law ones and the nature and perceived difficulties of mixed proceedings and problems which may arise in respect of issues of jurisdiction and enforceability.