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Cultural issues in litigation in the Asia Pacific Region: myth or reality?*

IBA Annual Conference 2010: Report on the Joint Session of the IBA Litigation Committee and the Asia Pacific Forum

The morning session held jointly by the IBA Litigation Committee and the Asia Pacific Regional Forum on 6 October 2010 during the IBA Annual Conference in Vancouver provided an excellent discussion on cultural issues in litigation in the Asia Pacific region.

Skilfully co-chaired by Ilona Aro (Castrén & Snellman, Finland) and Lawrence Teh (Rodyk & Davidson, Singapore), the discussion was organised into two panels with representatives from across the world: Peter Bartlett (Minter Ellison, Australia), Ning Fei (Jun He Law Offices, China), Yoshimasa Furuta (Anderson Mori & Tomotsune, Japan), Ashok K Gupta (Aditya Birla Group, India), Hang Phung (Tam & Associates, Vietnam) and Jongkwan Peck (Lee & Ko, Korea) formed the Asia Pacific panel, while the rest of the world was represented by Jacques Bouyssou (Alérion, France), Bruno Oliveira Maggi (Xavier Bernardes Bragança Sociedade de Advogados, Brazil) and Christopher Richter (Woods, Canada).

It is often said that for cultural reasons the Asian approach to dispute resolution differs significantly from that in Australasia, Europe, and North and South America. The panellists examined this proposition in light of the culture of their respective jurisdictions and focused more particularly on the general questions of:

- the reluctance or predisposition to sue;
- the importance of 'saving face' and the use of apologies in resolving disputes;
- whether particular forms of dispute resolution work better in different parts of the region for cultural or procedural reasons; and
- the extent to which the approach of Western countries to dispute resolution influences that of Asia and South America as their legal systems and markets develop.

The following are some of the highlights of the two panels' findings.

Is there a cultural reluctance or predisposition to sue?

It has been suggested that the Western world is more litigious, while Asian countries are more reluctant to resort to adversarial proceedings. However, as globalisation has diversified communities, communication techniques have advanced and foreign jurisdictions have become more open; the two panels proved this assumption to be more myth than reality.

Although many Asia Pacific countries honour philosophical traditions that view legal disputes as greatly undesirable (China, Vietnam and India), these non-litigious traditions are more common in rural areas while urban areas are evolving rapidly towards a more litigation-orientated settlements of disputes.

Overall, the factors holding back recourse to judicial proceedings seem to be mostly institutional rather than cultural. While the fundamental faith that, notably French, Canadian and Australian people have, in the institution of justice strengthens their predisposition to sue, in countries such as India, costs related to protracted court procedures may often discourage parties from filing court claims.

The importance of saving face and the use of apologies in resolving disputes

Another common belief related to dispute resolution within the Asia Pacific region is the importance of saving face and public apologies. Where the Western legal culture typically emphasises confrontation and finding the 'winner' and 'loser' in a dispute, the Asia Pacific region has traditionally stressed virtues of compromise, yielding and harmony.

Based on the dialogue of the panellists from this area, it seems that the common belief does hold true to a certain extent. Due to underlying philosophical beliefs, saving face

is an important issue to consider, especially in China and Vietnam and to a slightly lesser degree in India, South Korea and Japan. Chinese judges, for example, seem to be rather reluctant to render judgments that clearly determine the liability of each party and prefer settling a dispute by way of mediation to avoid the confrontation between the parties.

Although important, the role of saving face in the Asia Pacific region should not be over-emphasised. As commercial relations become more international and as the ownership of Asian corporations becomes global, there is less social stigma and saving face understandably loses significance.

Moreover, the importance of saving face and apologies is in no way an exclusive feature of Asian or Pacific countries. In Western jurisdictions, enterprises often view preserving their reputation as more important in terms of finance than insisting upon legal rights. Allowing the opponent to keep public face and apologising for any disruption may renew positive business relations between the parties and enable them to continue valuable, long-term commercial relationships.

Do particular forms of dispute resolution work better in different regions for cultural or procedural reasons?

In jurisdictions of the Asia Pacific region, such as China and Vietnam, philosophical traditions render mediation a very popular form of dispute resolution. Networking also plays an important role in finding an amicable solution. Furthermore, certain countries, such as Australia with its *Koori Courts* for Indigenous peoples and India with its *Panchayats* of respected elders chosen by the village community, have taken into consideration the needs and issues of specific communities by establishing these special dispute resolution mechanisms.

In addition to cultural reasons, the efficiency of the different mechanisms considered has had a substantial impact on the choice of the method to settle disputes. In Japan, litigation in national courts has become fast and efficient, and thus, arbitration is not so popular in ordinary civil disputes. In Brazil, on the other hand, arbitration and gradually mediation are becoming increasingly important due to the long duration of court proceedings.

To what extent does the dispute resolution approach of Western countries influence that of South America and Asia as their legal systems and markets develop?

Due to the tremendous growth of Asian economies and their increased participation in global commerce, it is often suggested that the Asia Pacific region will continue to be influenced by the Western approach to dispute resolution.

Based on the discussion of the two panels, it can be concluded that dispute resolution in this region and the rest of the world is, in fact, gradually becoming increasingly similar. Arbitration is gaining importance in the Asia Pacific region and also in South America, as illustrated by the number of arbitration institutions established in these areas in the past few decades. This is due to both the region's increasing participation in global commerce and the adoption of Western style legislation favouring arbitration.

However, the Asia Pacific region is not only adopting the Western model but also contributing to dispute resolution in the rest of the world. The Asian cultural background of preferring consensual dispute resolution to confrontational conflicts has led to a growing interest in alternative dispute resolution and greater use of settlement techniques outside of courts in Western countries. This can be seen, for example, in the growing usage of steering committees, alternative dispute resolution mechanisms and contract clauses designed to avoid litigation.

Conclusion

The joint session of the IBA Litigation Committee and the Asia Pacific Regional Forum succeeded in providing practitioners from all over the world with a better understanding of their professional counterparties and useful tips for interacting across regions.

The discussion by the panellists brought large attention to the fact that many of the common beliefs on dispute resolution in the Asia Pacific region are more myth than reality. However, it also provided various examples of differing practices and reminded us that – to a certain extent – the unique historical and cultural traditions in the Asia Pacific countries and the rest of the world continue to influence the way in which litigation and alternative dispute resolution techniques are perceived.

Note

- 1 A report on the session will also be published in the first edition of the 2011 edition of the IBA Litigation Committee newsletter, *International Litigation News*.



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This newsletter is intended to provide general information regarding recent developments in the Asia Pacific Region. The views expressed in this publication are those of the contributors, and not necessarily those of the International Bar Association.

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