

Increased Use Of International Arbitration Spurs US-Hong Kong Alliance

Some of the largest, most complex matters that in-house lawyers manage are international business disputes. The globalization of commerce has sparked, in

US, educating lawyers on the effective use of arbitration – including online dispute resolution – and the importance of ADR clauses in international business contracts.

Robert B. Davidson, Executive Director of JAMS Arbitration Practice, and **Michael J. Moser**, Chairman of HKIAC and the first foreigner to be appointed an arbitrator in mainland China, discuss trends in international arbitration and how the strategic alliance will benefit GCs doing business internationally.



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particular, an increase in Pan-Pacific cases. To accommodate this trend, JAMS, The Resolution Experts, and Hong Kong International Arbitration Centre have strategically aligned to jointly administer the arbitration and mediation of international cases.

With more than 200 neutrals, JAMS is the US's largest private provider of alternative dispute resolution services, handling 10,000 cases a year. Similarly, HKIAC, funded by the Hong Kong government and business community, is a leading ADR resource in Asia, administering nearly 400 international cases in 2006. Together, JAMS and HKIAC will promote international ADR by conducting seminars in Asia and the

What practice tips do you have for general counsels entering international business contracts?

Davidson: Pay strict attention to the contract's dispute resolution clause. Companies should rarely use an off-the-shelf arbitration clause that is boilerplate or unspecific. When investing overseas, consult with outside counsel and selected outside provider organizations to get precisely the right clause.

Moser: I couldn't agree more, particularly when you're dealing with different systems of law. Chinese law, for example, has technical traps for the unwary and some ADR clauses commonly used in the US would be positively invalid in China, meaning the cases will end up in Chinese court. Also, ADR clauses should not require bilingual arbitra-

tion proceedings. They can be a nightmare in terms of conducting the proceedings and dealing with witnesses, as well as financially.

What trends are you seeing in international ADR, especially Asia-related disputes?

Davidson: There's been a huge growth of ordinary commercial litigation because of the increase in world commerce and because business is being done in significantly more complex ways than ever before. The trends I see most are, first, a marked increase in the absolute number of international arbitrations, and second, an increase in such arbitrations taking place in Asia.

Moser: There's also a worldwide explosion in investor-state arbitrations in which businesses are seeking to resolve disputes with government entities.

How will the JAMS-HKIAC alliance benefit general counsels?

Moser: When a Chinese company enters into a contract with a US company, the Chinese want [any related disputes] to stay in China. But the American company doesn't want to litigate in mainland China: Many Chinese courts are undeveloped, and there's often corruption and local protectionism. So arbitration is

always quicker and less expensive [than Chinese courts], and Hong Kong is the perfect compromise location. JAMS-HKIAC will act as a bridge so the US and Chinese companies can jointly administer an international arbitration. This is more than just a simple legal alliance – we'll help with cultural issues too.

Davidson: Companies often come to us before they enter into an international business agreement and ask if we can recommend an ADR provider in China capable of issuing enforceable awards. Quality control is very important in these cases. We'll provide a resource for companies to get quality help from a quality organization.

How will the alliance actually operate?

Davidson: Cross-training is key – HKIAC members will participate in the JAMS internal training programs and JAMS will provide neutrals for HKIAC training programs. We will administer arbitrations together in appropriate cases, and, when we have a US company seeking to arbitrate or mediate in Asia, we will be able to suggest a venue and provide names of arbitrators or mediators. We will cross-refer in that regard.

Moser: We'll also mutually promote ADR, raising the profile in the international business community. The world now offers so much interaction, especially between the US and Asia. We'll make our representative constituencies more comfortable with what's happening on the other side of the world. Chinese companies never want to come to the US but now they will feel more comfortable if JAMS neutrals trained by HKIAC are on the list in Hong Kong.

What kinds of disputes will best be served by this alliance?

Davidson: Large commercial disputes, joint ventures, sales-of-goods, infrastructure and construction disputes, and maritime cases. Intellectual property matters involving China are also becoming more frequent as are licensing cases.

Moser: Also, last year HKIAC resolved 93 cases online, many relating to domain-name and e-commerce disputes.

Is ADR too complicated, costly or inefficient?

Davidson: In the old days, with, say, garment disputes, the arbitrator would say, "Let me see the goods" and after examining them would simply declare, "Pay the man!" That, of course, is fast and cheap. Nowadays, cases may be about a \$300 billion high-speed rail service that does not work properly or that cost too much. Who was at fault? Were there performance or other guarantees? It is unfair to blame the process for an increase in time and costs when the disputes are quite complicated. We are working to make the process more efficient and timely, but it's a balance – you must be fair to the parties and give them the time and sometimes carefully tailored discovery to prove their cases.

What's the future of international ADR?

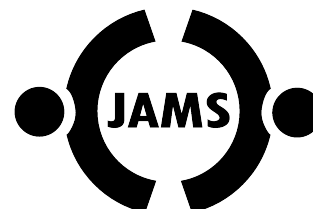
Davidson: In view of the New York Convention, arbitration will continue to be the primary way to resolve international commercial disputes. International mediation will also grow

because it is less costly, faster, and can result in remedies fashioned by the parties themselves to suit their business interests.

Moser: The trend is more and more and up and up. There's an explosion of business activity across the Pacific between the US and Asia. In Asia, you'll also see a growth in the "mediation-arbitration" approach in which part-way through the process, the arbitrator takes off the arbitrator hat and gets the parties to settle. In the US, the procedure is discouraged; in the UK, it's abhorred. But in Asia, Germany, Austria and Switzerland, it's tradition, with specific laws allowing arbitrators to act this way, and we will see more.

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