

INSIDE ARBITRATION: EVENT REPORT - INVESTOR-STATE MEDIATION AT THE TIPPING POINT

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Legal Briefings

The pandemic this year may have held a lot of us back from physical gatherings, but it certainly did not diminish our interest in gathering (virtually) for this year's Hong Kong Mediation Lecture. The lecture, organised by the Department of Justice and proudly sponsored by Herbert Smith Freehills, was well attended, with attendees coming from a diverse spread of countries, including the United Kingdom, Canada, Turkey, Serbia, Saudi Arabia and Singapore.

Following opening remarks by the Secretary for Justice, Teresa Cheng SC, and Simon Chapman QC, Partner of Herbert Smith Freehills, Mark Appel, an Independent International Mediator and Arbitrator, delivered a presentation on 'Investor-State Mediation at the Tipping Point'. His speech looked at a number of points including how Investor-State mediation seems to be at the tipping point of change, what accumulation of events have led us to this place and what was required for real change to occur?

Mark set the scene by explaining the meaning behind his use of the phrase 'tipping point': Investor-State mediation has previously rarely been used due to a number of reasons, many of which come down to the lack of trust. However, this seems to be on the brink of change, thanks to the concerted effort of the ISDS community over the past few years.

Mark then demonstrated what has been done in recent years by various stakeholders to provide much needed education and address the legitimate concerns with the Investor-State mediation process. Mark highlighted the innovative set of Investor-State Mediation Rules published by the International Bar Association in 2012, which recommended novel best practice (such as the possibility of appointing co-mediators) and hence helped normalise and legitimise practice. There were also efforts to upskill mediators, including the Competency Criteria for Investor-State Mediators developed by the IMI Investor- State Mediation Taskforce, as well as training programmes run by the Centre for Effective Dispute Resolution (CEDR) and other institutions.

However, Mark noted that rules and mediator quality were just part of the story. Nagging perceptions and doubts still existed. In Mark's view, these have also now fortunately been addressed. A survey revealed that States find mediation problematic due to, among other things, the fear of being criticised or even prosecuted for corruption. Through dialogues in a series of workshops and seminars with different stakeholders, the Energy Charter Organisation was able to get to the bottom of these perceptions. It found that a major cause is that many States lack structural and policy support for mediated negotiation. In light of the finding, the Energy Charter Secretariat drafted the Energy Charter Model Instrument on Management of Investment Disputes, providing guidance on the practical and legal issues that should be considered by States in developing a conflict management plan for investment disputes.

Mark also highlighted other recent efforts to address concerns, such as the Draft ICSID Mediation Rules, the Draft UNCITRAL Mediation Rules and the Draft UNCITRAL Notes on Mediation. Finally, Mark covered the Singapore Convention, which he considered to be the single greatest contributor to increased confidence in international mediation.

In his concluding remarks, Mark noted that we are starting to see the results of these efforts: mediators are growing in competence and model instruments are receiving more and more attention. Mark reiterated his view that Investor-State Mediation really has come to the 'tipping point'.

As a thought leader in the legal community, Herbert Smith Freehills will be proudly sponsoring the Hong Kong Mediation Lecture for five years and looks forward to being part of a lecture series which will continue to contribute to the latest discussions on and development of mediation.

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