

International Commercial Arbitration in Asia

Prof. ZHAO Yun
The University of Hong Kong

1

Methods of dispute resolution of international commercial disputes

- International commercial arbitration
- Transnational litigation
- ADR: expert determination on a particular issue, mediation, negotiation, etc.

2

Arbitration

- Parties agree to resolve disputes by arbitration with nominated Rules
- Parties appoint Arbitrator or panel
- Arbitration conducted
- Decision made by arbitrator
- Binding on the parties
- Enforceable in approx 146 countries

3

“Asia”

- The central and eastern part of Euroasia (traditionally the continents of Europe and Asia)
- Approximately 50 countries
- Roughly 49,694,700 square km
- Subregions:
 - Central Asia (Kazakhstan, Uzbekistan, Afganistan, Mongolia, former Soviet states in Caucasus region)
 - East Asia (Japan, South Korea, North Korea, eastern regions of China)
 - North Asia (Siberia /Asian part of Russia)
 - South Asia (India, Pakistan, Nepal, Sri Lanka, Maldives)
 - Southeast Asia (Thailand, Cambodia, Vietnam, Malaysia, Brunei, Philipines, Singapore, Indonesia)
 - Southwest Asia / Middle East (Syria, Israel, Jordan, Iraq, Saudi Arabia, Kuwait)

4

Categories of Dispute Resolution Culture

- US-influenced
 - Driven by foreign investment
- Combined
 - Combines an inherited colonial systems with international system
 - Desiring to becoming arbitration centers
- National
 - Strong native system
 - Extensive supervisory power of the national courts

5

So is there an Asian Culture?

- Chris Patten, “East and West” (p. 158)
 - What is the value system that links umbilically the commuter in Japan, the forest dweller in Irian Jaya, the mid-levels resident in a high-rise flat on Hong Kong’s Victoria Island, the peasant in Sichuan setting out to try to find a job and a fortune in Shanghai or Guangdong?
 - What is it that, within China itself, holds to its capacious bosom the follower of traditional Confucianism, the classical Buddhist or Taoist, the disciple of Islam, the Maoist atheist, the agnostic consumerists, the evangelical Christian?

6

So is there an Asian Culture?

- Michael Pryles, “Dispute Resolution in Asia”
 - Understanding the dispute resolution choices that transaction partners in Asia requires us to look behind claims about Asian cultural uniformity
- Illustration of the Heterogeneity
 - Independence and impartiality of arbitrators

7

Independence and Impartiality: China

- Article 34 of Arbitration Law
 - In any of the following circumstances, an arbitrator must withdraw from the arbitration, and the parties shall have the right to apply for his withdrawal if he:
 - Is a party or a close relative of a party or of a party’s representative;
 - Is related in the case;
 - Has some other relationship with a party to the case or with a party’s agent which could possibly affect the impartiality of the arbitration;
 - Meets a party or his agent in private, accepts an invitation for dinner by a party or his representative or accepts gifts presented by any of them.

8

Independence and Impartiality: Japan

- Article 50 of Arbitration Law
 - An arbitrator who accepts, demands or promises to accept a bribe in relation to its duty shall be punished by imprisonment with labor for not more than five years. In such case, when the arbitrator agrees to do an act in response to a request, imprisonment with labor for not more than seven years shall be imposed.
 - When a person to be appointed an arbitrator accepts, demands or promises to accept a bribe in relation to the duty to assume with agreement to do an act in response to a request, imprisonment with labor for not more than five years shall be imposed in the event of appointment.

9

Trade disputes involving China

- Less formal methods are preferred
- Desirable to maintain a harmonious and consensual working relationship, so confrontational/adversarial methods often not helpful.
- Conciliation and arbitration therefore common
- Arbitration clauses common in Joint Venture contracts –avoid unfamiliar Chinese court system, reduce costs, preserve business relationships, enforceability.

10

Development of Arbitration

- Changes of international economic pattern provide opportunity for the development of international arbitration in Asia
 - Fast growth of economy in countries of Asian-Pacific Region
 - Asian governments pay more attention to the function of arbitration
 - Arbitration institutions in the region actively expand their influence

11

Arbitration in Asia

- Factors restricting the development of international arbitration in Asia
- In global perspective, the commercial arbitration talents in this region are still inadequate.
- Arbitrators from the Asia-Pacific region are less likely to be appointed or selected, in disputes with bigger amount or greater complexity, even though parties to the dispute are local.

12

Pool of Arbitrators

- Selection and training of Asia-Pacific arbitration talents , having the following positive aspects:
 - Reduce arbitration costs and expand the influence of arbitration.
 - Promote Arbitration system in Asia Pacific region.
 - Beneficial to the development of international commercial arbitration mechanism.

13

Arbitration process

- Can be similar to a court process
- Can be informal
- Can be remote
- Can be on 'papers' only, i.e. written materials and no oral hearing
- Parties can choose an arbitrator with expertise in their business
- Usual to choose 1 or 3 arbitrator, so no deadlock possible
- Usually confidential, so limited precedent bank to consult / research
- Important elements are a process, rules defining how that works, and a timetable to keep it moving along

14

Arbitration for International disputes

- Advantages
 - Neutrality
 - Flexibility
 - Efficiency
 - Confidentiality
 - Enforceability

The fundamentals of arbitration

1. The agreement to arbitrate
2. Applicable law of contract & other aspects.
3. Seat of arbitration
4. The arbitrators
5. The procedure
6. Confidentiality
7. The award

International Arbitral Institutions

- International Court of Arbitration and ICC in Paris
- London Court of International Arbitration
- Swiss Chambers of Commerce and Industry
- Arbitration and Institute of Stockholm Chamber of Commerce
- American Arbitration Association
- HK International Arbitration Centre
- Singapore International Arbitration Centre
- China International Economic and Trade Arbitration Commission
- Kuala Lumpur Regional Centre for Arbitration
- The Australian Centre for International Commercial Arbitration
- International Centre for the Settlement of Investment Disputes

Asia Pacific Regional Arbitration Group (APRAG) is association of 17 regional arbitral institutions in our area. See www.aprag.org

Hong Kong International Arbitration Center (HKIAC)

- HKIAC, an independent non-profit making entity, was established in 1985 to provide advisory and support services for the resolution of local and international disputes by mediation and arbitration
- An active mediation body—HK Mediation Council, a division of the HKIAC
- Publication of various rules and procedures for arbitrations in HK including securities Arbitration Rules and Small-Claims/ Documents-Only Procedures

Mainland China

- China Council for the Promotion of International Trade (CCPIT)/China Chamber of International Commerce: quasi-governmental organ
 - China International Economic and Trade Arbitration Commission (CIETAC) set up in 1956
 - China Maritime Arbitration Commission (CMAC) in 1958
 - Over 200 local arbitration commissions on geographical basis (in theory independent of local governments)

19

Dual-Track System

- Domestic and foreign-related arbitrations
- Jurisdictional bifurcation between CIETAC, CMAC and local commissions has been blurred
- Foreign-related arbitrations enjoy more favorable treatment; most obviously, grounds for setting aside or denial of enforcement of domestic awards are much broader

20

Institutional arbitration

- Arbitration agreements must stipulate a Chinese arbitration commission; if not, agreement is invalid
- Ad hoc arbitration is not recognized