



# *Arbitration*

Teresa Cheng, GBS, SC, JP  
Chairperson of HKIAC



1  
5 September 2014

*Asia's Prime Location for Dispute Resolution Services*  
[www.hkiac.org](http://www.hkiac.org)

# Arbitration v. Litigation

## Litigation

- Rights of audience limited to local lawyers
- Local court procedures – usually rigid
- Judge assigned to cases
- Rights of appeal
- Public/Open court
- High cost and long time span
- Enforcement of judgments limited to bilateral or multilateral agreements

# Arbitration v. Litigation

## Arbitration

- Use of lawyers from own jurisdiction
- Flexible and Universally known procedures – UNCITRAL Model Law
- Choice of arbitrator suitable to the dispute
- No right of appeal – very limited right of recourse against awards
- Confidential/private hearings
- Cheaper and time efficient
- Enforcement under New York Convention
  - Over 142 states
  - Summary procedures and limited grounds to refuse enforcement

# Why arbitrate

- Easy to liquidate the fruits of the arbitration (Enforcement under New York Convention)
- Not want to litigate in counter-party's national courts
- Flexible procedures – better case management, mediation, use of own lawyer, use of internationally accepted practice
- Less formal
- Private (especially important for IP disputes)
- Freedom to chose applicable laws and arbitrators with that experience

# Where to arbitrate

- Legal seat – up to date arbitration legislations (eg 2006 UNCITRAL Model Law)
- Arbitration-friendly court – for interim measures, challenge of awards, enforcing awards
- Hearing place (can be different from the legal seat) – to suit parties and witnesses (convenience, accessibility, good hearing facilities)
- Institutional arbitration – good secretariat and no intervention
- Ad hoc arbitration – experienced arbitrators to handle procedures

# Arbitration agreement example

## HKIAC model clause:

***"Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.***

***\*The law of this arbitration clause shall be ... (Hong Kong law).***

***The seat of arbitration shall be ...(Hong Kong).***

***\*\*The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ...(insert language)."***

Note:

\*Optional. This provision should be included particularly where the law of the substantive contract and the law of the seat are different. The law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects and enforceability of the arbitration clause and identities of the parties to the arbitration clause. It does not replace the law governing the substantive contract.

\*\*Optional

# Arbitration agreement example

Comments from users about HKIAC new model clauses:

**James Spigelman AC QC**, the former Chief Justice and Lieutenant Governor of New South Wales and a Non-Permanent Judge of the Hong Kong Court of Final Appeal, says an express choice of the law governing the arbitration agreement is highly desirable. He adds “There is no international consistency as to how to determine the law of the arbitration clause where none has been expressed. Because the arbitration clause is jurisdictional, this lack of consistency will complicate the enforcement of arbitral awards.” Echoing this point,

**Julian Lew QC** says “one sure way to avoid uncertainty as to the law applicable to the arbitration agreement is for the parties to unambiguously choose the law they want to apply”. In this respect, he says “The addition to the HKIAC’s model clause to provide an express choice of law to govern the arbitration agreement is forward thinking and opportune”.

**Audley Sheppard**, the Co-Global Head of Clifford Chance’s international arbitration practice says, “Given the case law in some jurisdictions, the HKIAC’s reminder to specify the governing law of the arbitration agreement should help to avoid subsequent uncertainty and potential disputes and legal costs”.

**Peter Yuen**, Partner of Fangda Partners comments that there remain certain special characteristics concerning the validity of an arbitration agreement under Chinese law, so “users will benefit from stipulating (and being reminded to stipulate) clearly what law is to govern the arbitration agreement”.

**Promod Nair**, Head of Arista Chambers and an advocate in India says HKIAC’s amendment to its model clauses is “an excellent and welcome initiative by HKIAC”. He has seen considerable uncertainty arising in recent cases as to what law should govern the arbitration agreement in the absence of an express choice by the parties. He says, simply by choosing HKIAC’s new model clause, parties can avoid such uncertainty and the risk of unintended court interference.

# Hong Kong legal system

- Common law system –familiar to US parties
- Many experience in handling Chinese law – familiar to Chinese parties
- Strong and Independent legal profession – barristers and solicitors
- Rule of law observed and practised

# Hong Kong Judicial Independence

- Judicial system: Court of first instance, Court of Appeal, Court of Final Appeal (includes permanent and non-permanent justices)

# A Judicial Snapshot

## Members of the Court of Final Appeal (as of 15 November 2013):

### Chief Justice of the Court of Final Appeal

The Hon Chief Justice Geoffrey MA, GBM

### Permanent Judges of the Court of Final Appeal

The Hon Mr Justice RIBEIRO

The Hon Mr Justice TANG, SBS

The Hon Mr Justice FOK

### Non-Permanent Judges of the Court of Final Appeal

The Hon Mr Justice John Barry MORTIMER, GBS

The Hon Mr Justice STOCK

The Hon Mr Justice BOKHARY, GBM

The Hon Sir Anthony MASON, GBM

The Rt Hon the Lord MILLETT

The Hon Mr Justice Murray GLEESON

The Rt Hon the Lord WALKER of Gestingthorpe

The Rt Hon the Lord CLARKE of Stone-cum-Ebony

The Hon Mr Justice James SPIGELMAN

The Hon Mr Justice Henry Denis LITTON, GBM

The Hon Mr Justice HARTMANN, GBS

The Hon Mr Justice CHAN, GBM

The Rt Hon the Lord HOFFMANN

The Rt Hon Sir Thomas Munro GAULT

The Rt Hon the Lord NEUBERGER of Abbotsbury

The Rt Hon the Lord COLLINS of Mapesbury

The Rt Hon the Lord PHILLIPS of Worth Matravers

The Hon Mr Justice William GUMMOW

# Hong Kong Judicial Independence

- Hong Kong is ranked No. 4 out of 148 countries included in the index of judicial independence published in “The Global Competitiveness Report 2013-2014” released by the World Economic Forum, following only New Zealand, Finland, and Ireland.

(The ranking reflects the opinion of over 13,000 business leaders in 148 economies, where the individuals surveyed scored on a scale of 1 to 7 their response to the question “in your country, to what extent is the judiciary independent from the influences of members of government, citizens or firms?”)

A comparison with other influential jurisdictions:

Country	Ranking
Hong Kong	4
UK	6
Japan	14
Australia	16
Singapore	17
US	32
India	40
China	57

# What the Justices Say:



“Our system of law – the common law system of law – had (and has) as its characteristics a respect for the dignity and rights of the individual, an independent and fearless judiciary to enforce these rights and the ability to instill confidence in our community.”

-- Chief Justice Geoffrey Ma GBM, Lecture on “The Essence of Our Society: from a Written Constitution to Reality and into the Future 50 Years”, CUHK, 22 March 2013

“Whatever the cynics may say from time to time, I have no doubt in my mind, none whatsoever, that the Hong Kong Judiciary will remain the vigorous, independent, well-respected institution that it is today.”

-- Justice Michael Hartmann GBS (Non-Permanent Judge of the Court of Final Appeal), “Hong Kong Lawyer”, March 2013



# Independence of the Judiciary



“I have sat on the Court of Final Appeal of Hong Kong for 14 years and have never experienced any political interference from China or anywhere else in all that time...The local Permanent Judges are professionals to their fingertips. At no time in our discussions have I heard any of them express the slightest interest in what Beijing might think of our decisions. I am proud to be a member of one of the strongest appellate courts in the common law world.”

– Lord Millett (Non-Permanent Judge of the Court of Final Appeal)

“I have been a Non-Permanent Judge of the Court of Final Appeal for four years. I have never experienced, or heard of any interference in the work of the Court from any source. I should hope it goes without saying that, if it were otherwise, I would not be on the Court. The independence of the Court is secured by the constitutional arrangements of the SAR, the calibre of its members, and the vigour and spirit of the legal profession.”

– Justice Murray Gleeson (Non-Permanent Judge of the Court of Final Appeal)



# Hong Kong International Arbitration Centre statistics

## 2011-to 2013: cases involving US parties

- US party was the Claimant in **72%** of the cases
- **72%** commercial disputes, a majority of which were over USD 1 million (with the top range at USD 100 million).
- Other types of disputes include corporate and maritime.
- A majority of cases involving Californian parties consist some technology and telecommunications element to the disputes.
- Counterparties included China, Hong Kong, Canada, Singapore and Brunei.

# Examples of international arbitrations involving US and Chinese parties

## Disputes involving two of the top three manufacturers of certain sport products in the world

- Hong Kong arbitration
- Illinois law
- Arbitrators nationality: US, British, Chinese (Hong Kong)
- Legal representatives: US, US and Hong Kong and Mainland China
- Breach of contract, Sherman Act, infringement of intellectual property rights

# Disputes involving construction of diplomatic premises

- Pennsylvania arbitration
- Pennsylvania laws
- Arbitrators nationality: Two US, Chinese(Hong Kong)
- Legal representatives: US, US and Taiwan
- Variations and delay in construction work

# Disputes involving joint venture business in automobile industry

- Hong Kong arbitration
- Hong Kong law
- Arbitrators nationality: Austrian, two Chinese (Mainland and Hong Kong)
- Legal representatives: US and Hong Kong, Hong Kong
- Breach of contract, infringement of intellectual property rights

# Future trends of dispute resolution

- Arbitration in commercial contracts continue to grow
- US-China Bilateral Investment Treaty under negotiation – like all other BITs: dispute resolution by arbitration (International Centre for Settlement of Investment Disputes, UNCITRAL Rules, ICC, etc.)
- International disputes (eg International Tribunal of the Laws of the Seas)
- Demand for more transparency in investment arbitrations growing
- More deference to arbitral tribunals decision - respected by courts (eg US Supreme Court decision in *BG v Argentina*)



Thank You

## *Arbitration*

Teresa Cheng, GBS, SC, JP  
Chairperson of HKIAC



20  
5 September 2014

*Asia's Prime Location for Dispute Resolution Services*  
[www.hkiac.org](http://www.hkiac.org)