CILTHK 2-day Course 2016

9-10 April 2016
Hong Kong.
Introduction

- Litigation:
  - (1) National Courts
  - (2) Arbitration

- Natural justice/due process

- Why commence litigation:
  - (1) To compel payment or enforce rights;
  - (2) To protect time bar;
  - (3) To put pressure on the opponent.
The history and development of Arbitration


(2) Globalization (cross-border transactions) and international arbitration

(3) UNCITRAL Arbitration Law/Rules; International Bar Association (IBA) Rules; Investment arbitration/ICSID
Other Alternative Dispute Resolution (ADR)

- Mediation

- Med-Arb
  - *Court of Appeal: Gao Haiyan v Keeneye Holdings Ltd* [2012] 1 HKLRD 627

- Adjudication
Types of arbitration

- *Ad hoc* arbitration
- Institutional Arbitration
  - ICC, LCIA, AAA (ICDR), SIAC, KLRCA, HKIAC, CIETAC, KCAB
Advantages of arbitration

- Certainty of agreed neutral forum and enforcement

- Problem of Lis pendens/concurrent litigations
  
  (i) Application to stay (forum non-conveniens (an inappropriate court); first-in-time rule; etc)
  
  (ii) Anti-suit injunction
  
  (iii) Faster final decision/judgment to enforce/res judicata
  
  (iv) Negotiation between parties
New York Convention 1958
(1) Mandatory stay by contracting states’ courts
(2) Enforcement of foreign awards.
(see ss.20, 61, 82-86 of Hong Kong Arbitration Ordinance CAP 609)

Mutual agreement between Mainland and HK
《Supreme People's Court on the Arrangements for the Reciprocal Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region》
Advantages (continue ...)

- Confidentiality
  - Implied in law
  - *Aegis v. European Re* (2003) UKPC 11 (Previous Award allowed to disclose in subsequent arbitration to prove issue estoppel, which is to enforce a party’s legal rights)
Advantages (continue …)

- **Exceptions to Confidentiality:**
  2. Consent;
  3. Compulsion of law (a) leave of court (Myanma Yaung Chi Oo Co Ltd v. Win Win Nu [2003] 2 SLR 547); reasonably necessary; (b) interests of justice; (c) protect legitimate interest; (d) obligation to disclose;
Advantages (continue ...)

- **Confidentiality in other jurisdictions:**
  - Sweden: *Al Trade Finance Inc v. Bulgarian Foreign Bank Ltd* [1999] YCA 321 (Unilateral publication of award on jurisdiction held to be a fundamental breach and terminate arbitration agreement, but reversed)
  - Express term in contract remains necessary.

- **HKAO Cap/609, Sec. 18, 3 exceptions:**
  - protect/pursue legal right, enforcement, challenge;
  - make to authorities as obliged by law;
  - make to professional/advisor of parties.
Advantage

- Informality and Flexibility

- Economical and Speedy (?) (capping costs in s.57 of HKAO; Small Claims Procedures; instant arbitration; s.74[8] disallows parties to split costs)

- Arbitrator’s professional knowledge

- Globalization: National court no longer being trusted/political sensitivity/cultural difference
Disadvantages of arbitration

- Court-mimic procedure
- Can be cost-wasting and time-consuming
- Arbitrator’s jurisdiction cannot extend to third party (Joinder)
Disadvantages (continue ...)

- Difficulty in resolving multi-party disputes by consolidation of arbitration
  - Arbitral Institution Rules: ICC / HKIAC (Rule 28) / SIAC (not LCIA but prefer to appoint same arbitrator[s] if empowered)

- Quality and ethical control of arbitrators