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Arbitration and Forum Shopping in the Seat

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Arbitration and Forum Shopping in the Seat

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1. Ways to resolve a dispute

- Litigation
- Arbitration
- Mediation/Conciliation
- Expert Determination
- Adjudication etc.

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1. Ways to resolve a dispute

- Litigation

The Oxford Dictionary's Definition

"The action or process of carrying on a lawsuit"

It is a contest authorized by law before a court for the purpose of enforcing a right.

Participants: parties (including witnesses), lawyers, experts (if necessary), judge as the umpire

End product of the process: a judgment

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1. Ways to resolve a dispute

- Arbitration

The Oxford Dictionary's Definition

"The settlement of a dispute or debate by an arbitrator"

It is another form of determination of a dispute by an independent third party rather than by court. The disputes are determined in a judicial manner, but the process is not part of the formal judicial process. However an arbitrator is bound to apply the law accurately and must conform to the rules of natural justice i.e. quasi-judicial characters

Participants: parties (including witnesses), lawyers, experts (if necessary), arbitrator(s) as the umpire

End product of the process: an arbitral award

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1. Ways to resolve a dispute

- Mediation/Conciliation

The Oxford Dictionary of Law's Definition

"A form of alternative dispute resolution in which an independent third party (mediator) assists the parties involved in a dispute or negotiation to achieve a mutually accepted resolution of the points of conflict. The mediator, who may be a lawyer or specially trained non-lawyer, has no decision-making powers and cannot force the parties to accept a settlement"

Participants: parties, representatives (if necessary), mediator

End product of the process: a settlement agreement or nothing if unsuccessful

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1. Ways to resolve a dispute

-Mediation/ Conciliation

The term “conciliation” is used interchangeability with “mediation”. The new Arbitration Ordinance (cap 609) defines mediation as including conciliation.

Conciliation is distinguished from mediation in terms of the conciliator’s input to the substance of the settlement agreement. Where the mediator takes a more pro-active role, the term “evaluative mediation” is used, where the conciliator’s recommendation carries some coercive powers.

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1. Ways to resolve a dispute

- Expert Determination/ Appraisal

The Hong Kong Legal Dictionary’s Definition

“A process by which disputing parties refer a matter to a third person, an expert in the area, for expert opinion, appraisal or valuation to settle the dispute.”

Participants: Parties, parties’ representatives (experts), expert (the appraiser)

End product of the process: Expert determination

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1. Ways to resolve a dispute

- Adjudication

Private adjudication is process in which the parties present arguments and evidence to a third party adjudicator who makes a determination based on the application of legal principles in a relatively quick and efficient manner. The adjudicator's decision is prima facie final and binding but may be varied by subsequent court proceedings, arbitration of agreement between the parties.

Adjudication is provided for as a dispute resolution mechanism in a number of standard forms of contracts (especially construction) in the world. In HK, there is currently a consultation about security of payment in the construction industry under which the disputes will be submitted to determination by the process of adjudication.

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2. Why choose arbitration as the preferred option

Arbitration versus Mediation/ Conciliation

- Mediation/conciliation may not be successful.
- In the event that the parties are able to reach a settlement agreement, the agreement itself is a valid contract but itself is a non-binding decision.
- In contract, the arbitral award rendered by an arbitral tribunal is a legally binding and enforceable decision pertaining to the res judicata effect

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2. Why choose arbitration as the preferred option



Arbitration versus Litigation

There are 9 aspects that arbitration differs from court litigation including

1. Competence and special expertise of the decision maker
2. Protection of privacy and confidentiality
3. Enforceability of the arbitral award
4. Speed and finality
5. Neutral forum
6. Procedure
7. Cost
8. Special powers
9. Representation

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Competence & Special Expertise of the Decision Maker



Dispute Resolution Techniques	Parties' Participation
Court Litigation	Parties do not make any input into the judge assigned to hear and make a decision over their dispute. The parties are not, in any position, assess how technically competent the assigned judge is
Arbitration	The notion of party autonomy plays a strong role in arbitration. Parties are entitled to choose the arbitrators and so the parties may nominate an arbitrator with relevant technical expertise to adjudicate their dispute

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Protection of Privacy and Confidentiality



Dispute Resolution Techniques	Privacy of the Proceedings
Court Litigation	Litigation is open to public. The documents filed and the judgments made are all public documents as well
Arbitration	Documents filed and awards rendered by the Tribunal are private between the disputing parties and the Tribunal See: Section 16 and 17 of the Arbitration Ordinance (Cap. 609)


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Enforceability of the Arbitral Award



Dispute Resolution Techniques	Enforceability
Court Litigation	Judgments of national courts are enforced through the coercive powers of the State
Arbitration	Arbitration do not have any automatic coercive powers of enforcement. Arbitral Award is not self-enforcing, except where the award is voluntarily complied with, the winning party can seek enforcement before national courts


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Speed and Finality

Dispute Resolution Techniques	Finality and Appealable
Court Litigation	A court judgment is subject to appeal on the merits and usually becomes final only when it is no longer appealable
Arbitration	<p>An arbitral award is final and binding. In the event that the party wishes to challenge the arbitral award, they are entitled to set aside/challenge the arbitral award within the stipulated time frame (Three months time in Hong Kong)</p> <p>See: Section 73 of the Arbitration Ordinance (Cap. 609); See Also: Section 81 of the Arbitration Ordinance (Cap. 609)</p>

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Neutral Forum

Dispute Resolution Techniques	Neutrality
Court Litigation	Litigation takes place before national courts. A parties litigating before a national court must have standing to sue before
Arbitration	<p>The notion of party autonomy provides that the parties are entitled to arbitrate the dispute in any forum of their choice without the necessity of any connection with the forum.</p> <p>In some cases, both parties tend to choose a neutral third country to assure level of play field and avoid one party getting home advantage and perception bias</p>

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Procedure



Dispute Resolution Techniques	Procedure
Court Litigation	National courts are strictly bound by a set of procedural rules and the law of evidence to assess the weight and admissibility of the evidence adduced by the parties
Arbitration	<p>Parties are entitled to tailor their procedural rules to suits their particular dispute.</p> <p>In the event that the dispute needs to be resolved urgently, the parties can opt in Article 29 of the ICC Rules (Revised in 2012) into the arbitration agreement – so as to resolve the disputes in a speedily manner</p>


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Cost



Dispute Resolution Techniques	Cost
Court Litigation	<p>Litigation cost in some cases can gone up seriously high. The parties are not only paying for the costs of appointing the legal representatives as well as the expert witnesses but also the court expenses.</p> <p>In the event that the nature of dispute is rather complicated and technical, one may suggest that it will prolong the entire proceeding</p>
Arbitration	Parties in arbitration are only paying for the nominated/appointed arbitrators as well as the administration fees for the relevant institution (i.e. the HKIAC, ICC, SIAC or LCIA where applicable)


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Special Powers

Dispute Resolution Techniques	Special Powers
Court Litigation	The power and what a judge can order or direct are promulgated by a set of procedural rules
Arbitration	Arbitrator may exercise wider powers as conferred on him or her by the parties i.e. the parties may empower the arbitrator to decide as <i>amicable compositeur</i> or <i>ex aequo et bono</i>

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Representation

Dispute Resolution Techniques	Representation
Court Litigation	Parties must appoint a legal practitioner that has acquainted with that jurisdiction's professional qualification and be admitted under the raises of a local bar or professional body
Arbitration	Parties are entitled to appoint any person of their choice as their representative in the arbitration. A representative can possibly be a lawyer or, alternatively, a technical person who acquainted with relevant technical expertise but need not belong to any professional body in the jurisdiction

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3. Forum Shopping in the Seat of Arbitration- The 2015 Survey

2015 International Arbitration Survey by Queen Mary University of London

Preferred and Improved Seats

- The 5 most preferred and widely used seats are London, Paris, HK, Singapore and Geneva, i.e. **HK ranks the 3rd**
- The primary factor driving the selection of a seat is its **reputation and recognition**
- Preferences for certain seats are based on **legal infrastructure, neutrality/impartiality** of the legal system, the **arbitration law, track records** of enforcing arbitration agreements and arbitral awards
- Most improved seat over the past 5 years is Singapore, followed by HK
- **HKIAC** is the **3rd most preferred arbitral institution** after ICC and LICA and is the **most improved institution** ahead of SIAC, ICC, LCIA and ICDR/AAA

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3. Forum Shopping in the Seat of Arbitration

It may mean “shopping around for a suitable jurisdiction and venue or seat in which potentially more than one option legitimately exists, or indeed more than one has already been invoked or more than one has already been exhausted”. Richard Kreindler’s article in “Arbitral Forum Shipping”

In short, one party is seeking to gain certain legal advantages or benefits out of forum shopping; or avoid certain legal disadvantages; or simply to find a seat where one feels comfortable/good/is familiar with.

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3. Forum Shopping in the Seat of Arbitration



Seat of arbitration is important because

1. It is the country where the award was made and the arbitration took place.
2. The seat is the juridical seat of the arbitration, i.e. legal seat (not the "physical" place)
3. It provides the territorial link between the arbitration itself and the arbitration law of the place i.e. to what extent are the courts' involved in the process
4. It is the place for challenges or annulment process in relation to the arbitration,
5. Enforcement stage, Art V(1)(a) and (d) of the NYC: an award may be refused if the arbitration agreement is not valid under the law of the seat or there is non-conformity of the law of the seat e.g. composition, arbitral procedures etc.

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4. How the Seat is determined



Seat of arbitration is usually determined by

Certain

Explicit

1. Express agreement of the parties (by the arbitration clause or subsequent agreement with no arbitration clause)

Not explicit

2. Fixed at the place where the arbitration institution is located

Uncertain

3. Determined by the arbitration institution
4. Determined by the tribunal if the parties have submitted to certain rules
5. Last resort, the seat of arbitration is determined in accordance with the applicable law of the place where one party seeks such determination.

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5. Legal significance and implications



Legal significance and implications about the seat

Why parties want to shop the seat, why they prefer one seat over another, which areas they look into in shopping the seat and how they should do the shopping:-

1. The party initiates the arbitration has an interest in choosing the appropriate regimes, rules and seat from the standpoint of jurisdiction (as a weak or defective jurisdiction will undermine the continuation of the arbitration and the enforceability of the award)
2. Forum shopping in arbitration is to obtain a home advantage, or at least the perception of such an advantage, insofar as a particular seat (and its national law on arbitration) will give rise to the selection or appointment of arbitrators with a corresponding nationality or background.
3. By selecting a particular seat, the forum shopper influences which mandatory principles of law may apply with respect to the procedure in the arbitration and which local courts at the seat may play in its supervisory role.

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5. Legal significance and implications



Legal significance and implications about the seat (continued)

4. A seat may be chosen out of an interest in being able to enforce it locally in accordance with the local enforcement standards and procedures.
5. The law of the seat normally dictates the legal standard for annulment of any award.
6. The seat may be chosen out of considerations of convenience, cost and user-friendliness of a location and facilities.
7. Applicable municipal law may have an impact on the choice of arbitral seat and procedures, e.g. certain JV disputes in China are referred specifically to CIETAC for arbitration.

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5. Legal significance and implications



Particular legal issues involving the choice or a particular seat

1. The conflict of laws rules applied by the arbitral tribunals
2. The law applicable to certain issues of arbitration
3. The involvement of the courts in the seat of arbitration
4. The recognition and enforcement of the arbitral award

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6. What to consider in choosing the seat when drafting the arbitration clause



Forum shopping is generally regarded as legitimate in international commercial arbitration: the principle of party autonomy.

When drafting the arbitration clause:-

1. Well aware of the legal significance of the seat of the arbitration
2. Locate the primary enforcing states where future award may be enforced, i.e. where the assets of the other party are located.
3. Compare the legal infrastructure of different seats in terms of procedures, assets preservation, assets preservation, evidence taking, challenges, annulment procedures and its track records of enforcing arbitration agreements and arbitral awards
4. Consider the other factors such as neutrality, logistical convenience and costs.
5. Designate a seat explicitly.

A GOOD SEAT CHOSEN AT THE BEGINNING MAKES A GOOD ENDING IN ARBITRATION

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7. The Chartered Institute of Arbitrators and the EAB



CI Arb is a leading professional membership organization representing the interests of alternative dispute practitioners worldwide.

With over 14,000 members located in more than 130 countries, CI Arb supports the global promotion, facilitation and development of all forms of private dispute resolution.

As a not-for-profit, UK registered charity, CI Arb works in the public interest through an international network of 37 Branches and EAB is the largest overseas Branch outside UK.

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7. The Chartered Institute of Arbitrators and the EAB



As a professional Chartered Institute, CI Arb offers a range of education and vocational training courses and qualifications from introductory to advanced levels in the various disciplines of dispute resolution, including arbitration, mediation and construction adjudication.

Membership of CI Arb (ACI Arb, MCI Arb, FCI Arb, Chartered Arbitrator) is widely recognized. It carries a worldwide reputation of knowledge, experience and excellence. Besides, there are benefits of networking, attending seminars or trainings, receiving journals and newsletters and also YMG activities

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7. The Chartered Institute of Arbitrators and the EAB



Who can become an arbitrator?

1. Anyone can become an arbitrator. While many arbitrators are in the legal profession, many are not and come from various professional and technical backgrounds.
2. Arbitration is a secondary profession.
3. The arbitrator has a judicial role in listening to the facts and evidence presented by the parties, applying the relevant law and issuing a final award, hence training and education is important (especially in the international context)

SO, WELCOME TO JOIN CIARB(EAB)