

Arbitrating in Asia

Musical Chairs - Choosing the Right Seat in Times of Change

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Arbitrating in Asia?



- **The Asian jurisdictions are diverse (different legal cultures, different degree of development, cultural differences etc.)**
- **Approach the topic practically: which Asian countries will most likely be represented on the other side when you are advising clients or corporate colleagues on arbitration clauses:**
 - **China**
 - **India**

 - **Japan**
 - **Korea**

 - **Indonesia**
 - **Malaysia**
 - **Thailand**
 - **Vietnam**
- **Rule of Thumb: Hong Kong or Singapore is the safe choice**

Hong Kong



- **Most established seat of arbitration for international arbitration in Asia**
- **Reliability: One country two systems, common law, rule of law, transparency, freedom from corruption**
- **Strong legal profession (arbitrators and other arbitration professionals)**
- **Strong institutions**
 - **Courts**
 - **World class arbitration institutions: HKIAC and ICC**
- **Statutory framework: New Arbitration Ordinance as of 1 June 2011 (based on the UNCITRAL Model Law)**
- **Enforcement of Hong Kong awards in Mainland China under a special enforcement regime (works in practice)**
- **New York Convention**

Hong Kong



- **Unparalleled experience of arbitration involving parties from Mainland China**
- **Mainland China Parties: Certain Restrictions on Arbitration outside Mainland China**
- **Taiwanese Parties: Taiwan is not a member of the New York Convention but Taiwan enforces Hong Kong awards**
- **Also frequently chosen by Korean, Japanese and Vietnamese parties**
- **Superb infrastructure and facilities for arbitration hearing (HKIAC more than double its space for hearings this year)**

World Class Institutions: HKIAC and ICC



•HKIAC

- ✓ Modern and efficient rules
- ✓ Light touch case management
- ✓ No terms of reference, no scrutiny of the award
- ✓ 291 arbitrations in 2011 (175 international)

•ICC

- ✓ Case management for whole of Asia in Hong Kong
- ✓ Chinese parties tend to choose the HKIAC more frequently but not impossible to convince them to accept ICC
- ✓ Korean, Japanese and larger Taiwanese companies are more frequent users
- ✓ ICC is used more frequently in Singapore than in Hong Kong likely because SIAC is a younger institution than the HKIAC

Singapore



- **Singapore is becoming an arbitration hub for South-East Asia and an alternative to Hong Kong**
- **Modern Arbitration act based on the UNCITRAL Model Law, but with traces of the English Arbitration Act**
- **Government is supportive of arbitration (sees it as a good business for Singapore)**
- **Good courts and an emerging body of arbitration case law**
- **Maxwell Chambers**
- **SIAC, ICC and the ICDR**

Singapore



- **Strong track-record when it comes to disputes involving Indian parties (enforcement, geographical proximity, Indian community in Singapore)**
- **Indian peculiarity is that Indian courts only enforce awards from New York Convention Countries that have been included in India's Official Gazette (less than 50 countries included)**
- **China will be added which will benefit arbitration in Hong Kong involving Indian parties**
- **Singapore is generally a good option also for parties from Indonesia and Malaysia**

A closer look at Mainland China

Seat of arbitration may only be outside of Mainland China if there is a foreign element to the contract:

- One or both parties foreign entities?
- The disputed object located outside of China?
- The legal fact establishing, altering or terminating the legal relationship occurs outside China?

Problem with recognition/enforcement of the award may arise if the dispute is arbitrated outside of China and if no foreign elements are deemed to be at hand.

Rule of thumb: *If both parties are Chinese entities, the seat of the arbitration should be in China and only a Chinese arbitration commission should be appointed.*

Note: *Wholly owned Chinese subsidiary of a foreign company is considered to be a Chinese entity*

Arbitration in China



- **Must choose a Chinese Arbitration Commission**
- **CIETAC**
- **Chinese arbitration law does not support the choice of a foreign arbitration institution (ICC or HKIAC) with the seat of arbitration in China**
- **Where the seat of arbitration may be outside Mainland China, there is no problem to agree on arbitration in Hong Kong and hearings to be held in China**
- **Pay particular attention to the arbitration clause if you must arbitrate on the Mainland**

THANK YOU!

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