



中加国际仲裁热点研讨会
Enforcement of Foreign
Arbitration Agreements
in China 非内国仲裁协议
在中国的承认执行

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Brief Introduction

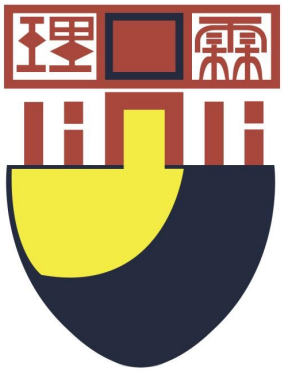
- ▶ Foreign arbitration agreements
- ▶ New York Convention - Non-Domestic Arbitration Awards
- ▶ Chinese law - Applicable law
- ▶ Case studies

International Convention

- ▶ **New York Convention**
- ▶ Article I - 1. Foreign Awards and Non-Domestic Awards
 - ▶ 2. The term “arbitral awards” shall include not only *ad hoc* arbitration awards but also institutional arbitration awards.
- ▶ Article 2 - The court of a Contracting State.. Shall, at the request of one of the parties, refer the parties to arbitration, **unless it finds that the arb agreement is null and void, inoperable and incapable of being performed.**

Foreign Awards

- ▶ Nexus: The Court at the Place where recognition and enforcement is sought
- ▶ Award made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.



Non-Domestic Awards

- ▶ New York Convention Article 1

- ▶ 一、仲裁裁决，因自然人或法人间之争议而产生在声请承认及执行地所在国以外之国家领土内作成者，其承认及执行适用本公约。本公约对于仲裁裁决经声请承认及执行地所在国认为非内国裁决者，亦适用之。
- ▶ 二、仲裁裁决不仅包括为专案选定的仲裁员作出的裁决，而且也包括当事人提请仲裁的常设机构作出的裁决。



Non-Domestic Arbitration Agreements

- ▶ **Categories of arbitration agreements**
- ▶ - Domestic
- ▶ - Foreign related - parties - relationship - subject matter - others

- ▶ **Under UNCITRAL Model Law**
- ▶ - International arbitration between parties whose places of business are located in different states;
- ▶ Where parties' places are located in the same country, but the following are in different states:
 - ▶ - place of arbitration
 - ▶ Most closely connected place with the performance of substantial part of the agreement
 - ▶ Where parties **expressly agree the subject matter of the agreement relates to more than one country.**

Under Chinese law

- ▶ Civil Procedure Law - Article 271 - 273
- ▶ Arbitration Law - Chapter 3 - Arbitration Agreement
 - ▶ Article 16 - intent/scope of arbitration/selected arbitration commission.

Certain “Non-Domestic” Arb Awards

- ▶ Foreign Arbitration Institutions arbitrating in China
- ▶ Chinese arbitration institutions arbitrating in foreign countries
- ▶ Article XV of New York Convention - UN SG will notify the States certain matters under Articles I, X and XI.

Law applicable to the Arbitration Agreement

- ▶ Law
 - ▶ Applicable law
 - ▶ Chosen by the parties
 - ▶ Law of the country that most closely related to the contract
- ▶ Contract in which the arbitration agreement is contained - separate applicable law
- ▶ Perspectives - from within - perspective from without

Principles at Play

- ▶ International law (国际法)
- ▶ Legal rules of private international law (国际私法规则)
- ▶ Party autonomy (当事人意思自治)
- ▶ Statutory jurisdiction(法定管辖)



Case study

- ▶ BNA v. BNB and another [2019] SGCA 84
 - ▶ Two party agreement --> three party agreement
 - ▶ Party choice of arbitration institution in Singapore but the place of arbitration in Shanghai, China.
 - ▶ Whether Chinese law applies and whether Singapore law applies, the effect of such applicable law.

Scenarios of Choice of Chinese law

- ▶ Chinese Co + Chinese Co deal (Domestic)
- ▶ Chinese Co operating and sales contracts in BRI countries
- ▶ If contract is under chosen Chinese law, then most likely arbitration agreement will be governed by Chinese law, unless otherwise agreed or decided according to conflict of law rules.
- ▶ If foreign law is chosen to be applicable law for contract, will the arbitration agreement be still governed under Chinese law? [In metaverse business etc]

Chinese law to govern the arbitration agreement

- ▶ Express choice made in the arbitration agreement
- ▶ Express choice by the parties to govern the contract containing the arbitration agreement
- ▶ If the parties chose Chinese arbitration institutions, Chinese law will likely govern, because the arbitration institutions are subject to Chinese arbitration law [except in the case of institutions having their branches overseas (like CIETAC Hong Kong Centre or EU Centre or North America Centre)].

Chinese law + Foreign Arbitration Institutions

- ▶ Foreign arbitration institutions - strictly speaking, ICC, SIAC LCIA, SCC etc.
- ▶ [Is HKIAC a foreign arbitration institution?]
- ▶ Foreign Arbitration Institutions Conducting Cases in China.
- ▶ Case study -
- ▶ **Brentwood Case**
 - ▶ ICC and the place of arbitration in Guangzhou, China

C v. D. [2021] HKCFI 1474

- ▶ 14.1 Governing Law. This Agreement shall be governed by, and construed in accordance with, **the laws of Hong Kong**, without regard to the principles of conflicts of law of any jurisdiction.
- ▶ 14.2 Dispute Resolution. The Parties agree that if any controversy, dispute or claim arises between the Parties out of or in relation to this Agreement, or the breach, interpretation or validity thereof, **the Parties shall attempt in good faith promptly to resolve such dispute by negotiation**. Either Party may, by written notice to the other, have such dispute referred to the Chief Executive Officers of the Parties for resolution. The Chief Executive Officers (or their authorized representatives) shall meet at a mutually acceptable time and place within ten (10) Business Days of the date of such request in writing, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute through negotiation.
- ▶ 14.3 Arbitration. If any dispute cannot be resolved amicably within sixty (60) Business days of the date of a Party's request in writing for such negotiation, or such other time period as may be agreed, then such dispute shall be referred by either Party for settlement **exclusively and finally by arbitration in Hong Kong at the Hong Kong International Arbitration Centre ('HKIAC')** in accordance with the UNCITRAL Arbitration Rules in force at the time of commencement of the arbitration (the 'Rules').

Interactions between legal jurisdictions in China

- ▶ Z v A and Others [2015] HKCFI 228
- ▶ Case Brief
 - ▶ Applicant two separate contracts - agency agreement and a technical coop agreement
 - ▶ “In case of breach,... both Parties **agree to arbitration as per the international chamber of commerce and held in China**”
 - ▶ ”Any dispute, controversy or difference shall be **finally settled in China by arbitration pursuant to the Rules of the International Chamber of Commerce** whose award shall bind the parties hereto.”

Concluding Remarks



- ▶ Foreign arbitration agreements are **enforceable** in China.
- ▶ **Foreign arbitration institutions operating in China will** become a reality.
- ▶ Non-domestic arbitration awards could be triggered if **reciprocity reservation** is withdrawn.
- ▶ Be cautious in dealing with choice of law in the arbitration agreement.
- ▶ Open minded in considering **convergence issues** between different legal systems in China.
- ▶ The new arbitration law will open up to **ad hoc arbitration** as it is a legal process under the New York Convention.

Thank you!

