

PRC Companies in International Arbitration: Introduction and Background

by Ray Liu Esq.

Introduction to the series

With the rapid development of China's national economy, more and more PRC companies will enter occasional disputes with foreign partners in international business dealings. Depending on their bargaining positions during the course of contract negotiations, the parties might choose to arbitrate in Hong Kong as dispute resolution provision. On the one hand, Hong Kong, as part of China, is attractive to PRC companies due to its geographical convenience and understanding of socio-cultural relations with the Mainland; on the other hand, foreign enterprises find Hong Kong's legal system mature and its use of common law preferable. This is also a reason why arbitration proceedings in Hong Kong have involved more PRC companies in turn.

Dorsey's bilingual Hong Kong and China-based arbitration and litigation practice covers a wide range of disputes, primarily concerning Sino-Foreign commercial and financial business arrangements such as fund investments, joint ventures, cooperative technology development, manufacturing, agribusiness, health care, pharmaceuticals and biotechnology. Among other things, we were among the first law firms successfully to utilize the Arrangement on Interim Measures to obtain a court-ordered asset-preservation freeze in the Mainland in aid of a Hong Kong arbitration.

In this series, we intend to address some common questions and misunderstandings PRC companies may encounter when facing arbitration proceedings in Hong Kong, and put forward some feasible solutions for consideration. After all, we are not "dispute" lawyers, but "dispute resolution" lawyers. Topics will include

- (i) Brief Background about International Arbitration;
- (ii) Arrangement on Interim Measures between Hong Kong and PRC
- (iii) Costs in arbitration;

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- (v) Costs order in arbitration;
- (vi) Selection of arbitrators; and
- (vii) How to enforce arbitral awards.

What is international arbitration?

In modern commerce, PRC Companies often need to enter into sale and purchase agreements, as well as various types of financing and joint venture agreements with foreign counterparts. Both parties may choose to incorporate arbitration provisions that stipulate all contract-related disputes must be settled via arbitration. Where such provisions stipulate the appointed arbitration institution to be in a jurisdiction outside mainland China, such arbitration is defined as international arbitration.

Arbitration is a dispute resolution method in place of litigation, whereby contracting parties bring their dispute to an arbitration tribunal for decision. Arbitral tribunal makes its decision based on evidence submitted by the parties in dispute and the undertaking of arbitration procedures. The tribunal would then declare the judgment in the form of awards, which is equivalent to judgments in traditional litigation. An arbitration tribunal's awards are final,¹ with equal binding power as that of a court. Yet, compared to a court judgment, enforcing an arbitral award in a foreign jurisdiction has become much easier, as most countries are signatories to the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the “**New York Convention**”). At the same time, the entire arbitration process is confidential.

Below are some basic traits of international arbitration, with the pretext of a typical arbitration carried out in Hong Kong.

Can PRC companies request to engage in arbitration in Hong Kong?

Yes, as long as the arbitration provisions in a contract list Hong Kong as the designated “arbitration venue”. Of course, even if a contract does not have arbitration provisions, contracting parties may agree to engage in arbitration to resolve their dispute after-the-fact.

Hong Kong is often seen as an attractive hub for international arbitration for a number of reasons. Firstly, Hong Kong is the door to Mainland China, and is the commercial hub that connects to all of East Asia, South East Asia, Australia-South Pacific and even the rest of the world. Secondly, Hong Kong has a strong, mature, and arbitration-friendly legal system, with a large number of arbitrators and other legal personnel to support existing arbitration infrastructure. Finally, arbitration awards made in Hong Kong are easily enforced in all major jurisdictions, including in mainland China.

What are the differences in arbitration proceedings in Hong Kong and those in

mainland China?

The difference between arbitration in Mainland China and that in Hong Kong is essentially the difference between PRC law and Hong Kong law. Based on our experience, we note the following common challenges that PRC companies may encounter when facing arbitration proceedings in Hong Kong:

1. Common Law is seen as “case made law”, and each case can be distinguished from another due to its unique factual matrix. A specific wording adopted in a contractual term, an email between the parties, a Wechat message, or a telephone discussion may play a vital role in a dispute. These factors may also create great deals of uncertainty towards each case.
2. Arbitration requires a greater degree of party participation, from instructing solicitors at the outset, to strategic planning with solicitors, to even testifying in front of the arbitration tribunal. In short, clients and solicitors must be joint participants. Whereas in mainland China, client would normally hand the case over to the lawyers, and thus the level of participation is much lower.
3. Arbitration in Hong Kong normally takes more time, and thus incurs greater expenses.
4. Arbitration awards in Hong Kong are much more recognized internationally.

How is an arbitration tribunal formed?

Firstly, the number of arbitrators must be confirmed, it may be a sole arbitrator or a three-person tribunal, which is usually specified in the contract. If there is no such provision, or contracting parties cannot come to an agreement over how many arbitrators there should be, the number of arbitrators will be determined by the applicable rules and procedures.

If the contract stipulates for a sole arbitrator, the choice of arbitrator will be determined by the procedures set out in the contract, or by an independent third party nominated under the contract. If the contract provisions stipulate for three arbitrators, then typically each contracting party will nominate an arbitrator, with a third arbitrator (the Chair) nominated by the two party nominated arbitrators. Where parties cannot come to an agreement over arbitrators, or their contract does not make such provisions, any party may request the Hong Kong International Arbitration Centre (HKIAC) to make a ruling.

In arbitration, parties can freely choose the arbitration tribunal, whereas in litigation, the presiding judge is selected by the court. This is also an advantage that arbitration has over traditional litigation. Nominating arbitrators can be an important tactic in arbitration: the ideal nominee should be experienced and is well respected. A good arbitrator should be able to effectively control arbitration proceedings, so that the dispute can be resolved as effectively as possible. Considerations that parties should take into account when choosing a suitable arbitrator will be explored in later articles.

What disputes can be resolved via arbitration?

Arbitration can resolve all forms of civil and commercial disputes, except in disputes where the court has exclusive jurisdiction. For example, under Hong Kong law, disputes over employment and employment wages, criminal cases, and divorces cannot be arbitrated.

What laws are applicable in arbitral disputes?

Most contracts include a governing law provision. Arbitration tribunals will consequently follow these provisions in arbitrating the disputes between contracting parties.

At the same time, arbitration will be subject to procedural law,² which themselves are determined by the location of arbitration, which in turn is determined in the relevant arbitration agreement(s). For example, if a contract stipulates that Hong Kong is to be the venue of arbitration, then the Hong Kong Arbitration Ordinance (Cap 609) will serve as the procedural law governing the arbitration proceedings. Similarly, if Beijing or Shanghai was chosen as the arbitration venue, then the *Arbitration Law of the People's Republic of China* will govern arbitration proceedings.³

Dorsey & Whitney LLP has rich experience in handling complex arbitration cases in, and arbitral disputes under both mainland China and Hong Kong.

In what language is arbitration held?

In principle, both arbitrating parties can freely agree to the language of arbitration. When deciding on a language, both parties should consider their native language as well as the language used in relevant contracts and evidence. Generally, arbitration agreements will have already stipulated the language of use in arbitration.

If relevant contracts use more than one language, then generally, when parties are in conflict, one of the multiple languages used should be made the “priority use” language. This also applies to the arbitration proceeding itself, as a dual-lingual or multi-lingual arbitration proceeding is not the ideal solution.

Dorsey & Whitney LLP has rich experience in handling both English and Chinese cases, and has attorneys fluent in both languages in offices across Hong Kong, Shanghai, and Beijing who are experienced dispute resolvers themselves.

¹ Only in very limited circumstances, a party may be able to appeal against an arbitral award.

² These procedural rules stipulate the basic legal framework of arbitration, as well as the relationship between courts and arbitration proceedings, such as the enforcement, recognition and invalidation of arbitral awards.

³ As promulgated by the Order of the President of the People's Republic of China (No. 31) on August 31, 1994.

