

Seminar for HKIE/CDRC
29 March 2023

Good Choice of Venue and Arbitration Rules for Access to Justice in GBA Construction Cases

Mr. Samuel Wong FCIArb, FHKIArb
Chartered Arbitrator, Barrister-at-law

ADDRESS

1808-09, Tower One Lippo Centre
89 Queensway, Hong Kong

WEBSITE

www.18LC.com

PHONE

+852 3795 5636

FAX

+852 3611 5241

EMAIL

wongchatchor@gmail.com

Can there be legal convergence of dispute resolution in the GBA:

1. Existing framework: “one country two systems”,
3 different jurisdictions;
2. Examples of one country different jurisdictions:
US, Canada, Australia

Issues of dispute resolution in GBA

1. Different existing institutions for resolving disputes;
2. Different procedural laws: Hong Kong AO Cap 609 section 5 – Cap 609 to apply if the place of arbitration is Hong Kong;
3. Differences as to arbitrability of disputes: as to contractual and non-contractual disputes (tort);
4. Ad hoc arbitration verses Institution Administered arbitration
5. Different applicable arbitration rules.

Harmonization verse unification

Limitations of harmonization:

1. Adaptation (building bridges) verses adoption

2. inter-regional harmonization:
 - 2.1 Arrangement Concerning Mutual Enforcement of Arbitral Awards between Mainland and Hong Kong SAR (1999);
 - 2.2 Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between Mainland and Hong Kong SAR (2020);
 - 2.3 Arrangement Concerning Mutual Enforcement of Arbitral Awards between Macao and Hong Kong SAR (2013), ss 98A-D of AO Cap 609;
 - 2.4 Arrangement Concerning Mutual Assistance in Court Ordered Interim Measures in Aid of Arbitral Proceedings by the Courts in Mainland and of the Hong Kong SAR (2019)
 - 2.5 Adoption of CISG in Hong Kong

Different situations where different dispute resolution platform would be more advantageous:

1. Dispute Resolution of complex fact sensitive cases;
2. Documents determinable cases
3. Common law approach verses Civil law approach

Nature of construction / civil engineering disputes

1. Disputes between employer/ main contractor or between main contractor and its subcontractors;
2. Extra work/ variations;
3. Rates applicable to extra works;
4. Inclement of weather;
5. Delay to hand over of part of the works under contract or delay to practical completion;

6. Liquidated damages;
7. Prolongation due to variations / extra works leading to claims of additional overhead and attendance;
8. Defects and its causes and maintenance;
9. Withholding of payment/ Issuance of architect certificates;
10. Retention and Defects liability period.

Scott Schedule: multiple items of disputes

Construction Disputes are fact sensitive

PRC Arbitration: usual procedure based on:

1. Submissions
2. Documents produced in support of a party's case
3. No discovery by list and no inspection before the hearing
4. No witness evidence
5. Expert determination without the benefit sufficient information as to what happened
6. Single expert chosen by lot from list of the arbitration commission

Procedures of PRC Arbitration Commissions generally do not allow for:

1. Investigation into the versions of fact, leading to a version that is preferred
2. Separate experts of various discipline for each party and cross examination of experts

This leads to serious difficulties for the Arbitral Tribunal to arrive at (i) a reasoned findings of fact; (ii) a reasoned conclusion based on choice of applicable governing law.

In the context of GBA construction disputes, it is possible to overcome this inadequacy by the parties choice of (i) the rules and the institutions; and (ii) the seat of arbitration.

Choice of Institutions / Choice of Seat

Shenzhen Court of International Arbitration (“SCIA”)

1. SCIA accepts arbitration cases related to contractual disputes ... including
 - (a) international or foreign related disputes;
 - (b) disputes related to the HKSAR; Macau SAR; and
 - (c) Chinese Mainland disputes. Art. 2.1 of the Rules

2. Where the parties agree that the disputes at Art. 2.1(a) and (b) be governed by UNCITRAL Arbitration Rules, the SCIA shall administered the case in accordance with the UNCITRAL Arbitration Rules and the SCIA Guidelines for the Administration of Arbitration under UNCITRAL Arbitration Rules. Art. 2.6

3. Where the parties have agreed on the place of arbitration, the parties agreement shall prevail. Art. 4.1

4. The arbitral award shall be deemed to be made at the place of arbitration. Art 4.3

Construction disputes; (i) resolved in Hong Kong; (ii) in accordance with It is by these provisions that the parties can agree in the dispute resolution clause to have UNCITRAL Arbitration Rules.

Further, section 5 of the Hong Kong Arbitration Ordinance Cap 609 provides at s. 5(1) that Cap 609 “applies to an arbitration under an arbitration agreement, whether or not the agreement is entered into in Hong Kong , if the place of is in Hong Kong.”

So, upon parties' choice, disputes can be resolved in Hong Kong upon a procedure that is more appropriate for fact sensitive cases, verses cases where a documents-only arbitration would be more convenient and fact evidence mere peripheral.

Moreover, the arbitration would have the benefit of assistance and supervision of the Hong Kong court: assistance as to interim measures to maintain status quo in respect of evidence and asset.

Assistance of PRC courts in respect of interim measures: the Arrangement between Mutual Assistance in court-ordered interim measures in aid of arbitral proceedings by the courts of mainland and of the Hong Kong SAR. (came into force 1 October 2019)

It should also be mentioned that in addition to SCIA, allowing arbitration in Hong Kong are: (i) the Rules of the Nansha Arbitration Center of the Guangzhou Arbitration Commission (“GAC”) also allow parties to elect in the arbitration agreement for resolution of disputes in Hong Kong or Macau or China upon different rules and different procedural laws; (ii) the Rules of South China International Arbitration (Hong Kong) Arbitration (SCIAHK) (based on UNCITRAL Arbitration Rules); (iii) the rules of CIETAC Hong Kong Center; and (iv) possibly AALCO Hong Kong Center rules.

Arbitration Funding

Third Party Funding (“TPF”) (Part 10A) and Outcome Related Fee Structure for Arbitration (ORFS) (Part 10B) of Cap 609

Third Party Funding allows for funding, but excludes funding by Hong Kong lawyers.

However, TPF is more used in respect of Investor State Arbitration with big quantum. It is not much used for construction disputes of more moderate claims. Process laborious and costly.

However, ORFS allows lawyers to fund the arbitration by Conditional Fee Agreement (“CFA”), or Damages-based fee agreements (“DBA”) ; or hybrid agreements. This is known as the “**no win, low fee**” arrangement and it broadens the capability of Hong Kong lawyers to fund client’s construction arbitration cases, thus improving access to justice for contractors or parties with lesser means.