

Long Term Oriented Methods for Dispute Resolution in the Greater Bay Area (GBA)

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Greater Bay Area (GBA)

- ▶ Next to Hong Kong and Macao
- ▶ Nice cities
 - ▶ 广州、深圳、佛山、东莞、惠州、中山、珠海、江门、肇庆
 - ▶ Is there an local administrative legislative authority?
- ▶ Provincial Law
 - ▶ City Court/Provincial Court
 - ▶ Choice of forum?



肇慶

廣州

惠州

佛山

東莞

深圳

中山

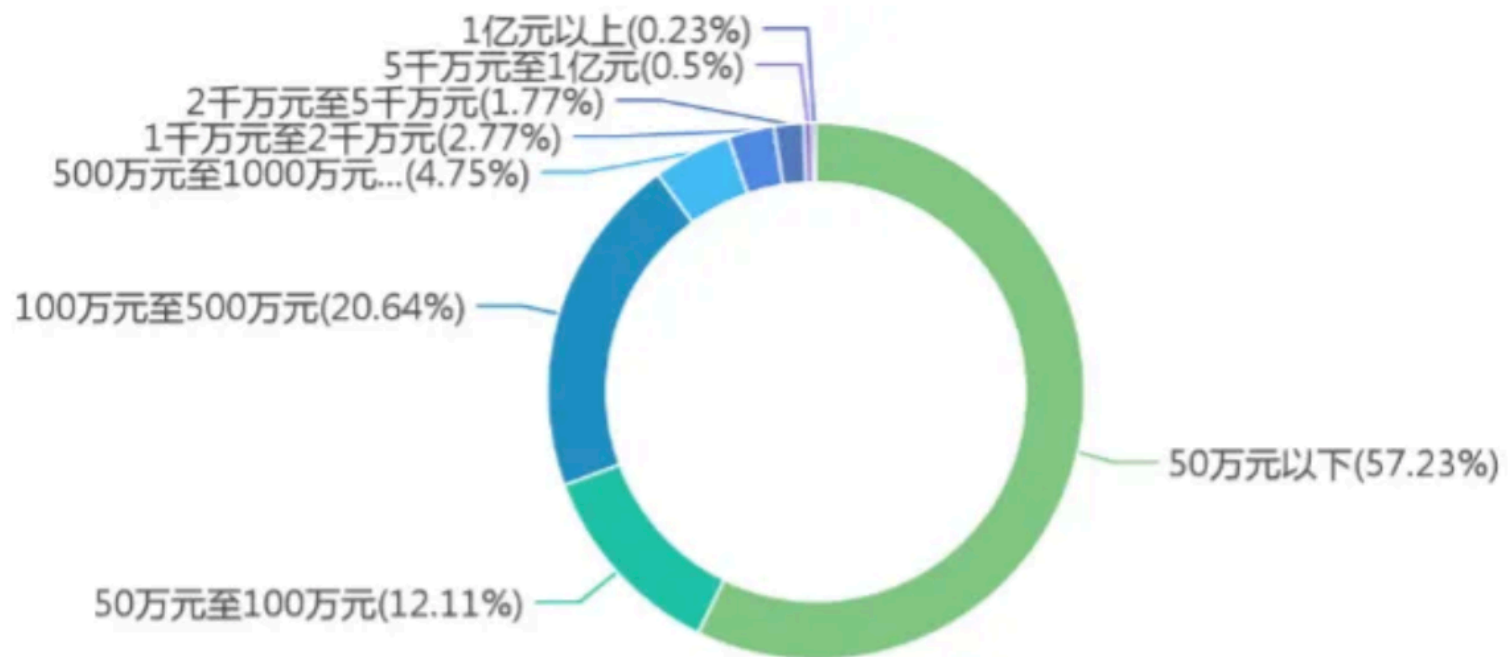
江門

珠海

澳門

香港

Presentation



P r e s e n t a t i o n

- From the chart above, it can be seen that: there were 21,762 cases where the target amount was less than 500,000 yuan, the largest number of cases, accounting for 57.23%.
- There were 4,603 cases between 500,000 and 1 million yuan, 7,848 cases between 1 million and 5 million yuan, 1,804 cases between 5 million and 10 million yuan, and 10 million to 20 million yuan. There were 1,054 cases, 674 cases of 20 million to 50 million yuan, 190 cases of 50 million to 100 million yuan, and 88 cases of more than 100 million yuan. (Based on the classification, sorting, and comparative **analysis of 73,936 judgment documents published by the China Judgment Documents Network and the Alpha database from January to September 2021 involving construction contract disputes across the country**)
- It can be seen that cases related to construction disputes have always attracted the attention of China's administrative and judicial departments. As the center of China's economy, the Greater Bay Area is also very common in construction disputes.

Three Sections

1. Legal Framework
2. Construction Case Studies
3. Points of Attention



1. Chinese Legal Framework

- ▶ Constitution (宪法)
 - ▶ Law/Judicial Interpretations (法律)
 - ▶ Administrative Regulations (行政法规)
 - ▶ Local legislation - [Guangdong Province/Shenzhen Municipality] (地方性法规)
 - ▶ Departmental Rules (部门规章)
-
- ▶ Choice of law provision
 - ▶ Can “either or” or “both” Mainland law and HK law be chosen to apply?

Key legislations/laws

- Civil Code of the People's Republic of China,
- Construction Law of the People's Republic of China,
- Bidding Law of the People's Republic of China,
- Civil Procedure Law of the People's Republic of China.
- The Judicial Committee of the Supreme People's Court discussed at the 1751st meeting, and passed the Interpretation of the Supreme People's Court on the Application of Law in the Trial of Construction Contract Dispute Cases (2) (hereinafter referred to as the "Interpretation").

Civil Code/Contract Division

- ▶ General Principles
 - ▶ Formation
 - ▶ Validity
 - ▶ Performance
 - ▶ etc
- ▶ Typical Contracts
 - ▶ Sales Contracts
 - ▶
 - ▶ **Construction Contracts**
- ▶ Quasi Contracts

Methods of Dispute Resolution

- ▶ Litigation
- ▶ Arbitration (Arbitrator)
- ▶ Mediation (Mediator)
- ▶ Adjudication (仲裁) (Adjudicator)
- ▶ Notarization

2. Case Studies

- ▶ 莫志华、深圳市东深工程有限公司与东莞市长富广场房地产开发有限公司建设工程合同纠纷案【(2011)民提字第235号】
- ▶ 房地产租赁合同争议仲裁案（中国国际经济贸易仲裁裁决书选编（2003-2006）法律出版社）
- ▶ 深圳稳健建设集团有限公司、龙光工程建设有限公司光明分公司等建设工程施工合同纠纷民事二审民事调解书【(2021)粤03民终33396号】

Case 1

莫志华、深圳市东深工程有限公司与东莞市长富广场房地产开发有限公司建设工程合同纠纷案【(2011)民提字第235号】

- ▶ 2003
- ▶ 2011
- ▶ Eight years from first instance - second instance - retrial.
- ▶ Invalid contract, but the losses (materialized) be assessed per as is basis as if the contract is valid, but could not be compensated more than a valid contract.

Case 2

房地产租赁合同争议仲裁案（中国国际经济贸易仲裁裁决书选编（2003-2006）法律出版社）

- ▶ About one year arbitration process from commencement to arbitration award.
- ▶ Leased property but constructed on area where fire protection corridor is required.
- ▶ Invalid contract because breach of mandatory safety requirement.

Case 3

深圳文件建设集团有限公司、龙光工程建设有限公司光明分公司等建设工程施工合同纠纷民事二审民事调解书 【（2021）粤03民终33396号】

- ▶ Mediated settlement agreement reached at the second instance / appeal stage.
- ▶ One judge presided over process.
- ▶ Mediation statement was issued.



3. Points of Attention



- Litigation could take a long time, if it goes all the way to retrial.
- Arbitration is most widely used based on one-final decision.
- Mediation is quick and can be used in both of the above proceedings.
- Adjudication is used increasingly in construction projects

International Commercial Arbitration (ICA)

▶ International Commercial Arbitration

- ▶ Resolving international commercial disputes by way of an impartial third-party panel called **arbitrator(s)**.
- ▶ Written records date back for at least 2500 years, and some form of pacific dispute resolution by an impartial third party must be older than this. - Baron Mustill, *The History of International Commercial Arbitration - A Sketch*/ Lawrence Newman and Richard Hill ed. *The Leading Arbitrators' Guide to International Arbitration* (Third Edition, JURIS)

Rhetoric - “Commercial” v Economic and Trade

- ▶ UNCITRAL Model Law Footnote 2:
- ▶ The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.
- ▶ Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

“International”

- ▶ CISG uses “the places of business being **in different states**” as the element of consideration in the scope of application - Article 1, CISG.
- ▶ 货物买卖合同当事人的营业地处于不同国家
- ▶ 中外当事人之间- 中国大陆内地和港澳台地区之间 - **跨区际之间的契约和合同法** 律关系是否为国际?
- ▶ 其他的因素 - 标的物所在地 the location of subject matter; 法律事实 (法律关系产生、变化和终止) 发生在另一个国家 the legal facts (commencement, change or termination of legal relationship) take place in another country;

Inter-Regional Arbitration

- ▶ Place of arbitration: Hong Kong preferred?
- ▶ Choice of law - Hong Kong law or both HK and Mainland law applicable?

Conceptual /dimensional perspectives

- ▶ **Z v A and Others (Hong Kong case, [2015] HKCFI, 228)**
- ▶ **Arbitration clause re “arbitration in China” / disputes to be “settled in China” - construed as having the effect that arbitrator appointed by ICC in Hong Kong had jurisdiction over the disputes, because Hong Kong SAR is part of China.**

Conceptual dimensions

- ▶ One country two systems (一国两制) applicable to Hong Kong, Macao and Taiwan
- ▶ - “Two Unshakables” (两个好不动摇)
- ▶ Chinese-style modernization (中国式现代化)

Common Law + Civil Law System

Positive Interactions

Due Process

- ▶ Paklito Investment v Klockner East Asia
- ▶ Amendment of Arbitration Rules of CIETAC 1994
 - ▶ Opportunity to present its case



Mediation

- ▶ Singapore Mediation Convention
- ▶ Court assisted mediation is carved out under Singapore Mediation Convention.
- ▶ Developing a mediator's pool and having mediators' independent work supported by signed document or notarized signature of mediated settlement agreement.



Mediation Rules of GBA

- ▶ Institutional Mediation
- ▶ Non-institutional Mediation (GBA Mediator)

- ▶ **One Mediator;**
- ▶ 30 days period;
- ▶ Neutral and Impartial;
- ▶ Mediated Settlement Agreement [signed and stamped (if available)]

Adjudication

审裁 (裁断)

- ▶ CIETAC DB Review (评审) - Construction Project Disputes Review Rules (2015)
 - ▶ Choice of one DB reviewer/adjudicator?
 - ▶ Could the DB Review be expressly changed to Adjudication?
- ▶ Hong Kong Adjudication Practice - HKIAC Adjudication Rules (2009)
- ▶ Malaysian Adjudication Practice - Construction Industry Payment and Adjudication Act (2012)

Latest Development in Foreign Institutional Arbitration in the GBA

- ▶ 布兰特伍德工业有限公司 [Brentwood Industries、广东阔安龙机械成套设备工程有限公司] 申请承认与执行法院判决、仲裁裁决案件一审民事裁定书 (2015) 穗中法民四初字第62号

Impact of International Convention, Domestic Law and Party Autonomy

- ▶ New York Convention
- ▶ Singapore Convention
- ▶ Domestic Law (e.g., the Consultative New Arbitration Law)
- ▶ Chinese laws, legislations and arrangements/agreements
 - ▶ 深化粤港澳合作 推进大湾区建设框架协议 (Regional Agreement)
- ▶ Party Autonomy (choice of place of arbitration, and choice of law)

Concluding Remarks

- ▶ Long term oriented -- > > Party autonomy on choice of arbitration, mediation and adjudication **as used in international practices.**
- ▶ Choice of law/Choice of place of arbitration, etc.
- ▶ [Notarized] mediator's settlement agreement.
- ▶ Other long term ADR means (such as People's Mediation Committee, Med-Arb, mobile tribunal, and other practice in the GBA)



**Using both International and Domestic
Practices according to the Local Needs**



▶ Thank you!