



# Enforcement of *ad hoc* arbitration awards in China

Douglas Clark  
Barrister Hong Kong  
Adjunct Professor, Faculty of Law,  
University of Hong Kong

# What is an ad hoc arbitration?



- .Where the parties have not nominated an institution to administer the arbitration
  - Parties can create own procedures
  - Can be time cost efficient
    - Particular for sophisticated parties
- Sometimes parties agree hybrid clause:
  - Rules of one institution
  - Administered by another
  - Generally considered to be ad hoc arbitration

# The issue in China

- Article 16 of the PRC Arbitration Law:

An agreement for arbitration shall include the arbitration clauses stipulated in the contracts or other written agreements for arbitration reached before or after a dispute occurs.

An arbitration agreement shall contain the following:

1. The expression of application for arbitration.
2. Matters for arbitration.
3. **The arbitration commission chosen.**



# The problem in China



- Article 18, Arbitration Law
- “If an arbitration agreement contains no or unclear provisions concerning . . . the arbitration commission, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be null and void”
- Article 4 2006 SPC Judicial Interpretation:
  - “In case an arbitration agreement only stipulates the arbitration rules that applies to the dispute, it shall be ascertained that the arbitration institution is not agreed:
    - except that the interested parties reach a supplementary agreement or
    - can conclude the arbitration institution in light of the arbitration rules stipulated between them.”

# Hong Kong awards



- From 1 July 1997, HK became a Special Administrative Region of PRC
- New York Convention no longer applicable to enforcement of awards between HK and Mainland China
- In June 1999, HK and Mainland China entered into “Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region”
- Article 7 lists reasons awards may not be enforced.
  - Does not include arbitration was ad hoc

# Hong Kong awards



- In 2009, Supreme Court issued “Notice of Relevant Issues on the Enforcement of Hong Kong Arbitral Awards in the Mainland”
  - Issued in response to queries from lower courts
- Specifically stated that ad hoc awards from Hong Kong are enforceable.
  - Also clarified that awards from ICC and other international bodies in HK were enforceable.
- Only exceptions to enforcement are those listed in Article 7 of Arrangement

# The problem for New York Convention awards



- Many model clauses did not specifically identify the administering institution

- For example, ICC model clause:

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

- ICC rules are mentioned but not that ICC will administer

# New model clauses

- HKIAC (and SIAC) have now amended model clauses to avoid the issue.
- HKIAC model clause now reads:

“Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration **administered by the Hong Kong International Arbitration Centre (HKIAC)** under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.”





# The hybrid clause

- When negotiating over model clauses, Chinese party will often insist arbitral body be named.

- This could lead to a hybrid clause
  - Particularly if negotiating late at night/early in the morning.

- Example:

Disputes to be resolved:

“by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce”



# Alstom v Insigma



- Hybrid clause set out above was actual wording in agreement between Alstom and PRC company Insigma.
- Alstom brought arbitration at SIAC in 2008
- SIAC confirmed it could administer under ICC rules.
- Insigma challenged in Singapore courts
  - Singapore CA held clause a valid ad hoc arbitration agreement. (Insigma Technology Co Ltd v Alstom Technology Ltd [2009] SGCA 24)
- Tribunal awarded US\$58 million in damages
- (ICC changed rules in 2012 to provide only ICC can administer under ICC rules)

# Alstom v Insigma



- Award not paid
- Alstom sought to enforce in China
  - Rejected by Hangzhou Intermediate Court
    - Constitution of tribunal under SIAC rules not in accordance with ICC rules
    - Rejection approved by SPC
- Alstom tried to wind up Insigma in HK because it owned shares in a HK company (Re Insigma Technology Co Ltd HCCW 224/2013)
  - Rejected by HK court on grounds excessive jurisdiction
    - to put it charitably “speculative”
  - Alstom ordered to pay costs
    - Not on indemnity basis because Insigma had not paid debt.

# Conclusion



- To ensure arbitral award enforceable in China:
  - Make sure any arbitration clause specifies the institution to administer the arbitration.
  - If clause does not include the administering institution, seek to agree with other party the institution before instituting arbitration.
    - Can be as simple as confirming by email.
  - But, make sure agreement in writing
    - Oral agreement will not be enough



Questions?



Douglas Clark, FHKI Arb  
Barrister, Adjunct Prof. HKU  
Gilt Chambers,  
8<sup>th</sup> Floor, Far East Finance Centre  
16 Harcourt Road, Hong Kong

Tel: +852 2866 8233  
Email: [doug@douglas-clark.com](mailto:doug@douglas-clark.com)