Module 1:
Arbitration for Dispute Resolution

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A. Methods of Dispute Resolution

- Negotiation
- Expert Determination
- “Med-Arb”
- ENE (Early Neutral Evaluation) ,Dispute Review Boards
- Adjudication, etc.

Most common techeniques in Hong Kong

- Mediation
- Litigation
- Arbitration

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B. Mediation

- Private, informal dispute resolution process
- Neutral facilitates parties' agreement
- Mediator is not a judge or counsel
- Define issues to resolve and assists the parties to work on common interests
- Maintain business relationship and creative "practical" solutions
- Aim is not to determine who is right or wrong

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B. Mediation (cont'd)

- Resulting settlement agreement contractually binding, but generally not enforceable as a judgement
- Litigants in Hong Kong expected to attempt to mediate
- Parties who unreasonably refuse to mediate may be denied costs or may end up paying costs of opponent [High Court Practice Direction 31]
- Singapore Convention 2019 (United Nations Convention on International Settlement Agreements Resulting from Mediation) for enforcement of international mediated settlement agreements

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C. Litigation

- Default or usual method of resolving disputes
- Legal action to enforce a right or seek a remedy
- Results in a binding judgment on parties
- Rules of natural justice must be respected

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C. Litigation (cont'd)

- Judgment may be enforced using state's powers
- Judgment may be appealed or review
- Disadvantage in an international dispute of one party's 'home court' advantage
- Parties have little control over procedure, they are bound by rigid court rules

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D. Arbitration Simply Described

- "a private process[1] in which parties agree[2], to have their dispute decided for them[3] by a 3rd party arbitrator[4] resulting in a binding decision imposed[5] upon them by the arbitrator, which can be enforced by law."

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E. Role of the Judge/Arbitrator

- The coin 硬幣

- P with complete intellectual integrity - look at the head side
- D with same integrity – look at the tail side
- Judge/Arbitrator look at the edge of coin. P & D to persuade J/A
- J/A puts the coin down be it head or tail

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F. Trend for ADR in Resolving International Disputes

- International trade & commerce
- Different laws & legal systems
- Time, costs, abuse
- New York Convention 1958 which has 168 contracting states, requires contracting states to enforce valid arbitration agreements and arbitral awards

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G. Genesis of Modern International Arbitration

- The Alabama Claims [1871-1872]
  - American Civil War (1861-1865)
  - The Northern United States (the Union) were at war with the Southern Confederate States (the Confederacy). Confederate bought warships from the UK to divert the Northern ships from blockade duties.
  - Ships were built as merchant vessels to be converted into warships for the Confederate. CSS Alabama captured or sank 69 Union vessels before it was sunk.
  - US Government claimed compensation of US$2 billion or the cession of Canada. A choice between war or arbitration.
  - The treaty of Washington 1871: the financial disputes known as the “Alabama Claims” were to be resolved by arbitration.

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G. Genesis of Modern International Arbitration

- The Alabama Claims [1871-1872]
  - Question was whether the UK had violated its neutrality law
    - Three agreed Rules: the state should
    - (i) use due diligence to prevent the fitting out, arming, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to carry on war against a State with which it is at peace
    - (ii) not to permit or suffer a belligerent to make use of its ports for the purpose of obtaining military supplies or arms
    - (iii) exercise due diligence to prevent its people or ports to violate the above two
  - British Government was prepared to be bound by those Rules though they were not in its neutrality laws

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G. Genesis of Modern International Arbitration

- The Alabama Claims [1871-1872]
  - The 5 members of the Tribunal were nominated by the British Queen Victoria, the US President, the King of Italy, the President Swiss Republic and the Emperor of Brazil. Pleadings were produced in English by the US and British parties. All the documents were translated into French. The arbitration was conducted in French and was held in Geneva in 1871-1872
  - US introduced claims for indirect losses. The arbitrators effectively ruled on their own jurisdiction and decided that the Treaty gave them no power to hear those claims
  - Britain was held liable for damages in the sum of $15.5 M in gold
  - 16 pages award. Over 250 pages dissenting opinion

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H. Features & Advantages of Arbitration

- It is Consensual
  - There must be an agreement to arbitrate
    - may take the simple form of a clause within the main contract (before dispute has arisen)
    - a submission agreement (after dispute has arisen)
    - Recommended WIPO Contract Clauses and Submission Agreements

    http://www.wipo.int/amc/en/clauses/index.html
  - The agreement is the basic source of the powers of the arbitral tribunal to arbitrate
  - The concept is recognized by international treaties
    - New York Convention (NYC)
    - UNCITRAL Model Law

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H. Features & Advantages of Arbitration

- Parties Choose Their Dispute Resolution Decision Makers
  - Tribunal is entrusted by the parties with the right and obligation to reach a decision which will be binding upon them
  - Arbitrator must be neutral, must act fairly and impartially
  - Specific qualifications, skill and experience of the arbitrator may be dictated (as opposed to judges with a general background)
- Private and Confidential
  - Essentially a private process
  - Reflected in institution arbitration rules

Art. 53(C) [WIPO Arbitration Rules]
Art. 52(a) defines “confidential information”
[UNCITRAL Arbitration Rules Article 25.4]

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H. Features & Advantages of Arbitration

- Documents disclosed and the evidence given should also remain private
- General principle of confidentiality under English law : Ali Shipping[1998]2AER 136. CA
- Limitations that remain to be determined on a case by case basis

- Flexible Procedures
  - Parties and arbitrators are free to choose
    - The procedures
    - Their local lawyers and advisers
    - The applicable law
    - The seat of arbitration
    - The place of hearing

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H. Features & Advantages of Arbitration

- The Decision is Final, Binding and Enforceable
  - Limited court intervention [Sections 12 and 13 Hong Kong Arbitration Ordinance Cap. 609] [S. 5 and 6 of Schedule 2 of the Arbitration Ordinance] [S. 81 of Arbitration Ordinance]
  - Enforceable in 168 states which have acceded to the NYC subject to national laws with regard to the exact procedures [Art. V]
  - In the context of an international commercial arbitration it begins by way of the parties' private agreement to arbitrate, followed by the private arbitral process and ends with an award enforceable in most countries of the world
- International
  - The New York Convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958)
    - 168 states have acceded to the Convention
    - Article II requires the courts of Contracting States to enforce valid arbitration agreements and to stay judicial proceedings pending arbitration
    - Hong Kong Arrangement 2000/Supplemental Arrangement 2020

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H. Features & Advantages of Arbitration

- UNCITRAL Model Law (The Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law 1985)
  - Many States have now been able to modernize their laws governing arbitration by adopting the Model Law
  - The principle objectives are:
    - (i) to limit the role of national courts;
    - (ii) to secure procedural fairness;
    - (iii) to put in place rules which would permit completion of an arbitration.
- Hong Kong Arbitration Ordinance Cap. 609 (HKAO) Section 3(a) object:
  - “fair and 17speedy resolution”

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I. Party Autonomy – Jurisdiction – Kompetenz – Kompetenz – Independence of Arbitration Agreement

- ***Premium Nafta Products Ltd v Fili Shipping Co Ltd*** **[2007][House of Lords]**
  - 8 charter parties between a group of ship owners and various chartering companies. Ship owners alleged that the contracts were procured by bribery and sought to rescind. The arbitration clause provided :-
    - (1) This charter shall be construed and the relations between the parties determined in accordance with the laws of England;
    - (2) Any dispute arising under this charter shall be decided by the English courts to whose jurisdiction the parties hereby agree
- The House of Lords said:-
  - (i) The validity of the main contract has no effect on the arbitration clause which is separate. The arbitration agreement of the charter contract survived any rescission of the charter contract and the arbitrators have jurisdiction to decide whether that rescission was lawful
  - (ii) It was time for the English courts to draw a line under the semantic distinctions previously applied to arbitration agreement and make a fresh start. There should no longer be any difference between what is covered by a clause referring to disputes “under” as opposed to “arising out of” a contract. A liberal approach is to be adopted.

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I. Party Autonomy – Jurisdiction – Kompetenz – Kompetenz – Independence of Arbitration Agreement

- Premium Nafta Products Ltd v Fili Shipping Co Ltd [2007][House of Lords]
  - Statements of principle and policy made by
    - (i) Lord Justice Longmore in the Court of Appeal :-

      If an arbitrator does have jurisdiction to decide a particular issue, ……he is to be restrained from doing so and no stay of court proceedings, …… there is likely to be a potential breach of the United Kingdom's international obligations under the New York Convention

    - (ii) Lord Hoffmann in the House of Lords :-

      "The parties …… want …… disputes decided by a tribunal which they have chosen, on the grounds of neutrality, expertise and privacy, the availability of legal services at the seat of arbitration and the unobtrusive efficiency of its supervisory law. Particularly …… do not want to take the risks of delay and …… partiality, in proceedings before a national jurisdiction."

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J. Pro Arbitration Policy

- West Tanker v. Ras Riunione Adriatica di Sicurta Spa, The Front Comor [2007] UKHL 4
  - House of Lords granting an order to restrain proceedings in Italy
  - Lord Hoffmann:-

"The courts are there to serve the business community rather than the other way round. No one is obliged to choose London. The existence of the jurisdiction to restrain proceedings in breach of an arbitration …… may be regarded as one of the advantages which the chosen seat of arbitration has to offer. If other Member States wish to attract arbitration business, they might do well to offer similar remedies."

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K. Administering Institutions

- Types of Arbitrations
  - Institutional (administered)
  - Ad hoc (non-administered)
- Advantages of institutional (administered) arbitration
  - Administration support and supervision are particularly helpful at the beginning when the respondent is usually reluctant to cooperate
  - Assist in the selection and appointment of tribunal, fixing the fees of arbitrators and handling the payment of expenses and other administrative matters
  - Institution Rules may be adopted for the efficient conduct of the arbitration
- The function is to facilitate but do not themselves arbitrate the merits

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L. Disadvantages of Arbitration

- Opposite side of some advantages [barred from court action – no free judge – limited appeal grounds]
- Absence of non-consenting parties
  - Problematic for multi-party contracts or groups of linked contracts
- Lack of precedents/jurisprudence
  - Confidentiality of arbitral process
  - No *stare decisis*
- Arbitrators have no coercive powers
  - Can order interim measures, but need court assistance to compel parties

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Q&A

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