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Which arbitration centre to choose?

In the last two decades arbitration has come of age in Asia-Pacific. Most Asian jurisdictions have legislated to make their laws arbitration-friendly, and new arbitral institutions have sprung up across the region. Several of these now attract high levels of support from the international business community, and are in direct competition with the best-known institutions of Europe and America.

With all this new choice, some of it close to home, how do you choose the best arbitration venue for your contract or your business? Fortunately most businessmen do not become embroiled in arbitration very often, so it is hard to get a first-hand impression of what is available. In practice the choice often seems to be based on habit or stale anecdotal information. The parties only find out what they have signed up for when a dispute arises!

To provide a more scientific basis for choosing, in this briefing we compare the offerings of the three leading Asian institutions: the Japan Commercial Arbitration Association (**JCAA**), the Hong Kong International Arbitration Centre (**HKIAC**) and the Singapore International Arbitration Centre (**SIAC**).

How important is the choice of arbitral institution?

It is fair to say at the outset that the choice of arbitral institution is much less important to achieving a good arbitration than the choice of arbitrator(s). The three institutions we are discussing all offer high quality services at competitive prices; so none is a bad choice. Nevertheless, there are significant differences, including the services on offer and the cost, as we discuss below.

Since the top arbitrators tend to be highly mobile, the choice of arbitral institution need not much influence the crucial issue of who the arbitrator(s) will be, but there will often be some linkage. If the parties cannot agree on an arbitrator (or the chair of a 3-man tribunal) the decision will be made by the arbitral institution, and will usually be someone on its approved panel of arbitrators. So it is important for the institution to have a thoughtful appointments process and an extensive and varied panel. All three of the institutions we are discussing have that (although that is not true of all arbitral institutions). Nevertheless, all things being equal, you are still more likely to get an arbitrator from the appointing institution's home jurisdiction.

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Unless the parties expressly agree otherwise, the choice of arbitral institution will also determine the important issue of the "seat" of the arbitration; e.g. where there is no express choice of seat, an arbitration under the rules of SIAC will be deemed to have a Singapore seat. The "seat" is not only the default location for hearings, but also determines which procedural law applies to the conduct of the arbitration (we discuss this more fully below) and which court system will, in case of necessity, be supervising and assisting the arbitral process. That local court system could be important if a party needs the court's assistance, for example to compel a reluctant witness to give evidence, or to replace an arbitrator who has behaved in an unfair and partisan way.

What services can you expect from your arbitral institution?

The breadth of services provided by arbitral institutions around the world differ widely. At one extreme, some do little more than appoint arbitrators when the parties cannot agree, leaving the parties and the arbitrators to do all the practical work of administering the arbitration. At the other extreme, some employ a large administrative staff to co-ordinate the parties, their advisors and the arbitrators, and generally keep the process moving. They also exercise a quality assurance function over the arbitral process itself, to ensure a high standard of award and easy enforceability.

Broadly, the larger the role the institution plays, the higher its charges are likely to be. The extent to which you wish to pay more to have a more highly-managed arbitral process is a matter of individual preference. It is less necessary if you know the other party and are likely to have business with them in the future, because in those circumstances the arbitration process is likely to remain reasonably civilized and manageable. Conversely, if the other party is unknown to you or likely to be uncooperative, you may welcome the comfort of delegating the administration of the process to a neutral institution.

JCAA's services are on the administratively-light side of the spectrum. Its secretariat can provide rooms for hearings and incidental services such as recording and transcription. It can also draft procedural orders and notifications to the parties. Once an award is made the secretariat will check it for arithmetic or typographical errors.

HKIAC offers a low-cost unmanaged option using the UNCITRAL Rules, and a more expensive managed option using its own HKIAC Administered Rules.

In the unmanaged option the HKIAC can, if the parties so wish, offer services similar to those offered by the JCAA. Its secretariat can also arrange video-conferencing and secure storage of documents, and can hold money as a stakeholder. These services are priced individually, and the parties can choose from the menu which, if any, they want to use.

If the parties opt (usually in the arbitration clause) for the managed option, the HKIAC will coordinate the whole arbitration process in accordance with its own rules. It will organise the appointment of a tribunal, and will manage the proceedings until a tribunal is formed. It will confirm the appointment of the arbitrators, and adjudicate on any challenge to that appointment. Where necessary, it will fix the arbitrators' fees. It acts as a neutral conduit for communications between the parties and the arbitrators, and will provide any other required administrative support, including arranging hearing dates and rooms. It will keep an account of the cost of the proceedings, and make sure any necessary advance payments are made by the parties. It can also assist in filing or registering awards in countries outside Hong Kong where that is required. Although this is a much more proactive process than the unmanaged option, it is still intended to be a "light touch" procedure.

SIAC offers a tightly managed style of arbitration modeled on that of the ICC. This includes case management and financial management of the arbitration in the same way as the HKIAC managed option, but the SIAC Rules also give additional powers to SIAC to relation to the substance of the dispute. Most notably, SIAC has a quality assurance role in the preparation of the award. Before issuing the award the arbitrators must submit it in draft to SIAC, which may suggest modifications to the form of the award and may also draw attention to points of substance. No award can be issued by the Tribunal until its form has been approved by the Registrar. SIAC also has procedural powers. In appropriate cases it may determine that a case should follow an expedited procedure with shortened time limits and a sole arbitrator, leading to a summary award with 6 months. And in cases where a party seeks emergency relief before a tribunal has been appointed, SIAC may unilaterally appoint a temporary emergency arbitrator to consider the application and, if appropriate, make an emergency order.

What can you expect to pay?

Two amounts have to be taken into account when assessing the cost of arbitration: the fee charged by the arbitral institution, and the arbitrators' fees. There will usually also be expenses such as room hire, interpreters, transcription etc.

JCAA, **HKIAC** (for its managed option) and **SIAC** all calculate their fee as a percentage of the amount in dispute. The percentage decreases as the sum in dispute gets higher. For comparison purposes we have set out below the administration fee for a US$ 1 million dispute and a US$ 10 million dispute through each of the three institutions.

*For its unmanaged option **HKIAC** charges only fixed fees for the services it is asked to perform; for example US$ 500 for appointing an arbitrator.

Comparison of institutions' fees

Institution	Fee (US$) on US$ 1 million claim	Fee (US$) on US$ 10 million claim
JCAA	14,200	43,800
HKIAC (unmanaged)*	500	500
HKIAC (managed)	6,300	14,900
SIAC	11,400	26,600

There are two approaches to calculating arbitrators' fees: on an hourly rate basis, and as a percentage of the amount in dispute.

JCAA allows the parties to negotiate and agree their own rates with the arbitrators, but failing agreement will set an hourly rate between US$ 350 and $950, depending on the arbitrator's experience, the complexity of the case etc.

HKIAC does not become involved with arbitrators' fees in its unmanaged option: they are left to the parties to negotiate with the arbitrators. On its managed option **HKIAC** allows the parties to negotiate and agree their own rates with the arbitrators, but failing agreement it will set a fixed fee per arbitrator. The Rules give a range (a higher and a lower percentage of the amount in dispute) within which the HKIAC will set the fee, depending on complexity, time spent etc.

SIAC calculates the fees payable to the arbitrators as a percentage of the amount in dispute. There is no option for the parties to negotiate a different fee with the arbitrators.

For comparison purposes we have set out below the arbitrator's fee (or range of fees) for a US$ 1 million dispute and a US$ 10 million dispute through SIAC and through HKIAC's managed option.

Comparison of arbitrators' fixed fees on managed arbitrations

Institution	Fee (US$) on US$ 1 million claim	Fee (US$) on US$ 10 million claim
HKIAC (managed)	10,700 – 45,000	26,000 – 100,000
SIAC	48,700	157,000

In the case of fixed fee arrangements (for institution and arbitrators' fees), it is possible to negotiate with SIAC and HKIAC for the return of portions of those amounts where the dispute settles early in the proceedings.

Differences in procedural rules

As mentioned above, where there is no express choice of seat the choice of arbitral institution will usually determine the underlying procedural law of the arbitration. In an arbitration under the SIAC Rules the underlying procedural law will be Singaporean law, for example. This is a default rule: the parties are free to depart from it by expressly agreeing a different procedural law, but in practice parties rarely descend to this level of detail when agreeing arbitration clauses.

How much difference does the choice of procedural law make? Arbitrators almost always have a very wide discretion as to how they should orchestrate the proceedings, and they are certainly not obliged to adhere rigorously to local procedural rules; indeed the procedural informality of arbitration is one of its attractions. Amongst experienced international arbitrators an informal but fairly predictable "best practice" procedural style has developed.

Yet there are very significant differences between the procedural laws of different jurisdictions, in particular between civil law jurisdictions such as Japan and common law jurisdictions such as Hong Kong and Singapore. Common law jurisdictions attach a much greater importance to oral witness evidence, assuming that the true facts will emerge on cross-examination. They also favour transparency about the facts, with parties being forced to disclose their evidence even if it is confidential or damaging to their case. In civil law jurisdictions oral evidence is much less important; the primary focus is instead on documentary evidence and the lawyers' submissions. Compulsory disclosure of evidence is rarely ordered, and parties must usually rely on their own knowledge about the facts.

The extent to which these local differences of procedural law will affect an arbitration is not always predictable. But clearly arbitrators are influenced by their professional training when deciding what a fair hearing should look like. An arbitration seated in Japan with a predominantly Japanese panel may well be influenced by Japanese civil law-style procedural law and practice. Also, since arbitration is a consensual process, arbitrators also want to meet the parties' expectations. An arbitration seated in Hong Kong where both disputing parties are from Hong Kong is quite likely to be influenced by Hong Kong common law-style procedural law and practice. And if the parties disagree about what procedure should be adopted, the arbitrator(s) may regard the choice of seat as a strong pointer to what was originally intended by the parties when they made their agreement to arbitrate.

Other considerations

Lastly, there are other less obvious considerations which influence the choice of arbitral institution. These can be cultural, such as Hong Kong's long-standing role as a legal services provider to China. The HKIAC is well networked to legal institutions in Mainland China, which can informally assist enforcement of HKIAC awards. They can also be legal, such as Singapore's predominance as a seat for arbitrations involving India. Not all arbitral awards are enforceable in India: only those from countries which have been approved ("gazetted") by the Indian government. Singapore and Japan have been gazetted, but not China, so Singaporean and Japanese arbitral awards are enforceable in India, but not those from Hong Kong.

Some tentative conclusions

1. The whole range of different arbitration styles are supported within Asia Pacific by the JCAA, HKIAC and SIAC. There is no longer any need to go outside Asia Pacific.

2. If you know the other party and are likely to have business with them in the future, a "lighter" cheaper style of arbitration – offered by the JCAA or HKIAC's unmanaged option - may be best.

3. If the other party is unknown to you or likely to be uncooperative, you may prefer a more heavily managed style of arbitration, as offered by SIAC or HKIAC's managed option.

4. On price, the HKIAC is arguably the most competitive institution. SIAC is generally more expensive, but also provides a higher degree of certainty about price, so if the ability to budget ahead for the costs of arbitration is an important factor, SIAC may be a good choice. JCAA's rates are quite high, but because JCAA arbitrators are paid an hourly rate rather than a fixed lump sum, JCAA may work out cheaper if a dispute settles early, as is often the case.

5. You should decide whether you prefer a common law style of proceeding – including cross-examination of witnesses and targeted compulsory disclosure of documents – or a civil law style – much less emphasis on witnesses and more on lawyers' submissions, and no compulsory disclosure. Consider giving the arbitrators express guidance on these issues.

6. Prefer SIAC or JCAA (but not HKIAC) where an award may have to be enforced in India. Consider HKIAC as a strong contender where an award may have to be enforced in Mainland China.