

第四环节： 个案分析 - 选择解决争议方法的实践

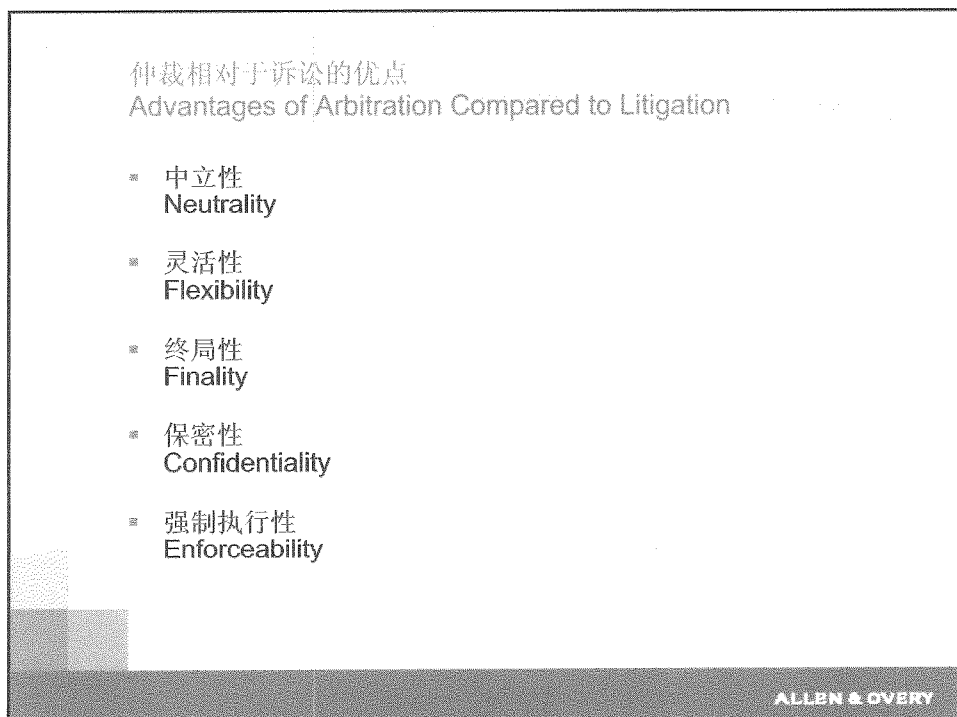
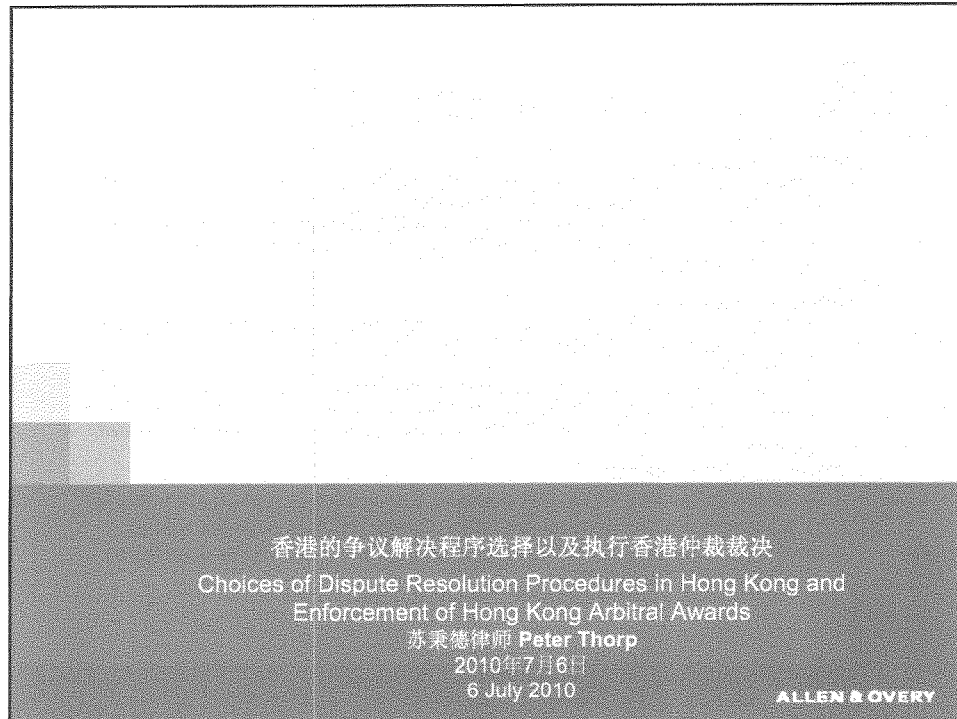
Session Four: Dispute Resolution in Practice - A Case Study

讲题： 上诉机制和执行裁决

Topic: Recourse and Enforcement of Arbitral Awards

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仲裁程序类别 Types of Arbitration Proceedings

机构 Institutional

机构仲裁指由众多专门仲裁机构之一按其仲裁规则管理的仲裁，例如国际商会、伦敦国际仲裁法院或中国国际经济贸易仲裁委员会

An institutional arbitration is one which is **administered** by one of the many specialist arbitral institutions under its own rules of arbitration, for example the ICC, LCIA or CIETAC

临时权宜 Ad-hoc

临时权宜仲裁指由仲裁员和有关方单独安排的仲裁。仲裁可采用某一现成的仲裁规则（如联合国国际贸易法委员会仲裁规则），或按照有关方自行草拟的规则进行（此情况较少）

Ad hoc arbitrations are arranged solely between the arbitrators and the parties. They may adopt a ready-made set of arbitration rules (such as the UNCITRAL Rules of arbitration) or, less frequently, may be conducted under rules drawn up by the parties

香港国际仲裁中心 HKIAC

香港国际仲裁中心通过调解和仲裁就解决本地和国际争议提供顾问和支持服务

The Hong Kong International Arbitration Centre (HKIAC) provides advisory and support services for the resolution of local and international disputes by mediation and arbitration

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强制执行性 Enforceability

- 在选择诉讼或是仲裁时，首要的考虑是其产生的裁决可否强制执行
When choosing litigation or arbitration, a key consideration is enforceability of the resulting decision
- 外国民事判决经常难以得到强制执行
Foreign civil judgments often difficult to enforce
- 相反，根据《承认和强制执行仲裁裁决公约》（纽约公约），外国仲裁裁决的强制执行更容易，提出异议的理由也非常有限（即，不得上诉、不得审核案件的实质问题）
By contrast, under New York Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention), enforcement of foreign arbitral awards far easier and subject to very limited grounds of challenge (i.e. no appeals, no examination of merits)

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强制执行性 Enforceability

- 关于内地与香港特别行政区法院相互承认和强制执行仲裁裁决的安排已于2000年起施行。根据这种安排，在香港作出的仲裁裁决可以在中国内地强制执行，反之亦然，与《纽约公约》规定的仲裁裁决的处理方法一样

A reciprocal enforcement regime in respect of the enforcement of arbitral awards as between Hong Kong and China has been in place since 2000. Under this regime an arbitral award made in Hong Kong may be enforced in the Mainland, and vice versa, in the same way as a New York Convention award

- 关于内地与香港特别行政区法院相互承认生效司法判决的强制执行安排于2008年8月1日实行

A reciprocal enforcement regime providing for the mutual recognition of qualifying judgments between the PRC and Hong Kong became effective from 1 August 2008

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香港诉讼程序 Litigation proceedings in Hong Kong

高等法院程序 High Court Proceedings

- 发出令状: 对申索的性质或诉讼要求的济助或补救作出简洁的陈述
Issue of Writ: Concise statement of the nature of the claim made or the relief or remedy required in the action
- 状书 Pleadings
 - 申索陈述书 Statement of Claim
 - 抗辩书 Defence
 - 反申索书 Counterclaim
 - 答复书 Reply
 - 反申索之抗辩书 Defence to Counterclaim
- 临时命令 Interim Orders
 - 审讯前/待决审讯期间的暂时禁令
Interim injunctions before/pending trial
 - 财产的暂时保存令
Orders for interim detention, custody or preservation of subject matter/property of action
- 上诉 Appeals
 - 高等法院的上诉法院 Court of Appeal of the High Court
 - 终审法院 Court of Final Appeal

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调解 Mediation

- 调解实务指引31于2010年1月1日起施行。该指引是2009年4月开始的民事司法制度改革的继续

On 1 January 2010, Practice Direction 31 on Mediation came into effect. The Practice Direction follows on from the Civil Justice Reforms which were implemented in April 2009

- 2010年1月1日起，诉讼当事人各方有义务考虑将调解作为解决争议的适当途径。对于无故未能调解争议或在司法程序初期未能适当并且持续地考虑调解途径的当事人，他们将可能面临不利的付费判令的风险

From 1 January 2010, parties to litigation are obliged to consider whether mediation is an appropriate way to settle their dispute. Those who fail to mediate without good reason, or fail to give proper consideration to mediation early on in the proceedings and on an ongoing basis, risk having adverse costs orders made against them

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个案分析 Case study

- 在涉及Zeus, Hercules 和 Apollo 的个案中，当事方：
In the case study involving Zeus, Hercules and Apollo, the parties:

- 诉讼程序费用较高，不希望参与
Do not want expensive litigation
- 希望可以得到能够强制执行的裁决
Want an award that is enforceable
- 保密性
Confidentiality

- 建议进行仲裁
Suggest arbitration

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个案分析 Case study

- 问题 Issues
 1. Zeus 并未合法地持有股权和/或享有合法的处置权
Zeus did not legally hold shares and/or right of disposal
 2. 未达成转让QQ 的知识产权的协议
No agreement to assign IP in QQ
- Apollo 终止股权转让协议，要求损害赔偿
Apollo terminates SPA, claims damages
- Hercules 提出抗辩，称Apollo 盗用QQ，未经许可/允许擅自销售产品
Hercules counters that Apollo misappropriated QQ, selling products without license/permission

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个案分析 Case study

- 问题1: Issue 1:
 - 若Apollo/Zeus未订立争议解决条款，则争议解决的法院地在哪儿？中国？美国？
If there was no dispute resolution clause between Apollo/Zeus, then which courts would the dispute be resolved in? China? US?
 - 若协议载有争议解决条款，在香港法院提起诉讼？
Can litigate in Hong Kong courts if there is a dispute resolution clause in the agreement specifying this?
 - 若订有争议解决条款，因仲裁具有保密性、终局性和强制执行性，首选仲裁
If there is a dispute resolution clause, arbitration is preferable because of confidentiality, finality, enforceability
 - 可以在中国仲裁，但外方若坚持在更“中立”的地方仲裁，则在香港仲裁是一个不错的选择
Can have arbitration in the PRC, but if foreign party insists on a more 'neutral' place, arbitration in Hong Kong is a good choice

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个案分析 Case Study

香港仲裁的程序和证据问题

Procedural and evidentiary issues in Hong Kong arbitration

答辩 Pleadings

- 仲裁通知 Notice of Arbitration
- 仲裁通知的答复（包括仲裁反诉，若有） Answer to the Notice of Arbitration (including counterclaims, if any)
- 仲裁请求 Statement of Claim
- 答辩状 Statement of Defence

证人证言 Witness statements

- 事实证言 Factual witness statements
- 专家证言 Expert witness statements

证据开示 Discovery

- 通常比在诉讼中更受限制 Typically more limited than in litigation

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个案分析 Case Study

香港仲裁裁决的强制执行

Enforcement of a Hong Kong arbitral award

- 可以在香港强制执行（例如，在香港有资产）
Can enforce in Hong Kong (e.g. if there are assets in Hong Kong)
- 可以依据《纽约公约》在国外执行
Can enforce abroad under the New York Convention
- 可以依据双边对等安排在中国内地执行
Can enforce in mainland China under the Reciprocal Arrangement

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个案分析 Case Study

- 对仲裁裁决提出的异议 Recourse against an arbitral award
 - 如果原法院在收到执行申请后六个月内未对申请作出执行决定，外方可以向更高级人民法院申请执行
The foreign party can apply to a higher level People's Court for enforcement if the original court did not decide on the enforcement application within 6 months of receipt
 - 如果中方希望对香港仲裁裁决提出异议：
If the Chinese party wishes to challenge the Hong Kong arbitral award:
 - 可以根据有限的理由在香港法庭针对仲裁裁决申请撤销
Can apply to set aside the award in the Hong Kong courts under limited grounds
 - 可以依据中国《民事诉讼法》规定的理由在中国内地反对执行仲裁裁决
Can object to the enforcement of the award in mainland China under grounds set out in the Civil Procedural Law of the PRC

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个案分析 Case study

- 问题2: Issue 2:
 - 侵犯知识产权的主张：在哪里提起侵权主张？中国/美国/香港？
IP infringement claim: where will the infringement claim be brought? China/US/Hong Kong?
 - 要考虑的问题：Things to consider:
 - 侵权发生地 Where the infringement occurred
 - 知识产权注册地 Where the IP rights are registered
 - 侵权人资产所在地 Where the infringer's assets are located

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个案分析 Case Study

- 知识产权侵权的救济 Relief for infringement of IP
 - 诉讼前救济：可以在诉讼前申请财产保全
Pre-litigation relief: can apply for the preservation of property prior to litigation
 - 如果一方被认定已经侵犯知识产权，可以依据中国法律获得停止侵权和损害赔偿的救济
If a party has been found to have infringed IP rights, remedies of injunction and damages available under PRC law

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提问？ Questions?

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