

Taking Stock of Hong Kong as an Arbitral Seat

Counsel and arbitrators give their take on why Hong Kong remains a world class arbitral seat of choice.

Key Points:

- Hong Kong courts continue to be independent and take a pro-arbitration and pro-enforcement approach that facilitates the arbitral process.
- HKIAC Arbitration Rules are innovative and progressive, allowing for cost-effective and efficient resolution of disputes, particularly in situations involving multiple parties and/or multiple contracts.
- HKIAC provides a diverse pool of international arbitrators and world-class services that help ensure a smooth arbitration process.
- Hong Kong benefits from its unique status as both a Special Administrative Region of China and as an international hub.

2020 has been a challenging year for Hong Kong, with recent events such as political protests, the enactment of the National Security Law, and the COVID-19 pandemic calling into question whether Hong Kong will continue to be a viable choice as a seat for arbitration.

In a recent webinar hosted by Latham & Watkins as part of Hong Kong Arbitration Week 2020, four renowned international disputes resolution and arbitration specialists participated in a panel discussion on this topic. The panellists included Jonathan Caplan QC (an eminent UK Queen's Counsel), Fei Ning (a senior arbitration specialist in the People's Republic of China), Byung-Chol Yoon (a senior arbitration specialist in Korea), and Leong Wai Hong (a senior litigator and arbitrator in Malaysia). Drawing upon their own personal experiences and considering recent developments, they considered a range of legal and practical factors.

This *Briefing* will consider the efficacy of arbitrating in Hong Kong based on the panellists' observations regarding:

- Hong Kong's pro-arbitration approach and the rule of law
- The Hong Kong International Arbitration Centre (HKIAC)'s services
- The unique position of Hong Kong

Hong Kong's pro-arbitration approach and the rule of law

The laws of Hong Kong support the arbitration process, and Hong Kong courts have similarly adopted a pro-arbitration approach in their judgments.

For example, a group of arbitration specialist Judges in the High Court is responsible for dealing with arbitration-related cases in order to facilitate their efficient disposal. In a recent decision,¹ Justice Mimmie Chan (currently head of the group) laid out certain key principles indicating the Hong Kong court's attitude towards the enforcement of arbitration awards. The principles include:

- The “primary aim” of the courts is to “facilitate the arbitral process” and to “assist with enforcement of arbitral awards.”
- The court will only interfere in arbitral disputes as expressly provided for by the Arbitration Ordinance.²

The Court of Final Appeal clearly reaffirmed this pro-arbitration approach in the recent decision *Xiamen Xinjingdi Group Co Ltd v. Eton Properties Limited & Ors.*³ The court held that when a successful party to an arbitral award seeks to enforce an arbitral award by a common law action, the Hong Kong court is not restricted to enforcing the award “mechanistically” such that it can only grant relief that simply mirrors the award. Instead, it can exercise its discretion to fashion appropriate remedies to give effect to the award that may even go beyond those initially sought in the arbitration.

Further, a wide range of disputes are arbitrable under Hong Kong law. The area is dynamic and constantly developing: for example, the Arbitration (Amendment) Ordinance 2017 (which came into effect on 1 January 2018) clarified that all intellectual property disputes can be resolved by arbitration, and Hong Kong can enforce arbitral awards relating to intellectual property rights.

Rule of law in Hong Kong

Mr. Caplan QC relayed that there are no signs yet of any impairment of judicial independence in Hong Kong.

The judiciary's quality and efficiency is of the “highest” standard and the city has an excellent reputation as a legal center as it is “open, reliable, independent and efficient”, according to Mr. Caplan QC. In particular, he noted that it was to Hong Kong and the People's Republic of China's (PRC's) credit that in every appeal heard before the Court of Final Appeal, one out of five judges would almost invariably be a visiting judge known as a “Non-Permanent Judge” of the greatest distinction from other common law jurisdictions, including Australia and England and Wales.

Mr. Caplan QC did acknowledge a recent resignation by a foreign judge (Mr. James Spigelman), as well as calls by a UK parliamentary committee for serving judges to reject further appointments. However, in his view, it would be “*business as usual*” for foreign judges and Mr. Spigelman's resignation may prove to be a unique case.

Mr. Caplan QC also addressed whether recent developments such as the recent National Security Law⁴ would have any effect on Hong Kong's judicial independence. Speaking from his own belief and years of appearing before the Hong Kong courts, Mr. Caplan QC emphasized that the courts have shown no signs of failing to supervise the arbitral process independently without political favour or interference — either now, or in the future. In conclusion, he gave the Hong Kong courts a “huge vote of confidence.”

HKIAC and its services

The HKIAC was described as “innovative and progressive” by Mr. Yoon, and as being “on par with any top arbitration center” by Mr. Leong. In particular, they pointed out that the HKIAC Rules, as well as the HKIAC’s services and facilities, permit for cost-effective and efficient dispute resolution.

Multi-party and multi-contract arbitrations

In relation to multi-party and multi-contract arbitrations in Hong Kong, Mr. Yoon observed that the HKIAC Rules are very forward-thinking, and help parties save significant time and expense. In particular, the HKIAC Rules include the following notable features:

- **Joinder of parties:** The 2013 revisions to the HKIAC Arbitration Rules allow for a more flexible timeline for the joinder of parties. Under the 2013 revisions, the Tribunal itself has the power to join additional parties that are bound by a valid arbitration agreement, and the additional party itself can provide a request for joinder.
- **Consolidation of arbitrations:** The 2013 revisions also take a progressive approach to consolidation. They give the HKIAC power to consolidate even after arbitrators are confirmed or appointed, even if the parties and arbitrators are different in the various proceedings being consolidated, and even if all parties do not consent. Furthermore, 2018 revisions eliminated the requirement for all parties to be bound by each arbitration agreement before consolidation of related arbitrations. In contrast, the International Court of Arbitration (ICC) Rules are more restrictive. Without the consent of the parties, the ICC court can only consolidate arbitrations involving claims made under separate arbitration agreements if:
 - The parties are the same.
 - The dispute arises in connection with the same legal relationship.
 - The ICC court finds the arbitration agreements to be compatible.⁵
- **Concurrent proceedings:** Article 30, which was added to the HKIAC Rules in 2018, provides that the Tribunal “after consulting with the parties, can conduct two or more arbitrations under the Rules at the same time, or one immediately after another, or suspend any of those arbitrations” if all the arbitrations have the same tribunal, and there is a common question of law or fact arising in all the arbitrations.

Arbitrator appointments

Mr. Yoon opined that the HKIAC is flexible and highly skillful in shortlisting a pool of excellent arbitrators. He pointed out that arbitrators have very diverse backgrounds, nationalities, expertise, and regional specialties. In 2019, HKIAC made 122 arbitrator appointments. Examples of nationalities and the percentage they account for are as follows: UK 30%, Hong Kong 28%, Australia 8%, China 7%, Singapore 7%, Canada 5%, and dual nationals 7%.⁶ These statistics demonstrate that parties have a wide range of choices when selecting the most suitable arbitrator(s) for their disputes.

Full-service provision

Mr. Yoon also observed that the HKIAC’s full-service provision enhances the quality of the arbitration process for all parties involved. In particular, the HKIAC provides high-quality video and audio conferencing services. These services are highly sought after in light of COVID-19 and the increasing popularity of virtual hearings. The HKIAC’s virtual hearing guidelines are also informative.

Third-party service providers

Mr. Yoon noted that the HKIAC also engages third-party service providers for:

- High-quality translation and bilingual transcript services
- Electronic bundling services

Hong Kong's unique position

Mr. Fei and Mr. Leong noted that Hong Kong also offers distinct conveniences as a seat of arbitration.

Relationship with Mainland China

As a Special Administrative Region of China, Hong Kong is uniquely positioned to be a popular arbitration center, according to Mr. Fei. Various arrangements between Mainland China and Hong Kong allow for the recognition of arbitral awards and civil judgments, as well as for Mainland courts to order interim measures in support of Hong-Kong seated arbitrations.

Enforcement

Mr. Fei said he believed that the Chinese courts support Hong Kong as an international arbitration centre. Enforcement procedures also allow a party to a Hong Kong arbitral award to apply to the Intermediate People's Court if the respondent is domiciled in the Mainland or if the respondent's property is situated to enforce the award.

Interim Measures in Mainland China for Hong Kong arbitrations

On 2 April 2019, the Hong Kong government and the Supreme People's Court of the PRC signed the Arrangement Concerning Mutual Assistance in Aid of Arbitral Proceedings by the Court of the Mainland and of the HKSAR. The arrangement allows parties in Hong Kong-seated arbitrations to seek interim measures, such as property preservation, from Mainland Chinese courts. Mr. Fei pointed out that, in contrast, the Chinese courts are generally unable to grant interim measures for arbitrations seated in other foreign jurisdictions.

Pool of counsel

Mr. Fei observed that in Hong Kong, clients can choose from a broad pool of advocates, counsel, and solicitors from different jurisdictions. Mr. Caplan QC added that the same counsel would be able to represent a client in both the arbitral process and the domestic courts in Hong Kong. In certain other jurisdictions, such as Singapore, foreign-qualified counsel would not be able to represent their clients for ancillary applications before the domestic courts.

Other practical considerations

Speaking from personal experience, Mr. Leong said that Hong Kong is also an ideal venue for arbitration for certain practical reasons, including:

- Hong Kong is easily accessible for parties coming from different countries.
- Nationals from most countries do not require a visa to enter and stay in Hong Kong for a short period of time.
- English is one of Hong Kong's two official languages, and is commonly spoken.

Conclusion

In all, the panellists expressed optimism about Hong Kong's future as an arbitral seat. Their determination reflects factors ranging from Hong Kong's constitutional framework and its relationship with PRC courts, to more practical considerations such as its convenience for international visitors. For many parties, the advantages that Hong Kong continues to offer as a seat of arbitration will likely outweigh any concerns stemming from recent developments.

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Endnotes

- ¹ See *KB v S* (HCCT 13/2015).
- ² Cap. 609.
- ³ [2020] HKCFA 32.
- ⁴ See the English translation of the National Security law at: <https://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf>.
- ⁵ See 2021 ICC Rules of Arbitration, Article 21.
- ⁶ See the 2019 Arbitrator Appointments and Confirmations at: <https://www.hkiac.org/arbitration/arbitrators/arbitrator-appointments-and-confirmations-0>.