

Why Hong Kong will continue to be a leading arbitral center

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James Kwan, Zoe Dong, and Jacqueline Chan of Hogan Lovells argue that despite recent challenging times and the new National Security Law (NSL), Hong Kong will continue to be a leading center for arbitration.

The NSL came into force in Hong Kong on 1 July 2020.

Some observers have expressed concern that the law will threaten Hong Kong's status as an international dispute resolution center. Of particular concern is the potential impact on commercial arbitrations with Chinese parties – some worry that arbitration decisions in Hong Kong will favor Chinese interests.

There are also concerns as to whether Hong Kong's long-established common law traditions will be eroded by the implementation of the law and whether Hong Kong judges will apply Chinese civil law in adjudicating cases.

However, recent developments in Hong Kong clearly demonstrate that Hong Kong remains a neutral and effective seat of arbitration.

Hong Kong has a common law system that it inherited from the United Kingdom; the courts have the ability to make laws in the form of case law, which is determined by rulings on legal precedents.

This is in line with Article 8 of the Basic Law, which states:

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation, and customary law shall be maintained, except for any that contravene this law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

Hong Kong's judiciary continues to uphold Hong Kong's common law traditions. For example, in the first case adjudicated under the NSL earlier this year, *Tong Ying Kit v. HKSAR*, the Hong Kong Court of First Instance confirmed unequivocally that the Hong Kong courts should apply the common law approach to interpretation of the law, consistent with the approach which is applied in respect of the Basic Law.

In reaching this view, the court said:

... we consider that, as far as Hong Kong courts are concerned, we should continue to adopt the common law approach in the construction of the National Security Law. As authoritatively held by the Court of Final Appeal, the Basic Law, which is also a national law enacted by the NPC under the civil law system, should be construed using the common law approach... If the Basic Law, which is right at the interface of "one country, two systems", is to be construed using the common law approach (a proposition that we are duty-bound to accept), we can see no valid basis to adopt any other approach in the construction of the National Security Law.

This judgment is in line with the Hong Kong Court of Final Appeal's authoritative ruling in *Director of Immigration v. Chong Fung Yuen* (2001), in which it was emphasized that the Hong Kong courts are bound to apply the common law as developed in Hong Kong in interpreting the Basic Law and to preserve the independence of a separate legal system in Hong Kong based on common law.

Hong Kong still is and will continue to be a popular destination for international arbitration, in light of its well-regarded and independent judiciary and arbitration institutions, and its arbitration-friendly laws.

The Hong Kong judiciary's long-established institutional framework remains in good function to guarantee the judicial independence explicitly set out in the Basic Law. Eminent and highly respected judges from the senior courts of other jurisdictions are invited to sit on the Court of Final Appeal as non-permanent judges to adjudicate a wide range of cases, from commercial and criminal to constitutional cases.

According to the [World Economic Forum's 2019 judicial independence rankings](#) – which is a ranking of courts that are not subject to improper influence from the other branches of government or from private or partisan interests, Hong Kong ranks first in Asia and eighth overall globally, for judicial independence.

In respect of arbitration-related matters, Hong Kong's arbitration ordinance is based on the United Nations Commission on International Trade Law Model Law which reflects international best practice. The Hong Kong courts have a specialist arbitration list containing judges with extensive experience in arbitration. They have long been renowned for their pro-arbitration stance and neutrality in their decision-making process.

Furthermore, Hong Kong courts have been enforcing arbitral awards against entities (including Chinese state-owned enterprises) without regard to their nationalities.

For example, Hogan Lovells acted for Shandong Hongri Acron Chemical, a subsidiary of a Russian entity, in the enforcement of a China International Economic and Trade Arbitration Commission award against Petrochina International (HK) Corp., a subsidiary of a large Chinese state-owned enterprise (SOE): *Shandong Hongri Acron Chemical. Joint Stock Co v. PetroChina International (HK) Corp* (2011).

Crown immunity will unlikely be available to Chinese SOEs [*TNB Fuel Services SDN BHD v. China National Coal Group Corp* (2017)]. Hence, they can be sued in the Hong Kong courts, and enforcement and execution can be made against their assets. This should provide comfort to international investors doing business with Chinese SOEs.

Arbitral institutions operating in Hong Kong such as the Hong Kong International Arbitration Centre (HKIAC) and International Chamber of Commerce are renowned globally for their independence, integrity, and transparency. In a recent statement on why Hong Kong remains a

neutral and effective seat, the HKIAC recently reaffirmed its dedication to these principles, stating that:

HKIAC's decision-making bodies, such as its council and appointments, and proceedings committees, are comprised of international and local dispute resolution and industry experts and subject to transparent governance structures.

There is no reason (or, indeed, evidence) to suggest that the independence, integrity, or transparency of these institutions would be compromised in any way by the NSL.

In arbitration, parties have control over the selection and appointment of arbitral tribunals. They are at liberty to select arbitrators with neutral nationalities and appropriate expertise and experience to determine their disputes. Party autonomy in Hong Kong seated arbitration will not be undermined by the NSL.

Hong Kong also has a unique advantage for arbitrations involving interests in mainland China. The "arrangement concerning mutual assistance in aid of arbitral proceedings by the court of mainland and of the Hong Kong special administrative region" came into effect on 1 October 2019. Hong Kong thus became the first and only jurisdiction outside the mainland where the mainland courts can grant interim measures in aid of a foreign arbitration if administered by an institution.

Accordingly, parties to arbitral proceedings that have chosen a Hong Kong seat and administration by arbitral institutions set up or established in Hong Kong can apply to the mainland courts for interim measures. So far, the HKIAC has processed 25 applications made to the mainland Chinese courts for interim measures, approximately 30 percent which were made by parties from mainland China and 70 percent of which were made by parties from jurisdictions outside of mainland China – as set out in this [update](#).

In addition, Chinese courts have historically enforced Hong Kong seated awards including those administered by the HKIAC. There have been very few Hong Kong awards that have been refused enforcement in mainland China (since 1999, only three HKIAC awards have been refused enforcement, according to that institution and confirmed by the Chinese Supreme People's Court. The reason for non-enforcement were unrelated to any institutional decision or operation of the HKIAC rules).

Recent developments in Hong Kong, such as allowing for third-party funding in arbitrations and the amendment to the arbitration ordinance to provide for clarification on the arbitrability of intellectual property rights, promote Hong Kong as an international arbitration center and bolster the popularity of choosing Hong Kong as the seat amongst international commercial parties.

For all these reasons, despite the recent challenging times, Hong Kong looks set to continue to be a leading center for arbitration.

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