The Asia-Pacific Arbitration Review

2019

Hong Kong

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Global Arbitration Review is delighted to publish The Asia-Pacific Arbitration Review 2019, one of a series of special reports that deliver business-focused intelligence and analysis designed to help general counsel, arbitrators and private practitioners to avoid the pitfalls and seize the opportunities of international arbitration.

GAR Global Arbitration Review

Hong Kong

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Summary

INTRODUCTION

The Belt and Road Initiative (BRI) was first announced by President Xi of the People's Republic of China (PRC) in late 2013 and aims to connect Asia, Europe and Africa along five main routes.1 With the spurt of commercial and investment activities, the BRI sets the scene for the further development and popularity of international arbitration in Asia.

The BRI provides unprecedented opportunities for the dispute resolution landscape in Hong Kong, with Hong Kong being ideally placed to become the preferred venue for arbitration between the PRC entities involved in BRI opportunities and parties hailing from the 72 countries participating in the BRI.2 The proximity to China that may have previously led to uncertainty about the judicial system in Hong Kong now has the potential to help, with the BRI offering Hong Kong a historic opportunity to leverage its status as a modern financial hub combining efficient infrastructure, well-regulated markets and Western-styled legal institutions with a deep understanding of Chinese culture and business practices.3

Ms Carrie Lam, chief executive of Hong Kong Special Administrative Region, on 12 June 2016 showcased Hong Kong as a leading intermediary between mainland China and the rest of the world. To support this statement, she quoted certain principal considerations. Hong Kong's status as an international financial centre and the world's largest offshore renminbi business centre has the capital, products and expertise to meet the growing demand for financial services along the BRI. Ms Lam sang the praises of the Hong Kong professionals in the legal and arbitration sector as ideal service providers for dispute resolution between BRI enterprises.4

Mainland Chinese authorities also pay credence to Hong Kong's significant role in the BRI. On 18 May 2016, Mr Zhang Dejiang, member of the Standing Committee of the National People's Congress, in his keynote speech at the inaugural Belt and Road Summit, expressed clear support for Hong Kong's role in the BRI. He observed that Hong Kong sits at the busiest international sea route and boasts a developed port economy and is an important gateway in China's expansion. He further stated that Hong Kong and mainland China have developed all-round, wide-ranging and high-level exchange cooperation, and that Hong Kong should seize new opportunities arising from the BRI.5

President Xi Jinping's BRI as mainland China's flagship project entails ambitious global infrastructure projects and has gained momentum since 2013.6 Many of the countries involved in the BRI have unstable geopolitical climates that can give rise to increased potential for legal disputes. Some examples of BRI disputes could be late or non-payment of equipment suppliers, abandonment of projects because of political turmoil or companies not strictly following contracts.7

Thus, Hong Kong's strategic location, business environment and legal expertise, jettisoned by the support of the Hong Kong and mainland Chinese governments, paves the way for a significant role in the BRI in more ways than one.

This article discusses the key features that place Hong Kong as the most viable seat for resolution of disputes arising from the BRI.

HONG KONG AS A NEUTRAL SEAT

Over the years, legal practitioners, arbitral institutions,8 the judiciary and members of the government have consistently worked together to clear the air around the PRC's 'influence'

over Hong Kong.9 Any concern that Hong Kong is subject to 'undue political influence' from the PRC is unfounded. Hong Kong has a robust, independent legal system, a strong legal profession, independent judiciary, user-friendly arbitration legislation, effective enforcement of both domestic and foreign awards, and the availability of a diverse pool of international arbitrators as well as the presence of world class arbitration institutions.10

The Basic Law11 effectively serves as Hong Kong's constitution within China and implements the idea that Hong Kong and China will function as 'One Country, Two Systems'. Hong Kong retains its autonomous common law framework including an independent judiciary to exercise the power of final adjudication.12 Further, the Basic Law expressly states that the national laws of the PRC shall not be applied to Hong Kong.13

CLEAR, CERTAIN AND ACCESSIBLE ARBITRATION LAW

In June 2011, a new Arbitration Ordinance14 (Arbitration Ordinance) came into effect which reformed the arbitration law of Hong Kong by unifying the legislative regimes for domestic and international arbitrations on the basis of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL Model Law).15

The Arbitration Ordinance is self-contained and comprehensively regulates all issues relevant to both domestic and international arbitration. In recent years, the Legislative Council of Hong Kong has made several amendments to the Arbitration Ordinance in order to address current issues arising in the context of arbitration and arbitrability in Hong Kong. The amendments continue to ensure that Hong Kong's arbitration laws are modern and up-to-date, which enhance its status as a preferred seat of arbitration.

The most notable amendments made in the Arbitration Ordinance include the express permission for third-party funding in arbitration and the jurisdiction to hear intellectual property rights (IPR) disputes. These amendments are discussed in further detail below.

ENFORCEABILITY OF INTERIM MEASURES

As stated above, the BRI necessarily involves several Chinese state-owned enterprises (SOEs)16 as the driving force behind many BRI projects along the old Silk Road and maritime trade routes. With the Chinese parties in BRI projects likely to be the party with the better bargaining power in contractual negotiations, many may prefer dispute resolution clauses with a seat in China.

Generally speaking, in the context of arbitral proceedings, the option of seeking interim relief from the arbitral tribunal is often preferred. However, the Arbitration Law of the People's Republic of China does not enable a party to seek interim relief from an arbitral tribunal but only from a competent court.17 By way of contrast, Hong Kong is well-placed to arbitrate BRI disputes in this respect because, as is typical of arbitration-friendly jurisdictions, the courts in Hong Kong are empowered to recognise and enforce interim measures ordered by an arbitration tribunal seated in or outside Hong Kong.18

An interim measure is defined as a 'temporary measure whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided'.19 The arbitral tribunal is equipped with the power to order a party to:20

- maintain or restore the status quo pending determination of the dispute;
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take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

In addition, section 21M of the High Court Ordinance21 empowers the court to grant interim relief in aid of proceedings seated outside Hong Kong without requiring that the relief must be incidental to substantive proceedings commenced in Hong Kong.22

RECOGNITION OF EMERGENCY RELIEF

The legislature has backed Hong Kong's efforts to strengthen its position to become a global seat for international arbitration. A significant provision in the Arbitration Ordinance permits all emergency relief granted by an emergency arbitrator, either granted in or out of Hong Kong, to be enforced in the same manner as an order or direction of the Hong Kong courts, with leave of the High Court.23

The court may refuse leave to enforce emergency relief granted outside Hong Kong unless the party seeking to enforce it can demonstrate that the relief being sought is a 'temporary measure' (including, for example, an injunction) with the aim of doing one or more of the following:24

- maintain or restore the status quo pending the determination of the dispute concerned;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award made by an arbitral tribunal may be satisfied;
- preserve evidence that may be relevant and material to resolving the dispute;
- give security in connection with anything to be done under the measures stated above; or
- give security for the costs of the arbitration.

The Hong Kong International Arbitration Centre (HKIAC) is also reacting to the trend of arbitral institutions in other arbitration-friendly jurisdictions of including emergency arbitrator provisions in the institutional rules. The HKIAC is currently consulting on amendments to its Administered Arbitration Rules and has released a second draft of the proposed new Administered Arbitration Rules.25 The proposed rules allow an applicant to file an application for the appointment of an emergency arbitrator prior to the submission of a Notice of Arbitration, provided that such notice is submitted to the HKIAC within seven days of receipt of the application, unless the emergency arbitrator extends such term.26

The emergency arbitration mechanism, assuming it is implemented, will provide a useful tool for parties engaged in BRI projects which desire rapid enforceable solutions prior to final arbitral resolution. The key benefit of appointing an emergency arbitrator over seeking relief from the main tribunal, once constituted, is, of course, urgency and the ability to maintain the status quo for the duration of the main arbitral proceedings.

MINIMAL COURT INTERVENTION

The underlying policy of the Arbitration Ordinance is to respect party autonomy and restrict the court's interference in the course of the arbitration.27 In this spirit, the judiciary maintains a policy of minimal intervention and routinely supports the arbitral regime by upholding its independence and finality, particularly in respect of recourse against awards (discussed further below).

The primary objective of the courts in Hong Kong, in the context of arbitration, is to facilitate the arbitral process and assist in enforcement of arbitral awards.28 The courts may intervene only in circumstances as expressly provided for in the Arbitration Ordinance.29

Enforcement is a matter of administrative procedure and Hong Kong courts strive to be as mechanistic as possible.30 In considering whether or not to refuse enforcement of an award, the court does not look into the merits or at the underlying transaction.31

RECOURSE AGAINST AWARDS

An arbitral award can be challenged under the Arbitration Ordinance only on limited grounds. The ability to appeal an arbitral award depends on whether the parties have, or deemed to have, opted in to certain opt-in provisions in Schedule 2 of the Arbitration Ordinance, which otherwise do not apply.

The types of challenge available under the Arbitration Ordinance are the following.

Setting Aside An Award Under Section 81 Of The Arbitration Ordinance

The setting aside procedure under the Arbitration Ordinance under section 81, read together with section 5, applies only to awards given by tribunals seated in Hong Kong. Section 81 is mandatory and cannot be contracted out of by the parties. The exhaustive grounds for setting aside are set out in section 81(1) and are analogous to article 34(2) of the UNCITRAL Model Law.

Challenging An Award On Grounds Of Serious Irregularity32

The provisions in relation to challenging an award under Schedule 2, section 4 and appealing an award under Schedule 2, section 5 are not mandatory but are opt-in provisions. Schedule 2 contains the provisions previously applicable to domestic arbitrations before the Arbitration Ordinance was revised in 2011 and the separate regimes for domestic and international arbitrations abolished. Until recently, it was sufficient for parties to refer to their arbitration as a 'domestic arbitration' in order to trigger the application of Schedule 2. However, for arbitration agreements signed from 1 June 2017, it is no longer sufficient for parties to an arbitration agreement to refer to a 'domestic arbitration'; rather, parties should expressly opt in to the entirety of Schedule 2 or state that they wish specific provisions of Schedule 2 to apply in their arbitration.

Schedule 2, section 4(2) of the Arbitration Ordinance, sets out the categories of serious irregularity in respect of which challenges may be brought. It is not sufficient for an applicant to establish that a serious irregularity has occurred. In addition, the applicant must show that the irregularity caused or will cause substantial injustice.33

The Court of Appeal in Grand Pacific Holdings Ltd v Pacific China Holdings Ltd34 set a high threshold and held that in dealing with an application to set aside an award, only a sufficiently serious error, which undermined due process, could be considered. Even so, the court may

still refuse to set aside the award if the court was satisfied that the arbitral tribunal could have reached a different conclusion. Some breaches might be so egregious that an award would be set aside although the result could not be different.35

Appealing An Award On Question Of Law36

Schedule 2, section 5 read together with Schedule 2, section 6(1), provides that an appeal under Schedule 2, section 5 can only be brought with the agreement of the parties or with leave of the court.

As per Schedule 2, section 6(4) of the Arbitration Ordinance, leave to appeal will only be granted if the court is satisfied that:

- the decision of the question will substantially affect the rights of one or more of the parties;
- the question is one which the arbitral tribunal was requested to decide; or
- on the basis of findings in the award, the decision of the arbitral tribunal on the question is obviously wrong or the question is one of general importance and the question is at least open to serious doubt.

The court in A & Others v Housing Authority37 set the test for leave to appeal against an arbitral award. Under section 6(4) of Schedule 2 to the Ordinance, leave to appeal is to be granted only if the court is satisfied that, on the basis of the findings of fact in the award, the decision of the arbitral tribunal on the question is 'obviously wrong' or the question is one of 'general importance' and the decision of the arbitral tribunal is 'at least open to serious doubt'.38 In either case, Justice Chan remarked that 'whether the appropriate test to be applied is “obviously wrong”, or “open to serious doubt”, the threshold is high'.39

RECOGNITION AND ENFORCEMENT OF AWARDS

One of the greatest advantages of arbitration is the enforceability of awards. BRI disputes will almost certainly involve Chinese parties, in which the ability to enforce awards in mainland China and against Chinese assets will be an important consideration. Arbitral awards rendered in Hong Kong are enforceable in more than 150 jurisdictions under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)40 and in mainland China under the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region.41 The Secretary for Justice of Hong Kong regards this extensive network as 'one of the important reasons why many parties choose to conduct arbitration in Hong Kong'.42

The Hong Kong judiciary prides itself with a remarkable track record of enforcing arbitral awards. As per the statistics published by the HKIAC, the courts have not refused enforcement of an arbitral award from 2010–2017.43 These statistics are telling of the determined and consistent pro-arbitration approach of the courts in Hong Kong.

RECOGNITION OF THIRD-PARTY FUNDING

On 14 June 2017, Hong Kong approved third-party funding (TPF) of arbitrations seated in Hong Kong by adopting the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 (Third Party Funding Ordinance).44

Scope

The Third Party Funding Ordinance amends the Arbitration Ordinance[45] and the Mediation Ordinance,[46] to permit TPF for arbitration, mediation and related proceedings. The Third Party Funding Ordinance unequivocally provides that third-party funding of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty.-[47] This is the case both for proceedings in Hong Kong and for work done in Hong Kong in pursuance of arbitrations or mediations outside the territory.

Definitions

A 'third-party funder' may provide 'arbitration funding' to a 'funded party' under a 'funding agreement' in return for a financial benefit if the arbitration is successful within the meaning of the funding agreement.[48] Arbitration funding can be in the form of money or any other financial assistance in relation to any costs of the arbitration.[49] The funding agreement must be in writing and includes only those made on or after the Third Party Funding Ordinance comes into effect.[50]

The definition of a third-party funder is not limited to only professional funders but extends to 'any person who is a party to a funding agreement and who does not have an interest recognised by law in the arbitration other than under the funding agreement'.[51] Given the definition of third-party funders, lawyers may establish funding practices, however lawyers and law firms that act for any party in relation to the arbitration may not fund those proceedings.[52] This is reflective of Hong Kong's stance against lawyers accepting contingency fees.[53]

Disclosure Obligations

The funded party must give written notice to the arbitration body and each party to the arbitration of:

- the fact that there is a funding agreement;
- the name of the funder; and
- the end of the funding agreement (other than because the arbitration has ended).[54]

Code Of Practice

A Code of Practice (Code) may be issued by an 'authorised body' appointed by the Secretary of Justice to set out the practices and standards with which third-party funders are ordinarily expected to comply in carrying on activities in connection with third party funding of arbitration.[55] The Arbitration Ordinance, save for providing that the Code will be issued, does not specify exactly what these standards and practices will be.

A draft Code circulated to the Legislative Council[56] provides some insight as to what may be contained in the Code. A third party will be subject to duties to maintain capital adequacy requirements to pay all debts when they are due and payable and cover aggregate funding liabilities under all of their funding agreements for a minimum period of thirty six months.[57] They also must maintain access to a minimum of HK$20 million of capital.[58]

In addition, the draft Code includes provisions for instances where there is non-compliance by a subsidiary or an associated entity of a third-party funder, a dispute resolution mechanism or an associated entity of a third party funder, a dispute resolution mechanism for disputes on the funding agreement, a complaints procedure and a requirement for an annual return.[59]

The Code will not be a part of the legislation and so a failure to comply with the Code will not attract any legal consequences.60

Thus, TPF provisions are welcomed as an encouragement for parties who may have a strong case but lack the requisite funding in commencing an arbitration. TPF creates opportunities to boost Hong Kong's role as a financing and dispute resolution hub for BRI projects.

ARBITRABILITY OF IPR DISPUTES IN HONG KONG

IPRs play a crucial role in the implementation of the BRI initiative. Trademark and branding activities may be the foundation for entities that plan to expand their businesses to BRI counties.61 Patent regime and innovation are the primary drivers of technology transfers between China and BRI countries.62

The 'Visions and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road', jointly issued by the National Development and Reform Commission, the Ministry of Foreign Affairs and the Ministry of Commerce of the PRC, aims to foster the development of a number of technologies and industries such as cross-border electronic commerce, maritime engineering technologies, environmental protection industries and energies industries.63 All these industries would need extensive investment in IPR acquisition, licensing, protection and enforcement. Given that the BRI covers a wide range of jurisdictions, IPR disputes can be expected in cross-border transactions and investments.

Arbitration is increasingly being used to resolve disputes involving IPR especially when involving parties from different jurisdictions. Court litigation for IPR disputes often result in multiple proceedings under different laws, with the risk of conflicting results. On the other hand, arbitration of IPR disputes has the attraction of offering a single proceeding under the law determined by the parties, coupled with an arbitral procedure and nationality of the arbitrator, or arbitrators, which is perceived as neutral from the perspective of the parties.

The enforcement of the Arbitration (Amendment) Ordinance in 2017 has paved the way for a clear stance on the arbitrability of IPR disputes, thereby establishing Hong Kong as the prime venue for arbitrating BRI IPR disputes.64

Scope

In Hong Kong, parties resort to arbitration to resolve any type of dispute over any IPR, irrespective of whether such IPR is protected by registration and whether it is registered or subsists in Hong Kong or any other jurisdiction.65 Examples of IPR include patents, know-how, trademarks, copyright as well as IPRs that are registered or subsist in Hong Kong or in other jurisdictions such as utility models or other types of 'petty patents', supplementary protection certificates, database rights, etc, as well as new types of IPRs which may emerge in the future.66

Limitations Of Enforcement

Parties can save significant time and costs by choosing arbitration to resolve IPR disputes. Rather than initiating multiple proceedings in multiple courts, pursuant to the IPR amendments to the Arbitration Ordinance, all IPR disputes arising in multiple jurisdictions could be resolved in arbitration seated in Hong Kong.

As stated above, parties can enforce the awards rendered in Hong Kong in any of the 150 signatory states to the New York Convention and in mainland China and the Macao Special

Administrative Region.67 However, whether an arbitral award is enforceable in a particular jurisdiction depends above all on the law of that jurisdiction. For instance, enforcement of an arbitral award which concerns the validity of a registered IPR may be refused in certain jurisdictions such as, in respect of patent infringement, China, where state authorities and courts are vested with sole competence to determine the validity of the IPR.68

Specialist Arbitrators

Given the nuances of the field, the HKIAC has introduced a Panel of Arbitrators from various jurisdictions with extensive experience and strong expertise in intellectual property disputes.69

The arbitrability of IPR disputes in Hong Kong cements Hong Kong's status as a leading venue for the arbitration of IPR disputes.

INSTITUTIONS IN HONG KONG

Hong Kong has received international and national recognition for its arbitral sophistication. Hong Kong's home-grown arbitral institution, the HKIAC, has unrivalled experience and was recently ranked as the fourth most-preferred arbitration institution worldwide.70 The HKIAC is designated the appointing body under the Arbitration Ordinance to appoint arbitrators and to determine the number of arbitrators where the parties to a dispute are unable to agree.71

Hong Kong was also selected by the Paris-based International Chamber of Commerce (ICC) to be the location for its first Asian branch. The China International Economic and Trade Arbitration Commission and the China Maritime Arbitration Commission also opened their first arbitration centres outside mainland China in Hong Kong.

The HKIAC announced its 'Belt and Road Programme' in early April 2018.72 The programme seeks to place the HKIAC in a prime position among other arbitral institutions for BRI disputes and includes a Belt and Road Advisory Committee and an online resource platform.73 The online resource platform contains publications, reports related to BRI, news and information on dispute resolution alternatives for BRI activities.74 The HKIAC was also a supporting organisation for the recent Belt & Road Summit and has hosted several other events on the same subject matter.75

Other arbitral institutions are also reacting to the BRI. The ICC Court established a commission focusing on dispute resolution relating to the BRI in early March 2018.76 The commission will develop the existing ICC dispute resolution procedures and the ICC infrastructure to tailor them for BRI disputes.77 Some of the aims of the commission include raising awareness of the ICC as an arbitral institution, maximising its international coverage, engaging with corporations and governments in all the BRI countries and conducting conduct events throughout the BRI region with the ultimate goal of establishing ICC as a competent institution in resolving BRI disputes.78

INVESTOR–STATE ARBITRATION IN HONG KONG

Several agreements have been made with a view of facilitating investor–state arbitration in Hong Kong. A Host Country Agreement between Hong Kong and the Permanent Court of Arbitration (PCA) was signed on 4 January 2015 which took effect immediately. The aim of the Host Country Agreement is to facilitate the PCA's conduct, provision of facilities and services of arbitral proceedings in Hong Kong. In addition to the Host Country Agreements, the PCA has entered into a cooperation agreement with the HKIAC.79

The Host Country Agreement allows the PCA to offer full benefits of its services at the HKIAC. The dispute resolution administered by the PCA includes arbitration, mediation, conciliation and fact-finding commissions of inquiry.

In addition to arrangements like the Host Country Agreement, the HKIAC offers free hearing space to parties in cases involving a state eligible for the Organisation for Economic Co-operation and Development (OECD) Development Assistance Committee.[80] This measure is particularly relevant for investor–state arbitrations arising from the BRI.

The HKIAC and the Institute of Modern Arbitration of the Russian Federation (IMA) also signed a Cooperation Agreement on the 6 March 2018. The goal of the Cooperation Agreement is to promote investor–state arbitration and alternative dispute resolutions methods in Russia and Hong Kong.[81]

As reported by Global Arbitration Review on 8 August 2018,[82] the HKIAC is set to administer a treaty claim filed by an American citizen against South Korea. This would be the second investment treaty case in which the HKIAC has been requested to provide administrative support.

The HKIAC Secretary General Sarah Grimmer was quoted as saying:

> Several members of HKIAC's secretariat have significant experience in investment treaty arbitration, making HKIAC an excellent administrative choice for such disputes.[83]

Hong Kong and the HKIAC continue to strengthen their respective positions in becoming a preeminent arbitral seat and institution, not only for commercial arbitration but also for investor–state arbitration.

CONCLUSION

The London Centenary Principles (London Principles)[84] postulate key factors that are necessary for an effective, efficient and safe seat for the conduct of international arbitration. Some of the principles are:

- a clear and effective law,
- an independent judiciary,
- legal expertise,
- functional facilities and
- the ready recognition and enforcement of foreign arbitration agreements, orders and awards made at the seat in other countries.

Parties engaged in BRI projects would find that Hong Kong scores highly on all the London Principles and rivals long-established seats of London, Paris and Geneva. Reflecting the importance of Hong Kong as an arbitral seat and as stated above, the International Arbitration Survey produced by the Queen Mary University of London, finds Hong Kong to be the fourth most-preferred seat worldwide.[85]

The former Secretary for Justice of Hong Kong Special Administrative Region, Mr Rimsky Yuen noted that:

proper legal risk management is crucial for any Belt and Road project, and Hong Kong, with its modern legal infrastructure and expertise in dispute resolution, is an ideal neutral venue for resolving Belt and Road disputes.86

Arbitration in Hong Kong has come of age with the amendments introducing TPF and arbitrability of IPR. Modern arbitration laws and the pro-arbitration approach of the judiciary coupled with world-class facilities and highly qualified lawyers make Hong Kong the ideal venue for the arbitration of disputes arising from the BRI.

Notes

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19 Section 35 (1), Arbitration Ordinance.
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