10th
Anniversary
Edition

2016-2017

# The Baker McKenzie **International Arbitration Yearbook**

# Hong Kong

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## A. Legislation and rules

### A.1 Legislation

The Hong Kong Arbitration Ordinance (Cap. 609) has been in force since 1 June 2011. It is largely based on the UNCITRAL Model Law, including its 2006 amendments. Unlike its predecessor, the Ordinance adopts a unitary regime without distinguishing between domestic and international arbitration, thereby providing greater certainty for local and foreign parties. The Ordinance is very user-friendly, as it follows the order of the Model Law and allows users to identify easily to what extent the Model Law has been adopted.

The Ordinance is based on the principles of maximum party autonomy and minimum court intervention. Its object is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense. The Ordinance enhances efficiency in various ways. For example, the default number of arbitrators is either one or three, as decided by HKIAC (as opposed to three arbitrators under the Model Law), which allows for more flexibility.

The Ordinance imposes express confidentiality duties on parties to arbitration proceedings. Disclosure of information related to the arbitral proceedings or the award is only permitted in certain limited circumstances (for example, where a party is obliged by law to make the disclosure to any government or regulatory body, or to any court or tribunal). The confidentiality provisions also cover arbitration-

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related court proceedings, the default position being that those proceedings are to be conducted in closed court. The confidentiality provisions have provided greater certainty and assurance to parties as to confidentiality in arbitrations and related court proceedings in Hong Kong.

Based on the Model Law, the Ordinance has added considerable detail in relation to a tribunal's power to grant interim measures, including injunctions. For example, tribunals have express power to make orders for preservation of assets and to grant preliminary orders, including orders preventing parties from frustrating any interim measure. A separate regime has been adopted for the enforcement of interim measures: a tribunal's orders, whether made in or outside Hong Kong, may be enforced by the court in the same manner as a judgment. In 2013, specific provisions were introduced for the enforcement in Hong Kong of any emergency relief granted by an emergency arbitrator, whether in or outside Hong Kong, in the same manner as an order of the court.

The Ordinance remains one of the most modern arbitration statutes in the world. It recognizes and respects the parties' choice of arbitration as their dispute resolution method and has helped to enhance Hong Kong's position as an effective and efficient seat.

## A.2 Institutions, rules and infrastructure

### A.2.1 HKIAC

Since its establishment in 1985, HKIAC has evolved into one of the world's leading arbitral institutions. The 2015 International Arbitration Survey on Improvements and Innovations in International Arbitration, conducted by Queen Mary University of London, ranked HKIAC as the world's most improved institution over the preceding five years, the most preferred arbitral institution outside of Europe, and the third most preferred institution worldwide.

HKIAC's caseload is predominately international in nature. HKIAC's case statistics for 2015 show that out of the 271 new arbitration cases,

79% involved at least one non-Hong Kong party. Around 43% of the arbitration cases had no connection with Hong Kong and 6% had no connection with Asia. Parties came from 41 jurisdictions; the top 15 nationalities included Hong Kong, China, BVI, Singapore, Australia, UK, USA, Cayman Islands, South Korea, Mongolia and Germany. The total sum in dispute of the 271 arbitration cases reached HKD 47.9 billion (approximately USD 6.2 billion).

On 1 November 2013, a revised version of the HKIAC Administered Arbitration Rules came into effect. These revised rules provide for multiparty and multicontract regimes (allowing, in appropriate circumstances, for joinder and consolidation, and commencement of a single arbitration under multiple contracts), expanded the circumstances in which parties may apply for expedited procedures, and introduced emergency arbitrator procedures (by the end of 2016, HKIAC had received six applications under those procedures). Moreover, the revised rules offer the parties a unique choice on how to remunerate the arbitral tribunal: parties can either agree on remuneration based on the sum in dispute or on agreed hourly rates (subject to a cap, currently at HKD 6,500), with the latter option as the default. This allows parties to anticipate and control the tribunal's fees.

In 2012, HKIAC doubled its hearing space capacity and significantly improved its hearing facilities. These improvements have been well received by users. In a Hearing Centers Survey published by Global Arbitration Review in November 2016, HKIAC ranks as the most preferred arbitration center worldwide for its location, perceived value for money, IT services and helpfulness of staff. The survey is based on data gathered from counsel and arbitrators around the world who used the hearing space between 2013 and 2015.

### A.2.2 CIETAC Hong Kong Arbitration Center

In 2012, CIETAC established the CIETAC Hong Kong Arbitration Center as its first arbitration center outside Mainland China. CIETAC Hong Kong has been administering cases since 1 January 2015, when

the 2015 version of the CIETAC Arbitration Rules came into force. The revised rules introduced specific provisions for Hong Kong-seated arbitrations (for example, they make clear that Hong Kong-seated tribunals may grant interim relief, including emergency relief). Arbitrations administered by CIETAC Hong Kong are, in particular, suitable for parties that prefer the CIETAC Rules but wish to enjoy the benefits Hong Kong has to offer as a prime arbitral seat. In 2015, CIETAC Hong Kong administered five cases.

### A.2.3 ICC

In 2008, the ICC Secretariat opened an office in Hong Kong with a case management team (its first one outside Paris) for Asian-seated arbitrations under the ICC Rules.

## B. Cases

### B.1 Pro-arbitration approach in dealing with setting aside applications (2012)

The case of *Pacific China Holdings Ltd. (In Liquidation) v. Grand Pacific Holdings Ltd.*[3] was a significant step in the development of a robust attitude by the Hong Kong courts toward setting aside applications with a view to protect the finality of arbitral awards.

In this case, the Court of Appeal (CA) reinstated an ICC award that was set aside by the Court of First Instance for serious procedural irregularity pursuant to Article 34(2)(a) of the UNCITRAL Model Law. The CA made clear that when dealing with setting aside applications, the supervisory court is concerned with "the structural integrity of the arbitration proceedings." The setting aside remedy is not an appeal and the court will not consider the substantive merits of the dispute or the correctness of the award, whether concerning errors of fact or law. Further, the supervisory court is not entitled to interfere with a tribunal's case management decisions.

[3] [2012] 4 HKLRD 1; upheld by the Court of Final Appeal ([2013] HKEC 248).

The CA also noted that the court may exercise its discretion not to set aside an award despite a violation of Article 34(2)(a)(ii) of the Model Law (due process ground) if it is satisfied that the violation had no effect on the outcome of the arbitration. However, some errors may be so egregious that an award would be set aside, irrespective of the effect. An error will only be sufficiently serious to be regarded as a violation if it has undermined due process. Accordingly, if a party has had a reasonable opportunity to present its case, it will rarely be able to establish that it has been denied due process.

### B.2 First reported case on antisuit injunction granted (2015)

*Ever Judger Holding Co. Ltd. v. Kroman Celik Sanayii Anonim Sirketi*[4] was the first reported case in which a Hong Kong court granted an antisuit injunction in support of a Hong Kong arbitration agreement. The court established the principle that, as a matter of Hong Kong law, the court should ordinarily grant an injunction to restrain the pursuit of foreign proceedings brought in breach of an agreement for arbitration in Hong Kong, provided the injunction has been sought without delay[5] and the foreign proceedings are not too far advanced, unless the other party can demonstrate strong reason to the contrary. Accordingly, in appropriate circumstances, Hong Kong courts will not hesitate to enforce a Hong Kong arbitration agreement

[4] [2015] HKEC 605.

[5] In assessing whether there is lack of promptness, time begins to run from the start of the foreign proceedings in breach of an arbitration agreement. Once a party is aware of a breach, it is incumbent on it to take steps to rectify the position by applying for an antisuit injunction. In *Sea Powerful II Special Maritime Enterprises v. Bank of China Ltd.* ([2016] HKEC 90), the court clarified that delay was a standalone ground of refusal and refused to grant an antisuit injunction because of deliberate, inordinate and culpable delay: the applicant had deliberately evaded service for 8 months to let the claim become time barred under a contractual one-year limitation period. The applicant then challenged the foreign court's jurisdiction but only applied for an antisuit injunction almost 4 months later and only after its challenge was unsuccessful. The decision was upheld by the Court of Appeal ([2016] HKEC 1150).

where a party has brought proceedings in breach of such an agreement.

### B.3 The "good faith" principle in the context of enforcement (2016)

In Hong Kong, the "good faith" principle is deemed to be enshrined in the New York Convention. Estoppel is regarded as a fundamental principle of good faith. The principle may, for example, be invoked against a party resisting enforcement where that party has failed to raise an objection with the tribunal and carried on with the arbitration, keeping the point up its sleeve and only raising it at the enforcement stage.

In *Astro Nusantara International v. PT Ayunda Prima Mitra*,[6] Chow J of the Court of First Instance refused an application by First Media to extend the 14-day time limit for resisting enforcement in Hong Kong of arbitral awards rendered in Singapore, although the Singapore Court of Appeal (SCA) had already refused enforcement on the ground that the tribunal had no jurisdiction over three of the claimants. Chow J accepted that finding but nevertheless refused to grant an extension of time because the 14-month delay was substantial and the result of a deliberate and calculated decision by First Media. Moreover, Chow J concluded that even if time was extended, First Media would be precluded from relying on grounds permitting refusal of enforcement because it had breached the "good faith" principle, as it had neither sought immediate court review of the tribunal's decision on jurisdiction,[7] nor to have the awards set aside in Singapore. On appeal, the CA upheld Chow J's exercise of discretion not to extend time, but disagreed with Chow J's findings in relation to the "good faith" principle and provided useful guidance on its scope.

First, in considering whether the "good faith" principle may be successfully invoked to resist enforcement, the SCA's finding that the awards were made without jurisdiction had to be taken into account.

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[6] [2015] HKEC 330 (Court of First Instance); CACV 272/2015 (Court of Appeal, 5 December 2016).
[7] Pursuant to Article 16(3) of the UNCITRAL Model Law.

Had Chow J taken the fundamental defect of the awards into account, he could only have exercised his discretion to refuse enforcement.

Second, in considering whether a party's conduct of the arbitration was in breach of the "good faith" principle, it is particularly relevant to consider the law of the seat and the ruling of the supervisory court. As conclusively determined by the SCA, since First Media did not remain silent about its jurisdictional objection, but expressly and effectively reserved its rights, it was entitled to act in the way it did: although First Media did not seek court review of the tribunal's decision on jurisdiction (which is not a "one-shot remedy") or challenge the awards ("active" remedy), it was not prevented from raising the objection at the enforcement stage ("passive" remedy), because the "choice of remedies" principle allows an objecting party to reserve its position and raise its objections if and when enforcement is sought.

Third, the principles of "good faith" and "choice of remedies," which give parties a right to choose between the "active" and "passive" remedies, are not mutually exclusive, but complementary. In applying the "good faith" principle, the court should not adopt a dogmatic approach, but give regard to the full circumstances why an "active" remedy is not pursued or to other relevant circumstances, such as whether a party clearly reserved its rights so that the opposite party was not misled.

Although the Hong Kong courts recognize the "choice of remedies" principle, an objecting party must be careful not to mislead the opposite party into believing that it will not raise the objection at a later stage, as this may result in a breach of the "good faith" principle, allowing the court to enforce an award even where a ground for refusal has been made out.

## B.4 Discretion to enforce annulled awards under the New York Convention (2016)

Under the Arbitration Ordinance and in line with the New York Convention, enforcement of an award in Hong Kong "may" be refused if the applicant proves that the award has been set aside by a competent authority of the country in which, or under the law of which, it was made.

In *Dana Shipping and Trading SA v. Sino Channel Asia Ltd.,* [8] the Court of First Instance denied enforcement of an award that was set aside by the English supervisory court on the basis that the tribunal was not properly constituted and the award was made without jurisdiction. The court provided helpful guidance as to the circumstances in which annulled awards may be recognized and enforced in Hong Kong under the New York Convention.

Under Hong Kong law, a party has no automatic right to resist enforcement of an annulled award and the court retains a residual discretion to enforce it; the discretion must, however, be exercised on recognized legal principles. In considering whether to enforce an annulled award, the court will first decide whether, according to principles of Hong Kong law, the decision of the supervisory court should be given effect. Relevant matters include the grounds for annulment, whether the annulment proceedings were in any way procedurally unfair or irregular, whether the decision maker lacked impartiality, and whether it would be in any way contrary to the court's sense of justice or public policy to uphold the annulment decision. If the court concludes that it should give effect to the decision, it will consider whether to exercise its discretion to nevertheless enforce the award. The court may, for example, do so if the conduct of the party resisting enforcement is "sufficiently egregious to demonstrate bad faith" to justify the court's exercise of its discretion.

[8] [2016] HKEC 1641.

### B.5 The principle of awarding costs on an indemnity basis (2009 - 2016)

In 2009, Reyes J of the Court of First Instance established in *A v. R,*[9] the principle that in the absence of special circumstances, when an award is unsuccessfully challenged, the court will normally consider awarding costs against a losing party on an indemnity basis. Reyes J noted that parties that agree to arbitration should not have to face unmeritorious challenges to their awards and that if costs were awarded on the conventional party-and-party basis only, the winning party would effectively subsidize the losing party's "abortive attempt to frustrate enforcement of a valid award." In a series of subsequent decisions, the courts extended this principle to cases where a party unsuccessfully seeks to set aside an award,[10] brings a court action in breach of an arbitration agreement,[11] or otherwise challenges an arbitration agreement.[12] This line of decisions acts as a deterrent to unmeritorious challenges against arbitration agreements and awards.

## C. Trends and observations

Hong Kong has gained a well-deserved recognition and reputation as a world-class international arbitration center. The 2015 Queen Mary Survey (see Section A.2) ranked Hong Kong as the most preferred seat outside of Europe.

A key factor of Hong Kong's success is its independent, competent, efficient and arbitration-friendly judiciary. In the 2015-2016 Global Competitiveness Report of Switzerland's World Economic Forum, Hong Kong ranks as the fourth most independent jurisdiction in the world. Hong Kong courts consistently adhere to the important principles of maximum party autonomy and minimum court

[9] [2009] 3 HKLRD 389; approved in *Gao Haiyan v. Keeneye Holdings Ltd.* [2012] HKEC 138 (Court of Appeal).
[10] *Pacific China Holdings Ltd (In Liquidation) v. Grand Pacific Holdings Ltd.* [2012] 4 HKLRD 1.
[11] *T v. TS* [2014] 4 HKLRD 772.
[12] *Chimbusco International Petroleum (Singapore) Pte Ltd. v Fully Best Trading Ltd.* [2016] 1 HKLRD 582.

intervention enshrined in the Arbitration Ordinance, and have developed a robust attitude toward enforcing arbitration agreements and arbitral awards, and protecting the principle of finality of awards (see Section B).

Another key factor of Hong Kong's success has been strong government commitment to actively promote and enhance Hong Kong's status as a leading dispute resolution center. Amendments to the Arbitration Ordinance are being introduced where necessary to reflect best international practice or to stay ahead of the curve. Currently, the following legislative initiatives to enhance Hong Kong's arbitration law are underway.

### C.1 Third-Party Funding (TPF) of Arbitrations under Hong Kong Law

TPF of arbitration has become increasingly common over the last decade in numerous jurisdictions, including Australia, England and Wales, and the USA. A major benefit of TPF is that it provides parties, irrespective of their financial position, with additional financing options to pursue their claims and it allows them to share the risk of non-recovery with third- party funders. It has, however, been uncertain whether TPF of arbitration is permitted under Hong Kong law or whether the medieval common law doctrines of maintenance and champerty apply to it, making it a tort and criminal offence. After an extensive review of the subject, amendments to the Arbitration Ordinance have been proposed to ensure that TPF of arbitration is not prohibited and to provide for measures and safeguards in relation to TPF of arbitration. The amendments are expected to take effect in the first half of 2017. The express permission of TPF of arbitration will further enhance Hong Kong's competitiveness as one of the major international arbitration centers in the world.

### C.2 Arbitrability of disputes over intellectual property rights (IPRs)

In an effort to help more parties resolve IPR disputes through arbitration in Hong Kong, amendments to the Arbitration Ordinance have been proposed to clarify that under Hong Kong law, IPR disputes

are arbitrable as between the parties to the dispute and an award is not contrary to public policy only because it is in respect of a matter that relates to an IPR dispute (for example, over the enforceability, infringement, validity, ownership, scope, or duration of an IPR). The amendments will apply to IPRs whether or not the right is protectable by registration and whether or not it is registered or subsists in Hong Kong. The amendments, which are likely to be introduced in the second half of 2017, will provide certainty in this regard, especially on issues relating to the validity of registered patents, trademarks and designs.