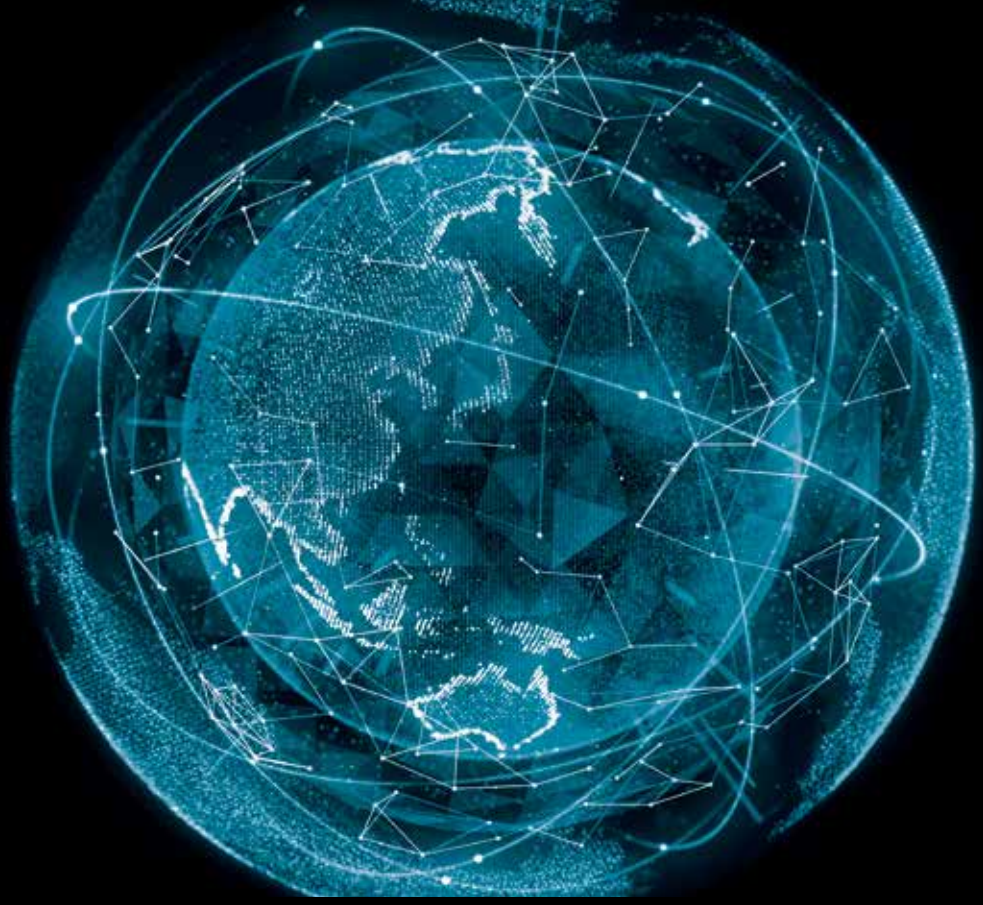

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Welcome to *The Asia-Pacific Arbitration Review 2022*, *a Global Arbitration Review* special report. For the uninitiated, *Global Arbitration Review* is the online home for international arbitration specialists the world over, telling them all they need to know about everything that matters.

Throughout the year, we deliver our readers pitch-perfect daily news, surveys and features; lively events (under our GAR Live and GAR Connect banners (GAR Connect for virtual)); and innovative tools and know-how products.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments in each region than the exigencies of journalism allow. *The Asia-Pacific Arbitration Review*, which you are reading, is part of that series.

It contains insight and thought leadership inspired by recent events, from 35 pre-eminent practitioners. Across 14 chapters and 92 pages, they provide us with an invaluable retrospective on the past year. All contributors are vetted for their standing and knowledge before being invited to take part.

The contributors' chapters capture and interpret the most substantial recent international arbitration events across the Asia-Pacific region, with footnotes and relevant statistics. Elsewhere they provide valuable background on arbitral infrastructure in different locales to help readers get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Australia, Hong Kong, India, Malaysia, Singapore, Sri Lanka and Vietnam and has overviews on construction and infrastructure disputes in the region (including the effect of covid-19), the state of ISDS and what to expect there, and trends in commercial arbitration, as well as contributions by four of the more dynamic local arbitral providers.

Among the nuggets this reader learned is that:

- force majeure is not necessarily the only option for project participants affected by covid-19, especially if the FIDIC suite is in the picture;
- Korea's diaspora is known as its *Hansang* and more 'international' arbitrators are now accepting KCAB appointments (the number of KCAB 'first-timers' is up by 23 per cent);
- it has become far easier for foreign counsel and arbitrators to conduct cases in Thailand;
- there have been some strongly pro-arbitration decisions from the Philippines and Vietnam of late;
- Sri Lanka's courts also seem to have turned a corner on avoiding excessive interference; and
- improvements in the arbitral environment in Vietnam are part of a concerted effort that began in 2015.

I also found answers to some other questions that had been on my mind, such as whether an increase in case numbers in the SIAC in 2020 was matched by an increase in the total value at stake there (spoiler alert: no), and a number of components I plan to consult when the need arises – including a summary of key decisions in Singapore; a long explainer on the background to the Amazon-Future dispute in India; and a fabulous chart deconstructing the arbitral furniture in Uzbekistan.

I hope you enjoy the volume and get as much from it as I did. If you have any suggestions for future editions, or want to take part in this annual project, my colleagues and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher
May 2021

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2020 arbitration developments in Hong Kong

Peter Yuen, Olga Boltenko and Zi Wei Wong
Fangda Partners

In summary

A number of pro-arbitration developments have occurred in Hong Kong since our last update. This includes Hong Kong and China supplementing the existing Arrangement Concerning Mutual Enforcement of Arbitral Awards between Mainland China and Hong Kong; Hong Kong courts handing down a number of arbitration-related decisions; and the Hong Kong Law Reform Commission publishing a consultation paper on outcome-related fee structure for arbitration, with a view to ultimately achieving legislative amendments that would allow outcome-related fee structures for arbitration proceedings seated in Hong Kong.

Discussion points

- The Interim Measures Arrangement in practice
- Amendments to the Arrangement Concerning Mutual Enforcement of Arbitral Awards between Mainland China and Hong Kong
- Decisions relating to the setting aside of arbitration awards handed down by the Hong Kong Court
- Hong Kong's consideration of outcome-based fees for arbitration

Referenced in this article

- *Cheung Shing Hong Ltd v China Ping An Insurance (Hong Kong) Co Ltd* [2020] HKCFI 2269
- *AB v CD* [2021] HKCFI 327

Hong Kong's arbitration institutions

In recent years, Hong Kong's arbitral institutions have reported increased caseloads:

- The Hong Kong International Arbitration Centre (HKIAC) reported 483 new cases in 2020,[1] slightly down from 503 in 2019.
- The China International Economic and Trade Arbitration Commission, which opened a Hong Kong arbitration centre in 2014, reported 739 foreign-related cases, an increase from 617 in 2019.[2]
- The International Chamber of Commerce – Hong Kong has yet to report its 2020 figures, but it reported 869 new cases in 2019.

Parties choose to arbitrate in Hong Kong in view of its arbitration-friendly judiciary, workable legal infrastructure and considerable pool of arbitration professionals. Hong Kong looks set to continue to benefit from important policy initiatives originating in mainland China. These include the Belt and Road Initiative and the Guangdong-Hong Kong-Macao Greater Bay Area Development, each of which will likely generate considerable economic activity and resulting dispute resolution work.

Interim Measures Arrangement in practice

The Hong Kong-Mainland China Interim Measures Arrangement (the Arrangement)[3] came into force on 1 October 2019.

Under China's 'one country, two systems', Hong Kong functions as a separate legal jurisdiction from mainland China, with its own independent courts and legal system based on English common law. Before the Arrangement, mainland Chinese courts would, in general, order interim relief only in support of arbitrations seated in mainland China. Now with the Arrangement in place, parties who want the option of interim relief in China may also choose to arbitrate in Hong Kong. The Arrangement further consolidates the territory's position as a preferred arbitral seat for disputes with Chinese parties.

Under the Arrangement, mainland China courts are empowered to grant interim measures in aid of Hong Kong-seated arbitrations administered by 'qualified' institutions, including the above-named institutions, as well as the South China International Arbitration Centre (SCIA) (Hong Kong). The Arrangement requires applicants to submit applications for interim measures to the relevant arbitral institution, which is responsible for forwarding the application to the appropriate Chinese court. Alternatively, an applicant may deliver its application directly to the relevant court.

The Arrangement was swiftly put into practice. On 13 February 2020, the HKIAC reported that since the Arrangement entered into force, it had processed 13 applications seeking to preserve evidence or assets worth a total of 5.5 billion yuan in mainland China. The HKIAC further noted that court orders had been issued in respect of 1.7 billion yuan in assets and that 40 per cent of cases were brought by applicants from mainland China. This suggests that the benefits of the Arrangement will be felt not only by international parties, but also by mainland China parties seeking relief in respect of assets or property located in mainland China.

In practice, since the Arrangement came into effect, Chinese courts have been efficient at processing interim measures applications. The average time taken by the courts to issue a decision is 14 days from receipt of the complete application, although applications made during the covid-19 pandemic may take longer. The interim measures applications made to the Chinese courts mainly concern preservation of assets or evidence. As at August 2020, there had been no cases of refusal by the Chinese courts of these applications, and the courts generally impose a relatively higher standard for conduct and evidence preservation applications than asset preservation applications.

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Amendment to the Arrangement Concerning Mutual Enforcement of Arbitral Awards between Mainland China and Hong Kong

Hong Kong maintains a bilateral arrangement with mainland China on mutual enforcement of arbitral awards, under which Hong Kong awards are directly enforceable in China (on terms broadly similar to the New York Convention).[4] This arrangement was supplemented on 27 November 2020 to further align with the spirit of the New York Convention. The supplemental arrangement sought to amend the Arrangement by:

- expressly including the term 'recognition' when referring to enforcement of arbitral awards in the Arrangement for greater certainty (using the word 'recognition' for the first time in acknowledgment that enforcement is a two-stage process, as under the New York Convention);
- adding an express provision to the existing Arrangement to confirm that courts considering the enforcement of an award may impose post-award interim measures;
- aligning the definition of the scope of arbitral awards with the prevalent international approach of 'seat of arbitration' under the New York Convention; and
- removing the current restriction of the Arrangement to allow parties to make simultaneous application to both the courts of the mainland and Hong Kong for enforcement of an arbitral award.

Hong Kong courts deliver arbitration-related decisions

Hong Kong courts handed down a number of arbitration-related decisions in 2020, and have continued in 2021.

In *Cheung Shing Hong Ltd v China Ping An Insurance (Hong Kong) Co Ltd* [2020] HKCFI 2269, Deputy High Court Judge José-Antonio Maurellet SC stayed court proceedings in favour of arbitration. In deciding whether a stay should be granted, the court considered the following questions:

- Was the clause in question an arbitration agreement?
- Was the arbitration agreement null and void, inoperative or incapable of being performed?
- Was there in reality a dispute or difference between the parties?
- Was the dispute or difference between the parties within the ambit of the arbitration agreement?

In granting the stay, the court explained that whether a dispute fell within the ambit of the arbitration agreement was 'ultimately an exercise of contractual interpretation'. When interpreting the arbitration clause, the court took into account the precise wording of the agreement and the surrounding circumstances and background. The court further stated that where the clause and the type of agreement was identical, it would normally follow the construction and the analysis of earlier court decisions, both because it was compelling and for consistency reasons.

In *AB v CD* [2021] HKCFI 327, the Hong Kong Court of First Instance (HKCFI) set aside an arbitral award on the basis that the award debtor, AB Engineering, was not a party to the arbitration agreement and was not given proper notice of the arbitration proceedings. The award was made pursuant to an arbitration clause contained in an agreement between AB Bureau and CD. CD initially issued a notice of arbitration, which named AB Bureau as the respondent. It later revised the name of the stated respondent from 'AB Bureau' to 'AB Bureau also known as AB Bureau Co, Ltd', and subsequently further revised it to 'AB Engineering'.

The HKCFI found that, as a matter of fact, AB Engineering and AB Bureau were two separate and distinct legal entities, and that AB Engineering was not a party to the agreement. The Court also found that AB Engineering was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings. The notice of arbitration named AB Bureau as the only respondent. The amended notice of arbitration named the respondent as 'AB Bureau also known as AB Bureau Co, Ltd'. These were the only two notices of the arbitration that were purportedly faxed or sent to the addresses of AB Bureau. There was no clear evidence of actual receipt of the notices by AB Engineering. As the two notices were not sent to the actual registered address of AB Engineering and were not addressed to AB Engineering, the Court concluded that AB Engineering was not given proper notice.

This case highlights the importance of identifying the parties to arbitration correctly and giving proper notice to other parties to the arbitration.

Hong Kong looks into outcome-related fee arrangements

Hong Kong law has traditionally prohibited outcome-related fee or conditional fee structures for work on contentious proceedings. In this way, Hong Kong differs from a number of other jurisdictions that allow conditional fee arrangements, such as Australia, China, England and Wales, and the United States.

On 25 October 2019, the Hong Kong Law Reform Commission announced that it had established a subcommittee to consider whether reform is needed to the relevant law and regulatory framework to allow outcome-related fee structures for arbitration and, if so, to make recommendations for reform. On 17 December 2020, the Hong Kong Law Reform Commission published a consultation paper proposing that the law in Hong Kong should be amended to permit lawyers to use outcome-related fee structures for arbitration taking place in and outside Hong Kong. The publication reflects increased interest in flexible fee structures across the region.

★ *The authors wish to acknowledge the contributions of Jessica Lee of Fangda Partners in the preparation of this chapter.*

Notes

1 https://www.hkiac.org/about-us/statistics.

2 The CIETAC has not confirmed how many of these cases represent Hong Kong-seated arbitrations.

3 The Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region.

4 Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (signed on 21 June 1999 and in force since 1 February 2000).

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Founded in 1993 and regarded as one of the pre-eminent law firms in the region, Fangda Partners is a full-service law firm that employs over 700 lawyers. We advise a wide variety of clients – including large multinational corporations, global financial institutions, leading Chinese enterprises and fast-growing high-tech companies – on a wide range of commercial matters through our network offices in Beijing, Guangzhou, Hong Kong, Shanghai and Shenzhen, offering PRC law and Hong Kong law advice.

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