

ANNUAL REVIEW

Commercial arbitration

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Q HOW WOULD YOU DESCRIBE THE APPETITE FOR COMMERCIAL ARBITRATION AS A MEANS OF RESOLVING DISPUTES? HOW DOES IT COMPARE TO LITIGATION AND MEDIATION, FOR EXAMPLE, AS A PREFERRED METHOD?

HOLDEN: Hong Kong remains the preferred seat of arbitration regionally, given its independent and robust legal system, user-friendly legislation and world-class facilities. Hong Kong's arbitral regime conforms to international best practices and is supported by a judiciary which maintains a policy of minimal intervention. Finality offered by arbitral awards and the extent of their recognition compares favourably with court judgments. However, cost remains an ongoing matter of concern. Whilst it is often assumed that arbitration is less expensive than litigation, that is not always the case. Mediation is often less expensive and speedier than other techniques and has proven quite successful, particularly in the construction industry in Hong Kong.

Q HAVE YOU SEEN ANY RECENT CHANGES IN ARBITRATION RULES AND PROCESSES IN HONG KONG? IF SO, HOW DO YOU EXPECT THEY WILL AFFECT THE ARBITRATION PROCESS GOING FORWARD?

HOLDEN: The beginning of this year saw the Hong Kong International Arbitration Centre (HKIAC) update the administration procedures for UNCITRAL cases, bringing them in line with all versions of the UNCITRAL Rules, namely the 1976 and 2010 versions. HKIAC has also revised its model arbitration clause to provide an express choice of law to govern the arbitration agreement. Recognising this development, the Global Arbitration Review recently conferred upon HKIAC the award for 'Innovation by an Organisation in 2014'. In a move to further enhance its position as an international arbitration centre, Hong Kong has signed an agreement with the Permanent Court of Arbitration (PCA), pursuant to which PCA administered proceedings can be conducted in Hong Kong on an ad hoc basis. Another noteworthy change includes the codification of procedures for challenging an arbitrator under a range of rules into one streamlined system. The opt-in provisions for domestic arbitration are also likely to undergo considerable changes, once the Hong Kong Arbitration (Amendment) Bill 2015 is enacted.



Q HAVE THERE BEEN ANY RECENT COMMERCIAL ARBITRATION CASES OF NOTE? WHAT INSIGHTS CAN WE DRAW FROM THEIR OUTCOME AND WHAT IMPACT MIGHT THEY HAVE ON OTHER CASES?

HOLDEN: The cases of *Shanghai Fusheng Soya-Food Co Ltd vs. Pulmuone Holdings Co Ltd* and *S Co v B Co* endorse the view that the Hong Kong courts will generally ensure that the public policy objection is not abused to resist the enforcement of arbitral awards. The case of *Arima Photovoltaic & Optical Corp v Flextronics Computing Sales and Marketing (L) Ltd* further illustrates that courts will not easily set aside an award. In this case, the Court of Appeal, while considering the sufficiency and adequacy of reasons given by the arbitral tribunal in an award, took a practical approach with regard to the manner in which the matter was dealt with in the arbitration and subsequently upheld the award. The liberal approach of the courts towards interpretation of arbitration agreements was recently highlighted in the case of *T vs. TS*. The aforementioned decisions reaffirm the non-interventionist pro-arbitration approach of the Hong Kong judiciary.

Q THERE HAVE BEEN RECENT DEBATES ON THE RISING COST OF ARBITRATION. WHAT ADVICE CAN YOU OFFER TO PARTIES ON MANAGING THIS ASPECT OF THE PROCESS, WHERE POSSIBLE?

HOLDEN: Arbitration costs today are rivalling and at times even surpassing those of traditional litigation. From our experience, a carefully drafted arbitration clause not only eliminates unnecessary time and cost spent dealing with jurisdictional challenges, it affords parties the opportunity to impart cost-saving components into the process. At the very least, parties should agree the seat of arbitration and the procedural rules that will apply. Parties can also consider implementing agreements to govern process, for example, procedures in respect of documentation, submissions and even agreeing time limits for various procedural steps. The flexibility of the arbitral process allows parties to set milestone dates – including the substantive hearing date – at an early stage. This is a key practical step that can assist in managing time and cost. Where appropriate, parties can now consider invoking the emergency relief and expedited procedures under the HKIAC rules which allow for a more efficient process.



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Q WHAT HURDLES MIGHT PARTIES FACE WITH REGARD TO THE ENFORCEMENT OF AWARDS? WHAT OTHER OBSTACLES AND CHALLENGES TEND TO SURFACE DURING ARBITRATION PROCESSES IN HONG KONG?

HOLDEN: Hong Kong has adopted a pro-enforcement attitude. Enforcement of domestic and foreign awards in Hong Kong is both time and cost efficient. Furthermore, emergency relief granted by an emergency arbitrator in or outside Hong Kong is also enforceable in accordance with the provisions of the Arbitration Ordinance. To uphold the integrity of arbitral awards and assist in efficient enforcement, the courts have, in many cases, awarded indemnity costs against defendants in unsuccessful applications to set aside arbitral awards or challenges to enforcement. Trans-border disputes add difficulties, complexities and inefficiencies to any arbitration process. The issue of cost remains a major obstacle.

Q DO YOU BELIEVE MORE COMPANIES SHOULD INCLUDE ARBITRATION PROVISIONS IN THEIR CONTRACT CLAUSES AT THE OUTSET OF A COMMERCIAL VENTURE? WHAT ARE SOME OF THE KEY CONSIDERATIONS?

HOLDEN: Commercial parties are certainly well advised to consider their dispute resolution strategy at the outset and make provision for it in their agreement. A well-drafted arbitration clause will save parties both time and cost in eliminating potential challenges to forum and jurisdiction. Typically, the incorporation of a model clause can provide greater procedural certainty, however the nature of the dispute has an important bearing upon the incorporation of such clauses. Aside from the procedural and jurisdictional provisions, great care should be taken to ensure that the scope of the clause is clearly defined and is binding and enforceable. Including a tiered dispute resolution mechanism – such as a pre-arbitration mediation requirement – is often appropriate and to be encouraged.

Q WHAT FINAL ADVICE DO YOU HAVE FOR PARTIES ON MAXIMISING THEIR CHANCES OF A SUCCESSFUL OUTCOME WHEN UNDERTAKING ARBITRATION IN HONG KONG?

HOLDEN: As the arbitration procedure is driven by 'party autonomy', a successful outcome will depend substantially upon adequate pre-arbitration preparations. A specialist arbitration counsel can proactively address the key issues and operate to ensure a streamlined process. Selection of an independent tribunal can also have a significant impact on the conduct of the arbitration, thereby maximising the prospects of a favourable outcome. Lastly, parties must ensure that communications and agreements between the parties are properly documented. These are crucial to avoiding time and money being wasted and the duration of the arbitration being unnecessarily prolonged.



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Brooke Holden is a senior disputes lawyer with experience representing local and international clients in a broad range of contractual and commercial disputes. Her recent experience includes advising in relation to shareholder/director disputes, joint venture disputes, high value family disputes, cross-border fraud and asset tracing investigations, and obtaining various injunctions and urgent interim relief both in support of Hong Kong proceedings and in aid of foreign proceedings. In addition to her litigation experience, Ms Holden has extensive experience advising in relation to domestic and international arbitration, both in Hong Kong and abroad.

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