

Foreword

Historically, the role of Hong Kong in international arbitration was limited. That was the reflection of the state of international arbitration in Asia at the time up to the 1980s. So Professor Julian DM Lew QC, in his key note address entitled ‘Increasing Influence of Asia in International Arbitration’ at the inaugural Hong Kong Arbitration Week in 2012, observed that “Asia’s past contribution to international arbitration has been small” and that “[t]he Asian region was largely a bystander to the development of international arbitration and had little influence and perhaps little interest.”¹

His view fits in with my own recollections. I was first involved in Hong Kong arbitration over 30 years ago. It was of course already an established arbitration centre with a healthy diet of construction and maritime cases but with a strong connection to Hong Kong. There were no especial innovations in the practice or law of arbitration. Within a few years, however, there was an explosion of international cases. Moreover, in common with a limited number of other centres, Hong Kong is now in the forefront of arbitral innovations and has established itself as a firm favourite with the consumers of international arbitration services.

1985 saw two important developments which have greatly contributed to this development of Hong Kong as an international arbitration centre. One was the promulgation of the UNCITRAL Model Law in 1985 and its subsequent success in many countries including just a few years later its adoption by Hong Kong. That coupled with the continuous recognition by Asian governments of the nature and potential benefits of arbitration as a method for resolving private disputes galvanized the development of arbitration in Asia. Hong Kong adopted the Model Law, including the 2006 amendments, in June 2011, by introducing the Arbitration Ordinance (Cap 609).

Another event in 1985 was the establishment of the Hong Kong International Arbitration Centre. Led by successive far-sighted Chairpersons and Secretaries General and assisted by a Council with strong international representation HKIAC

¹ Julian D. M. Lew, ‘Increasing Influence of Asia in International Arbitration’, *Asian Dispute Review* (Hong Kong International Arbitration Centre (HKIAC); Hong Kong International Arbitration Centre (HKIAC) 2014, Volume 16 Issue 1) pp. 4–9.

has been a great success. The Centre and arbitrations there have not been a pale imitation of other arbitration centres. On the contrary, there have been specifically Hong Kong and Asian innovations in a number of areas being ahead of other institutions. At the heart of this are the HKIAC Rules which have been updated to keep pace with the demands of arbitration in the region. Users need to know how these rules operate.

As for the law in Hong Kong, the Arbitration Ordinance provides a modern and reliable statutory framework for the conduct of arbitration in Hong Kong. Importantly, and consistent with the letter and spirit of the Model Law, the Arbitration Ordinance only permits minimal curial intervention—in cases expressly envisaged by the law, such as granting interim relief in support of arbitration, assisting with taking of evidence and deciding challenges to awards, in the context of set aside and/or enforcement proceedings. So far Hong Kong courts have been careful not to abuse their arbitration-related powers and adhered strictly to the principal of minimal curial intervention, at the heart of the UNCITRAL Model Law.

Hong Kong has also proved a popular choice for international arbitration.

It is accessible. Hong Kong is within a five-hour flight to half of the world's population. Visa and entry requirements are minimised. Visitors may, for example, obtain a visa for a short-term visit on arrival. Anyone who has not been able to secure a witness or expert attendance due to visa issues—and these things happen more often than you think—will no doubt appreciate the potential benefits of this visa regime for the smooth conduct of arbitration proceedings.

Hong Kong also displays an extraordinarily large pool of multilingual professionals who can easily compete with leading arbitral centres. The city is a home to more than 1,300 barristers² and 1,299 registered foreign lawyers (from 31 jurisdictions),³ not to mention an impressive, in size and quality of its members, pool of non-legal professionals, including engineers, accountants, surveyors, and architects (particularly important for construction disputes).

Finally, when it comes to *where* to hold a hearing, Hong Kong has excellent hearing facilities. HKIAC, Hong Kong's flagship arbitral institution, boasts of 20 meeting spaces including seven hearing rooms and 10 conference rooms. (I declare an interest as a past Vice Chairman). In October 2016, the Centre announced that it would offer its hearing and meeting rooms to parties free-of-charge in respect of dispute resolution proceedings administered by HKIAC in which at least one party is a State listed on the OECD DAC List of ODA assistance.⁴

² See the introductory page on the Hong Kong Bar Association website: <http://www.hkba.org/the-bar/aboutus/index.html> (accessed 28 October 2018).

³ Law Society of Hong Kong, statistics as of 31 December 2015, available at: http://www.hklawsoc.org.hk/pub_e/about/ (accessed 28 October 2018).

⁴ <http://www.hkiac.org/news/free-hearing-space-cases-involving-states>.

Adaptiveness/Ability to React to Users' Changing Demands

Hong Kong has also an enviable ability to innovate and to listen and respond—promptly and adequately—to the changing needs and preferences of the users of international arbitration.

Some examples will suffice. Traditionally, Hong Kong law did not permit third party funding for litigation, except in few narrow circumstances. However, as the use and demand for litigation finance in arbitration increased, in 2013 Hong Kong's Law Reform Commission launched a public consultation on whether to permit third party funding for arbitration in Hong Kong. In October 2016, the Commission issued a comprehensive report recommending that third party funding should be expressly permitted for arbitrations seated in Hong Kong, and in June 2017 Hong Kong passed a bill amending the Arbitration Ordinance to allow third party funding in arbitration.⁵

The most recent manifestation of Hong Kong's receptiveness to the changing needs and demands of the users of international arbitration is the revision of the 2013 HKIAC Arbitration Rules. The 2018 HKIAC Arbitration Rules contain a number of notable market-driven innovations. So, the Rules introduce the early determination procedure, which expressly empowers an arbitral tribunal to decide any point of law or fact by way of early determination on the basis that it is “manifestly without merit,” “manifestly outside the arbitral tribunal's jurisdiction,” or that, even if the point were “assumed to be correct,” it would not result in an award in favour of the party that submitted it (Article 43). This mechanism was introduced in recognition of increasing demands for early determinations—a procedure already available under certain other rules but absent from many others. This is potentially a useful tool to narrowing the issues in dispute, increasing the prospects of settlement, or even providing a full answer to claims.

Other notable innovations include:

- an arbitral tribunal's enhanced powers with respect to the conduct of multiple arbitrations where the same tribunal is constituted and where common issues of law or fact are involved (Article 30) (an arbitral tribunal now has a menu of case management options: to run the arbitrations concurrently, consecutively, or even suspend any of the arbitrations pending resolution of the others); and
- provisions clarifying the test for and streamlining the process of emergency arbitration (Schedule 4).

Together with the 2018 Rules, HKIAC has also released a Practice Note on Appointment of Arbitrators, which sets out its general practice of appointing arbitrators, including a non-exhaustive list of the many factors that the Centre considers when selecting arbitrators. The Note provides some useful insights into what has

⁵ The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016, 14 June 2017.

long been one of the most enigmatic aspects of the arbitral process—appointment of arbitrators—and thus represents an important step towards greater transparency in arbitrations conducted under HKIAC's Rules.

So, all this shows that thus far Hong Kong has proved to be a flexible, reliable, and modern platform for resolution of disputes that values innovation. Indeed, Hong Kong is consistently recognised as one of the leading arbitral seats for resolving international disputes. The 2018 Queen Mary survey, for example, placed Hong Kong among the top five global dispute resolution seats, along with London, Paris, Geneva, and Singapore.⁶ Hong Kong also appears to be a popular seat for Russian disputes. While most recent statistics is not available, according to the Russian Arbitration Association Survey conducted in 2016, 22.5% of the users chose Hong Kong as a seat in the contracts drafted in 2014–2015.⁷

This work by Stephen D. Mau is therefore very welcome and very much needed. With its own practices, law, and rules it is no longer possible to get by in a Hong Kong arbitration by reliance purely on knowledge of the law and practices of other jurisdictions. Stephen's excellent work provides therefore an important reference work for those embarking in Hong Kong arbitration. Additionally, in a broader perspective, it also provides an extremely useful introduction to arbitration law and practice in an eminently clear, logical, and readable way.

For the practitioner this book will also provide an important source of theoretical understanding and practical guidance; from the initial choice of arbitration and choice of rules to the appointment of arbitrators and throughout the reference. The important topics of jurisdiction and arbitral duties are dealt with in a thoughtful way with of course ample citation of authority to rules, laws, and cases. Practical guidance is provided on such topics as the preliminary meeting and the difference between a memorials-based and a pleadings-based approach. It also covers some critical practical areas such as the giving and reception of expert evidence and the duties this places on the expert.

The work also rightly deals not only with the contents of the award but also the recognition and enforcement of awards. This is a topic of very great importance in an international arbitration.

Nor does the author ignore the very practical questions of how to improve efficiency and reduce cost in arbitration as he devotes a chapter to this important question.

I am privileged therefore to have been asked to provide this foreword and happy to commend it.

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⁶ <http://www.arbitration.qmul.ac.uk/research/2018/> (accessed 16 October 2018).

⁷ <https://shop.americanbar.org/PersonifyImages/ProductFiles/297648970/Roundtable%206.pdf>.