Litigating and Arbitrating in Hong Kong –
Key Considerations for Indian Corporates

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Speakers

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Agenda

- Introduction (Kajal Aswani)
- Part 1: Arbitration in India – Myths Dispelled (Naresh Thacker)
- Part 2: Litigating and arbitrating in Hong Kong (Chris Wong)
- Part 3: Overview of HKIAC and Hong Kong as a seat of arbitration (Eric Ng)

PART 1: ARBITRATION IN INDIA – MYTHS DISPELLED

NARESH THACKER, PARTNER, ECONOMICS LAW PRACTICE

Evolution of the Regime

1996
Indian Act is introduced.

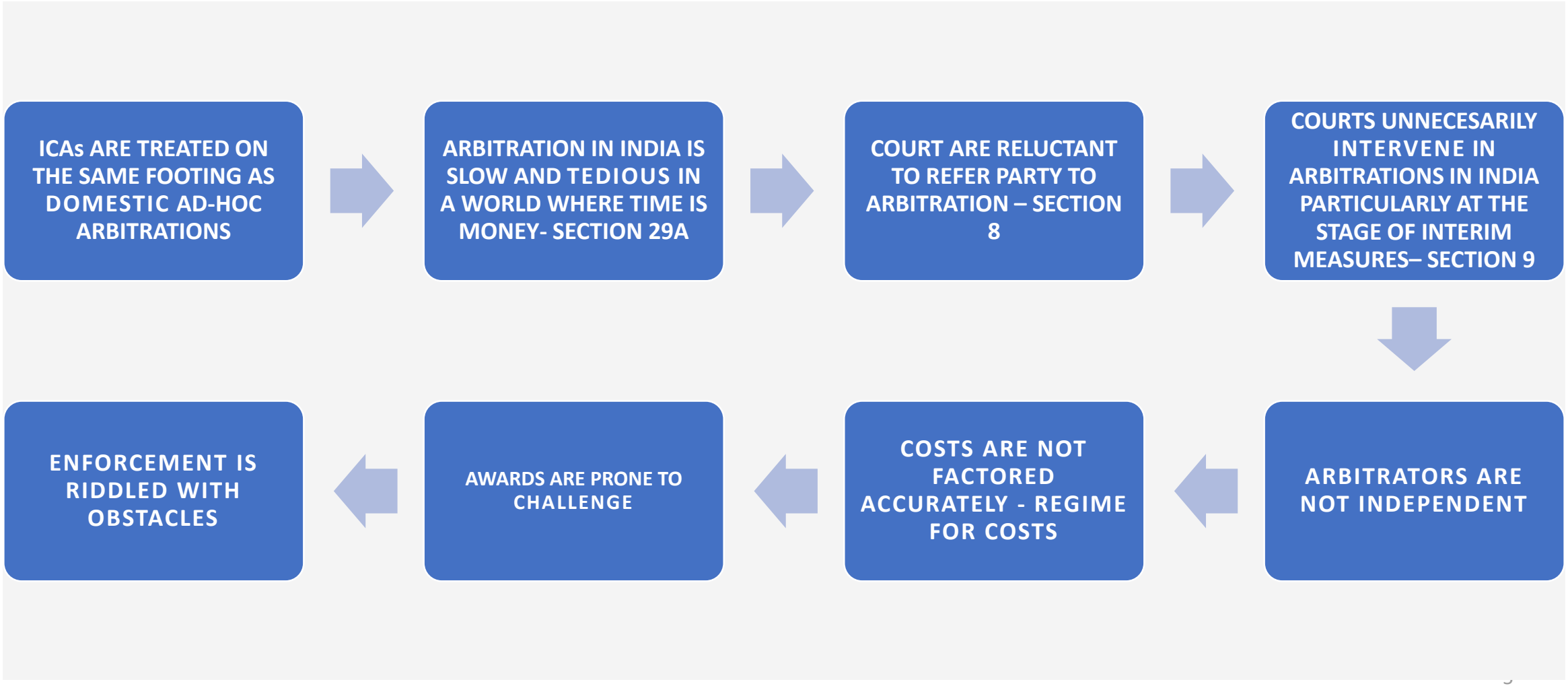
2015
The Arbitration and Conciliation (Amendment) Act, 2015 (2015 Amendment) ushered in. Act, as amended by 2015 Amendment Act is Amended Act.

2019
A further change is brought in 2019.

2020

In exercise of it powers under Article 123 of the Constitution of India, 2020 the Hon'ble President promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2020 (Ordinance).

Busting the Myths



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SECTION 2: DEFINITION OF - COURT, TERRITORIAL APPLICABILITY OF THE ACT, AND ICA

SECTION 7: ARBITRATION AGREEMENT

Contrary to the myth that ICAs ARE TREATED ON THE SAME FOOTING AS DOMESTIC AD-HOC ARBITRATIONS, the Indian legislature has carved out distinctions for ICAs in its effort to bolster India as a favorable seat for arbitration.

Definition of the "Court" – SECTION 2

Court matters pertaining to international commercial arbitrations are to be heard by commercially oriented and experienced judges

Prior to the 2015 Amendment Act, in cases wherein the High Courts did not exercise ordinary civil jurisdiction, the Principal Civil Court (i.e. the court subordinate to the High Court) would qualify as the applicable "court" for international commercial arbitrations.

The 2015 Amendment Act has expanded the definition of the term "Court" to include the High Court as the court of first instance for international commercial arbitrations (where at least one party is a foreign party), instead of the lower judicial courts. Hence, the High Courts shall now exercise jurisdiction in all cases of international commercial arbitration.

BENEFIT: This amendment will ensure that court matters pertaining to international commercial arbitrations are heard expeditiously, by commercially oriented and experienced judges. The amended provision essentially spares a foreign party with little knowledge of the legal system in India from having to litigate in the lower judicial courts, in remote areas of the country.

Scope of "International Commercial Arbitrations"

- Section 2(1)(f) of the Act: expansive criteria done away with.

- The 2015 Amendment Act: clarifies place of incorporation as the deciding factor in determining whether an entity is a foreign party to qualify as an "international commercial arbitration".

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Time Limits to Make an Arbitral Award
Key Consideration for Arbitration Schedule

- The 2015 Amendment Act introduced time limits of 12 months.
- The 2019 Amendment Act excludes ICAs from the rigor of the 12 months time schedule.
- Implication

Following the 2019 amendment time limits are only applicable to domestic arbitrations (and not ICAs), as a result of statutory time limits on ICAs from 2015 to 2019, stakeholders have become more time conscious.

Time Limit to Make an Award – 2019 *(notified)*

TIME LIMIT FOR AWARD – ONLY DOMESTIC [AD HOC AND INSTITUTIONAL]

- **Within 12 months from the date of completion of pleadings**
- **Extension**
  - **By consent of both parties – 6 months maximum**
  - **By application to the Court**
    - **Application must be decided within 60 days**
    - **Court may substitute one or all arbitrators**
    - **Granted only on sufficient cause**
    - **Court may impose terms and conditions**
    - **Court may order reduction of fees of the arbitrator**
- **12 Month/ Extension NOT followed**
  - **Mandate to continue during pendency of application**

Fast Track Award – Section 29B

Under this provision, notwithstanding anything contained in the Act, the parties to an arbitration agreement may (before or at the time of the appointment of arbitral tribunal), agree in writing to have their dispute resolved by a fast track procedure.

The parties may, while agreeing for the fast track procedure, agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties. The fast track procedure to be followed by an arbitral tribunal has been more particularly described in sub-section (3) that provides:

- The dispute shall be decided on the basis of written pleadings, documents and submissions filed by the parties without any oral hearings.
- The arbitral tribunal has the power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them.
- An oral hearing may be held only on a request made by all the parties or if it is considered necessary by the arbitral tribunal for clarifying certain issues.
- In an oral hearing is held, the arbitral tribunal may dispense with any technical formalities and adopt such procedure as deemed appropriate for expeditious disposal of the case. The time limit for making an award under this section has been capped at 6 months from the date the arbitral tribunal enters upon the reference.

In case the award is not made within the prescribed time period, the provisions of sub-sections (3) to (9) of section 29 A will be applicable. It has been further provided that the fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.

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POWERS OF THE COURTS

SECTION 8: Referring parties to arbitration

SECTION 9: Interim measures by the court

Contrary to the myth that courts in India excessively intervene in arbitration related proceedings, courts have in fact adopted a policy of minimal court intervention and the law of arbitration in India reflects on this intent of the courts.

- The Amendment Act has redefined the scope and nature of the role of the courts while referring parties to arbitration. In the Amended Act, the acceptable judicial intervention is minimal and **limited to examining the existence of a *prima facie* arbitration agreement**.
- With respect to the powers of the court to grant interim reliefs, the legislature has made provisions to preclude parties from unnecessarily seeking intervention of the court to grant interim measures. For instance, **once the tribunal is constituted, a party shall not seek interim relief from the court, unless the tribunal is <u>unable to</u>**

Section 8 – Role of Court

- The kompetenz-kompetenz principle is re-affirmed by the 2015 Amendment Act.
- Reduces the discretion of the court and limits it to determining whether prima facie a valid arbitration agreement exists.
- In *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.*, (2013) 1 SCC 641, the Supreme Court for the first time recognizes the need to add non-signatories to an arbitration.
- The Indian legislature acknowledges a burning issue on the international arena- and allows non-signatories to be added as parties.

Section 9 – Interim Measures by the Court

- The legislature has taken steps to ensure that interim measures can only be granted if parties really intend to pursue arbitration.
- **TIME WINDOW** - Under the newly inserted Section 9 (2), the Amended Act provides that in the event a petition is filed in courts to obtain interim relief prior to initiation of arbitration, the party filing such petition shall commence the arbitration within a period of 90 days from the date it has obtained an order of interim relief.
- **MINIMAL COURT INTERVENTION** - The Amendment Act has also sought to rule out unnecessary intervention of courts during arbitral proceedings. As per the newly inserted 9 (3) of the Amended Act, once an arbitral tribunal has been constituted, the court shall not entertain an application for interim relief unless it finds that the interim relief sought from the arbitral tribunal under Section 17 of the Amended Act would not be efficacious.

Interim Measures Pending Enforcement of Foreign Awards

***Aircon Beibars FZE* v. *Heligo Charters Pvt. Ltd.*, 2017 SCC Online Bom 631**

- Adopting the pro-arbitration spirit of the Amended Act, the Bombay High Court in the case of *Aircon Beibars* has secured the amounts due from a judgment debtor under a foreign award, pending enforcement of the award in India, by way of Section 9 of the Amended Act. The Bombay High Court through this order sought to ensure that the interests of a foreign award holders are protected pending enforcement.

***Trammo DMCC (formerly Known as Transammonia DMCC)* v. *Nagarjuna Fertilizers & Chemicals Ltd.*, 2017 SCC OnLine Bom 8676**

- In *TRAMMO DMCC* , the Bombay High Court allowed the holder of a foreign award to apply for interim relief in the court which enjoyed jurisdiction over the assets of the judgment debtor. The decision saves the award holder from the unnecessary hassle of deciding which court to approach, i.e. the court which enjoys jurisdiction over subject matter of arbitration or the court which enjoys jurisdiction over the location of the assets to be used for enforcement.

Enforcement of interim reliefs in a foreign seated emergency arbitration

***Raffles Design International India Pvt. Ltd.* v. *Educomp Professional Education Ltd. & Ors.*, 2016 SCC OnLine Del 5521**

***HSBC PI Holdings (Mauritius) Ltd.* v. *Avitel Post Studioz Ltd. & Ors*, 2014 SCC OnLine Bom 102**

- While Indian courts have granted interim reliefs in relation to foreign seated arbitrations under Section 9 of the Act, in cases of enforcement of interim reliefs in a foreign seated emergency arbitration, for example in Raffles Design and Avitel, the courts till date have ruled that eventually a suit may have to be filed in Indian courts for seeking enforcement of such awards, or the courts may consider granting similar interim relief as the emergency arbitrator, after scrutinizing the merits of the interim relief sought, under a separate Section 9 application filed in Indian courts

Powers of the Tribunal equivalent to the court

SECTION 17: As Amended by the 2015 Amendment Act And clarification under 2019 Amendment Act

- The 2015 Amendment Act has empowered the tribunal to grant the same interim measures as the courts. By extending the powers of the courts to the tribunal, the intervention of courts for securing interim measures has reduced considerably.
- The powers of the tribunal with respect to the conduct of arbitral proceedings and the regime for awarding costs in arbitral proceedings have also been amended to allow the apportionment of costs to be based on the success or failure of a party in the arbitration, unless the parties agree otherwise.

The High Courts have been forthcoming in upholding the interim reliefs granted by arbitral tribunals in view of section 17(1) of the Amended Act

- ***Delhi State Industrial & Infrastructure* v. *PNC Delhi Industrial Infra Private Ltd.*, ARB. A. (COMM.) 17/2017, Delhi High Court**

In *NTPC Limited* and *Delhi State,* the Delhi High Court upheld the mandatory injunction granted by the tribunal.

- ***Lanco Infrastructure Ltd.* v. *Hindustan Construction Co. Ltd.*, 2016 SCC OnLine Del 5365**

In *Lanco Infrastructure,* the Delhi High Court took note of the tribunal's powers under the amended Section 17 to grant reliefs to secure amounts in disputes.

- ***Enercon GmbH* & Ors. v. *Yogesh Mehra & Ors.*, 2017 SCC OnLine Bom 1744**

In *Enercon GmbH,* the Bombay High Court reiterated that an arbitral tribunal's power to grant interim relief is like that of courts.

- ***Alka Chandewar* v. *Shamshul Ishrar Khan*, 2017 SCC OnLine SC 758**

In keeping with the spirit of the Amendment Act, the Supreme Court in *Alka Chandewar*, enforced an interim order granted under the pre-Amendment Act. The court noted that a party's failure to comply with tribunal's interim order amounted to a contempt of its orders. Hence, it is evident that the courts are increasingly inclined to adopt a pro-enforcement approach towards interim measures granted in arbitrations. *NTPC Ltd.* v. *Jindal ITF Ltd. & Ors.*, 2017 SCC OnLine Del 11219

Grounds for challenge to the appointment of the arbitrator

Section 12: As amended by the 2015 Amendment Act

Contrary to the myth that arbitrators are prejudiced or biased, the legislature introduced a welcome and non-derogable provision (along with schedule) to ensure independence and impartiality.

The 2015 Amendment Act introduced much needed additions to Section 12 of the Act by expressly mandating prospective arbitrators to make certain disclosures in writing and providing the circumstances under which an arbitrator would be ineligible for appointment.

Section 12 – Grounds for Challenge to Appointment

Disclosures

- Statutorily recognizing the grounds for justifiable doubt and the ineligibility criteria from the *International Bar Association Guidelines*, the Indian legislature imports the same in the Act.
- The 2015 Amendment Act necessitates disclosures of :
  - Circumstances that give rise to justifiable doubts as to the proposed arbitrator's independence and impartiality; and
  - Any circumstances which are likely to affect the proposed arbitrator's ability to complete the entire arbitration within 12 months.

Independence and Impartiality

- The grounds which may give rise to justifiable doubts as to the independence or impartiality of an arbitrator have been stated in the Fifth Schedule to the Amended Act. These grounds can be relied on by the parties, upon the arbitrators' disclosure, for challenging the appointment of the arbitrator(s).
- Further, the Seventh Schedule of the Amended Act provides grounds which, if found to exist upon disclosure, bar the appointment of such arbitrator(s).

Regime for Costs – Section 31-A

Contrary to the myth that COSTS are not awarded and factored in accurately, the legislature has set out factors to be considered by the tribunal while awarding costs.

- A tribunal can follow the general rule that costs follow the award but may decide otherwise for reasons to be recorded in writing.
- Adopts the loser pays principle

Challenge of Award – 2015 Amendment Act
Section 34 – Grounds

- AN AWARD IS IN CONFLICT OF PUBLIC POLICY [DISCUSSED NEXT]
- PATENT ILLEGALITY – OTHER THAN FOR INTERNATIONAL COMMERCIAL ARBITRATIONS
- A PARTY WAS UNDER SOME INCAPACITY
- THE ARBITRATION AGREEMENT IS NOT VALID UNDER THE AGREED OR APPLICABLE LAW
- NO PROPER NOTICE OF THE APPOINTMENT OF THE ARBITRATOR OR THE PROCEEDING HAD BEEN GIVEN TO IT
- THE DISPUTE DEALT BY THE ARBITRAL AWARD DOES NOT FALL WITHIN THE TERMS OF THE SUBMISSION, OR THE AWARD CONTAINS A DECISION BEYOND THE SCOPE OF SUBMISSION.
- THE COMPOSITION OF THE TRIBUNAL WAS NOT IN ACCORDANCE WITH THE AGREEMENT OF THE PARTIES
- THE SUBJECT MATTER OF DISPUTE CANNOT BE SETTLED BY MEANS OF ARBITRATION

Challenge of Award

Section 34 – An award is in conflict of the "Public Policy of India" if -

THE MAKING OF THE AWARD WAS AFFECTED OR INDUCED BY FRAUD OR CORRUPTION

THE AWARD IS IN CONTRAVENTION OF THE FUNDAMENTAL POLICY OF INDIAN LAW

THE AWARD CONFLICTS WITH BASIC NOTIONS OF MORALITY OR JUSTICE.

Ssangyong Engineering & Construction Co. Ltd. v. National Highway Authority of India, 2019 SCC OnLine SC 677

Restricted scope in a Section 34 application – 2019 Amendment Act

The 2019 Amendment Act has also amended Section 34 of the Act by substituting the phrase ***furnishes proof*** with the phrase ***establishes on the basis of the record of the arbitral tribunal that***.

Parties are therefore not permitted to produce documents that are beyond the ***record of the arbitral tribunal***

However, while this decision is welcome, the ***record of the arbitral tribunal*** has not been defined or clarified for the purposes of section 34.

Section 34(2)(a) of the Act as amended by Section 7 of the 2019 Amendment Act.

Enforcement of foreign award – 2015 Amendment Act

The Amended Act now provides that while considering whether a foreign award should be enforced in India, the test to determine whether the award is in contravention with the fundamental policy of India shall not entail a review on the merits of the dispute. This change reinforces the aim of non-interference with the enforceability of a foreign award.

The Amended Act now clarifies the scope of review under Section 48 (2) (b), on the grounds of public policy. Explanation 1 to Section 48(2) (b) expressly mandates that an award will conflict with the public policy of India only if:

- the making of the award was induced or affected by fraud or corruption; or
- the award is in contravention with the fundamental policy of Indian law; or
- the award is in conflict with the basic notions of morality and justice.

SC enforces Foreign Award

- In *Vijay Karia v Prysmian Cavi E Sistemi SRL & Ors.*, 2020 SCC OnLine SC 177, the apex court while reiterating the limited grounds on which the enforcement of a foreign award may be resisted, has most importantly allowed enforcement of an award even if such enforcement would violate the provisions of Foreign Exchange Management Act, 1999, thereby affirming the decision pronounced by the Delhi High Court in *Cruz City 1 Mauritius Holdings v Unitech Limited* (2017) 239 DLT 649.
- The apex court in *Vijay Karia* clarified that for a foreign award to be unenforceable as being in contravention of the fundamental policy of Indian law, as stated in *Renusagar Power Co. Ltd. v General Electric Co.* (1994) Supp (1) SCC 644 it must involve a breach of some legal principle or legislation that is so basic to Indian law that it is not susceptible to being compromised. The court in *Vijay Karia* emphasised that 'fundamental policy' refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also in time-honoured principles that are followed by the courts.

PART 2: LITIGATING AND ARBITRATING IN HONG KONG

CHRIS WONG, EXECUTIVE PARTNER, GALL

Hong Kong – Background and Unique Legal History

Pre 1997

- Colony of the British empire
- Laws adopted from those issued by the British Parliament
- Final adjudication and authority lay with the Privy Council

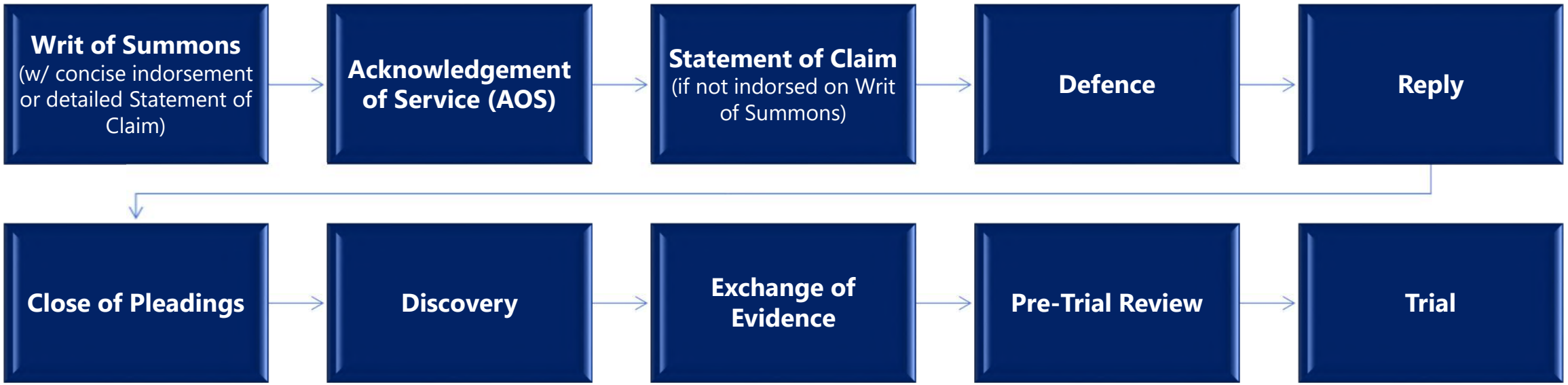
Post 1997

- Special Administrative Region under China
- One country two systems regime
- Own (mini) constitution - Basic Law

Why attractive for dispute resolution?

- Common Law system
- Independent judiciary
- Rule of Law
- Easy enforcement of judgments and awards

Overview of Litigation Procedure in Hong Kong



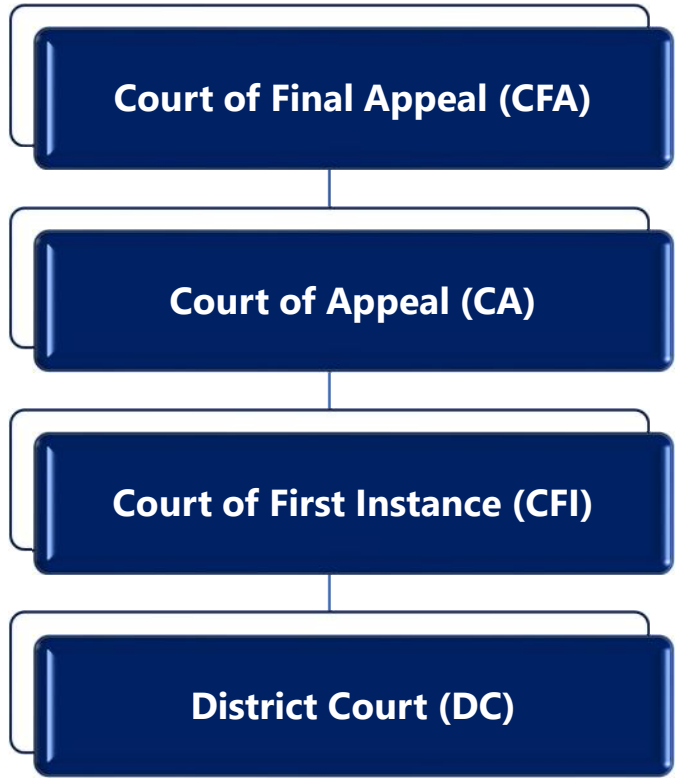
Stages in Litigation

Overview of Litigation Procedure in Hong Kong

- Writ of summons most common mode of commencing proceedings in Hong Kong. The writ may be indorsed with a concise indorsement of claim or a detailed statement of claim. It is entirely optional, yet sometimes a concise indorsement is preferable, for example, when there are time limitations, or issues concerning confidentiality because a writ of summons is available for public inspection at the court registry.
- Default Judgment: If no AOS or defence is filed within the prescribed time, plaintiff is entitled to apply for default judgment.
- Summary Judgment: The summary judgment procedure is also available where it is clear that defendant has no arguable defence to a claim. It is particularly useful when enforcing overseas judgments.
- Injunctions: Courts have the power to grant both interlocutory and final injunctions in cases where it appears just and convenient to do so, e.g., Mareva injunction, anti-suit injunction. In urgent ex parte injunction applications, courts generally grant an order on the same day of the application.
- Mediation: Parties are strongly encouraged to engage in mediation after the close of pleadings.
- Subject to any interlocutory applications and the court's diary, a matter can be expected to go to trial within 2 years. That being said, matters rarely go all the way to trial, as most disputes settle at some point after the close of pleadings and prior to trial.

Overview of Litigation Procedure in Hong Kong

- Court Structure: Unique CFA incorporating Chief Justice, 3 local permanent judges and 13 overseas non-permanent judges. Allows Hong Kong to benefit from a wider judicial gene pool and facilitates confidence in independence of judiciary.
- Civil Justice Reforms: Introduced in 2009 to implement key changes to civil procedures. The new rules ensure that parties adhere strictly to procedural timetables, avoid unnecessary applications, give serious consideration to settlement. Adverse costs sanctions for failure to accept sanctioned offers or sanctioned payments, failure to engage in mediation without reasonable cause.
- Language: Court proceedings conducted in English or Chinese or both. English more frequently used in the higher courts.
- Costs: Whilst general costs principle is that costs follow the event, recovery is not 100%. Generally, successful litigants can expect to receive between 40-60% of their legal costs. Contingency fee arrangements are prohibited in Hong Kong.



Overview of Arbitration Procedure in Hong Kong

- Arbitrations conducted in Hong Kong are governed by the Arbitration Ordinance which incorporates a unified regime for domestic as well as international arbitrations. The Ordinance adopts the UNCITRAL Model Law in its entirety with some modifications and supplements.
- Party autonomy is a key feature and courts can interfere in the dispute only where expressly provided in the Ordinance.
- There is no 'one size fits all' approach, and in the absence of any agreement between the parties, the procedure is generally tailored to the dispute itself, subject to the requirements specified in the Ordinance.
- The Ordinance contains provisions for the appointment of an 'emergency arbitrator' before the constitution of the arbitral tribunal for emergency relief in or outside Hong Kong. This order is enforceable as a court order with the leave of the court.
- The Arbitration Ordinance has 'med-arb' provisions whereby an arbitrator can transform his role to one of mediator and, if the mediation fails, resume his role as an arbitrator.
- The arbitral tribunal also has the power to grant interim measures (such as Mareva injunctions) similar to those granted by courts.
- Amendments have been made to the Ordinance recently to allow third-party funding in arbitrations.

Recognition of Indian Awards

Awards enforceable in the same manner as court judgments, subject to leave of court.

Limitation period is 6 years.

Application for leave made ex parte with supporting documents.

Award debtor given 14 days to contest the order and set it aside. If unopposed after 14 days, enforcement of award allowed as if it were a judgment of the court.

Strong presumption that court would grant leave in favour of enforcement of Convention awards. Grounds for setting aside / refusing enforcement are limited.

Indemnity costs sanctions against unsuccessful applicants.

GROUNDS FOR REFUSAL

- Party under incapacity
- Arbitration agreement not valid
- Arbitral procedure contrary to what parties agreed or to the law where arbitration took place
- Award deals with a dispute not within the scope of agreement
- Award not yet binding or has been set aside or suspended by a competent authority
- Subject matter of dispute not capable of settlement by arbitration under HK laws, or enforcement contrary to public policy

Recognition of Indian Judgments

India one of the recognised countries under the Foreign Judgments (Reciprocal Enforcement) Ordinance of Hong Kong.

Recognition and enforcement procedures accordingly simplified.

Limitation period is 6 years.

Application for registration made ex parte with supporting documents.

Upon registration, judgment recognised as a domestic judgment.

GROUNDS FOR RECOGNITION

- ❑ Judgment should be for a fixed sum of money
- ❑ should be final and conclusive on the merits of the case
- ❑ should not be wholly satisfied
- ❑ should be made by a superior court with jurisdiction
- ❑ should not be against public policy

Enforcement Measures

- A judgment for the payment of money can be enforced by way of a writ of *fieri facias*, a garnishee order against the debtor's bank accounts, a charging order against property or securities, or the appointment of a receiver in case of debts continuing to accrue
- A judgment for the giving of possession of land can be enforced by a writ of possession
- A judgment concerning the delivery of goods may be enforced by a writ of delivery
- Winding up / bankruptcy proceedings may be commenced against the debtor (generally considered a remedy of last resort)
- Examination orders available for obtaining more information regarding assets

Availability of Anti-Suit Injunctions

Test applicable

1.There must be existing proceedings in Hong Kong;
2.The defendants must have commenced or proposed to commence, in bad faith, proceedings against the applicant in another jurisdiction for the purpose of frustrating or obstructing the proceedings in Hong Kong; and
3.The court considers it is necessary in order to protect the legitimate interests of the applicant in the Hong Kong proceedings to grant the injunction.

In case of an exclusive jurisdiction clause, courts usually inclined to grant the injunction

Indemnity costs sanctions against unsuccessful respondents

Breach of injunction amounts to contempt, with penalties including fine and/or imprisonment

Pro-Enforcement Approach

- Enforcement of arbitral awards considered 'a matter of administrative procedure'
- Applications to appeal against or to set aside an award, or for an order refusing enforcement, based on exceptional events
- Unmeritorious challenges to enforcement not viewed favourably
- Indemnity costs sanctions against parties launching unfounded challenges
- Wide discretion to grant security

Availability of Interim Measures in Mainland China

- Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings (October 2019)
- Parties to arbitrations seated in Hong Kong administered by designated arbitral institutions can seek interim measures from Mainland courts for preservation of property, evidence, conduct of parties
- Similarly, in case of arbitrations seated in Mainland, interim or injunctive relief for maintenance of status quo can be sought from Hong Kong courts
- Hong Kong only jurisdiction to have an interim relief arrangement with Mainland
- Arrangements for reciprocal recognition and enforcement of judgments and awards between Hong Kong and Mainland

Third-Party Funding

PROHIBITION AGAINST CHAMPERTY AND MAINTENANCE

-Tortious and criminal liability

-Prevent unwanted intermeddling by uninterested parties

LITIGATION

-Available in limited circumstances

-Assignment of cause of action by liquidator in insolvency or trustee in bankruptcy exception to the law against champerty and maintenance

ARBITRATION

-Attitude more open

-Arbitration Ordinance amended in 2017 to approve third-party funding

-Code of practice sets out compliance requirements

Litigation or Arbitration

Familiarity of Procedures	Compliance Sanctions	Precedent Value / Predictability of Outcome	Right of Appeal
Confidentiality / Reputational Concerns	Costs	Flexibility	Enforcement Options

PART 3: OVERVIEW OF HKIAC AND HONG KONG AS A SEAT OF ARBITRATION

ERIC NG, MANAGING COUNSEL, HONG KONG INTERNATIONAL ARBITRATION CENTRE

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Founded in 1985, HKIAC has managed over 10,500 cases to date

Top 4 arbitral institutions globally

Independent & non-profit organisation

One stop shop for arbitration, mediation, adjudication & domain name disputes

www.gallhk.com www.elplaw.in

HKIAC has one of the largest caseloads in Asia-Pacific

503 new disputes in 2019

182 domain name disputes

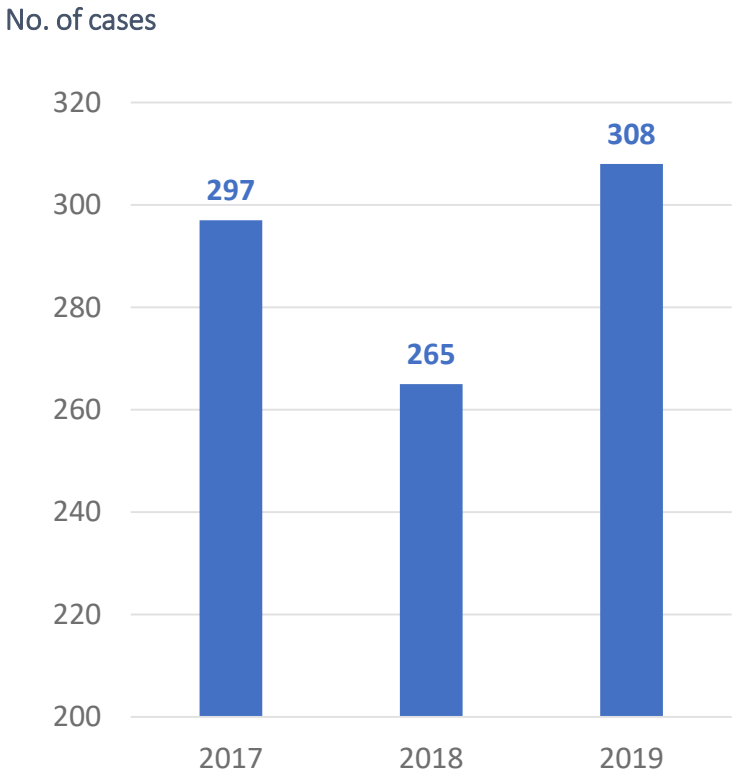
308 arbitration cases

- 173 fully administered

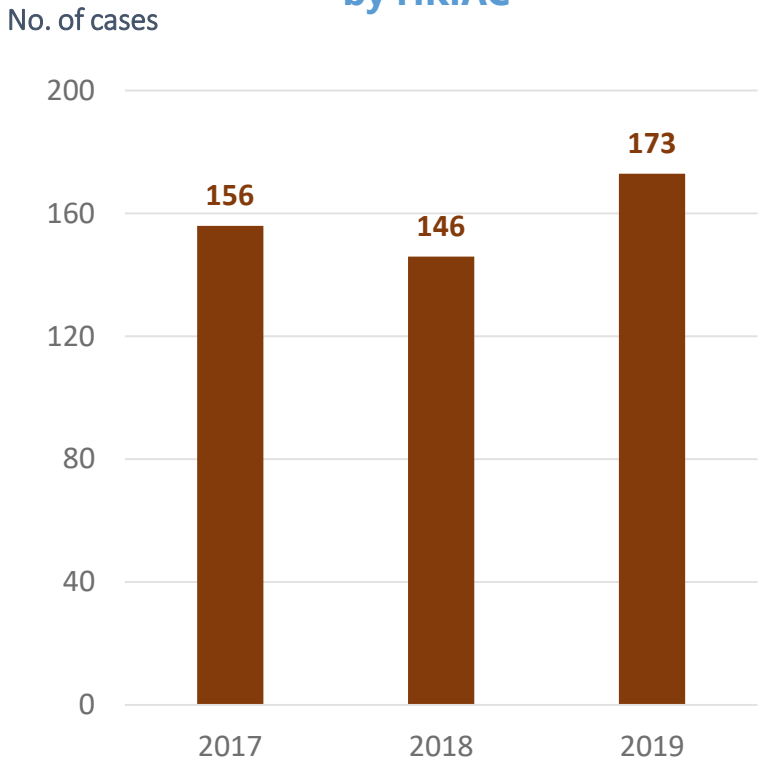
12 mediations

Growing Arbitration Caseload at HKIAC

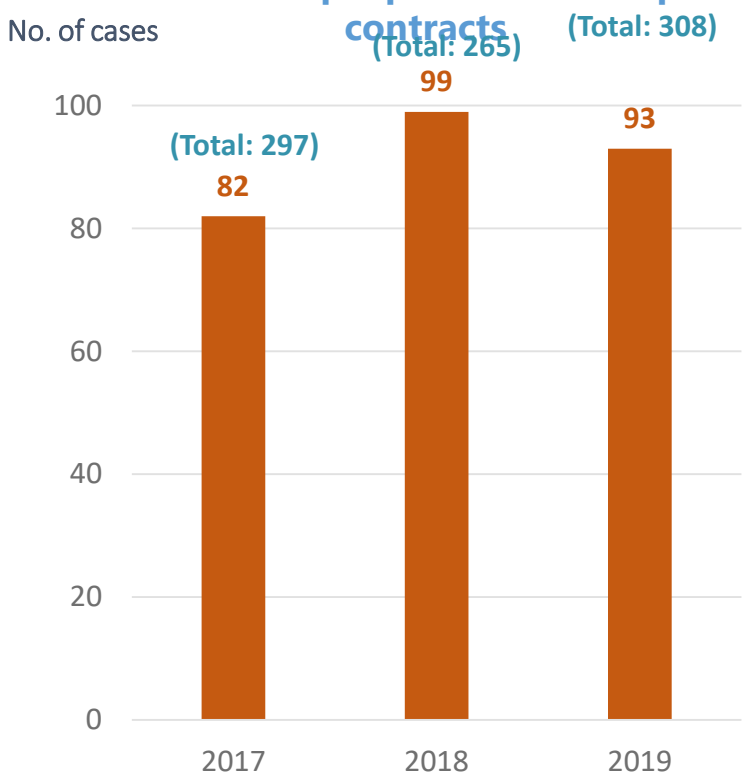
Total HKIAC arbitration cases



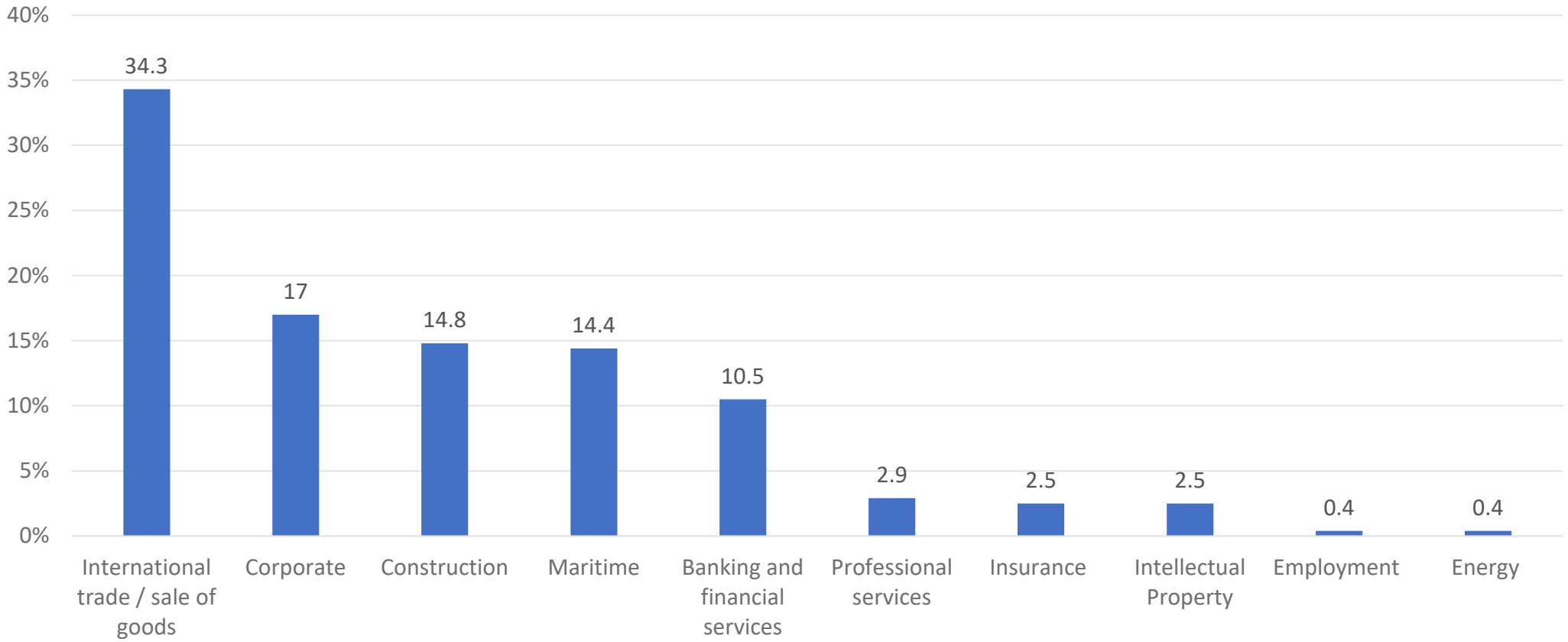
Total arbitration cases administered by HKIAC



HKIAC arbitration cases commenced with multiple parties or multiple contracts



Percentage of HKIAC arbitrations by industry sector 2019



Key Features of the 2018 HKIAC Administered Arbitration Rules

Cost saving measures

- Arbitrator fee choice system (Hourly rate / amount in dispute)
- Cap on arbitrator hourly rate (HK$6,500, approx. US$800)
- Cap on emergency arbitrator fees
- Tribunal secretary service

Time saving measures

- Early determination procedure
- Time limit for issuing awards
- Expedited procedure
- Emergency arbitrator procedure

Efficiency in complex arbitrations

- Consolidation of two or more arbitrations
- Single arbitration under multiple contracts
- Joinder of additional parties
- Multiple arbitrations conducted concurrently

Relevance to recent developments

- Use of ADR in arbitration (e.g., arb-med-arb)
- Addressing third party funding arrangements
- Delivery and storage of documents through online repository

Hong Kong: A Pro-Arbitration Legal Framework

- **One country, Two systems**
- **First-class arbitration legislation**
  - Unified regime for international and domestic arbitrations
  - Interim measures
  - Confidentiality
  - Third party funding
  - Arbitrability of IP disputes
  - Opt-in mechanism to appeal awards based on a question of law
- **Flexible procedures**
- **Availability of interim relief in Mainland China**
- **Worldwide enforceability of Hong Kong awards**

Hong Kong: An International Judiciary

- Court of Final Appeal includes 15 eminent retired judges from the UK, Australia, and Canada (latest nominations include Baroness Brenda Hale, Beverley McLachlin, and Lord Jonathan Sumption)

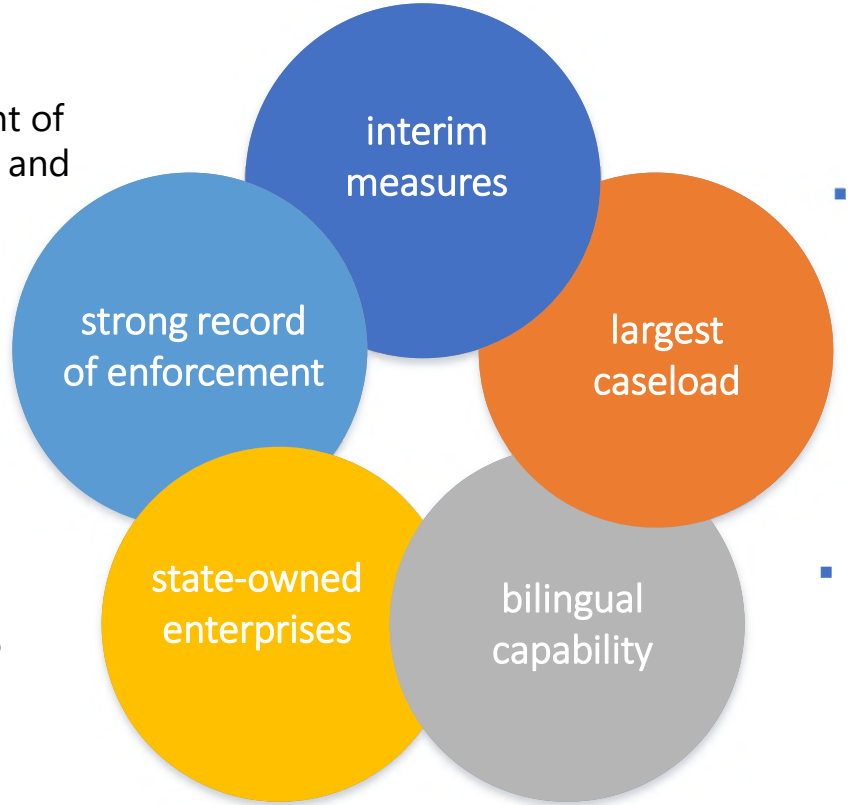
- Specialist arbitration judge: Madam Justice Mimmie Chan (Brunei)

Hong Kong: A Neutral Forum

- World Economic Forum's Judicial Independence Ranking 2019
  - Hong Kong ranked 1st in Asia and 8th worldwide
  - US: 25th, UK: 26th

HKIAC widely accepted by Chinese and foreign parties

- Availability of interim relief in Mainland China for HKIAC administered arbitrations seated in Hong Kong
- Special arrangement for enforcement of arbitral awards between Hong Kong and Mainland China
- HKIAC has the largest caseload involving Chinese parties among all arbitral institutions outside of Mainland China
- HKIAC awards have a strong record of enforcement in Mainland China
- Between 10-20% HKIAC cases conducted in Chinese and English or Chinese only
- Each year between 10-16% Chinese parties are state owned enterprises



HK-PRC Arrangement on Interim Measures

- *Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region* (the "**Arrangement**")
- Arrangement signed on 2 April 2019, effective from 1 October 2019
- HKIAC qualified institution
- Effect of Arrangement
  - Access to interim measures from PRC courts before award rendered in HK-seated, "HK-administered" cases
  - Preservation of property, evidence, and conduct

34 applications
(assets, evidence, conduct)

RMB 11.6 billion (USD 1.8 billion) worth of assets

Court orders for **RMB 9.7 billion**
(USD 1.5 billion) worth of assets

77% foreign, 23% Mainland Chinese **applicants**

50% Mainland Chinese, 50% foreign **respondents**

www.gallhk.com www.elplaw.in

HKIAC And COVID-19

Impact on HKIAC cases

Impact on HKIAC hearings

HKIAC's measures and service continuity

What is a virtual hearing?

- A virtual hearing employs various technologies to extend the functions and services that would normally be found in physical hearing rooms to remote participants all over the world, allowing hearings to continue uninterrupted by physical restrictions.

Virtual Hearings at HKIAC

Users choosing to proceed with virtual hearings instead of postponing

Even those hearings which were originally postponed are now opting for virtual solutions

Most hearings to date in 2020 at HKIAC have been virtual

65% to date (52 partially virtual, 8 fully virtual)

85% in April and May

60% of future bookings will be virtual

Simple arrangements
Full merits hearings
40-day+ constructions case
Fully virtual hearings

What kinds of virtual hearings has HKIAC held?

HKIAC cases
ICC, SIAC, SCC, *ad hoc* cases

Court proceedings in Hong Kong, Singapore, Supreme Court of British Columbia

HKIAC and India – An Economic Perspective

- Approximatelyy US$ **81 billion** in merchandise trade between India and Mainland China (including Hong Kong) in 2019;
- Exports of steel, manufactured goods, and other products can be easily arbitrated;
- Trade in commercial services and infrastructure investments also see significant Chinese involvement

Conclusion: Hong Kong as a Seat for Arbitration

- HKIAC's unique position in respect to the Mainland makes it an ideal choice for handling disputes between foreign and Mainland entities;
- Interim Measures Arrangement means Hong Kong is the *only* seat of arbitration where parties can seek interim measures against entities located in the Mainland;
- Hong Kong's judicial independence and strong pro-arbitration framework ensures that arbitration of disputes in Hong Kong remains a first-class option;
- HKIAC provides modern arbitration rules that provide significant advantages for multi-party and multi-contract disputes;
- HKIAC is a market leader in technological advancement for arbitration and virtual services.

Q&A

Thank you for joining our webinar