

Why should we choose Arbitration in Hong Kong?

When disputes arise, the parties may resolve them through various means, the most common ones being litigation and arbitration. This talk will discuss why parties should choose arbitration in Hong Kong instead of litigation or arbitration in other countries.

Confidentiality

Arbitration All documents (including the arbitral award) and hearings are confidential. Parties to the arbitration are subject to an implied undertaking of confidentiality not to disclose any information or documents relating to the arbitration proceedings to any third party. In Hong Kong, any Court hearings relating to arbitration proceedings will be heard in “chambers” (i.e. not open to public) and parties cannot publish any information relating to the hearing unless otherwise permitted by the Court (Section 17 of the Arbitration Ordinance, Cap 609).

Court To commence a civil lawsuit in court in Hong Kong, the first document which the claimant has to submit to the court is the writ of summons which specifies the names and addresses of the claimant and the defendant. The writ of summons may include either a brief description of the claim (called general endorsement) or a detailed statement of claim. The writ of summons is a document which is open to viewing by public. News reporters check the writs of summons filed with the court daily and report on new cases which attract their attention. Interlocutory hearings and trials are in general open to public. Judgements are in general public documents and could be downloaded from the judiciary website.

Parties’ control over procedure

Arbitration The parties are generally in control of the procedure (such as the timeline for submitting documents) as long as consensus is reached. Parties have control over when the trial will take place. In Hong Kong, parties may choose to adopt ad hoc arbitration (i.e. arbitration without rules) or institutional arbitration (i.e. arbitration administered by institutions in Hong Kong such as the Hong Kong International Arbitration Centre), which gives more flexibility to the parties.

Court Since the civil justice reform in 2009, the court is more active in managing proceedings and may impose timeline upon the parties to push the case forward. The trial date is fixed by the court and is subject to the court’s diary. Short trials (with estimated length of no more than 3 days) are put into the “running list” and the court will inform the parties of the trial dates shortly beforehand. For long trials, the trial dates are fixed in advance and sometimes

the trial may take place months (and in some cases more than a year) after the case is ready for trial.

Mediation

Arbitration The parties will not be penalised for not attempting mediation. In Hong Kong, arbitrator is also permitted to act as mediator for the mediation proceedings (Section 33 of the Arbitration Ordinance, Cap 609).

Court Since the civil justice reform in 2009, each party needs to file a certificate saying whether the party is willing to attempt mediation. If a party refuses to attempt mediation without proper reason, after the trial, the court has power to make an adverse order against that party on costs.

Timing

Arbitration The whole arbitration can finish within months, depending upon the availability of the parties and arbitrators. In Hong Kong, there are over 500 arbitrators listed in the HKIAC's panel/list of arbitrators with different nationalities and expertise, and it is very unlikely that the arbitration would be delayed due to the unavailability of arbitrators.

Court It is not unusual to take 1 to 2 years or even longer to conclude a civil suit, even if there is no appeal.

Language & Expertise

Arbitration The parties are free to agree on the language of the proceedings, and are free to appoint arbitrators who speak the language(s) of the parties' choice. The parties are also free to appoint arbitrators with expertise on the issues in dispute. It is not difficult for the parties to appoint arbitrators with their preferred language and expertise.

Court Proceedings are conducted in either English or Chinese. Documents and evidence will need to be translated into either language, depending on whether the trial will take place before the English division or the bilingual division. If the trial takes place before the English division, all documents and evidence (including Chinese ones) will need to be translated into English. Judges are assigned by the Court and the parties have no choice on the selection of Judges.

Legal Representatives

Arbitration The parties may appoint any legal representatives from Hong Kong or overseas, or even without legal representation to conduct the arbitration. In Hong Kong, it is not uncommon for the parties to engage Queen’s Counsel from England to conduct the arbitration.

Court The parties are required to appoint Hong Kong legal representatives to conduct litigation proceedings, and parties cannot engage overseas Counsel to conduct the litigation unless otherwise permitted by the Court.

Costs

Arbitration Arbitrators usually charge fees on time spent basis. Also, other costs such as arbitration venue costs, transcriber costs, interpreter costs and translation costs are commonly associated in arbitration proceedings.

Court Except for minimal filing fees, the court basically provides free service and judges do not charge fees to the parties.

Appeal

Arbitration In Hong Kong, arbitral awards may only be set aside on grounds relating to lack of jurisdiction, improper constitution of the tribunal, or serious procedural irregularities. Unless otherwise agreed by the parties, the Tribunal’s findings of both facts and law cannot be challenged by the parties.

Court Parties may appeal against the Judge’s findings of both facts and law.

Enforcement of Arbitral Awards / Judgment

Arbitration Since Hong Kong is a party to the New York Convention, Hong Kong arbitral awards can be enforced in more than 156 countries and may be executed in the same manner as Court Judgments upon leave of the Court. Further, it is much easier to enforce arbitral awards in the PRC due to the “Arrangement Concerning Mutual Enforcement of Arbitral Awards between the PRC and Hong Kong”. Enforcement of Hong Kong arbitral awards may be refused only on narrow grounds relating to lack of jurisdiction, improper constitution of the tribunal, serious procedural irregularity or if enforcement of the award would be contrary to public policy.

To enforce an arbitral award in Hong Kong, the claimant only needs to apply to the court for an order to enter judgment in terms of the arbitral award. This is a relatively simple procedure. The claimant applies to the court ex parte by filing the necessary documents

(including an originating summons and an affirmation exhibiting a copy of the arbitral award and the arbitration agreement). Usually no hearing is necessary. Assuming the documents are in order, in about a week's time the court will give an order to enter judgment. The court usually orders at the same time that the respondent will have 14 days to apply to the court to set aside the order after being served the order, and the claimant may not enforce the order during this 14-day period or until the final disposal of the respondent's application. The grounds for a respondent to apply to set aside an arbitral award are very restrictive (e.g. issues relating to lack of jurisdiction, improper constitution of the tribunal, serious procedural irregularity or if enforcement of the award would be contrary to public policy). It is not the function of the Court to reconsider the merits of the case.

Court Since Hong Kong is adopting the common law system, Hong Kong judgments can only be enforced in common law countries and some foreign countries with reciprocal recognition of foreign judgments (e.g. France and Belgium).

In conclusion, although the costs of arbitration may sometimes be higher than litigation in Hong Kong, it has significant advantages over litigation. In particular, Hong Kong arbitral awards can be enforced in over 156 countries, and it is much easier to enforce Hong Kong arbitral awards in the PRC than arbitral awards from other foreign countries.



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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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