

Arbitration in Asia: Developments in 2019 and Their Impact in 2020

10 January 2020

The popularity of international arbitration and other alternative mechanisms for resolving disputes continues to grow in Asia. The number of cross-border disputes remains on the rise, and the number of parties arbitrating in Asia has reached record highs. In 2019, there were many significant developments. These will affect the Asia dispute resolution landscape in 2020 and beyond. We report below on 10 such developments, which those with potential or actual disputes in Asia should continue to monitor throughout the year ahead.

Hong Kong / Mainland Interim Measures Arrangement

On 1 October 2019, 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 (the “Interim Measures Arrangement”) came into force. This empowers Mainland Chinese courts to grant interim measures in support of certain arbitrations seated in Hong Kong. These include proceedings before the Hong Kong International Arbitration Centre (“HKIAC”), the China International Economic and Trade Arbitration Commission (“CIETAC”), and the International Court of Arbitration of the International Chamber of Commerce (“ICC”). Since the entry into force of the Interim Measures Arrangement, the HKIAC has received at least 11 applications for interim measures under the Interim Measures Arrangement,¹ and at least four have been granted by Mainland Chinese courts.

The Supreme People’s Court of the People’s Republic of China has published a commentary on the Interim Measures Arrangement, and both the HKIAC and the ICC have provided guidance on the procedures for making applications under the Interim Measures Arrangement for arbitrations seated in Hong Kong and administered by them. In summary, parties may apply for interim relief in support of pending or anticipated

¹ Pursuant to Article 3(2) of the Interim Measures Arrangement, applications for interim measures in pending arbitrations must be submitted to the arbitral institution, which will then transfer it to the relevant Mainland Chinese court.

eligible arbitrations. The interim measures that are available from Mainland Chinese courts under the Interim Measures Arrangement are: (i) property preservation; (ii) evidence preservation; and (iii) conduct preservation, which includes orders compelling or prohibiting a party from performing certain actions. Prior to the Interim Measures Arrangement, Mainland Chinese courts were not expressly permitted to grant interim measures in aid of arbitrations seated outside of Mainland China. As a result, Mainland Chinese courts were historically reluctant to grant interim relief in support of foreign-seated arbitrations. The new Interim Measures Arrangement gives parties to Hong Kong arbitration proceedings the same rights as parties to arbitration proceedings seated in the Mainland. This increases the attractiveness of Hong Kong as a seat for China-related international arbitrations, as it is the only seat where parties are allowed to arbitrate outside of Mainland China while retaining the option of seeking interim relief in Mainland China. Parties to potential or existing Hong Kong arbitrations that require interim relief should consider whether there are assets and evidence located in Mainland China that may be targeted. Parties should also keep this development in mind when selecting the seat and administering institution in their arbitration agreements, particularly if any disputes are likely to involve China-related elements.

Please see [here](#) and [here](#) for our previous updates on this development.

Hong Kong / PRC New Regime on Reciprocal Recognition and Enforcement of Judgments

On 18 January 2019, the Hong Kong Government and the Supreme People's Court of the People's Republic of China signed an Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the "Judgment Recognition Arrangement"). The Judgment Recognition Arrangement significantly expands, beyond monetary judgments, the types of judgments which the courts of each jurisdiction could enforce from the other jurisdiction's courts. Parties seeking to enforce judgments covered by the Arrangement will not need to commence new proceedings when seeking to recover assets in Hong Kong or the Mainland. The Judgment Recognition Arrangement applies to matters of a "civil and commercial" nature under both Hong Kong and Mainland Chinese law and excludes nonjudicial proceedings and proceedings on administrative or regulatory matters. The Judgment Recognition Arrangement covers both monetary and nonmonetary relief. It also sets out jurisdictional grounds for the purpose of recognition and enforcement as well as grounds for refusal of recognition and enforcement.

The Judgment Recognition Arrangement is the sixth arrangement between Hong Kong and Mainland China concerning mutual legal assistance in civil and commercial matters, and the third arrangement providing for reciprocal recognition and enforcement of judgments in civil and commercial matters. It provides greater certainty and efficiency for parties litigating in these two jurisdictions. Together with the Interim Measures Arrangement, the Judgment Recognition Arrangement deepens the enforceability channels available in disputes with a connection to both the Mainland and Hong Kong. Please see [here](#) for the provisions of the Arrangement.

Hong Kong's New Law on Third Party Funding in Arbitration

On 1 February 2019, Hong Kong's amendment to its arbitration law to permit the use of third party funding ("TPF") for arbitration and related court proceedings came into force. This change in law creates opportunities for parties in arbitration previously unable to fund claims or seeking to reduce the risk of pursuing claims. A Code of Practice for Third Party Funding in Arbitration was issued by the Hong Kong Department of Justice in December 2018 to provide guidance on the ethical and financial standards and practices that third party funders are expected to meet.

TPF is a highly sophisticated multibillion-dollar industry, and this change in law is expected to bring a steady flow of funded arbitrations into Hong Kong, maintaining its status as one of the world's leading arbitral hubs. Any party considering TPF for its arbitration should carefully consider the terms of any funding agreement and obtain professional advice. Equally, a defending party should be prepared to adjust its litigation strategy to cater to the nuances of a funded claim.

Please see [here](#) for our previous update.

HKIAC Permitted to Administer Russian Arbitrations

On 25 April 2019, the HKIAC became the first foreign arbitral institution to be granted permission to operate as a permanent arbitral institution ("PAI") under Russia's Federal Laws on Arbitration. The HKIAC now has the right to administer international commercial arbitrations seated in Russia, disputes between residents of a special administrative region as defined under Russian law or arising out of agreements to conduct business in a special administrative region as well as certain types of corporate disputes in respect of Russian companies.

As economic links between Russian and Asian parties continue to grow, there is increasing interest in Hong Kong and the HKIAC from the legal and business community in Russia. The grant of PAI status to the HKIAC reinforces this trend and is likely to result in more Russian disputes being submitted to HKIAC arbitration.

Please see [here](#) for our previous update.

Singapore Convention on Mediation

On 7 August 2019, the signing ceremony of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the “Singapore Convention”) was held in Singapore. There are 51 signatory countries to the Singapore Convention, including the United States of America, China, Singapore, South Korea, Malaysia, India, Laos, the Philippines, and Sri Lanka. The Singapore Convention will enter into force once it has been ratified by at least three countries.

Adopted by the United Nations General Assembly in December 2018, the Singapore Convention provides an efficient and harmonised framework for the enforcement of international settlement agreements resulting from mediation. Given the growing popularity of mediation as a method of cross-border dispute resolution, the Singapore Convention is expected to increase awareness of the process and to further encourage the use of mediation to resolve cross-border commercial disputes by promoting the enforceability of mediated settlement agreements. Please see [here](#) for the text of the Convention.

Singapore Public Consultation on Conditional Fee Arrangements in Arbitration

From 27 August to 8 October 2019, Singapore’s Ministry of Law held a public consultation to invite feedback on its proposal to permit conditional fee arrangements (“CFAs”) for international and domestic arbitration proceedings in Singapore, certain proceedings in the Singapore International Commercial Court (the “SICC”), and any mediation relating to these proceedings.

CFAs are agreements where a lawyer receives payment of his or her legal fees only if the claim brought on behalf of the client is successful. Such payment may include a “success” fee in addition to the lawyer’s standard rates. Under Singapore law, solicitors and clients are currently prohibited from entering into CFAs and contingency fee agreements.

In recognition of the growing demand for alternative funding arrangements for parties to manage their litigation costs and risks, the Singapore Ministry of Law introduced TPF in Singapore for international arbitration proceedings in 2017. On 8 August 2019, the Singapore Minister for Law announced that the TPF framework would be extended to domestic arbitration proceedings in Singapore as well as certain SICC proceedings. Please see [here](#) for the public consultation paper.

Hong Kong Studies Outcome-Related Fee Structures for Arbitration

In October 2019, the Law Reform Commission of Hong Kong established a subcommittee to study the topic of outcome-related fee structures for arbitration and consider whether and what sort of legislative and regulatory reform would be needed to permit more flexible fee structures to arbitration users.

Hong Kong lawyers are currently prohibited from charging outcome-related fees in arbitration. By contrast, other jurisdictions, such as the United States and the United Kingdom, allow success fees and other flexible fee structures in arbitration. In light of the increasing demand for alternative pricing structures from clients in arbitration, the creation of the subcommittee to study outcome-related fee structures in arbitration in Hong Kong is timely and important for Hong Kong to maintain its competitiveness and status as a leading arbitration hub. Please see [here](#) for the press release.

PRC to Allow Foreign Arbitral Institutions to Administer Arbitrations in the Shanghai Pilot Free Trade Zone

On 6 August 2019, the State Council of the People's Republic of China issued the Framework Plan for the Lingang New Area of the China (Shanghai) Pilot Free Trade Zone (the "Framework Plan"). Under the Framework Plan, reputable overseas arbitral and dispute resolution institutions will be allowed to register with the Judicial Administrative Department of the Shanghai Municipal People's Government and set up branches to administer arbitrations in the Lingang New Area with respect to civil and commercial disputes arising out of international commerce, maritime affairs, investment, and other fields. The registered institutions will also be permitted to support applications for and the enforcement of interim measures by Chinese and foreign parties before and during the arbitration proceedings, including property preservation, evidence preservation, and conduct preservation.

On 21 October 2019, the Shanghai Municipal Bureau of Justice issued the Administrative Measures for the Establishment of Business Offices by Overseas Arbitral Institutions in the Lingang New Area of China (Shanghai) Pilot Free Trade Zone (the “Administrative Measures”), which set out the rules governing the registration and operation of overseas arbitral institutions. Notably, branches of overseas arbitral institutions may administer only foreign-related arbitrations in the Lingang New Area. Such branches must also submit annual reports to the Shanghai Municipal Bureau of Justice. However, the Administrative Measures do not address the application for and enforcement of interim measures as provided in the Framework Plan. The Administrative Measures came into force on 1 January 2020 and will remain in effect until 31 December 2022.

Foreign arbitral institutions previously were not permitted to administer arbitrations seated in Mainland China. The Framework Plan and Administrative Measures represent a welcome development in the liberalisation of arbitration practice in Mainland China. It is envisaged that these changes will help to enhance the image of the People’s Republic of China as a seat of arbitration. Please see [here](#) for the Framework Plan and [here](#) for the Administrative Measures.

Singapore International Commercial Court

The Singapore International Commercial Court (“SICC”) was launched in 2015 in an attempt to expand the internationalisation and export of Singapore law and cement Singapore’s status as a hub for international commercial dispute resolution. SICC offers international users a panel of international judges, the ability to contractually limit the right of appeal, the possibility of full or partial foreign legal representation, exclusion of the Singaporean law of evidence, confidentiality in proceedings and the determination of foreign law on the basis of oral and/or written submissions instead of expert evidence.

In 2019, SICC handed down its first arbitration-related judgment in *BXS v BXT* [2019] SGHC(I) 10. The case concerned whether the SICC had the power to extend the three-month time limit under Article 34(3) of the UNCITRAL Model Law.² This issue had previously been considered by the Hong Kong Court of First Instance in *Sun Tian Gang v. Hong Kong & China Gas (Jilin) Ltd* [2016] HKEC 2128. The Hong Kong Court of First Instance held that the three-month period under Article 34(3) was not mandatory and

² Article 34(3) of the UNCITRAL Model Law provides that an application for setting aside an arbitral award may not be made after 3 months have elapsed from the date on which the party making the set aside application had received the award or, if a request for correction, interpretation or an additional award has been made, from the date on which such request had been disposed of by the arbitral tribunal.

that the Court had discretion to grant an extension of time for the application to set aside an award if there were good reasons to do so.

The SICC took the Hong Kong Court decision into account but took a different view. It held that Article 34(3) was a “written law relating to limitation” and that the Court had no power to extend a three-month time limit imposed on bringing an application to set aside an arbitral award, particularly in cases where there was no good reason for the delay. The SICC also ruled on the applicability of the Singapore International Arbitration Centre’s (“SIAC”) expedited arbitration rules and the appointment of arbitrators. Please see [here](#) for the case decision.

The role of the SICC is likely to increase in prominence in developing arbitration law, and may lead to the creation of courts with similar mandates in other jurisdictions.

Macau Issues New Arbitration Law Aligning with International Standards and Practices

On 5 November 2019, the Government of the Macau Special Administrative Region published Law No. 19/2019 (the “New Arbitration Law”), which will come into force on 4 May 2020. While the previous arbitration act governing Macau-seated international commercial arbitration (Decree-Law 55/98/M) was based on the 1985 UNCITRAL Model Law, the New Arbitration Law is in line with the 2006 UNCITRAL Model Law, and will apply to both domestic and international arbitrations seated in Macau. It also specifies that when interpreting the law, the 2006 UNCITRAL Model Law shall be taken into account. The New Arbitration Law represents a modernisation of Macau’s arbitration law, incorporating provisions on emergency arbitrators, interim measures, and assistance from the courts in the taking of evidence, and aligns Macau’s arbitration law with international standards and practices.

The New Arbitration Law is aimed at promoting Macau’s arbitration services and establishing Macau as a viable arbitral seat in the Greater Bay Area and among the Lusophone countries, increasing the attractiveness of Macau as a place of arbitration, both generally and also for the resolution of disputes between Chinese and Portuguese-speaking parties. Please see [here](#) for the full text of the New Arbitration Law.

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Please do not hesitate to contact us with any questions.

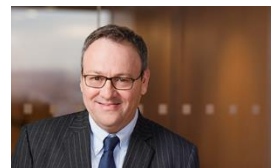
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