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Hong Kong maritime arbitration under the Arbitration Ordinance 2011

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Abstract

Purpose – In 2011, the new Arbitration Ordinance took effect in Hong Kong. This paper aims to discuss the new features on maritime arbitration.

Design/methodology/approach – The relevant provisions of the Arbitration Ordinance 2011 and the legal cases are examined.

Findings – Hong Kong is a first class maritime arbitration centre in the Asia Pacific Region.

Originality/value – This paper is one of the very few general reviews of the maritime arbitration under the Arbitration Ordinance 2011.

Keywords Hong Kong, Maritime arbitration, Maritime disputes

Paper type General review

1. Introduction

In the shipping industry, international arbitration is the most commonly used dispute resolution mechanism. Maritime disputes have several special features. First, they are international disputes involving two or more parties in different countries. Second, the monetary amount of the disputes is high. Third, the disputes would be better resolved by someone who has shipping knowledge. Some typical contractual shipping disputes are claims for cargo damage or loss, wrongful delivery of goods, shortage of bulk cargo, etc. Typical tortious maritime cases are ship collisions, oil pollutions, etc. Thus, the use of maritime arbitration to resolve shipping disputes would be better than the use of traditional judicial litigation.

Hong Kong has special advantages as a centre in maritime arbitration. As Hong Kong is an international maritime centre, it is much easier to have qualified arbitrators who are experts in different areas of the maritime industry, such as marine insurers, average adjusters, shipping lawyers etc. It also has a long history of an independent judicial system with a good support from the common law and written legislation. As far as languages are concerned, the arbitrators are able to speak not only English but also Chinese languages, including Mandarin and Cantonese which are commonly used in the commercial world.

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Moreover, Chinese people in Mainland China, Hong Kong and Taiwan have a philosophy to maintain social harmony in resolving disputes. Thus, arbitration is preferable than litigation to resolve disputes (Wong, 2000).

2. Hong Kong arbitration law

The new Arbitration Ordinance (Cap. 609, the Ordinance) (AO) was enacted by the Legislative Council on 10 November 2010, and the new law came into effect on 1 June 2011, replacing the old Arbitration Ordinance (Cap. 341, the old AO).

In 2011, 65 per cent (representing 178 cases) of all arbitration cases handled by the Hong Kong International Arbitration Centre (HKIAC) were of international nature.

One of the advantages of using arbitration to resolve disputes is the confidentiality of arbitration. Section 18 of the ordinance provides that, unless otherwise agreed by the parties or provided by the exceptions in Sub-section 2 which are primarily relating to disclosure of awards in the context of court proceedings in Hong Kong and abroad or regulatory matters, the disclosure of information relating to arbitral proceedings or awards is prohibited. In general, arbitral proceedings under the ordinance are not to be heard in open court. The exception is that the court may order the proceedings to be heard in an open court on the application of any party or if, in any particular case, the court is satisfied that the proceedings ought to be heard in an open court (Section 17, AO).

2.1 New features

When arbitrations were governed by the old AO, they were classified as domestic and international arbitrations. As far as the international arbitration regime is concerned, the old AO was based on the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (the Model Law) which formed the Fifth Schedule to the legislation since 1990.

The main feature of the ordinance is the removal of the distinction between domestic and international arbitrations. The ordinance provides a single, unified regime based on the Model Law, but with a number of modifications and additions tailored to suit the requirements of Hong Kong (Section 4, AO). This approach aligns the arbitration regime in Hong Kong more closely to international practices.

The structure of the ordinance generally follows the same order as the Model Law and refers to each article regarding its application or non-application. This makes the ordinance generally easier for practitioners and parties, particularly those from outside Hong Kong who are more familiar with the Model Law.

3. Maritime arbitration

The HKIAC was established in 1985 to promote the use of arbitration and other forms of alternative dispute resolutions in Hong Kong. It is completely independent of the Hong Kong Government and governed by its council headed by a chairperson. The work of the HKIAC is conducted through its various committees.

The HKIAC has handled maritime cases since its establishment. Moreover, a division of the HKIAC, the Hong Kong Maritime Arbitration Group (MAG), which is specialised in maritime arbitration, was formed in 2000. It is formed by a group of professionals residing in Hong Kong who are prepared to sit as arbitrators of maritime disputes. A separate list of 33 maritime arbitrators (as of 1 June 2017) is maintained for this purpose. A full list of maritime arbitrators can be downloaded from the website of the Hong Kong Shipowners Association.

Table I shows the total number of cases handled by the HKIAC and the number of maritime arbitration (MA) cases in the period from 1985 to 2007 (Moser and Cheng, 2014).

Between 1985 and 2007, the total arbitration cases were 4,510. There were 502 maritime cases, ranking third in number of arbitration cases in Hong Kong. Ranking the first was construction with 2,066 cases and the second was commercial with 1,059 cases (Moser and Cheng, 2008).

Table II shows the number and percentage of maritime cases between 2010 and 2016, which was in the range of 15 to 20 per cent, except in 2011 and 2012 when the percentage went up to 38 per cent.

In terms of the total amount of claims in arbitration cases, the amount was US$2.8bn in 2014, US$6.2bn in 2015 and US$2.5bn in 2016.

3.1 MAG Model Arbitration Clause

The MAG of the HKIAC has drafted a Model Maritime Arbitration Clause (HKIAC, 2014) as follows:

> This Contract shall be governed by and construed in accordance with English/Hong Kong* law and any dispute arising out of or in connection with this Contract shall be referred to arbitration in Hong Kong in accordance with the Arbitration Ordinance Cap. 609 or any statutory reenactment or modification thereof save to the extent necessary to give effect to the provisions of this clause.
>
> The arbitration reference shall be to three arbitrators:
>
> (i) A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice, and stating it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified.
>
> If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he/she had been appointed by agreement.
>
> (ii) Where each party appoints its own arbitrator, then the two arbitrators so appointed may proceed with the arbitration and at any time thereafter appoint a third arbitrator so long as they do so before any substantive hearing or forthwith in the event that they cannot agree on any matter relating to the arbitration. If the said two arbitrators do not appoint a third within 14 days of one calling upon the other to do so, or if they are in disagreement as to the third arbitrator, either arbitrator or a party shall apply to the Hong Kong International Arbitration Centre (HKIAC) for the appointment of the third arbitrator.
>
> The language used in the arbitration shall be English.
>
> Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator and, if necessary, for the HKIAC to exercise its statutory power to appoint the sole arbitrator if the parties cannot agree on the appointment.

Table I.
The number of maritime arbitration cases between 1985 and 2007

Year	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996
All	9	20	43	24	45	54	94	185	139	150	184	197
MA	0	0	2	1	14	8	8	74	42	33	41	21

Year	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
All	218	240	257	298	307	320	287*	280	281	394	448
MA	30	31	13	18	11	9	28	25	48	18	27

Note: *Hong Kong was attacked by SARS in 2003
Source: Moser, 2008

> This arbitration shall be conducted in accordance with the HKIAC Small Claims Procedure current at the time when the arbitration proceedings are commenced provided that neither the claim nor any counterclaim exceeds the limit provided for in such procedure.
>
> * - Delete as appropriate. If no deletion is made, Hong Kong law shall apply.
>
> The Model Arbitration Clause provides that English be used in arbitrations. However, arbitrations can also be conducted in Chinese. In fact, this is one of the advantages of having arbitrations in Hong Kong, especially when one or both of the parties are from Mainland China, Taiwan or Hong Kong and they speak Chinese only. In fact, parties from Hong Kong and Mainland China were the top two groups of people having arbitrations in the HKIAC. Moreover, there is a trend that Chinese is demanded by the parties in more arbitrations. In 2015, 79 per cent of the arbitration cases were conducted in English, 7.4 per cent in Chinese and 13.6 per cent in both English and Chinese and in 2016, 79.8 per cent in English, 12.8 per cent in Chinese and 7.5 per cent in both English and Chinese.

Another advantage is that Hong Kong or Chinese Law can be the governing law in arbitrations in Hong Kong. In fact, Hong Kong or Chinese Law was applied in many arbitration cases.

3.2 Arbitration agreement

According to Section 19 of the Ordinance by adopting Article 7 of the Model Law:

> "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

It is a condition that an arbitration agreement must be in writing. However, the meaning of "writing" is very wide. An arbitration agreement is in writing if its content is recorded in any form, such as a written contract, an arbitration clause etc., and there is no need for the parties to sign such written document. It can also be in the electronic form, such as electronic data interchange, electronic mail, telegram, telex, etc. By reference to an arbitration agreement is also acceptable, such as a bill of lading to incorporate the arbitration clause in a charter party. See *Sea Powerful II Special Maritime Enterprises (ENE)* v. *Bank of China Ltd* ([2016] 1 HKLRD 1032) that the bill of lading incorporated the terms and conditions of a charter party, which in turn contained an arbitration clause. The Court of First Instance held that the Hong Kong court should grant an injunction to restrain the pursuit of foreign proceedings brought in breach of an agreement for Hong Kong arbitration.

3.3 Stay of proceedings

When an arbitration agreement is valid, a party is not allowed to commence legal proceedings to resolve the dispute. Otherwise the court proceedings will be stayed.

Table II. The number and percentage of maritime arbitration cases between 2010 and 2016

Year	2010	2011	2012	2013	2014	2015	2016
All	624	502	456	463	477	520	460
MA	106 (17%)	191 (38%)	173 (38%)	51 (11%)	74 (15.5%)	94 (18%)	99 (21.6%)

Source: From the website of HKIAC

In *William Company* v. *Chu Kong Agency Co Ltd* ([1995] 2 HKLR 139), the plaintiff instituted proceedings in Hong Kong to recover damages for cargo damage on a vessel under a bill of lading issued by the defendants. The bill of lading contained a clause providing that all disputes to be resolved in the courts of the People's Republic of China or by the arbitration in China. The defendants applied for a stay in favour of the arbitration in China. The court held that the word "may" in the dispute resolution clause gave the right of choice for arbitration or litigation in China to the plaintiff. As the plaintiff had opted for a method not agreed by the parties, it was opened to the defendants to exercise their choice by applying for a stay. Thus, the stay of proceedings was granted. The said rule applies even if the arbitration is in relation to a claim under the Employees' Compensation Ordinance. In *Paquito Lima Buton* v. *Rainbow Joy Shipping Ltd Inc* ([2007] 1 HKLRD 926), the employee brought an action against his employer for personal injury. However, there was an international arbitration agreement in the employment contract. The employer thus applied for a stay of the proceedings in favour of the arbitration. The judge of the District Court decided that the claim was not arbitrable because the District Court had exclusive jurisdiction over the statutory employees' compensation. On appeal by the employer, the Court of Appeal ordered for the proceedings to be stayed and the injury claim be referred to the arbitration.

3.4 Institutional and ad hoc arbitration

Maritime arbitration can be conducted in the form of an institutional or an *ad hoc* arbitration. Institutional arbitration refers to the arbitrations conducted in accordance with the rules and procedures of an arbitration institution. Examples of arbitral institutions include:

- the HKIAC;
- the London Maritime Arbitrators Association (LMAA);
- the ICC based in Paris; and
- the China Maritime Arbitration Commission (CMAC), which set up its Hong Kong Arbitration Centre in November 2014 after the China International Economic and Trade Arbitration Commission also established its arbitration centre in Hong Kong in 2012.

Most *ad hoc* arbitrations, however, follow no rules and they are up to the parties to agree on the procedures to follow, without referring to any arbitral institution. They can be divided into two categories: the document-only arbitration and the oral hearing arbitration. The document-only arbitration is generally cheaper and faster and is usually suited to small claims or where there is a single issue at stake.

3.5 Composition of arbitral tribunal

The parties have the freedom to decide the composition of the arbitral tribunal to be formed by one, two or three arbitrators (S 23, AO). If the parties fail to agree on the number of arbitrators, the right to decide the number of arbitrators is delegated to the HKIAC to have either one or three arbitrators.

An arbitration agreement may agree that an arbitrator should be "a commercial shipping man". The meaning of a "commercial shipping man" was provided in *Vincor Shipping Co Ltd* v. *Transatlantic Schiffahrtskontor* GmbH ([1987] HKLR 613). In an arbitration, the appointee was qualified as a solicitor in 1970 and practiced in London

for three years handling cargo claims, charter party disputes and personal injury claims. In 1973, he joined the London correspondents of a P and I Club. In 1979, he acted as the Hong Kong correspondent of a P and I Club. He started up on his own in 1984 as the correspondent for two P and I Clubs handling marine claims and charter party disputes. He had also acted as an arbitrator in shipping disputes. The court decided that the appointment of a "commercial shipping man" should be given a sensible construction and should have open the possibility of arbitrators being chosen from a wide field of persons with commercial experience so long as they were not practicing lawyers. As the appointee was engaged full-time in commercial shipping, he was a commercial shipping man qualified to be an arbitrator.

3.6 Interim measures

By the adoption of the Model Law, one of the important changes is the additional provisions regarding interim measures. Section 35 of the ordinance provides that "the arbitral tribunal may, at the request of a party, grant interim measures". The interim measures are temporary measures made prior to the issuance of an award. They include injunctive relief, to maintain or restore the status quo, to prevent harm or prejudice to the arbitral process, to preserve assets and evidence. Additionally, arbitral tribunals are empowered to order the provision of security for costs and direct the discovery of documents or delivery of interrogatories (Article 17, the Model Law).

Moreover, according to Section 45 of the ordinance, Hong Kong courts are empowered to grant interim relief in protection of arbitrations which are yet to be commenced outside Hong Kong. In the case of *CSSC Huangpu Wenchong Shipbuilding Co Ltd* v. *Dry Bulk Services Ltd* ([2016] HKCFI 2162), the judge agreed to freeze $13.7m in assets belonging to a Hong Kong ship management company during two ongoing London arbitrations. It was because the plaintiff shipbuilding company claimed against the defendant management company for overdue scheduled payments and had "a good arguable case".

3.7 Effect and enforcement of awards

An award made by an arbitral tribunal is final and binding on both parties (Section 73, AO).

The ordinance does not adopt the enforcement provisions of the Model Law. Section 84 of the ordinance provides that, with the leave of the court, an award, whether made inside or outside Hong Kong, is enforceable in the same manner as a court judgment.

As there is an extremely close relationship between Hong Kong and Mainland China, the Department of Justice in Hong Kong and the Supreme People's Court in China reached the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong (the "Arrangement") in 1999 basing on Article 95 of the Basic Law. This is an important development in judicial assistance between the two jurisdictions and implementation of the "one country, two systems" principle (Zhang, 1999).

Under the reciprocity principle, courts in Hong Kong agree to enforce awards made pursuant to the Chinese Arbitration Law (Section 92, AO) and the People's Courts also agree to enforce awards made pursuant to the Arbitration Ordinance in Hong Kong (Preamble of the Arrangement). Article 1 of the Arrangement provides that:

> Where a party fails to comply with an arbitral award, whether made in Mainland or in the HKSAR, the other party may apply to the relevant court in the place where the party against whom the application is filed is domiciled or in the place where the property of the said party is situated to enforce the award.

The meaning of "the relevant court" is the Court of First Instance in Hong Kong and the Intermediate People's Court in China (Article 2, the Arrangement). For enforcement of an award, the applicant has to submit to the relevant court an application for enforcement together with the arbitral award and the arbitration agreement (Article 3, the Arrangement and Section 94, AO).

From 1999 to 2011, more than 90 arbitral awards made in Mainland China were recognised and enforced in Hong Kong. On the other hand, between 2000 and 2008, at least 24 Hong Kong arbitral awards were executed in Mainland China (Gu and Zhang, 2012). According to a survey, people enforcing foreign arbitral awards in China might face some difficulties, but a large majority were fortunately able to recover all or most of their awards (Alford *et al.*, 2016).

Other foreign awards are also enforceable in Hong Kong because Hong Kong has adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). New York Convention awards are recognised and can be enforced in Hong Kong either by action in the court or in the same manner as an arbitral award (Section 87, AO).

As arbitral awards made in Hong Kong can be enforced in China and in other countries by applying the New York Convention and vice versa, this arrangement can encourage more parties to have their disputes to be resolved in Hong Kong by the arbitration (Reyes, 2017).

4. Conclusion

Hong Kong has very good conditions in different aspects to make it one of the best maritime arbitration centres, especially in the Asia Pacific Region. As discussed, the legal system, the maritime experts, the languages, the international shipping centre and the support of the HKIAC have provided a solid foundation for international maritime arbitration in Hong Kong. By adopting the Model Law and the New York Convention in the arbitration law in Hong Kong, this unified legislative policy has further promoted the international maritime arbitration. Finally, Hong Kong being the door to the People's Republic of China, it is advantageous that Mainland Chinese awards are recognised and enforced in Hong Kong and vice versa.

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