

**Speech by The Honourable Chief Justice Andrew Cheung
at the Hong Kong Arbitration Week – ADR in Asia Conference
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The Role of the Hong Kong Judiciary in Arbitration

I am honoured to be invited to speak at this session of the ADR in Asia Conference as part of the 10th Hong Kong Arbitration Week. In the past 10 years, Hong Kong’s status as a leading international arbitration hub has been continuously consolidated and developed. The strength of any place as an arbitral seat depends on a number of factors. They have been described by Lord Hoffmann from the perspective of commercial parties who are in the process of choosing an arbitral seat as follows:

“... the choice is likely to depend upon a combination of geographical convenience for the parties, ready access to good legal services and a local legal system which can be relied upon to be impartial and exercise unobtrusive supervision over the arbitration, intervening only when things have gone badly wrong”.¹

2. In this talk, I would like to make a few observations on whether parties to a Hong Kong arbitration can be confident that they will have access to, in Lord Hoffmann’s words, a local legal system which can be relied upon to be impartial and exercise unobtrusive supervision over the arbitration. This invites two questions. First, what are the characteristics of Hong Kong’s legal system? Secondly, what are the powers and functions of the Hong Kong courts in relation to arbitration proceedings?

¹ Choong & Weeramantry (eds), *The Hong Kong Arbitration Ordinance: Commentary and Annotations*, (2nd Ed, Sweet & Maxwell 2015), Foreword to the First Edition by Lord Hoffmann (April 2011).

3. The starting point of any discussion of Hong Kong's legal system begins with the Basic Law. The Basic Law became the constitutional document of the Hong Kong Special Administrative Region upon its establishment on 1 July 1997 when the People's Republic of China resumed the exercise of sovereignty over Hong Kong. It was adopted by the National People's Congress, the highest organ of state power in the PRC, and was promulgated on 4 April 1990.

4. Under the Basic Law, the legal system previously in force in Hong Kong before the handover remains in place. Thus, Hong Kong continues to adopt the common law system. In particular, Article 8 of the Basic Law expressly states that the laws previously in force in Hong Kong, that is, the common law, rules of equity, and ordinances, shall be maintained. And Article 84 specifically provides that the Hong Kong courts are able to "refer to the precedents of other common law jurisdictions".

5. As with other common law jurisdictions, Hong Kong's common law system adopts the doctrine of precedent. Legal precedents are typically established by authoritative decisions of the superior courts on matters of legal principle. In Hong Kong, the superior courts are the Court of First Instance, the Court of Appeal, and the Court of Final Appeal. In very general terms, the doctrine of precedent means that the legal principles laid down by the higher courts are binding on the lower courts when deciding subsequent cases involving the same or similar legal issues. This promotes legal certainty and ensures that like cases are treated alike, which are important features as well as virtues of the common law system.

6. Crucial to the proper functioning of any legal system is the presence of an independent judiciary. This is firmly guaranteed by the Basic Law:

- (1) Article 2 states that the Hong Kong Special Administrative Region enjoys independent judicial power, including that of final adjudication.
- (2) Article 85 reiterates that the Hong Kong courts shall exercise judicial power independently, free from any interference. Members of the judiciary are immune from legal action in the performance of their judicial functions.
- (3) Article 92 provides that judges are chosen on the basis of their judicial and professional qualities.
- (4) Article 89 provides for judges' security of tenure. It stipulates that a judge in Hong Kong may only be removed for inability to discharge his or her duties, or for misbehavior, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than 3 local judges.

7. A special feature of Hong Kong's common law system is the sitting of foreign judges in the Court of Final Appeal. This is specifically provided for by the Basic Law:

- (1) Article 82 states that the power of final adjudication vests in the Court of Final Appeal, "which may as required invite judges from other common law jurisdictions".

- (2) Article 92 provides that judges “may be recruited from other common law jurisdictions”.

8. There are currently 12 judges on the list of overseas non-permanent judges of the Court of Final Appeal: 8 are from the UK, 3 from Australia and 1 from Canada. As I have noted, the Basic Law expressly permits the Hong Kong courts to refer to the precedents of other common law jurisdictions. Having the very top judges or retired judges from leading common law jurisdictions whose precedents may be, and in practice, are often referred to in our courts is a clear and practical advantage for the development of Hong Kong’s common law. The participation of overseas judges ensures that the Court of Final Appeal’s jurisprudence is, where appropriate, considered in the context of comparative common law.

9. Further, the presence of overseas judges demonstrates their informed confidence in the rule of law in Hong Kong and the independence of the Hong Kong judiciary. As Mr Justice Fok PJ pointed out in a recent speech, it is perfectly reasonable to ask whether any of these eminent serving and retired overseas judges would have sat, or continue to sit, in a court in Hong Kong if they thought the rule of law was in any way compromised or the judges were subject to improper interference.²

10. A further feature of Hong Kong’s legal system that I would like to highlight, which is particularly relevant to Hong Kong’s appeal as an

² The Hon Mr Justice Joseph Fok PJ, “Judges from other common law jurisdictions in the Hong Kong Court of Final Appeal” (University of Hong Kong, 3 May 2021) <<https://www.hkcfa.hk/filemanager/engagement/en/upload/116/Keynote%20speech.pdf>> at paragraph 31.

international dispute resolution centre, is its bilingualism. Hong Kong is the only common law jurisdiction in the world which is bilingual in English and Chinese:

- (1) Article 9 of the Basic Law provides that both English and Chinese may be used as an official language by the Hong Kong judiciary.
- (2) Section 5(1) of the Official Languages Ordinance (Cap. 5) specifically provides that a judge may use either or both English and Chinese in any proceedings before him or her as the judge thinks fit. Judgments can be written in either English or Chinese.
- (3) Section 5(3) and (4) stipulate that litigants, witnesses, or legal representatives in any proceedings may use either or both English and Chinese to address the court or to testify.

11. Most judges in Hong Kong are bilingual. In proceedings involving Chinese-speaking parties, it is not uncommon for a substantial portion of the underlying documents to be written in Chinese. Even if the proceedings itself are conducted in English (as with most proceedings involving commercial parties), there is an obvious practical advantage in having a judge who can understand, for example, the arbitration clause which forms the centre of the parties' dispute, and indeed any relevant documents, in their original Chinese form.

12. In short, parties to a Hong Kong arbitration can expect that the arbitration will take place against the backdrop of an impartial and bilingual common law legal system.

13. I will now turn to the powers and functions of the Hong Kong courts in relation to arbitration proceedings. As a matter of general principle, the courts

adopt a pro-arbitration policy. The general policy of the courts is to uphold arbitration agreements, to facilitate arbitration, and not to intervene in an arbitration, which is the parties' free choice as to the method of dispute resolution.³

14. The role of the Hong Kong courts in respect of arbitrations can be divided into four broad categories: (1) enforcing arbitration agreements; (2) supporting the conduct of arbitration proceedings; (3) ruling on applications to set aside arbitral awards; (4) enforcing arbitral awards.

15. As to the enforcement of arbitration agreements, under section 20 of the Arbitration Ordinance (Cap. 609), the Hong Kong courts have a duty to enforce arbitration agreements by staying court actions which are brought in contravention of a valid arbitration clause.

16. The powers of the courts to support arbitral proceedings are prescribed by the Arbitration Ordinance. Section 3 of the Ordinance lays down the principles on which the Ordinance is based:

- (1) Subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved.
- (2) The court should interfere in the arbitration of a dispute only as expressly provided for in the Ordinance.

³ *Chimbusco International Petroleum (Singapore) PTE Ltd v Fully Best Trading Limited* [2016] 1 HKLRD 582 at paragraph 11.

17. Thus, the courts have the power to support arbitral proceedings only where this is considered a safeguard necessary in the public interest. Bearing this principle in mind, the courts' functions and powers over the conduct of arbitrations include the following:

- (1) Granting interim measures of protection in support of pending or ongoing arbitral proceedings;⁴
- (2) Ruling on challenges to the appointment of an arbitrator;⁵
- (3) Reviewing an arbitral tribunal's ruling that it has jurisdiction over the dispute;⁶
- (4) Assisting the taking of evidence by ordering a witness to attend arbitral proceedings to give evidence or to produce documents or other evidence;⁷ and
- (5) Determining the amount of fees and expenses payable to the arbitral tribunal in the event of dispute.⁸

18. Under the Arbitration Ordinance, there is no general right of appeal to the court against the merits of an award. Section 81 of the Ordinance, which incorporates Article 34 of UNCITRAL Model Law, states that an application for

⁴ Section 21.

⁵ Section 26.

⁶ Section 34.

⁷ Section 55.

⁸ Section 77.

setting aside is the exclusive recourse against an arbitral award. An award can be set aside by the court only in the circumstances specified by section 81, which are all fairly exceptional. It is worth emphasising that the merits of the award are not grounds for setting aside.

19. Once an award is made, it can be enforced under Part 10 of the Arbitration Ordinance:

- (1) Section 84 states that an arbitral award, whether made in or outside Hong Kong, is enforceable in the same manner as a judgment of the court, provided that the leave of the court is granted.
- (2) Section 87 of the Ordinance provides that an award governed by the New York Convention⁹ may be enforced in the same manner as an award to which section 84 applies.
- (3) Similarly, under section 92, a Mainland award, that is, an award made in accordance with the Arbitration Law of the PRC, is enforceable in the same manner as an award to which section 84 applies.

20. In relation to an award to which section 84 applies, although leave to enforce is not given as a matter of right, it will only be refused in unusual cases. There is a presumption that leave to enforce should be permitted.¹⁰ It is the firm policy of the law to aid the enforcement of arbitral awards. Part 10 of the

⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

¹⁰ G Ma (ed), *Arbitration in Hong Kong: A Practical Guide* (4th ed, Sweet & Maxwell 2017), paragraphs 19-018.

Ordinance¹¹ provides a list of grounds on which leave may be refused, namely where:

- (1) A party to the arbitration agreement was under some incapacity;
- (2) The arbitration agreement was not valid;
- (3) The party against whom enforcement is sought was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case;
- (4) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;
- (5) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;
- (6) The award is not yet binding on the parties, or has been set aside;
- (7) The award is in respect of a matter which is not capable of settlement by arbitration; and
- (8) The enforcement of the award would be contrary to the public policy of Hong Kong.

¹¹ Section 86 (Hong Kong awards); section 89 (Convention awards); section 95 (Mainland awards).

21. The grounds that I have mentioned above are the only grounds on which enforcement of a Convention or Mainland award may be refused. In relation to a Hong Kong award, although the court retains a discretion to refuse enforcement if, for any other reason, the court considers it just to do so, this discretion will be exercised only sparingly.

22. It would be apparent that the grounds listed under Part 10 all involve unusual circumstances. Importantly, the merits of the award or underlying facts are not grounds on which leave may be refused. Further, even where one of the above grounds is established, the court will refuse enforcement only if the error is sufficiently serious.¹²

23. In summary, the pro-arbitration policy of Hong Kong law is reflected in the following:

- (1) The duty of the courts to stay court proceedings in favour of arbitration;
- (2) The power of the courts to support arbitral proceedings where this is necessary in the public interest;
- (3) The limited circumstances in which an award may be set aside by the courts; and
- (4) The presumption that leave to enforce an award should be granted.

¹² *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No. 1)* [2012] 4 HKLRD 1.

24. At the beginning of my speech, I have referred to Lord Hoffmann's summary of the key considerations that commercial parties are likely to have in mind when choosing an arbitral seat. His Lordship then continued:

“There are not many places in the world which can satisfy all of these requirements: New York, London, Paris, Geneva and Singapore are names which regularly come up. But Hong Kong also satisfies the requirements which I have mentioned, and its unique amphibious position in relation to China, being part of the territory of the People's Republic of China but equipped with good legal services and an excellent court system, is coming to be recognized.”

25. That was written in 2011. Hong Kong's unique advantage as a leading international arbitration centre in this part of the world as described by Lord Hoffmann has since been firmly recognised. I have every confidence that Hong Kong's stature as a leading arbitration hub will only continue to grow. Thank you.

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