

LCQ14: Hong Kong as an international arbitration hub

Following is a question by the Hon Kenneth Leung and a written reply by the Secretary for Justice, Ms Teresa Cheng, SC, in the Legislative Council today (December 18):

Question:

One of the main policy objectives of the Department of Justice is to enhance Hong Kong's status as a leading centre for international legal and dispute resolution services in the Asia-Pacific region, in particular as an international arbitration hub. In this connection, will the Government inform this Council:

(1) whether it knows, in each of the past five years, the respective numbers of arbitration cases which were (i) seated in Hong Kong, (ii) heard in Hong Kong although not seated here, and (iii) provided only with secretarial support or services by the Hong Kong office of an arbitration institution; among such cases, the number of those which were international in nature; how such figures compare with those of Singapore and the causes for the differences;

(2) of the total Gross Value Added of arbitration activities in Hong Kong (including the induced contribution) in each of the past five years, and its percentage in the legal sector's Gross Domestic Product in that year;

(3) of the revenue brought by arbitration activities in each of the past five years, and its percentage in the Government's recurrent revenue in that year; and

(4) whether it has assessed the impacts of the Hong Kong Human Rights and Democracy Act (especially the measures involving sanctions set out therein) enacted by the United States last month on Hong Kong as an international arbitration hub; if it has assessed, of the outcome; if not, the reasons for that?

Reply:

President,

Arbitration is a dispute resolution mechanism consented to by the parties, the advantages of arbitration being its confidential nature, its upholding of the principle of parties' autonomy, the flexibility in its procedure, and the enforceability of its awards in the over 160 Contracting States to the Convention on the Recognition and Enforcement of Foreign Arbitration Awards (New York Convention).

A strong legal system (including a comprehensive legal infrastructure for arbitration) is conducive to attracting foreign direct investment for

places around the world. To this end, it is one of the major long-term policy objectives of the Department of Justice (DoJ) in recent years to commit to the development and promotion of Hong Kong as a leading international legal and dispute resolution services centre in the Asia-Pacific region, which objective complements Hong Kong's position as an international business and financial centre. In order to promote Hong Kong's legal services comprehensively, the DoJ has added the new policy objective of "deal-making" since 2018 and endeavours to enhance Hong Kong's position as a deal-making and dispute resolution hub.

Under "One Country, Two Systems", Hong Kong enjoys unique double advantages in providing international arbitration services.

First, pursuant to the constitutional safeguards laid down in the Basic Law, Hong Kong has a sound legal system and a rule of law tradition, as well as an independent judiciary. Hong Kong adopts the common law system, which is more familiar to the international commercial and trade community. Furthermore, Hong Kong has experienced dispute resolution talents and rich dispute resolution culture.

Second, there is national support for the development of Hong Kong as an international legal and dispute resolution services centre in the region. In the chapter dedicated to Hong Kong and Macao under the national "13th Five-Year Plan", the Central Government has clearly voiced its support for Hong Kong to develop as an international legal and dispute resolution services centre in the Asia-Pacific region. Similarly, the key developments mentioned in the Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area published in February 2019 included the development of Hong Kong as a major international legal and dispute resolution services centre in the Asia-Pacific region, as well as the support for Hong Kong to develop as a service centre for resolving investment and commercial disputes in projects relating to the Belt and Road Initiative. Therefore, Hong Kong should seize the opportunities generated by the Belt and Road Initiative and the Guangdong-Hong Kong-Macao Greater Bay Area Development, in order to constantly enhance its competitiveness.

A consolidated reply of the DoJ to the question raised by the Hon Kenneth Leung is as follows:

(1) to (3) Due to the features stated below, public information and statistics concerning arbitration activities in Hong Kong are very limited. The DoJ, therefore, does not have official figures requested in parts (1) to (3) of the question.

(a) A distinctive feature of arbitration is its confidential nature. In order to better safeguard the confidentiality of arbitrations, the Arbitration Ordinance (Cap. 609) restricts parties from publishing, disclosing or communicating any information relating to the arbitral proceedings or the award, unless where the parties agreed otherwise, where a party needs to protect or pursue own legal right or interest, or where a party discloses information relating to the arbitration when enforcing or challenging the award.

(b) The Arbitration Ordinance (Cap. 609) currently in force has come into operation since 2011 and is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law). It superseded the Arbitration Ordinance (Cap. 341) and unified the legal frameworks of domestic arbitrations and international arbitrations. Since the commencement of the Arbitration Ordinance (Cap. 609), the distinctions between the prescribed regimes of "domestic arbitration" and "international arbitration" has ceased to exist in the arbitration-related legal framework in Hong Kong.

(c) Arbitral proceedings can be classified into the two main categories of institutional arbitration and ad hoc arbitration. Institutional arbitrations are administered by arbitral institutions (for example, the Hong Kong International Arbitration Centre (HKIAC)) in accordance with, generally, the arbitration rules of the arbitral institution which administers the arbitral proceedings. Ad hoc arbitrations are wholly "administered" by the arbitrator(s) and the parties, in accordance with readily available arbitration rules (for example, the UNCITRAL Arbitration Rules) or rules tailor-made by the arbitral tribunal based on the nature of the case. In ad hoc arbitrations, if no party makes application to the court for enforcement or setting aside of arbitral award, any third party to the parties to the proceedings will not have knowledge of the arbitral proceedings having been conducted.

In fact, the early development of arbitration in Hong Kong focused on ad hoc arbitration. Before the establishment of the HKIAC in 1985, a vast majority of the parties who chose Hong Kong as the seat of arbitration would have opted for ad hoc arbitration. It was only in September 2008 that the HKIAC for the first time published its Administered Arbitration Rules.

(d) Apart from parties' autonomy in terms of the arbitration rules, flexibility in the arbitral proceedings is also showcased in the parties' choice of arbitrator and representation. The Arbitration Ordinance (Cap. 609) does not impose any requirement with respect to the professional qualification of arbitrators and representation, such that arbitrators and representation in arbitral proceedings conducted in Hong Kong are not necessarily Hong Kong practising solicitors or barristers. In fact, depending on the complexity and technicality of the case, parties from different sectors may consider appointing relevant professionals concerning the issues in dispute in the case to discharge the role of arbitrator.

We notice that, although the HKIAC publishes statistics concerning its arbitration and dispute resolution services, such statistics could not cover all arbitration cases conducted in Hong Kong, which include arbitration cases administered by other arbitral institutions, ad hoc arbitration cases, arbitration cases not seated in Hong Kong but heard in Hong Kong only, etc. For the above reasons, the statistics can only partially reflect the position of arbitration activities in Hong Kong.

According to information made public by the HKIAC, we have tabulated the total number of new cases (including arbitrations, mediations and domain name disputes), overall arbitration cases, the percentage share of international

arbitrations (i.e. at least one party was not from Hong Kong) out of the number of arbitration cases, the top five geographical origins or nationalities of the parties (apart from Hong Kong) and the total amount in dispute in the past five years (i.e. from 2014 to 2018) as follows.

	Total new cases (including arbitrations, mediations and domain name disputes)	Overall arbitration cases	Percentage share of international arbitrations out of the number of arbitration cases (i.e. at least one party was not from Hong Kong)	Top five geographical origins or nationalities of the parties (apart from Hong Kong)	Total amount in dispute
2014	477	252	Statistics not available	1. Mainland China 2. United States 3. Singapore 4. United Kingdom 5. British Virgin Islands	Approximately US\$2.8 billion
2015	520	271	Statistics not available	1. Mainland China 2. British Virgin Islands 3. Macao / Singapore 4. Australia 5. United Kingdom / United States	Approximately US\$6.2 billion
2016	460	262	78.4%	1. Mainland China 2. British Virgin Islands 3. Singapore 4. United States 5. Korea	Approximately US\$2.5 billion
2017	532	297	73.1%	1. Mainland China 2. Singapore 3. British Virgin Islands 4. Cayman Islands 5. United States	Approximately US\$5.0 billion
2018	520	265	71.7%	1. Mainland China 2. British Virgin Islands 3. United States 4. Cayman Islands 5. Singapore	Approximately US\$6.3 billion

(Source: Statistics published in the HKIAC's Annual Reports and case statistics)

Although the HKIAC has not yet published the statistics for 2019, the DoJ is given to understand that there has been an increase in the number of arbitration cases this year when compared with last year.

The DoJ is mindful of the dedicated efforts of neighbouring regions, including Singapore, Malaysia, Korea as well as Mainland cities (for example, Shanghai, Shenzhen), to promote international arbitration services in recent years, which have posed serious challenges to Hong Kong. In the face of keen competition within the region, there is an urgent need for us to enhance the promotional work and policy initiatives, in order to capitalise on Hong Kong's intrinsic strengths, including the opportunities generated by the national Belt and Road Initiative and the Guangdong-Hong Kong-Macao Greater Bay Area Development, thereby enhancing the competitiveness of Hong Kong's arbitration services as well as other dispute resolution services options.

The DoJ has in recent years adopted various initiatives, fine-tuning the arbitration-related legal framework, attracting international dispute resolution institutions to set up offices in Hong Kong, and hosting large-scale international conferences relating to legal and dispute resolution services in Hong Kong. The Inclusive Dispute Avoidance and Resolution Office set up in early 2019 will continue to co-ordinate the promotional work related to arbitration and other dispute resolution measures within the DoJ.

In order to keep abreast of the latest developments in international arbitration, the DoJ has made amendments to the Arbitration Ordinance from time to time in recent years, in order to clarify that disputes over intellectual property rights can be settled through arbitration and that third party funding of arbitration is permitted under the laws of Hong Kong. The relevant legislative amendments respectively came into operation in 2018 and in early 2019.

In addition, the DoJ and the Supreme People's Court signed 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 (Interim Measures Arrangement) in April 2019, which came into force on October 1. The signing of the Interim Measures Arrangement is a major breakthrough to the benefit of Hong Kong under "One Country, Two Systems", signifying that Hong Kong has become the first and, to date, the only jurisdiction outside the Mainland where, as a seat of arbitration, parties to arbitral proceedings administered by the designated arbitral institutions would be able to apply to the Mainland courts for interim measures in order to ensure that the arbitral proceedings can be carried out effectively. This has been well-received by the local profession which generally considers that the Interim Measures Arrangement will help enhance the attractiveness of Hong Kong as a seat of arbitration for Mainland-related disputes.

The DoJ understands that there have already been successful applications for interim measures made to the Mainland courts by parties to arbitral proceedings applicable under the Interim Measures Arrangement. Besides, in light of the Interim Measures Arrangement, the International Chamber of Commerce has published a Practice Note to the effect that arbitration cases seated in Hong Kong will be assigned to the Secretariat of the International Court of Arbitration of the International Chamber of Commerce – Asia Office (ICCICA – Asia Office) based in Hong Kong for administration. The DoJ anticipates that the Interim Measures Arrangement will continue to bring

further opportunities for business expansion to Hong Kong's arbitration and dispute resolution sector.

In addition to the HKIAC, the DoJ has constantly been making efforts in attracting internationally renowned arbitral institutions to set up regional office or branch institution in Hong Kong, including offices already established in Hong Kong, namely, the ICCICA – Asia Office, the Hong Kong Arbitration Center of the China International Economic and Trade Arbitration Commission and the Hong Kong Arbitration Center of the China Maritime Arbitration Commission.

In order to build Hong Kong into an international capacity-building hub, the DoJ has in recent years successfully co-organised many large-scale international conferences and events in Hong Kong together with international intergovernmental organisations and/or local legal and dispute resolution services sector, for example, the forum held in September 2018 to commemorate the 60th Anniversary of the New York Convention, the Investor-State Dispute Settlement Reform Conference held in February 2019, the Third UNCITRAL Asia Pacific Judicial Summit held in November 2019, etc. The DoJ is also actively participating in the work of the UNCITRAL Working Group III in studying reforms of the investor-state dispute settlement mechanism. The above measures will deepen the understanding of issues in international law amongst Hong Kong's legal and dispute resolution services sector and its contribution to developments in international law, so as to enhance the quality and international standing of Hong Kong's international legal and arbitration services.

Going forward, the DoJ will continue to actively put forward new policy initiatives, for example, procuring the establishment of a regional arbitration centre in Hong Kong by the Asian-African Legal Consultative Organization, the detailed arrangements of which is expected to be finalised in 2020; on the other hand, in order to provide more flexible fee structure options to parties in arbitration, the Law Reform Commission has formed a sub-committee to study the topic of outcome-related fee structure for arbitration.

(4) The Hong Kong Special Administrative Region Government strongly opposes the enactment of the Hong Kong Human Rights and Democracy Act (Act) as the law of the United States. The Ministry of Foreign Affairs has clearly indicated that the signing and giving of the force of law to the Act constituted grave intervention in the affairs of Hong Kong, gross interference with the internal affairs of China and serious violations of international law and basic principles in international relations.

The uncertainty caused by the Act will inevitably affect the confidence of international investors and companies in Hong Kong. Having said that, as aforementioned, Hong Kong's legal system remains robust under "One Country, Two Systems". The DoJ will continue to exchange views and collaborate with the local and international communities with a view to consolidating different parties' confidence in Hong Kong's legal system and rule of law. The DoJ will also focus our efforts on promoting Hong Kong's international legal and arbitration services. We believe that, in the long run, the

intrinsic strengths of Hong Kong, together with the advantages enjoyed by Hong Kong's dispute resolution services pursuant to the ground-breaking initiatives of the Belt and Road Initiative, the Guangdong-Hong Kong-Macao Greater Bay Area Development and the Interim Measures Arrangement, etc., will help Hong Kong's dispute resolution services such as international arbitration, etc. to continue to thrive.