

A Look At Notable Trends From Hong Kong Arbitration Report

By Timothy Blakely, Yi-Jun Kang and Nicole Tsui (April 22, 2024, 2:03 PM EDT)

On March 6, the Hong Kong International Arbitration Centre released its annual statistics for 2023, reaffirming Hong Kong's status as a busy and important center for international arbitration.

Caseload and Related Statistics

In 2023, HKIAC saw a notable surge in arbitration filings, reaching a record-high total amount in dispute. HKIAC received 281 arbitration filings, the third-highest number since 2017, with 184 cases administered by HKIAC. The total amount in dispute reached 92.8 billion Hong Kong dollars (approximately \$11.8 billion at current exchange rates), with an average amount in dispute in administered arbitrations of HK\$467.6 million.

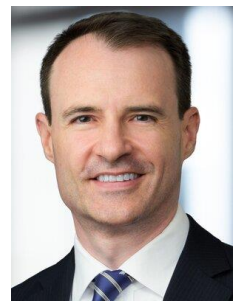
Disputes from the corporate sector constituted 21% of the registered cases, with disputes from the construction, commercial and maritime sectors each constituting more than 15% of the disputes. In 2023, there was a decrease in banking and financial services disputes from 36.9% of all cases in 2022 to only 11.4% in 2023.

Approximately 60% of the arbitration filings stemmed from contracts signed in 2020 or later, indicating that notwithstanding the social unrest of 2019 and the passage of the Hong Kong national security law in mid-2020, contracting parties remain confident in Hong Kong as an arbitral seat and in HKIAC's strong case administration services.

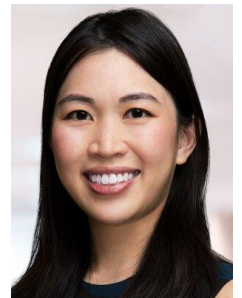
The number of arbitrations seated in Hong Kong also remained consistent at 96.8% as compared to 97.7% in 2022. Most of the arbitrations submitted to HKIAC in 2023 were international in nature, involving parties from 63 jurisdictions.

Hong Kong, mainland China and British Virgin Islands were the top three spots for party origin, with mainland Chinese parties appearing in 39.5% of all arbitrations. Furthermore, at least one non-Hong Kong party was featured in 75.1% of all arbitrations and in 89.7% of administered arbitrations.

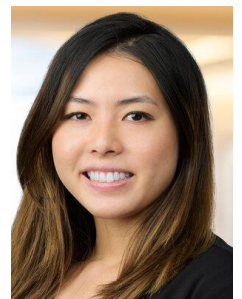
In terms of the number of different governing laws applicable to disputes submitted to HKIAC in 2023, there was a slight decrease from 16 in 2022 to 14 in 2023. Hong Kong law and English law remained at first and second place, respectively, while Chinese law replaced Jersey law in third place.



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English remained the dominant language used for HKIAC arbitrations: 83% of the arbitrations commenced in 2023 were conducted in English, a slight decrease from 87.1% in 2022; while slightly more arbitrations were conducted in Chinese, 12% in 2023, up from 11.3% in 2022. Interestingly, arbitrations conducted in both English and Chinese grew to 5% of the caseload in 2023, up from 1.6% in 2022.

Arbitrator Appointments

The statistics show that HKIAC continued to appoint arbitrators from a wide variety of nationalities. In 2023, HKIAC appointed a total of 172 arbitrators and confirmed 112 designations of arbitrators under the HKIAC Administered Arbitration Rules.

Among all appointed arbitrators, 74.5% were of Hong Kong, Australian, United Kingdom or dual nationality. A similar percentage, 73.1%, of arbitrators designated by parties or co-arbitrators under the HKIAC Rules were of those nationalities.

Significantly, the number of arbitrators of mainland Chinese nationality doubled to 6.4% in 2023 for those appointed by HKIAC and increased almost fourfold to 6.3% for those designated by the parties or co-arbitrators under the HKIAC Rules.

Notably, the data shows substantial improvement in enhancing diversity among HKIAC appointments, particularly in terms of gender representation. Female arbitrators represented 34.9% of all arbitrator appointments made by HKIAC in 2023, surpassing the figures of 27% in 2022 and 21.8% in 2021. This is the highest proportion of female arbitrator appointments since HKIAC began publishing female appointment figures in 2017.

HKIAC also expanded its overall pool of arbitrator appointments: 34.3% of the arbitrators HKIAC appointed in 2023 had not been previously appointed by HKIAC during the prior three years.

Expedited Procedure, Emergency Arbitration and Early Determination

In 2023, HKIAC experienced distinctive trends in the use of expedited procedures, emergency arbitrators and early determination applications, demonstrating that parties continue to leverage these modern procedural options available under the HKIAC rules. The number of expedited procedure applications increased to 24, surpassing 2022's count of 20 and ranking as the second-highest number of applications recorded since the mechanism was introduced. Of these applications, 15, or 65%, were granted.

Three emergency arbitrator applications were submitted, bringing the total number of emergency arbitrator applications filed with HKIAC up to 35. This is an increase from 2022 — one application — but remains relatively low compared to the 14 applications filed in 2020.

Five early determination applications under the HKIAC rules were submitted to arbitral tribunals in 2023, marking the highest number recorded thus far. Among these applications, two were granted, two were rejected and one was still pending as of the end of 2023. The total number of early determination applications filed with HKIAC rose to 13.

Interim Measures

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" has been well utilized by parties appearing before HKIAC in the last three years. The arrangement provides parties involved in Hong Kong-seated arbitrations the ability to seek interim relief from mainland Chinese courts.

Since its implementation on Oct. 1, 2019, the arrangement has played a crucial role in facilitating institutional arbitrations seated in Hong Kong. In 2021 and 2022, mainland Chinese courts issued preservation orders for a significant amount of assets. In 2021, the courts issued orders to preserve 1.5 billion Chinese yuan (or approximately \$207 million at current exchange rates) in assets, while in 2022, orders were issued to preserve assets amounting to 1.26 billion yuan.

Among the various forms of interim relief sought, preservation of assets was the most common: 47 of 50 applications under the arrangement in 2021 and 54 of 58 applications under the arrangement in 2022 sought preservation of assets. The total value of assets preserved amounted to 10.9 billion yuan in 2021 and 14.5 billion yuan in 2022.

The statistics for 2023 show a continuation of this trend.

In 2023, HKIAC processed 19 applications made to 13 different mainland Chinese courts under the arrangement. These applications sought to preserve assets valued at a total of 3.5 billion yuan. In response, mainland Chinese courts issued orders to preserve 544 million yuan of assets.

HKIAC also reported that between the introduction of the arrangement in October 2019 and the end of 2023, HKIAC processed 105 applications. HKIAC reported that, through the end of 2023, it is aware of mainland Chinese court orders preserving assets amounting to 15.8 billion yuan.

The statistics demonstrate the continued popularity and importance of the arrangement as a unique tool that can be deployed in connection with Hong Kong-seated international arbitration matters for disputes involving mainland China.

Outcome-Related Fee Structures

Hong Kong's new regime permitting outcome-related fee structures came into force in December 2022 through the amended Arbitration Ordinance (Cap. 609) and Arbitration (Outcome-Related Fee Structures for Arbitration) Rules (Cap. 609D). This new development marked a significant milestone in Hong Kong's evolution as a hub for international commercial dispute resolution and aligns Hong Kong's practice with that of Singapore, Australia, and England and Wales.

Under the new regime, clients and their lawyers have the flexibility to agree upon three categories of alternative fee structures: (1) conditional fee arrangements that allow lawyers to receive a success fee if the client achieves a favorable outcome in the matter; (2) damages-based agreements that enable lawyers to be compensated based on the financial benefit obtained by the client in the matter; and (3) hybrid damages-based agreements that provide a combination of a percentage of the financial benefit obtained by the client and an unconditional payment in the event of a successful outcome.

This was a welcome development, and 2023 saw parties swiftly adopting outcome-related fee structure agreements for their disputes. HKIAC reported that parties disclosed the existence of outcome-related fee structure agreements in three cases, all of which were administered by HKIAC. One of these cases involved an agreement entered into after the arbitration commenced.

The regime surely will be more frequently utilized going forward.

Concluding Remarks

Overall, HKIAC's 2023 statistics reaffirm Hong Kong's continued importance as a key hub for international arbitration, especially for mainland China-related disputes. Noteworthy trends such as the increasing diversity in arbitral appointments and the adoption of outcome-related fee structures indicate significant progress in Hong Kong's arbitration landscape.

These trends are further reinforced by HKIAC's proposed amendments to the 2018 HKIAC Rules, which are aimed at enhancing diversity in arbitral appointments, accommodating the adoption of outcome-related fee structures, addressing information security and strengthening the mechanism by which a single arbitration can proceed under multiple contracts.

This illustrates HKIAC's commitment to adapting to the evolving needs of the parties involved in arbitration proceedings.

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