

# Why Hong Kong should be chosen as a venue for commercial dispute resolutions in the projects under the Greater Bay Area and Belt and Road Initiative

Edward Liu  
Legal Director  
Hill Dickinson Hong Kong

21 August 2020  
2:30pm – 3:00pm

# About Hill Dickinson

- An international firm of market leading legal experts specialising in all aspects of commercial law, from non-contentious advisory and transactional work, through to all forms of commercial litigation and arbitration.
- Offices in the UK, mainland Europe and Asia, provide services across three broad business groups.
- The first law firm in Hong Kong to successfully obtain an interim measures order from the Shanghai Maritime Court in aid of an arbitration administered by the HKIAC.
- Hill Dickinson Hong Kong marine team
  - *Chambers & Partners Asia-Pacific 2020: the firm has expertise in commercial litigation, international arbitration, contentious shipping and trade matters. The firm also has significant non-contentious capability including corporate transactional and general corporate and regulatory matters.*
  - *The Legal 500 Asia-Pacific 2020: the firm as an 'established presence in the Hong Kong market', that provides a 'professional and customer-orientated service' across the gamut of wet and dry litigation'.*

# About Edward Liu



## Contact

### Edward Liu

#### Legal Director

Solicitor of England & Wales  
Hong Kong Registered Foreign  
Lawyer (P.R. China qualified)

#### Hill Dickinson Hong Kong

Room 3205, 32nd Floor, Tower Two,  
Lippo Centre, 89 Queensway,  
Admiralty, Hong Kong

D: +852 2525 7477

M: +852 6489 2717 / +86 185 7645  
0126

T: +852 2525 7525

F: +852 2525 7526

E: [edward.liu@hilldickinson.com](mailto:edward.liu@hilldickinson.com)

- Edward is qualified in England & Wales and PRC. He is primarily a legal director of Hill Dickinson Hong Kong and the Principal Representative of the International Chamber of Shipping (China) Liaison Office, the first overseas office of the International Chamber of Shipping.
- His main area of practice is in commercial and shipping litigation and arbitration, with significant experience in international commercial disputes, particularly in connection with Belt & Road projects. He has handled a wide variety of cases under LMAA terms, HKIAC-administered and UNCITRAL arbitration rules.
- Edward is a Fellow of the Chartered Institute of Arbitrators (CI Arb), a listed arbitrator of the HKIAC, a supporting member of the LMAA, and a member of HKMAG. He began to accept appointments as arbitrator in 2018. He is also a council member of the Hong Kong International Mediation Centre, an accredited mediator of the Hong Kong Mediation Accreditation Association (HKMAAL), and an international accredited professional mediator of the International Dispute Resolution & Risk Management Institute.
- Edward is also a co-opted member of the Hong Kong Maritime and Port Board, and a member of the Aviation Development and Three-Runway System Advisory Committee. The Secretary of Justice appointed him as a member of the Advisory Committee on Promotion of Arbitration in March 2020 and a member of the Steering Committee on Mediation in May 2020.
- He is a visiting professor at Shanghai Maritime University School of Economics & Management and regularly gives lectures to MBA and EMBA students. He is also an adjunct lecturer at HKU SPACE, where he teaches “Carriage of Goods by Sea”, a module in the BSc in Maritime Transport and Logistics jointly held by HKU SPACE and the University of Plymouth, UK.
- He has been named as a ‘next generation partner’ in the Legal 500 Asia Pacific 2020, one of the ‘Top 10 Maritime Lawyers in 2019’ by Lloyd’s List, and one of the “Top 100 Most Influential People in the Chinese Shipping Industry” twice in 2018 and 2019.
- Additionally, the first order from a mainland Chinese court for interim measures in aid of arbitration administered by the HKAIC under the new arrangement was successfully obtained by Hill Dickinson Hong Kong with Edward’s help.

# Background

*“Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area” (“The Outline Plan”)*

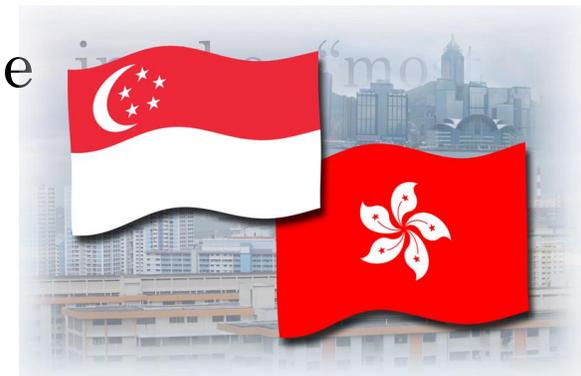
## The objectives and principles of the Outline

- Establish Hong Kong as the centre for international legal and dispute resolution services in the Asia-Pacific region;
- To provide international legal and dispute resolution services to the Belt and Road Initiative.
- Legal sector of Hong Kong shall carefully examine and understand the content of the Outline to :-
  - utilize the preferential policies under the Central Government’s overall jurisdiction;
  - make full use of Hong Kong’s high degree of autonomy; and
  - attract more Mainland and overseas enterprises to use Hong Kong’s legal and dispute resolution service for disputes arising from commercial transactions related to the Initiative.

# 1) Risks and Opportunities faced by Hong Kong's Arbitration Industry

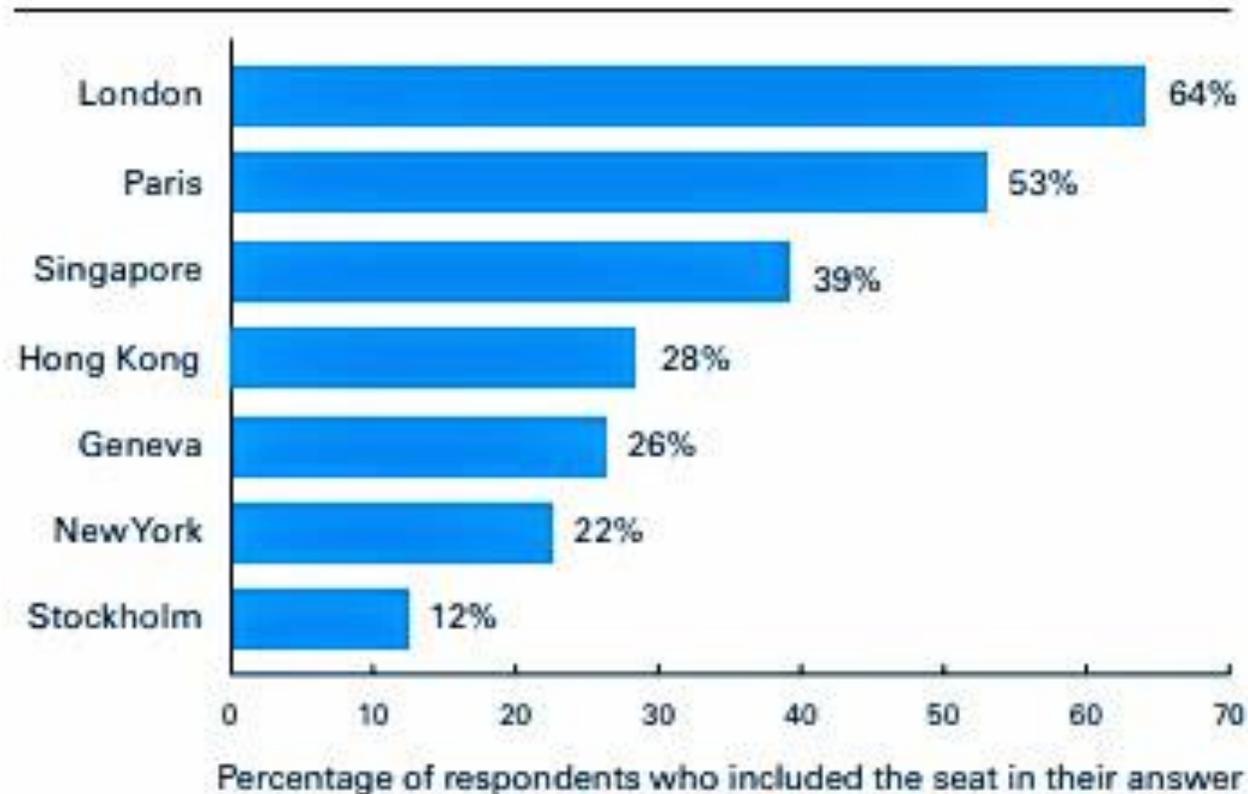
# The current status and problems faced by arbitration industry in Hong Kong

- *“2015 International Arbitration Survey: Improvements and Innovations in International Arbitration”* (Queen Mary, University of London):
  - Hong Kong was the 3<sup>rd</sup> most popular seat of international arbitration worldwide
  - HKIAC was the 3<sup>rd</sup> most preferred arbitration institution worldwide (for regions outside Europe)
- *“2018 International Arbitration Survey: The Evolution of International Arbitration”*:
- Hong Kong dropped from the 3<sup>rd</sup> to the 4<sup>th</sup> place preferred seats”, replaced by Singapore and SIAC



39% of respondents selected Singapore as the most preferred place of arbitration, which was 11 % higher than Hong Kong (28%) (2018 International Arbitration Survey )

**Chart 6: What are your or your organisation's most preferred seats?**



Among the most preferred institutions, SIAC got 36% of the vote, which was significantly higher than the 27% for HKIAC



# How can Hong Kong's Arbitration Service Industry catch up?

- According to the statistics, the four most important factors which determine the preferred seats are as follows:
  1. General reputation and recognition of the seat (14%)
  2. Neutrality and impartiality of the local legal system (13%)
  3. National arbitration law (12%)
  4. Track record in enforcing arbitration agreements and arbitral awards (11%).

## [World Justice Project– Rule of law index 2020](#)

- Hong Kong ranked 16<sup>th</sup> out of 128 in the Rule of Law Index 2020 and 11<sup>th</sup> in Civil Justice factor.
- Singapore ranked 12<sup>th</sup> and 6<sup>th</sup> respectively in both rankings.

# Hong Kong vs Singapore

- The difference in the rankings of Hong Kong and Singapore may be more subject to the first factor, i.e. “**general reputation and recognition**,” which depends mainly on (1) **the strength of the two regions in shaping the arbitration brand names** and (2) **the influence exerted on other regions**.
- Singapore has achieved remarkable results in shipping and trade arbitration through more than ten years of hard work and has gradually gained wide international recognition.
  - E.g. the English Lloyd’s Maritime Law Newsletter (LMLN) has been working with the Singapore Maritime Arbitration Association (SCMA) since July 2018 through anonymously publishing the maritime arbitral awards administered and recommended by SCMA.
  - The awards published in LMLN are quite likely to be cited by relevant authorities and even in court judgments.
- **Along with the surge of the number of arbitration cases, many top UK law firms or barristers have been attracted to set up offices in Singapore.**

## **2) Establish Diversified Dispute Resolution Mechanism**

# Branding+ Globalisation + Specialisation

- The statement of establishing a diversified dispute resolution mechanism in the Outline includes:
  - Refining the **international commercial dispute resolution mechanism**
  - Establishing **an international arbitration centre**
  - Supporting **exchanges and cooperation** among arbitration and mediation organisations in Guangdong, Hong Kong and Macao
  - Providing arbitration and mediation services to the **economic and trade activities** in Guangdong, Hong Kong and Macao.



Consultation



Contribution



Shared  
Benefits

# Branding+ Globalisation + Specialisation

- To promote the establishment of a diversified dispute resolution mechanism, Guangdong, Hong Kong and Macao should:
  - Gradually **explore arbitration business** in the Greater Bay Area
  - Attract Hong Kong mediation agencies to set up branches in **Shenzhen and Guangzhou**
  - Establish the **mutual recognition of qualifications for mediators**
  - Formulate **mediation rules**

### **3) Assist Mainland China to Promote a Business Environment of Legal Certainty**

# Expanding the footprints of enterprises in the Greater Bay Area

- The State Council listed “optimising business environment to stimulate market vitality and social creativity” as a major task of the Central People’s Government this year in the “Annual Government Work Report”.
- Hong Kong shall leverage her advantages of a highly globalised and regulated business environment and apply the relevant advanced concepts and tailor her best practices to the Greater Bay Area.
- Since there are different legal systems in Guangdong, Hong Kong and Macao, establishing a resources-sharing mechanism between judiciaries is vital, allowing one to share with others (1) the case-related foreign laws and regulations, (2) case acceptance, (3) case precedents, and (4) specific case analysis.
- Lawyers, arbitrators and mediators should go hand in hand to explore establishing professional contacts and cross-border cooperation mechanisms in the three places.

## 4) Hong Kong as an International Arbitration Venue Benefits from and Provides Assistance to the “Belt and Road Initiative”

# Dispute Resolution Services

- As an important supporting area for the “Belt and Road” Initiative, the Outline Development Plan for the Greater Bay Area (the “**Outline Plan**”) proposes to promote the handling of intellectual property rights disputes through alternative dispute resolution methods including **arbitration, mediation and consultation**;
- 97% of the respondents indicated that their most preferred method of dispute resolution was **international arbitration** (2018 International Arbitration Survey: The Evolution of International Arbitration).



# Hong Kong as an ideal place for arbitration

- As the development of trade globalization and the “Belt and Road” Initiative continuous, the number of disputes related to **cross-border investment** and **international trade** will increase accordingly.

## Hong Kong



Common law system that is familiar to the international commercial practice



Distinctive geographical advantage



Wide use of English and Chinese

Under the framework of “**One Country, Two Systems**”, **Hong Kong** has the protection of the **Basic Law** and the integration of Eastern and Western cultures, therefore it is undoubtedly an ideal place for arbitration acceptable to all parties.

**5) Provide the conditions for Hong Kong arbitration awards to be recognized and enforced in Mainland China**

# Arbitration related to the “Belt and Road” Initiative

- With the advancement of the “Belt and Road Initiative”, more foreign-funded enterprises and wholly foreign-owned enterprises will be established in the Mainland and free trade zones.
- Under the current Chinese law, if two companies agree to conduct arbitration overseas (including Hong Kong), the relevant arbitration award may not be recognized and enforced by the Chinese courts.
- SPC had issued documents to provide judicial assistance and protection for the “Belt and Road” initiative projects.



# Arrangements for mutual assistance in arbitration proceedings

- **2 April 2019:** “Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR” (the “**Arrangement**”) between the SPC and the Department of Justice of HK
- **26 September 2019:** the SPC published an explanatory note on the implementation and the interpretation of the Arrangement.
- **1 October 2019:** the Arrangement came into force.
- Since the Arrangement came into force, the HKIAC processed 13 applications made to 10 different Mainland Chinese courts seeking to preserve evidence or assets worth RMB 5.5 bil. (~US\$798 mil.) in Mainland China. To date, court orders have been issued in respect of RMB 1.7 bil. (~USD 244 mil.) worth of assets (website of the HKIAC).
- Hong Kong is the first and only jurisdiction outside Mainland China where the Mainland courts can grant interim measures in aid of the arbitral proceedings.

*13 applications*

*Court orders  
issued for  
RMB1.7 billion  
worth of assets*

*(as of 13 Feb 2020)*

# Background of the Arrangement

- Capitalises on the national policy of China as set out in its “Outline of the 13<sup>th</sup> Five-Year Plan for the National Economic and Social Development”.
- Signifies the SPC’s support for Hong Kong to develop as a leading international arbitration centre in the Asia-Pacific Region under “One Country, Two Systems”, with its legal basis provided under Art. 95 of the Basic Law.
- Under the blueprint of the Greater Bay Area, Hong Kong is positioned as the dispute resolution and legal affairs centre to provide reliable legal services to local & foreign companies for the Belt and Road Initiative.
- Hong Kong is the only common law jurisdiction in the Greater Bay Area and China, and its legal system has long been highly regarded.

# Arrangements for mutual assistance in arbitration proceedings

- The parties to Hong Kong arbitration can apply directly to the Mainland Intermediate People's Court for:
  - **Property** Preservation Order
  - **Evidence** preservation order
  - **Conduct** preservation order
- At any time before the arbitral award is made.
- Includes before the arbitration institution has accepted the arbitration case, provided that a letter from the institution certifying its acceptance is submitted to the PRC courts within 30 days after the interim measure is adopted, failing which the PRC courts will discharge the interim measure.
- Excludes *ad hoc* arbitrations.



# The Arrangement



HILL DICKINSON



- 6 qualified arbitral institutions:
  - Hong Kong International Arbitration Centre (HKIAC);
  - China International Economic and Trade Arbitration Commission – Hong Kong Arbitration Center;
  - International Court of Arbitration of the International Chamber of Commerce – Asia Office;
  - Hong Kong Maritime Arbitration Group;
  - South China International Arbitration Center (HK); and
  - eBRAM International Online Dispute Resolution Centre.



China International Economic and Trade Arbitration Commission  
Hong Kong Arbitration Center



eBRAM

# The Application Procedures

- **Application to the Mainland courts**
- Make an application to the Intermediate People's Court ("IPC") of the place of residence of the party against whom the application is made or the place where the property or evidence is situated –but not both.
- The application made before the Mainland courts will be governed by Chinese law and shall be made in accordance with Civil Procedure Law of the PRC, Arbitration Law of the PRC and relevant judicial interpretations.
- Where the application is made after the relevant arbitration institution had accepted the arbitration case, the application shall be passed on by that institution (Article 3 of the Arrangement)
- Parties to the arbitral proceedings in Hong Kong can submit the application and the letter issued by the arbitral institution (confirming acceptance of the case and to transfer the application) directly to the Mainland court.

# The Application Procedures

- **Application to the Mainland courts**
- When making an application to the Mainland courts, Chinese translation must be submitted to the courts if the original document is not in Chinese
- The Mainland courts may require the applicant to provide security, usually in a form of guarantee. (Articles 7(6) & 8 of the Arrangement)
- In contrast, the Hong Kong courts usually require the applicant to give an undertaking and provide security for costs for the application for interim measures. Parties are advised to prepare security to ensure their applications are progressed without delay.

# The Application Procedures

- **Application to the Hong Kong courts**
- The parties shall submit the application, supporting affidavit and exhibits, skeleton argument and the draft order to the High Court of Hong Kong.
- Article 7

# Costs of arbitration VS interim measures applications under the Arrangement

- “A party who makes an application for interim measure shall pay the fees in accordance with the laws and regulations on litigation fees of the requested place.” (Article 10 of the Arrangement)
- Generally, two types of costs may arise in an arbitration:
  - Costs of the arbitration
    - (a) the tribunal’s fees and expenses,
    - (b) the administrative fees and expenses of the institution, and
    - (c) the reasonable cost of expert advice and other assistance required by the tribunal.
  - Costs of the reference
    - the parties’ costs of preparing and submitting their cases to arbitration.
    - These also include the costs of interlocutory application where the arbitral tribunal has made no separate order as to the costs of such application (see *Evmar Shipping Corpn v Japan Line Ltd (The “Evmar”)* [1984] 2 Lloyd’s Rep 581).

# Costs of arbitration **VS** interim measures applications under the Arrangement

- **S. 74 of the Arbitration Ordinance (Cap. 609) (“AO”)**
  - An arbitral tribunal may include in an award direction with respect to the costs of arbitral proceedings (including the fees and expenses of the tribunal).
  - The tribunal must only allow costs which are reasonable in all the circumstances and may allow costs incurred in the preparation of the arbitral proceedings prior to the commencement of the arbitration.
- Silent on whether the costs incurred in court proceedings for seeking interim measures are recoverable as part of the costs of the arbitral proceedings.

# Costs of arbitration **VS** interim measures applications under the Arrangement

- Based on the present provisions and the practice of international arbitration, it seems that the costs of the arbitration proceedings under the AO only encompass the costs incurred in the arbitration proceedings, but not those incurred in ancillary court proceedings for obtaining interim measures.
- In practice, the arbitral tribunal will not award costs of the interim reliefs applications made before the court.
- Proper approach:
  - Apply to the court for costs order of the interim measures made by the court in aid of arbitration.
  - The Hong Kong courts are willing to make costs orders of the application for interim measures in aid of arbitration. In some occasions, the Hong Kong courts will assess costs summarily.

## Costs of arbitration VS interim measures applications under the Arrangement

- No concept of “costs follow the event” in Chinese law in Mainland China.
- Typically, the Mainland judges would award costs to the respondent if a claimant has commenced an action for malicious purpose.
- Given that the Mainland judges may not have the opportunity to consider all documents between the parties in the interlocutory application for interim measure, they are generally unlikely to make costs order for the application of interim measure under the Arrangement, except for the application fee.
- There is an uncertainty on whether the parties can successfully obtain their costs of application for the interim measures before Mainland courts under the Arrangement after the Hong Kong tribunal publishes an award.

## Costs of arbitration VS interim measures applications under the Arrangement

- The UK Arbitration Act 1996 sets out the scope of the costs of the arbitration.
- Under s.59 of the 1996 Act the “costs of the arbitration” include:
  - a) the arbitrators' fees and expenses
  - b) the fees and expenses of any arbitral institution concerned
  - c) the legal or other costs of the parties, and
  - d) the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration.
- Under English law, the reference to “other costs” typically encompasses the costs incurred prior to the commencement of the arbitration proceedings, costs of obtaining evidence, fees and expenses of witnesses, travel and accommodation costs, expert’s fees and necessarily costs incidental to the arbitration, such as costs of arranging hearings.

## Costs of arbitration **VS** interim measures applications under the Arrangement

- The English court had commented that the class of “other costs” was not closed.
- *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm)
  - “Do the costs relate to the arbitration and are they for the purposes of it?”

## Costs of arbitration **VS** interim measures applications under the Arrangement

- Since one of the main purposes of the Arrangement is to allow the arbitration proceedings can be carried out effectively, the application made under the Arrangement is relevant to the arbitration proceedings.
- It seems that there is no mechanism for the applicant to obtain costs order for the interim measures application made before the Mainland courts under the present Arrangement and the AO.
- Time to consider whether to expand / amend the Arrangement or the AO, so as to empower the arbitral tribunal to assess and award costs of the interim measures applications made in the Mainland China.

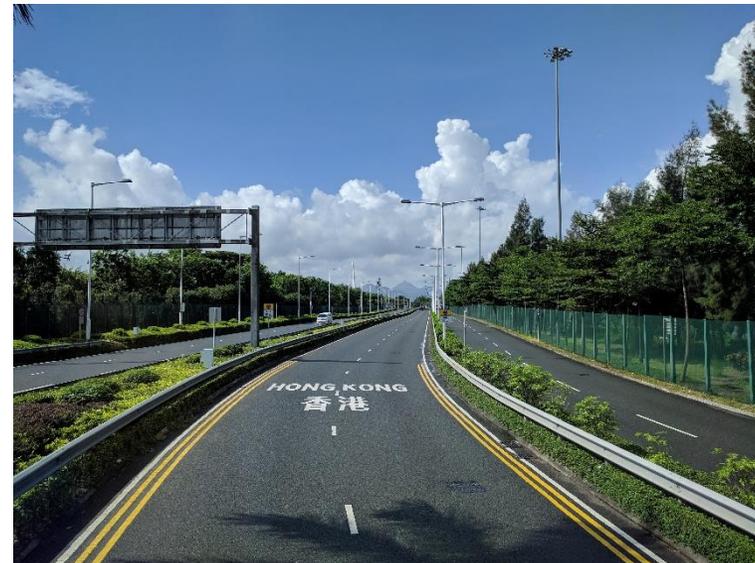
## 6) Hong Kong's Legal Services Help the Country in Global Governance

# “Sailing together”

- The Outline Plan specifically mentions the need to strengthen cooperation in Shenzhen-Hong Kong legal affairs to create an international legal service and commercial dispute resolution center.

## Jurisdiction

- The Hong Kong legal industry should make use of its advantages in its understanding and familiarity with the application of common law-based international business practices, to assist the country in promoting a set of rules and regulations in line with international standards with more opened vision and wider perspective.



Thank you!