

Letterhead Of Hong Kong International Arbitration Centre

19 November 2001

Members of Legco
Hong Kong

Dear Members of Legco

I am very sorry that I am unable to be present at the meeting to discuss the development of arbitration in Hong Kong with you. However my colleagues are more than capable of answering your questions.

Having been involved with HKIAC since the days when a steering committee was set up in 1982 to consider the viability of setting up an arbitration centre in Hong Kong and having been Chairman of HKIAC for the last 10 years may I make some observations.

Hong Kong is a leading arbitration centre and HKIAC is recognized a world leader in dispute resolution. At all the international conferences I attend HKIAC is spoken of in the same breath as the International Chamber of Commerce, American Arbitration Association, The London Court of International Arbitration - the other major players in this field.

A great deal of effort has been put into this development by many people and Hong Kong Government has been very supportive. We are streets ahead of any possible competitors in the Region. **What we need is to keep ahead.** What Hong Kong Government can do is to assist this by granting us more space - for without it we cannot expand and are already at bursting point. Furthermore Hong Kong Government should ensure that all administrative and bureaucratic procedures be eliminated or greatly reduced and simplified.

I thank members of Legco for their consideration of the topic of arbitration. Let there be no doubt that **Hong Kong is the premier venue for dispute resolution in Asia.** However in these difficult times we must not be complacent and must not rest on our laurels.

Yours sincerely

Neil Kaplan CBE, SC, QC
Chairman

PROMOTING HONG KONG AS AN INTERNATIONAL ARBITRATION CENTRE

SUMMARY

This paper provides one with an overview of the functions of the Hong Kong International Arbitration Centre (HKIAC), statistical data of arbitrations conducted in Hong Kong in particular those involving foreign nationalities/entities. The paper also provides one with an insight to the problems encountered in sustaining Hong Kong's position as the international arbitration centre.

(A) Brief Introduction on the Background and Functions of the HKIAC

BACKGROUND

On 10 December 1982, the then Attorney General, John Griffiths QC instigated a committee under the Chairmanship of Mr Justice Hunter to advise on ways and means by which Hong Kong could become a leading centre for the conduct of both domestic and international commercial arbitrations. On 15 December 1983, an Interim Report was published. Some of the key findings of the report were:-

- 1 The suggested adoption of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules for International Arbitrations;
- 2 Adoption of Rules for domestic arbitration which include a provision for the proposed centre to be appointed as Nominating Authority for Arbitrators;
- 3 The need to solicit support from the Hong Kong professional and business communities for the proposed centre as well as the Hong Kong Government;
- 4 The proposed centre should be legally established as a company limited by guarantee under the name of "Hong Kong International Arbitration Centre Limited";
- 5 The proposed centre should be operated by a Coordinator/Administrator; and
- 6 The recognition of the need to compile a list of suitable arbitrators.

The only major hurdle that the Steering Committee perceived which could hinder the establishment of the proposed Centre was the securing of funding to sustain the organisation's long-term viability. A break-through came when 13 leading professional and business organizations contributed initial funds. That, together with, a Hong Kong Government grant and an offer to make available premises at a nominal rent in the old Central Magistracy Building for the proposed Centre's day to day operations, all happened within a short period of time. As a result, the Hong Kong International Arbitration Centre (HKIAC) was established on 21 May 1985. As a not-for-profit company limited by guarantee and which on 5 July 1985 was granted charitable status.

In the first year of operation, 9 cases were handled by the HKIAC. Subsequent relocation to current premises at Exchange Square resulted in substantial increase in arbitrations and mediations. For the past 16 years, the HKIAC has been successfully promoting Hong Kong as the international arbitration centre - witness the large number of international arbitration conferences which have been held here, the increasing number of cases dealt with by the HKIAC and that the International Bureau of the Permanent Court of Arbitration in the Hague has asked the HKIAC to appoint arbitrators in international arbitration cases which have nothing to do with Hong Kong. In the year 2000, 298 cases were referred to the HKIAC and figures for 2001 (January to September) so far indicate that over 300 cases have been handled by the HKIAC.

(Refer to Mealey's International Arbitration Report - "Developments of the Hong Kong International Arbitration Centre" by Christopher Wing To dated December 2000 for further details on the background of the HKIAC)

The HKIAC has 6 full time staff (Secretary General, Assistant Secretary General, Personal Assistant, Administrative Assistant, Case Administrator and an Administrative Attendant) and 20 non-executive directors (refer to the attached list and the organizational chart of the HKIAC for further details).

FUNCTIONS

The HKIAC provides a variety of functions in relation to Arbitration and Alternative Dispute Resolution including

1. Providing a free information service on dispute resolution (statistics indicate that on average 27 enquiries per day are received by the HKIAC in either letter, facsimile, email and telephone formats), which covers the following areas:-
 - (i) Furnishing general information and assistance in connection with both international and domestic dispute resolution.
 - (ii) Answering enquiries concerning any proposed mediation or arbitration in Hong Kong.
 - (iii) Providing information on arbitration law and procedure relating to international arbitrations in Hong Kong.
 - (iv) Giving information on appropriate forms of arbitration clauses.
 - (v) Advising on arbitrators' fees.
 - (vi) Making any relevant enquiries of and arrangements with arbitration centres elsewhere in the world.
2. Administers the mediation service for Hong Kong Government Contracts. Accredits mediators to international standards in the category of "General" and "Family". Accreditation in the category of "Family" is a prerequisite to being listed on the Family Mediation Pilot project administered by the Judiciary.
3. Since 27 June 1997, the HKIAC has had statutory authority to appoint arbitrators under both the domestic and international regimes of the Arbitration Ordinance where the parties have not agreed on a mechanism for making appointments or the agreed mechanism has broken down. If the parties fail to agree on the number of arbitrators that should decide their case, the HKIAC also has the power, under the international regimes of the Arbitration Ordinance, to decide whether a tribunal of one or three arbitrators should be constituted.
4. When disputes do arise, the HKIAC is able to offer extensive administrative assistance together with physical facilities to support the conduct of both arbitration and mediations in a private and confidential setting.
5. Administers and supports the following Learned Organisations in their day to day operations.
 - (i) Hong Kong Institute of Arbitrators (HKI Arb)

- (ii) Chartered Institute of Arbitrators - East Asia Branch (CIArb - EAB).
- (iii) Hong Kong Mediation Council (HKMC) and its associated sub-groups (Community, Commercial, Construction and Family)
- (iv) Society of Construction Law - Hong Kong
- (v) The Academy of Experts

6. The HKIAC actively promotes Hong Kong through organizing and participating in yearly conferences (eg 3rd Arbitration Day of the International Bar Association was held in Hong Kong on 18 February 2000) with emphasis on arbitration and alternative dispute resolution. Recently the HKIAC has been exploring alternative avenues where Hong Kong arbitration and mediation services can be further utilized. One particular area is that of information technology. In line with the Hong Kong Government's policy of promoting Hong Kong as the information technology hub of Asia, the HKIAC has been actively organizing events in this field with particular emphasis on the use of technology in arbitration and alternative dispute resolution. With the aim of making Hong Kong the cyber arbitration centre of the East.

- (i) As of 1st June 2001, the HKIAC was appointed by the Hong Kong Domain Name Registration Company Limited as the sole dispute resolution provider for the .hk domain names. As of 18th October 2001, two .hk domain name disputes have been referred to the HKIAC for determination. (Decisions have been posted on the HKIAC website at www.hkiac.org) Whereas in Singapore, the Singapore Network Information Centre (SGNIC) has recently issued its draft version of the domain name dispute resolution policy for public consultation. The policy is similar in form to that of the HKIAC policy. In essence, Hong Kong is almost a year ahead of Singapore in the development of domain name dispute resolution.
- (ii) As of 1st January 2002, the HKIAC together with the China International Economic Trade Arbitration Commission (CIETAC) will become the fifth dispute resolution provider for the resolution of top-level domain names and the first in the Asia Pacific Region as indicated by the Internet Corporation for Assigned Names and Numbers (ICANN) at their meeting on 13 November 2001 in Los Angeles. A significant achievement which will put Hong Kong on the map as the centre for the resolution of information technology related disputes in the Asia Pacific Region.

As an indication, the number of proceedings handled by the current approved providers (currently there are four providers that are approved by ICANN) are as follows:-

CPR Institute for Dispute Resolution (USA)	32
e-Resolution (Canada)	277
National Arbitration Forum (USA)	1515
<u>World Intellectual Property Organisation (Europe)</u>	<u>2757</u>
Total (From 1 January 2000 to 18 October 2001)	4581

- (iii) The HKIAC has been working closely with a local technology provider, Tradelink to develop an online dispute resolution system for the resolution of domain name disputes. It is anticipated that traditional forms of arbitrations and mediations will have another avenue whereby disputes can be resolved on-line. The first phase of the system is scheduled to be launched at the end of November 2001.
- (iv) On another front, with the assistance of the Hong Kong Society of Accountants (HKSA), the HKIAC is in the process of devising a unique dispute resolution criteria to cater for the HKSA Web Trust Programme ("a comprehensive e-commerce assurance service that provides businesses with e-commerce 'best

practice' designed to build trust and confidence in the electronic marketplace") that provides a means of resolving Business-to-Business (B2B) and Business-to-Consumer (B2C) electronic commerce disputes.

- (v) Assisting the Hong Kong Reprographic Rights Licensing Society in compiling a set of Royalty Claims Arbitration Procedure for them to introduce to their members and the general public.
- 7. Promotion of arbitration and mediation abroad. For example conducting workshops on arbitration in conjunction with the Trade Development Council in Shanghai, Beijing, Guangzhou, Taiwan and Korea. Sponsoring seminars in Macau and Shanghai where in-house counsels are prominent. Speaking and presenting papers at international conferences in Asia, Europe and United States.
- 8. Developing Dispute Resolution Schemes for local domestic disputes such water seepage and leakage disputes between neighbours in conjunction with the Water Supplies Department of the HKSAR Government.
- 9. Since 1999, the HKIAC together with the HKI Arb, CI Arb - EAB and the HKMC have produced on a quarterly basis the only journal (Asian Dispute Review Journal) of its kind in Asia dedicated to the field of arbitration, mediation and other forms of dispute resolution. The journal has a circulation of over 6,000 worldwide and articles within the journal cover a variety of topics from within the Asia-Pacific region.
- 10. The HKIAC has a comprehensive and up-to-date library that offers users means of assessing international rules and procedures and maintains a website (www.hkiac.org) that is kept current (on average over 1,600 visitors visit the website per week).
- 11. Recently developed a promotional video with the assistance of TDC and are currently working in co-operation with a web based content provider - Netvigator with a view of having a weekly column to assist small to medium size enterprises in doing business in the Mainland of China with the intention of referring possible disputes to Hong Kong for resolution.
- 12. Providing guidance and advice on the development of arbitration law and procedure with the view of assisting in their updates.
- 13. Administering the Leveraged Foreign Exchange Trading Arbitration Disputes.
- (B) Breakdown of the number of Arbitral Awards made in Hong Kong involving a Hong Kong party and a Mainland party or a party in a foreign jurisdiction
 - (i) Compared to other venues for arbitration in Asia, Hong Kong probably handles the largest number of cases in which neither party is local.

	1992	1993	1994	1995	1996	1997	1998	1999	2000
AAA	204	207	187	180	226	320	387	453	510
CIETAC	267	486	829	802	778	723	645	609	543
HKIAC	185	139	150	184	197	218	240	257	298
ICC	337	352	384	427	433	452	466	529	541
JCAA	5	3	4	7	8	13	14	12	10
KCAB	N/A	28	33	18	34	51	59	40	N/A
KUALA LUMPER	4	3	8	12	6	8	15	19	N/A
LCIA	21	29	39	49	37	52	70	56	81
SIAC	7	15	22	37	25	43	67	67	N/A
STOCKHOLM	44	78	74	70	75	82	92	104	73
VANCOUVER	7	6	10	2	5	5	N/A	5	4
VIENNA	100	100	100	100	100	100	100	100	N/A

AAA	American Arbitration Association
CIETAC	China International Commercial Dispute Resolution
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
JCAA	Japan Commercial Arbitration Association
KCAB	The Korean Commercial Arbitration Board
KUALA LUMPUR	Kuala Lumpur Regional Centre for Arbitration
LCIA	London Court of International Arbitration
SIAC	Singapore International Arbitration centre
STOCKHOLM	Arbitration Institute of the Stockholm Chamber of Commerce
VANCOUVER	British Columbia International Commercial Arbitration Centre
VIENNA	International Arbitral Centre of the Austrian Federal Economic Chamber

- (ii) Of the 298 cases in the Year 2000, 5 cases were from the Mainland of China, where both parties were entities/nationals of the Mainland of China in which the arbitration clause specified Hong Kong as the place of arbitration. Whereas over 40% (120 cases) of the 298 cases made in Hong Kong in the Year 2000 involved a Hong Kong party and a Mainland Party. In terms of a party in a foreign jurisdiction other than the Mainland, these count for slightly over 53% (160 cases).

Year	Cases referred to the HKIAC	Year	Cases referred to the HKIAC
1985	9	1993	139
1986	20	1994	150
1987	43	1995	184
1988	24	1996	197
1989	45	1997	218
1990	54	1998	240
1991	94	1999	257
1992	185	2000	298

- (C) Breakdown of the number of arbitral awards made in Hong Kong involving disputes between individuals and major disputes of high international profile

Given the nature of arbitration - being confidential, it is difficult to list out individuals and major co-operations without firstly obtaining their permission to do so. Nevertheless in terms of caseload in Asia, the HKIAC is ranked second after the Mainland of China. Amounts in dispute

range from HK\$353,440.00 to HK\$300 million and parties nationalities range from Singaporean, Thai, Chinese (Mainland of China), Chinese (Hong Kong SAR), Chinese (Taiwan), Korean, Italian, Japanese, Australian, American, British, German, Swiss, Canadian and French. In a very recent case referred to the HKIAC in November 2001, the amount in dispute was well over HK\$950 million. The case involved individuals from different jurisdictions.

(D) Tendency of parties to contracts choosing to conduct arbitration in Hong Kong or in a jurisdiction outside Hong Kong

Parties tend to choose to conduct their arbitrations in Hong Kong for the following reasons:-

- (i) International trust in Hong Kong's common law-based legal system has made the SAR one of Asia's leading centres for commercial arbitration.
- (ii) Hong Kong has strong expertise in commerce, finance, business law, shipping and construction with an enormous pool of experienced professionals available to support commercial dispute resolution.
- (iii) The Hong Kong Arbitration Ordinance is widely recognised as being one of the most advanced arbitration statutes in the world and provides the legislative support to mediation and arbitration in Hong Kong. Under this law, there are two distinct arbitration regimes. One regime applies to domestic arbitration and the other to international arbitration. Since April 1990 the UNCITRAL Model Law has applied to international arbitrations held in Hong Kong.
- (iv) The Hong Kong Arbitration Ordinance - provides flexibility, is continuously updated, limits court intervention and provides the necessary enforcement provisions.
- (v) With these basic principles in place (as above) Hong Kong's popularity as an arbitration avenue surpasses other venues in the Asia Pacific region.
- (vi) The expected burst of investments resulting from easing of cross strait direct trade and China's WTO accession will indirectly benefit Hong Kong especially when in the majority of cases, Hong Kong will be chosen as the place for the possible resolution of disputes.
- (vii) The HKIAC has been actively participating in in-house counsel conferences and from in-direct sources Hong Kong ranks highly as the premier arbitration centre in Asia.

(E) Problems encountered by the local arbitration industry, measures required for improving business and promoting Hong Kong as a major international arbitration centre, and how best the Government can do in assisting in that regard

1. With recent changes in cross-strait economic relations and China's accession to the World Trade Organisation, more and more disputes have been referred to the HKIAC resulting in the significant usage of the HKIAC facilities. Room utilization rates as high as 97% in June 2000 followed by 99% in September 2000 and 94% in May 2001 being recorded compared to 54%

in June 1999 and 83% in May 2000 respectively. In certain cases, the HKIAC had to turn potential users away to other venues, as facilities were fully occupied at various periods during the year, thus making it difficult at times to plan and schedule the facilities accordingly. If this problem of space limitation in the current HKIAC premises cannot be resolved quickly, significant implications would result in users having to go elsewhere thus making our efforts in promoting Hong Kong as the dispute resolution centre in Asia in jeopardy. A possible remedy would be to expand the current HKIAC premises with additional space being provided - this would be very helpful and our aim of making Hong Kong the arbitration centre of the East would indeed be viable.

2. The HKIAC is very mindful of its promotional obligations and has established a Marketing and Promotion Committee. Moreover, it sends representatives and speakers to international conferences, seminars and meetings. The HKIAC has an established relationship with the TDC for the promotion in China of arbitration and other alternate dispute resolution methods. But we recognize that this is not enough, however our available resources - both human and financial for marketing are limited. We need a full time marketing person for Hong Kong and China - but we do not have the funds. We need funds to market in a more systematic way in North America and Europe - but we do not have the funds. If anything can be done to help us fund our marketing program - this would be very constructive.
3. As more and more business is being done in and with China - the number of disputes will increase. However, companies and business in China often tell their opposite numbers that they are under instructions to only accept "arbitration in China" in connection with the venue for dispute resolution. If this could be alleviated - by making it policy in China that "arbitration in Hong Kong" is an acceptable means of dispute resolution - this too would be very constructive.
4. There is a very real problem in getting easy and quick visa access for arbitrators, parties, witnesses and legal representatives especially those from the mainland. Sometimes hearings have to be convened urgently and ways and means have to be found to simplify and speed up the process at both ends.

Furthermore it seems illogical that arbitrators have to obtain work permits at all. They cannot fill out the relevant form because they are not sponsored by anyone and are acting independently of the parties in a quasi judicial capacity. The issue as to whether anyone in Hong Kong can carry out this function is wholly irrelevant. No work permit is required to enter UK or other European countries to conduct an arbitration. Any administrative hurdle however benign is seen as a counter productive factor in the choice of an arbitral venue. We must now put any unnecessary hurdles in the way of parties contemplating choosing Hong Kong as an arbitral venue. Some jurisdictions have got themselves into a bureaucratic mess with work permits and substantial withholding tax.

A major step would be to declare that arbitrators coming to Hong Kong to conduct an arbitration were not subject to Hong Kong tax. They are doing no more than businessmen do daily - attending meetings and going home. It is understood that no tax is due on arbitrators entering UK to carry out arbitral duties.

5. Within the domestic market, providing assistance to the public of the benefits and advantages of using methods of alternative dispute resolution in resolving their possible disputes. A possible solution would be to establish a marketing strategy followed by an implementation plan with all stakeholders involved in the decision making process. A typical example would

be to introduce consumer schemes that provide consumer protection. The HKIAC is currently working with the Water Supplies Department to introduce a scheme for water seepage problems in buildings between neighbours.

CONCLUSION

The paper outlines some of the key factors one needs to take into consideration with the view of enhancing Hong Kong's role as the International Arbitration Centre in Asia and to enable Mainland enterprises to negotiate and sign contracts with foreign enterprises here in Hong Kong.

HKIAC Council

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HKIAC Secretariat

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Hong Kong International Arbitration Centre Organization Chart

