
McGILL JOURNAL
OF DISPUTE RESOLUTION



REVUE DE RÈGLEMENT
DES DIFFÉRENDS DE MCGILL

Interview with Chiann Bao, the Secretary-General of the Hong Kong International Arbitration Centre

You have a very interesting career with a number of twists, but it seems that you first got introduced to the world of international commercial arbitration during your internship with the ICC while you were a law student at the University of Wisconsin. Could you please tell us how you discovered your interest in the field, pursued it through private practice, and ultimately, ended up as the Secretary General of the HKIAC, one of the leading arbitration institutions worldwide?

My introduction to the world of international commercial arbitration happened through the Internet. In university, I spent a summer in Beijing, where I found the energy palpable and the culture familiar. That experience left quite the impression on me and so, the following summer, I sought to find my way back to Asia. Hong Kong, an unfamiliar city to me at the time, seemed to be the place I could both explore international career options and connect with my Chinese heritage. One option to get to Hong Kong was through the Fulbright scholarship. At the time, I was a legal assistant at Cravath, Swaine & Moore. While that experience indoctrinated me into the ways of the legal industry, I felt that I might find disputes work to be more attractive as that field seemed more tangible and accessible than what I was doing before. I was also interested in taking advantage of the east/west cultural cross-section that Hong Kong represented. Hence, preparing my scholarship application, I keyed east/west/culture/disputes into the Internet. This search led me to “International commercial arbitration” - in particular, the Master’s in Arbitration and Dispute Resolution program at the City University of Hong Kong. And, this is how I got introduced to the world of international arbitration.

Over the next three years, I studied and worked in Hong Kong. I got to know many of the international arbitration players in the community, as they often guest-lectured in my courses. Importantly, I also participated in the Vis Moot competition in Vienna during this time. To the extent that I was not convinced about international commercial arbitration, the Vis experience made a convert out of me. Many of the folks I got to know during that time are still very much in the arbitration community, and are some of my closest colleagues today.

Looking to preserve the lifetime memory I made and the relationships I built as a result of this experience, I joined the Moot Alumni Association. Through this association, I connected with Neil Kaplan QC and became his first arbitration assistant. We stayed in touch over the next few years during which I went back to the US, got my JD and worked at a firm in New York. When this post as Secretary General of HKIAC opened up in early 2010, it was Neil who brought it to my attention. I applied, interviewed, and the rest, as they say, is history.

How did you find the transition from working in arbitration as legal counsel to managing an internationally renowned arbitration institution?

As you can imagine, working at an institution is very different from working at a law firm. Nothing really prepares you for working at an institution. It is a unique job. The job requires not only knowledge of arbitration, but also skills in entrepreneurship, policy-making, leadership, relationship management, and consensus- and community-building. Moreover, the role is unique to the person who fills it at any given time. In my case, I started this job as an outsider. While I had lived in Hong Kong for three years as a student, I was not part of the Hong Kong arbitration community. Hence, moving into this job from New York was a bit intimidating. With the help and

support of a few key individuals, however, I settled in quickly.

Could you give us a general description of the Role of the HKIAC Secretary-General?

As Secretary-General of HKIAC, my role is to oversee the work of the Secretariat and serve as a spokesperson for HKIAC and arbitration in Hong Kong. My key responsibilities include:

1. assisting HKIAC's various committees in making appointments and decisions in arbitrations governed by rules issued by HKIAC or the UNCITRAL Rules;
2. overseeing the HKIAC Secretariat's administration of a full range of ADR matters including arbitration, mediation, adjudication and domain name cases; and
3. promoting the use of HKIAC's dispute resolution services worldwide.

What do you love most about this position? What do you dislike the most?

I enjoy the variety of responsibilities that this job brings. Having the opportunity to strengthen an already reputable brand and to shape a HKIAC culture is particularly rewarding. We work internally to establish a service that is worthy of promotion to local and international clients. Achieving this takes buy-in from every person on the team. Equally, I enjoy handling the issues arising out of our case management. However, over the years, I have become less involved in case management because our team has grown and the work of the Secretariat has increased, requiring me to manage other aspects of the institution. But, I continue to enjoy this part of my work a great deal.

I dislike having to deal with arbitrators who do not perform their tasks efficiently and effectively. Calling arbitrators who cause delay is something I wish I didn't have to do. If arbitrators simply performed their duties professionally, I would not have to spend time chasing them. Luckily, this is a rare occurrence, but it does happen.

Do you feel the direct competition from other institutions in the region, for example from SIAC or KLRCA? If so, how does this competition manifest itself in your day-to-day affairs?

Certainly competition exists. And that's a great thing, not only for HKIAC but for the maturation of arbitration in Asia. I really enjoy the friendly competition and the equal camaraderie we share with similar institutions in the region and beyond. I believe this is part of what keeps us all motivated to dig deeper and find ways to serve the users better.

The HKIAC recently published new HKIAC Administered Rules. Are the relatively frequent updates to institutional rules a result of the competition between the various institutions? Do you find this pressure to innovate to be an advantage compared to the court system or do you see tradeoffs between justice and efficiency of process?

The frequency of rule updates varies among arbitration centers. LCIA, the most recent major institution to update its rules, did not revise its rules for over fifteen years and released its current rules in 2014. ICC updated its own rules in 2012, almost fifteen years after its previous

version was issued. SIAC has issued a new edition every three years since 2007.

HKIAC established its first set of administered arbitration rules in 2008. During the next five years, we found that there were certain aspects of the arbitral process that we could improve in order to provide a more efficient service. For example, we saw that approximately 30% of our caseload involved more than two parties or more than one contract. We uncovered a real need for provisions to facilitate joinder, consolidation and the procedure to bring disputes under multiple contracts into one arbitration. As a result, we added Articles 27-29 to the 2013 HKIAC Administered Arbitration Rules (the “2013 HKIAC Rules” or “Rules”). We also saw that there were inefficiencies when it came to arbitrator fees and the arbitrator’s terms of appointment. In response, we addressed these issues, established standard terms of appointment, and brought clarity to the payment of arbitrators. In my mind, these types of changes do not compromise justice, but certainly do enhance efficiency of the arbitration process.

How many new cases are registered each year? Have you found there to be an increase in demand upon publication of the new rules, especially since the 2013 HKIAC Administered Rules facilitate process in multi-party disputes?

Over 250 arbitration cases have been registered each year for the past couple of years. Since our administered arbitration rules were introduced in 2008, we have witnessed a steady rate of growth of approximately 25%. It is too early to tell whether there has been an increase in demand following the publication of our new rules in November 2013. In 2013, we received 81 administered cases. In 2014, we received 107 administered cases. This increase is approximately the same percentage growth as in previous years. While we have seen good demand for our provisions which facilitate multi-party disputes, we have seen great interest through enquiries received for these provisions, the consolidation provision in particular (which cannot be used for contracts prior to 1 November 2013). This suggests that with time, we will see more users take advantage of our new provisions.

Arbitration in Hong Kong is governed by the Arbitration Ordinance, which came into force in 2011 and serves as the law of procedure if Hong Kong is the seat of Arbitration. Does the HKIAC have a lot of leverage on shaping local procedural law?

HKIAC certainly has some say in shaping local legislation, just as much as other relevant arbitral bodies in Hong Kong. As part of the law-making process in Hong Kong, all draft legislation must go through a consultation period during which HKIAC, along with other institutions, have the opportunity to comment. When we feel that there is a need for legislative amendments, we do contact the Department of Justice to make suggestions. For instance, when we were in the process of drafting our 2013 HKIAC Rules, we thought that our emergency arbitrator procedures could benefit from the support of an enforcement mechanism in the courts. As a result, we worked with the Department of Justice to recommend suitable language to be inserted into the Arbitration Ordinance. The Ordinance was quickly amended to recognize relief issued by emergency arbitrators even before the HKIAC emergency arbitrator procedures came into force. This reflects the kind of support the Department of Justice gives to ensure an arbitration-friendly environment in Hong Kong.

Where does your clientele come from? And what type of contracts is usually subject to a HKIAC arbitration clause?

Parties who use HKIAC hail from around the world, with the majority of them coming from Asia, and China is our largest country-base of users. As for the type of contracts, we see all sorts of contracts including joint-venture contracts, share purchase agreements, loan agreements, guarantees, charter parties, hotel management agreements, and supply agreements. Most often, however, we see commercial and corporate disputes. Increasingly, we see private equity disputes and other types of financial disputes as well as a growing number of disputes involving natural resources.

Can you tell us one surprising fact about the HKIAC, or about the role of Secretary-General, that our readership would probably not know about?

We provide secure wireless networks to parties to HKIAC hearings. Each party will be given a separate Wi-Fi network and login details to secure wireless privacy and to avoid unintended sharing of confidential information.

Now we will turn to the 2013 HKIAC Administered Arbitration Rules and your Role in the process.

How does the appointment of arbitrators work under the HKIAC Rules? What is your role in the process?

The appointment of arbitrators under the 2013 HKIAC Rules is firmly in line with our “light touch” approach to the administration of arbitration. The emphasis is on party autonomy. The parties are always given an opportunity to agree on the number of arbitrators (where the number has not previously been agreed upon) usually within 30 days after the respondent receives the Notice of Arbitration (the “Notice”). In the case of a three member tribunal, each side is entitled to designate an arbitrator in the Notice and the Answer to the Notice of Arbitration (the “Answer”) respectively. The two arbitrators designated by the parties will then designate the third arbitrator within 30 days from the confirmation of the second arbitrator. The parties are always invited to jointly designate a sole arbitrator, usually by the Answer due date or within 30 days from the date of any subsequent decision that the dispute should be referred to a sole arbitrator. Where the parties have agreed to an alternative appointment mechanism, such mechanism will be followed. There is no requirement that arbitrators be designated from a specific panel or list. HKIAC will only make a decision either on the number of arbitrators (either one or three) or make an appointment where there has been a failure to agree to the number or designate within the specified time limit. Where HKIAC makes an appointment, it will most often appoint from the HKIAC Panel or List of Arbitrators. The Panel and List are fully searchable databases, which can be found on the HKIAC website (www.hkiac.org). The Panel contains over 300 arbitrators, and the List contains over 100 arbitrators.

HKIAC does provide a check on those arbitrators that have been designated by the parties or co-arbitrators. Article 9 of the Rules provides that any arbitrator that has been designated by

the parties or co-arbitrators (in the case of a three member tribunal) will only be appointed once HKIAC has confirmed the designation. This process allows HKIAC to obtain a declaration as to an arbitrator's availability, independence, and impartiality. This process also allows the parties to obtain an arbitrator's proposed hourly rate, - where the fees of the tribunal are calculated on an hourly basis. Before HKIAC confirms an arbitrator, parties will be given an opportunity to comment on the information provided by the arbitrator. Unless a party raises an objection, HKIAC will confirm the designation, and the appointment will become effective. Where HKIAC is required to make an appointment, before appointing an arbitrator, the same details as above will be requested from the potential arbitrator and circulated to the parties for comment before the arbitrator is appointed.

The HKIAC Appointments Committee is the body empowered to determine the number of arbitrators, to confirm designations, and to make appointments where HKIAC is required to do so under the Rules. My role is to make recommendations to the Appointment Committee and to assist the Committee members to make sensible decisions on these matters.

The HKIAC Rules also eliminate the need for discussion between the parties and the arbitrator in relation to the arbitrator's terms of appointment. As applicable, the confirmation or appointment will be made either on the terms contained in Schedule 2 or Schedule 3 of the Rules, respectively. Both schedules contain standard terms and conditions applicable to the appointment of an arbitrator, so the parties do not have to agree separate terms. Hence, the standard terms allow us to streamline the appointment process. The differences between Schedule 2 and 3 relate to the way in which the tribunal fees will be calculated.

Is HKIAC involved in cases of objections to the validity of the arbitration agreement?

If a party raises an objection before the constitution of the arbitral tribunal in relation to the existence, validity, or scope of the arbitration agreement or the competence of HKIAC to administer an arbitration, HKIAC can decide whether and to what extent the arbitration should proceed. The arbitration will proceed to the extent that HKIAC is satisfied, prima facie, that an arbitration agreement under the Rules may exist. The body, which is empowered to make such decisions, is the HKIAC Proceedings Committee. It has not been uncommon for a respondent to raise an objection prior to the constitution of the tribunal to the effect that, for example, no arbitration clause exists between the parties; the arbitration clause is invalid; or there is ambiguity with respect to the reference made to HKIAC. The threshold to meet for HKIAC to proceed with the arbitration is a low one, as HKIAC's power to decide is on a prima facie basis and the standard to be met is that an arbitration agreement under the Rules may exist. Any question as to the jurisdiction of the tribunal will be decided by the tribunal once constituted.

What is the HKIAC's role in cases of challenge to an arbitrator? What are the most common grounds for challenge? Can you share a particular time when the challenge to the arbitrator had a negative impact on the relationship between the arbitrator and the institution?

In cases of a challenge to an arbitrator, HKIAC's role is to (i) procedurally administer the challenge in accordance with the Rules and the 2014 Practice Note on the Challenge of an Arbi-

trator and (ii) determine the challenge. HKIAC sets time limits for submission of the respective Answers to the Notice of Challenge by the non-challenging party, the challenged arbitrator, and comments on the Answers to the Notice of Challenge by the challenging party. HKIAC's Proceedings Committee ("Committee") is tasked with deciding challenges to the appointment of an arbitrator where HKIAC is asked to make such decision. In its determination of the challenge, the Committee appoints a panel of one or three members drawn from the HKIAC Council and/or the International Advisory Board to consider the challenge and to make a recommendation to the Committee as to the merits of the challenge. After considering the challenge, the panel submits its recommendation accompanied by reasons to the Proceedings Committee, which however is not bound by the recommendation. Following receipt of the recommendation, the Committee decides the challenge, and its decision and reasons for the decision are presented in writing. From our experience, the most common ground for challenge relates to the arbitrator's alleged professional link with a party's counsel or the counsel's law firm. We have not had any experience where a challenge to an arbitrator had a negative impact on the relationship between the arbitrator and HKIAC.

The Emergency Arbitrator Procedure requires a preliminary decision on the admissibility of a party's application: What kind of criteria do you rely on?

Once the HKIAC receives an application for emergency relief, HKIAC assesses whether the application contains all information required by its Rules and checks whether the application deposit has been made. The application must contain the following information:

- a. the names and contact details of the parties affected by the application and their counsel (if any);
- b. a description of the circumstances giving rise to the application, as well as details of the underlying dispute;
- c. a statement of the relief sought;
- d. reasons explaining the urgency of the application and grounds justifying the request for emergency relief before the constitution of the arbitral tribunal;
- e. the reasons why the applicant is entitled to emergency relief;
- f. any relevant contract(s) and arbitration agreement(s);
- g. comments on the language, seat, and applicable law of the emergency relief proceedings;
- h. confirmation of payment of the initial deposit for the application; and
- i. confirmation that copies of the application and any exhibits have been or are being delivered to all affected parties.

Once HKIAC accepts the application, an emergency arbitrator is appointed within two days to determine the application. As part of his or her decision, the emergency arbitrator deter-

mines whether the application is admissible under the Rules.

Where do you see HKIAC in ten years? Will international arbitration continue to attract an increasing number of users? What are the most important challenges that HKIAC will have to face?

HKIAC's trajectory is positive. The goodwill garnered and the hard work invested over the past 30 years ensures that, in ten years, HKIAC will continue to enjoy a healthy caseload and a solid reputation. In the last few years, we have worked hard to "dig deep", to find ways to enhance our services, and to anticipate our users' evolving needs. We have many ideas that we hope to implement, and so we look forward to the next decade of excellence in service.

International arbitration, when working well, is an ideal means of resolving business disputes. With growing cross-border trade, disputes will inevitably arise. HKIAC, and other institutions, must not only cater to this probable growth, but also continue to reflect on its services and find ways to improve the system.