

Why Hong Kong is the ideal place to resolve your commercial disputes

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CATEGORY:
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As one of the leading commercial hubs for international business transactions, Hong Kong also prides itself as a prime location for dispute resolution not only in the Asia Pacific, but also worldwide. With an established and trustworthy English-Chinese bilingual legal system, Hong Kong is an ideal hub to resolve international disputes for foreign parties conducting business in, or with parties based, in Hong Kong. Hong Kong also acts as a bridge for cross-border disputes involving Mainland Chinese parties given its geographic and economic proximity to Mainland China.

This article touches on two key points of a dispute (commencement and enforcement) in showing why Hong Kong is the ideal place to resolve commercial disputes.

Commencing Proceedings in Hong Kong

Litigation

In Hong Kong, the principle of “One Country, Two Systems” is enshrined in the Basic Law. As such, Hong Kong maintained its common law system after the handover of its sovereignty to China and is the only Chinese city with a common law jurisdiction. This provides international parties with the familiarity of a legal system but also reassurance of how Hong Kong’s judiciary operates.

A party wishing to commence litigation in Hong Kong has to first identify the appropriate court. This would be based on the nature and amount of the claim. For commercial disputes, it would often be the District Court or the Court of First Instance of the High Court in which a party would commence an action.

Apart from a nominal filing fee for registering the “originating process” (setting out details of the claims and the amount of compensation being sought) with the court, the benefit for a litigant in Hong Kong is that no upfront court fees are required. This is in contrast to some other jurisdictions, where courts would require payment of courts fees based on a percentage of the total amount of the claim.

Arbitration

As a leading seat of arbitration, Hong Kong is home to a number of the world’s top arbitral institutions, first-rate arbitrators, and foremost arbitration practitioners, making it an ideal place to commence arbitration proceedings.

For parties who wish to commence an arbitration to resolve disputes, there must be consent to arbitrate. In this respect, a party needs to show that a valid arbitration agreement exists. While an arbitration agreement is normally incorporated as an arbitration clause in a main contract, it is not the only means. As an arbitration friendly jurisdiction, Hong Kong law sets out a broad definition of what constitutes a valid arbitration agreement.

The details of how to commence an arbitration will depend on the wording of the arbitration agreement. An arbitration agreement generally provides for a number of procedural guidelines, including the applicable arbitral rules. Such rules should set out how a party commences arbitration and provide for the costs of an arbitration.

Enforcement of Court Judgments and Arbitral Awards

Ease in commencing proceedings is one important factor as to why Hong Kong is an ideal place for resolving commercial disputes. However, once a party has a positive judgment or award on hand, it needs to be able to collect on it. Failure of a party to honour a monetary judgment or arbitral award in Hong Kong is not the end game. A party may still enforce such judgment or award overseas where assets of the losing party exists. As briefly summarized below, Hong Kong is also a preferred jurisdiction for issuing and enforcing court judgments and arbitral awards.

Enforcement of Court Judgments

Hong Kong has reciprocal agreements for the recognition and enforcement of court judgments with 15 countries under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Chapter 319 of the Laws of Hong Kong). This means that a Hong Kong monetary judgment can be registered, then recognised and directly enforceable in the designated jurisdictions according to their respective statutes.

A party may still enforce a Hong Kong judgment overseas with relative ease outside of the 15 reciprocal jurisdictions. A party would need to bring new court proceedings (in the relevant jurisdiction) to obtain a fresh judgment from the foreign court for the recognition and enforcement of the Hong Kong judgment in that particular jurisdiction. As a common law jurisdiction, Hong Kong judgments are given preferential treatments by other common law jurisdictions worldwide. A party simply needs to show, subject to the relevant laws and procedural rules, that the Hong Kong judgment is a money judgment for a definite sum, is final and conclusive as to the underlying disputes between the parties, and not subject to further appeals in Hong Kong.

Such enforcement mechanism is also possible in non-common law jurisdictions and the above options also apply to enforcement of foreign judgments in Hong Kong.

Enforcement of arbitral awards

With respect to arbitration awards, Hong Kong is very arbitration friendly and the courts have rarely refused to recognize or enforce an arbitral award (whether it is made in or outside of Hong Kong).

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") is a key instrument in international arbitration. As of June 2020, 164 countries have agreed to recognize and enforce arbitration awards made in other signatory countries subject to limited conditions. The New York Convention applies to Hong Kong by virtue of China's extension of its application to Hong Kong. Therefore, so long as certain conditions are met, Hong Kong will enforce arbitral awards as if they were local Hong Kong court judgments.

The grounds for refusing enforcement of an arbitral award in Hong Kong (and other New York Convention countries) are very limited. These grounds mainly relate to procedural fairness, jurisdictional issues, and issues of public policy. Unlike the appeals system in national courts, substantive issues such as questions of facts and law determined in an award cannot be challenged or used as grounds for refusing enforcement.

Even in the unlikely event an arbitral award made in Hong Kong needs to be enforced in a non-New York Convention jurisdiction, enforcement may still be possible.

Reciprocity with Mainland China

Given Hong Kong's status as a separate jurisdiction from Mainland China, Hong Kong judgments and arbitral awards are separate and distinct from those in Mainland China. While they are not considered "international" for purposes of enforcement, Hong Kong judgments and arbitration awards have reciprocity in Mainland China through specific arrangements.

The implementation of the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region means 90% of civil and commercial judgments will be mutually recognized and enforced between Mainland China and Hong Kong. Whereas the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administration Region allows for enforcement of arbitral awards between Mainland China and Hong Kong.

Conclusion

Hong Kong offers parties a transparent and user friendly platform. Its recognized judicial system and reciprocity with Mainland China further strengthen its position worldwide as the ideal place for parties to resolve disputes particularly in light of the increase in cross-border relations between the East and West.

For further information on how Withers can help ensure the inclusion of a proper dispute resolution mechanism in cross-border transactions and/or resolution of international commercial disputes, please do not hesitate to contact us.

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