

# The Whispered Conversation: Hong Kong v. Singapore

## **Kluwer Arbitration Blog**

January 2, 2019

Gary L. Benton (Gary Benton Arbitration)

*Please refer to this post as: Gary L. Benton, 'The Whispered Conversation: Hong Kong v. Singapore', Kluwer Arbitration Blog, January 2 2019, <http://arbitrationblog.kluwerarbitration.com/2019/01/02/whispered-conversation-hong-kong-v-singapore/>*

---

Hong Kong v. Singapore. It's not the next big football match or title of an upcoming Japanese monster film. It's the question of where to bring international arbitration claims in Asia. It's a topic whispered at cocktail receptions and routinely reserved for hushed discussion in law firm conference rooms. It's the topic rarely if ever discussed with sincerity at arbitration conferences – and it's certainly not a topic to debate too loudly while in Singapore or China, especially if you're on the "wrong" side of the debate.

The West has slowly come to recognize Hong Kong and Singapore as credible seats for international arbitration in Asia and one can barely deny that Hong Kong and Singapore are rapidly becoming global arbitral seats in their own right.

Their development is very much an Asia-first model, fueled largely by economic potential and, in considerable part, by disregard from the West. With European nations and the US focusing arbitration resources on the Atlantic and largely ignoring the Pacific Rim, East Asia simply took matters into its own hands, building arbitral centres that attract Asia-related disputes. With the rise of credible seats in Asia, there is rarely a need to travel to Paris or London for arbitration and, in turn, Asia may soon be challenging the West for matters without regional ties.

The potential for further expansion in Asia is significant. The International Monetary Fund ranks the US, China and Japan as the world's largest economies and, in fact, most of their economic activity is focused on Asia and the Pacific Rim. In the US, California, ranked alone, is the fourth largest economy in the world, with China, Hong Kong and Japan ranking among its top 5 export regions. California companies, particularly companies in the technology sector, look principally to Asia for trade and, not surprisingly, are under growing pressure to submit disputes to courts and tribunals in Asia for resolution. The same holds true for companies supplying raw materials and finished goods from Western Canada and throughout much of Latin America – the focus is largely on trade with China and other Asian countries. Looking North from Oceania or East from Central Asia, particularly with China's planned Belt and Road Initiative, the epicenter of further global economic growth appears to be Asia.

Accordingly, a question increasingly asked in jurisdictions facing Asia is where to arbitrate in Asia. At present, the choice is largely between Singapore and Hong Kong. Although regional centers in Seoul, Tokyo, Kuala Lumpur, mainland China and elsewhere in Asia are developing, and may be a solution for specific cases, there is no doubt that Hong Kong and Singapore remain the standard-bearers.

Both have their virtues. Singapore is a modern, vibrant shopping mecca; Hong Kong is a cosmopolitan

cultural delight with ready access to mainland China. But, of course, the answer more importantly turns around each jurisdiction's receptiveness to arbitration and the rule of law.

As rich and cosmopolitan as Singapore and Hong Kong may be, there is an underbelly to both to be considered. Freedom House, the leading international research institute that ranks freedom, democracy and the rule of law around the world, ranks Singapore as only partly free giving it a freedom score of 52/100. Freedom House ranks Hong Kong as partly free as well giving it a slightly better score of 59/100. Similarly, judicial independence rankings by The World Economic Forum place Hong Kong 13th in the world and Singapore at 19th.

Relative to much of the world, these rankings are not bad but the question can be asked whether jurisdictions that have less than ideal rankings for freedom and judicial independence can be entrusted with administering international arbitrations and enforcing arbitration awards. And, as between Hong Kong and Singapore, putting aside the relatively minor differences in their pro-arbitration laws and the rules of their leading institutions, which is to be preferred as an arbitral seat?

Starting with Singapore, the little city-state is on steroids when it comes to government initiatives to promote Singapore as an international dispute resolution mecca. Anchored by Singapore International Arbitration Centre and the well-acquainted Maxwell Chambers, Singapore is attracting a growing share of international work notably from Southeast Asia and India while regularly taking strategic steps to gain footholds in mainland China. The ICC, ICDR and other global players are scrambling to implement strategies to strengthen their positions there and Singapore has seen a large influx of Western practitioners who hope to benefit from Singapore's rise.

Behind the curtain, Singapore's political system receives mixed marks. Singapore's parliamentary political system has been dominated by the ruling People's Action Party (PAP) and the family of current prime minister Lee Hsien Loong since 1959. According to Freedom House, the electoral and legal framework allows for some political pluralism and considerable economic prosperity but critics contend that what effectively amounts to a one-party system limits freedoms of expression, assembly, and association. Death penalties for drug traffickers, canings for some 35 other offenses and prohibition on chewing gum are reminders that Singapore adheres to different standards than many Western jurisdictions.

That said, it is not believed that political interests unduly influence the judicial system, at least when it comes to international commercial matters. The courts in Singapore are well-respected and have a strong record for following a British tradition honoring the rule of law. Nonetheless, the question remains how independent the courts can truly be given the political constraints and the pressures faced by the small, regionally isolated city-state.

Hong Kong has a far different past and faces a far different future than Singapore largely because of its intertwined relationship with mainland China. Despite China opening its doors to international business, Hong Kong remains an important gateway to the mainland. Hong Kong's continuing strength as an international banking and financial center, combined with its access to mainland markets, provide strong economic advantages. The international arbitration sector in Hong Kong, built largely around the HKIAC and a talented legal and academic community, have made Hong Kong the traditional leader in Asia Pacific-based international arbitration. ICC is active in Hong Kong and CIETAC and other arbitral institutions are also looking to reap rewards.

Hong Kong residents have traditionally enjoyed substantial civil liberties and economic freedoms. As a Special Administrative Region of China, Hong Kong abides by the rule of law under its local constitution, the Basic Law. However, the Chief Executive and half of the Legislative Council are chosen through indirect electoral systems that are widely viewed to favor pro-Beijing interests, and

the territory's freedoms and autonomy have come under threat in recent years due to growing political and economic pressure from the mainland.

In the meantime, Hong Kong remains a stubborn bastion of democracy. Its legal system is fitted with a long history of English law jurisprudence including a court system that remains independent and widely respected. Hong Kong maintains a system of appointing pre-eminent jurists from around the world as non-permanent judges on its highest court. Hong Kong is an attractive forum for enforcement of arbitral agreements and the recognition of awards and, to date, the courts have not hesitated to enforce awards against Chinese state-owned enterprises. Like Singapore, Hong Kong is proactive with respect to legislation favoring arbitration.

Hong Kong has the added benefit of ties to the mainland and some argue mainland courts are more likely to enforce arbitral awards coming from Hong Kong than from foreign jurisdictions. The Arrangement Concerning Mutual Enforcement of Arbitral Awards made between Hong Kong and China has proven to work in enforcing awards and mainland China has taken steps to ensure international arbitration awards are given protections.

For the immediate future, Hong Kong and China remain intertwined in a way that favors international arbitration. China benefits from Hong Kong's positioning as a global financial center and well-deserved reputation as the epicenter for the rule of law in Asia. China is surging forward with new economic initiatives. The Belt and Road initiative, representing US\$900 billion of investment infrastructure investment, is expected to bring strong returns and, undoubtedly, international arbitration work. The growth of arbitration in mainland China, largely through CIETAC and many other impressive regional institutions like BAC/BIAC in Beijing and SCIA-SAC in Shenzhen will likely benefit mainland China and Hong Kong in providing a broad network of domestic and international arbitration resources. So long as Hong Kong and Beijing work to find a proper balance in their relationship that protects Hong Kong's judicial independence, both will thrive from their relationship.

For both Singapore and Hong Kong, the next step is to move from being the leading regional Asian seats to leading global seats. For that, they need to demonstrate they can provide fair and independent dispute resolution - for Western and Asian parties - consistent with the leading seats in the West.

For Singapore, the challenge is to not lose sight of political pluralism and to expand beyond parochial interests by maintaining a judiciary which remains impartial and independent, by ensuring international arbitration initiatives are not driven largely by local interests and short-term economic goals and, relatedly, by providing genuine opportunities for non-local practitioners and arbitrators. As well, Singapore must find some way to manage its dependence on India for legal work. While Singapore will undoubtedly remain an important shipping port, it needs to find a way to remain relevant legally and economically as India develops its own infrastructure. If Singapore achieves these goals, Western and Asian parties will be comfortable looking to Singapore as a global seat.

Hong Kong has an advantage given the long history of its independent judiciary and its intimate access to mainland China. However, its challenge is to convince Beijing that democracy and an independent judiciary in Hong Kong will further long-term economic growth throughout China and not threaten state security. Hong Kong's related challenge is to ensure Beijing understands that Hong Kong can't be replaced. China has made extraordinary investment and generated extraordinary growth in the Pearl River Delta Economic Zone, just as it is now doing in many other parts of the country, but Beijing needs to understand that arbitral seats governed in socialist law will always be a second choice for foreign parties, particularly Western parties. If Hong Kong achieves these goals, Western and Asian parties will continue to hold it in high regard and it will be able to expand its base.

Certainly, practitioners in Singapore and Hong Kong, and in jurisdictions around the world, will have their own perspectives. Ironically, it's a topic that can't be too openly debated in Singapore or China given the political pressures that come to bear. But a genuine debate is needed for Hong Kong and Singapore to rise to the top of the Queen Mary seat survey.

Until then, it will remain mostly a topic for those whispered cocktail parties, those closed conference rooms – and, of course, the Kluwer Arbitration Blog.