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A Tale of Two Seats: How Do Legislations on Arbitration in Hong Kong and Singapore Differ, and Do These Differences Matter?

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Hong Kong and Singapore often take the top spots as the preferred arbitral seats in Asia and globally.[1)] These two seats share many similarities: they are both known for their arbitration friendly laws and courts, have adopted the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**") with modifications, and are often early adopters of innovative features to enhance their dispute resolution offering (see for instance recent reforms in the two jurisdictions on outcome-related fee structures for arbitral proceedings and third-party funding for international arbitration). Perhaps due to these similarities, the differences in the two jurisdictions' arbitration legislations are often unexamined, apart from the availability of the Interim Measures Arrangement which facilitates requests for interim measures from PRC courts in support of Hong Kong-seated arbitrations.

This article considers how and why the legislations on arbitration of Hong Kong and Singapore differ and to what extent these differences matter, with a special focus on three issues on which the two seats have diverged: availability of court-ordered interim measures, right of appeal on points of law, and appeal of tribunals' negative jurisdictional rulings.

Availability of Court-Ordered Interim Measures

Singapore law gives effect to the Model Law principle of limited curial intervention by restricting the circumstances in which a party may apply for court-ordered interim measures. Section 12A of the Singapore International Arbitration Act 1994 provides that Singapore courts may only order interim measures in relation to an arbitration in case of urgency to preserve evidence or assets.[2)] In case there is no urgency, interim measures may only be sought from Singapore courts with the permission of the tribunal or the agreement in writing of the other parties.[3)] Further, in every case, the Singapore courts are to grant interim measures only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.[4)]

In contrast, Hong Kong law gives a wide discretion to the courts in deciding whether to grant

interim measures, so that it is the courts, and not the statutes, which serve as the gatekeeper. Section 45(3) of the Hong Kong Arbitration Ordinance confers power on the Hong Kong courts to grant interim measures "irrespective of whether or not similar powers may be exercised by an arbitral tribunal." In exercise of its discretion, a Hong Kong court is to have regard to certain factors, such as whether there is any tribunal that is better suited to grant the measures sought and, in cases of non-Hong Kong seated arbitrations, the fact that the court's role is facilitative to the tribunal or the supervisory court with primary jurisdiction.[5] Case law indicates that Hong Kong courts have used their powers to grant interim measures sparingly. In *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] 4 HKC 347, the Hong Kong court emphasised that court-ordered interim measures should only be granted in limited circumstances, such as when the tribunal is unable to grant all the relief sought in a single application but the court can.[6] Where there is a tribunal that is willing and able to grant the relief sought, as was the case in *A v B* [2022] HKCFI 3620, the Hong Kong court denied the relief sought, observing that the application to the court was an "unnecessary duplication of costs and judicial resources."[7]

Thus, whilst, on the face of the statutes, Hong Kong law allows for the local courts to order interim measures in a wider range of circumstances, in practice parties would only be able to obtain the courts' assistance in relatively limited circumstances in either Hong Kong or Singapore once the tribunal has been constituted.

Right of Appeal on Points of Law

Singapore has a dual regime for arbitration, such that different statutes apply to domestic arbitration and international arbitration. Awards in domestic arbitration governed by the Singapore Arbitration Act 2001 are subject to appeal on a point of law before the Singapore courts, unless the parties exclude the courts' jurisdiction.[8] In contrast, awards governed by the Singapore International Arbitration Act 1994 are not subject to appeal on a point of law.

Hong Kong also used to have a dual regime similar to Singapore's, but the two regimes were merged when the current Hong Kong Arbitration Ordinance came into effect in 2011. The merged regime retained the right of appeal on a point of law, which had only been available under the old domestic regime.[9] Parties to any Hong Kong-seated arbitration can now opt-in to the Hong Kong courts' jurisdiction to hear appeal against awards by express agreement. One of the reasons for retaining the right of appeal was to address the concern of Hong Kong's construction industry, which represented the largest users of domestic arbitrations in Hong Kong and was accustomed to the features of the domestic regime.[10] As construction contracts often adopt standard forms, maintaining a limited power of appeal was said to promote legal certainty and development of common solutions to legal issues that frequently arise in the sector.

Will Singapore also extend the right of appeal to international arbitrations? The Singapore law reform body recommended introducing a limited right of appeal on an opt-in basis in a legislative amendment to the Singapore International Arbitration Act 1994, inspired partly by the opt-in regime under the Hong Kong Arbitration Ordinance. Whilst the suggestion was taken up in the Singapore Ministry of Law's 2019 legislative amendment consultation, it did not form part of the final legislation passed in 2020. Some suggested that the proposal was dropped to avoid the

perception that Singapore as a seat is adding an extra layer to arbitration as a dispute resolution process, when there are already concerns about its length and costs. While this concern might be a factor which a "safe seat" like Singapore may well take into account in law reforms, it does not necessarily conflict with an opt-in right of appeal. Further, Hong Kong case law demonstrates that courts are capable of discouraging frivolous applications by maintaining a high threshold for granting leave of appeal.[11] But law reform may be driven not only by legal technicalities; matters of perception are also relevant considerations.

Appeal Against Tribunals' Negative Jurisdiction Ruling

Article 16(3) of the Model Law provides that a positive ruling by a tribunal that it has jurisdiction is subject to appeal before its supervisory court, but is silent on whether the right of appeal is available for a negative jurisdictional ruling. The exclusion, however, is not an oversight. As explained in the UNCITRAL's 18th report on its work, forcing a tribunal which considers that it lacks jurisdiction to continue with the proceedings was thought to be "inappropriate." Consistent with this view, section 34(4) of the Hong Kong Arbitration Ordinance expressly provides that a tribunal's negative ruling on jurisdiction is not subject to appeal.[12]

Singapore International Arbitration Act 1994 previously adopted Article 16(3) of the Model Law,[13] and thus the right of appeal was not available against a negative jurisdictional ruling.[14] In 2011, the Singapore law reform body highlighted that this gap could shut out the access of parties, particularly aggrieved claimants, to the agreed form of dispute resolution in a neutral seat and could force the parties to litigate in national courts which they may have wanted to avoid through their choice of arbitration. On this basis, Singapore amended section 10(3) of its International Arbitration Act 1994 in June 2012 to provide that both positive and negative jurisdiction rulings handed down by tribunals are subject to appeal, thereby departing from the Model Law.

The same lacuna and the concern about leaving aggrieved parties without a remedy were identified in Hong Kong during the consultation for the revision of the Hong Kong Arbitration Ordinance in 2007.[15] Ultimately, however, Hong Kong decided not depart from the position under the Model Law, citing the finality of arbitral proceedings as an additional reason in support of this decision.

Do the Differences Matter?

In conclusion, as a result of legacies of previous laws, conscious attempts at innovation, and divergent policy choices, the legislations on arbitration of the two popular seats in Asia do differ. The differences may have a degree of impact when parties are faced with certain specific scenarios – i.e., when they are seeking interim relief from the national court rather than a tribunal, when they are interested in appealing an international arbitral award on a point of law, or when they are faced with a negative, rather than positive, jurisdictional ruling by a tribunal. In our experience, however, these differences rarely drive the parties' choice between Hong Kong and Singapore as their seat of arbitration. Instead, other concerns such as enforceability of awards and the "look and feel" of the seat are often front and centre in the parties' minds.

Nevertheless, these differences do have a wider significance as well. For one thing, they show that there is more than one way of advancing the “pro-arbitration” policy or attaining the treasured label of a “safe seat”. For another, as different laws are put to test by users, courts, and legislative bodies, the experience of one jurisdiction – particularly the experience of a “safe seat”– may provide valuable lessons for other jurisdictions examining their own laws and policies on arbitration. This is evidenced by the constant and continuing dialogue between Hong Kong and Singapore on many of these issues, inspired by the differences between the laws of the two jurisdictions. The arbitral community is all the richer because of these differences.

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References

?1 See for instance the 2021 and 2018 Queen Mary University London International Arbitration Surveys. Hong Kong and Singapore rank top three as the most preferred seats in the 2021 survey, and top three in the 2018 survey.

?2 Section 12A(4) of the Singapore International Arbitration Act 1994.

?3 Section 12A(5) of the Singapore International Arbitration Act 1994.

?4 Section 12A(6) of the Singapore International Arbitration Act 1994.

?5 Sections 45(3) and (7) of the Hong Kong Arbitration Ordinance (Cap 609).

?6 *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] HKCFI 549, [1998] 4 HKC 347, para. 35.

?7 *A v B* [2022] HKCFI 3620, para. 23.

?8 Section 49 of the Singapore Arbitration Act 2001. See section 49(2) for the opt-out provision.

?9 Para. 5, Schedule 2 of the Hong Kong Arbitration Ordinance (Cap 609).

?10 See para. 9 of the Hong Kong Legislative Council Bill Committee on Arbitration Bill, Background brief prepared by the Legislative Council Secretariat (27 July 2009), para. 9.

?11 See for instance *Chun Wo Construction & Engineering Co Ltd v Hong Kong Housing Authority* [2019] HKCA 369, paras. 4.5 to 4.14.

?12 Section 34(4) of the Hong Kong Arbitration Ordinance (Cap 609).

?13 Section 10 of the Singapore International Arbitration Act 1994 prior to the 1 June 2012 amendment.

?14 *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41, para. 68.

?15 See paras. 48-49 of Summary of submissions and comments on the Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill (September 2009).

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