

Hong Kong Arbitration: An Ideal Mechanism for Vietnamese Businesses to Resolve Commercial Disputes with Chinese Counterparties

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01 Introduction

Arbitration

Advantages

- Single neutral forum for multi-jurisdictional disputes
- Cross-border enforcement of awards (New York Convention)
- Freedom to choose arbitrators
- Flexibility and convenience
- Confidentiality (by statute or agreement)
- Finality (no appeals on errors of facts or law)

Limitations

- Arbitrators cannot issue default or summary judgments
- Awards only bind the parties
- Arbitrators cannot join third parties without consent
- Arbitrators lack coercive powers
- Interim measures may not always be available
- Awards do not establish binding legal precedent

Arbitration or litigation?



-● Would a court judgment be enforceable?
-● Is the dispute likely to concern a simple debt recovery claim or susceptible to summary judgment?
-● Is confidentiality a major concern?
-● Could it be important to obtain a judgment to establish binding legal precedent for future proceedings?
-● Do factors exist that make litigation in alternative forum unattractive?
-● Could the counterparty claim immunity from suit at the proposed forum?

Seat (or place) of arbitration



-● A legal concept, not to be confused with the factual venue

Significance:

- Law governing the arbitration proceedings
- Supervisory courts
- Place where the award is made

-● A poor choice of seat can seriously affect the conduct of the arbitration and its outcome

02 Benefits of choosing Hong Kong as seat

Modern legal framework, supportive courts

Legal Framework

- Unique position: part of PRC, but governed by separate common law system
- Arbitration Ordinance (Cap. 609) based on UNCITRAL Model law
- New York Convention status
- All disputes relating to IP rights are arbitrable
- Confidentiality guaranteed by statute
- Various mutual co-operation agreements with Mainland China facilitate conduct of arbitrations with Chinese elements

Courts

- Pro-arbitration and non-interventionist
- Robust approach towards enforcing arbitration agreements and awards
- Strict adherence to narrow grounds under UNCITRAL Model Law and New York Convention
- Specialist arbitration judge
- Indemnity costs rule
- Even level playing field: courts adopt same attitude towards PRC SOEs or other PRC or HK Government entities

Securing the outcome

Access to Mainland courts

Cross-border enforcement

- Hong Kong awards are enforceable in:
 - Over 170 jurisdictions via the New York Convention
 - Mainland China via a highly effective mutual enforcement regime
 - Taiwan based on reciprocity
- Strong enforcement track record in Mainland China

Flexible options and wide range of interim measures

- Courts, emergency arbitrators and tribunals have concurrent powers to grant IMs
- Tribunals can grant preliminary orders, including orders preventing parties from frustrating any IM
- Courts enforce IMs of emergency arbitrators and tribunals
- Parties to HK arbitrations administered by eligible institutions have direct access to the Mainland courts

Direct access to Mainland courts

HK-Mainland court-ordered interim measures arrangement




- Parties to HK arbitrations administered by certain eligible institutions can apply directly to the Mainland courts for interim measures in aid of their arbitration
- These IMs are then enforceable in Mainland China
- HK and Macau are the **only** seats outside Mainland China which can offer this important benefit
- Mainland courts otherwise do not provide IMs in aid of foreign arbitrations or enforce IMs issued abroad
- Currently 7 eligible institutions, incl. HKIAC, ICC - Asia Office, CIETAC HK and SCIA HK


As of
October
2023:

- HKIAC received 100 applications made to 36 different Mainland courts
- Total value of assets requested to be preserved: approx. USD 3.6 billion
- 81% of applicants are foreign parties and 62% of respondents are Mainland parties


Arbitrators




Parties retain full control over arbitrator appointments




Availability of quality arbitrators and other legal and industry professionals



Large pool of arbitrators who are familiar with PRC law and Chinese culture, and have strong expertise in resolving China-related disputes



HK law and HKIAC Rules provide flexible solution where arbitration clause does not designate number of arbitrators



HKIAC (default appointing authority) has track record of efficiently appointing neutral and qualified arbitrators


Modern and flexible financing regime




-● Third Party Funding of arbitrations, arbitration-related court proceedings and mediations (since 2/2019)
-● Outcome Related Fee Structure Arrangements (ORFSA) with lawyers (since 12/2022)
 - Conditional Fee Arrangements (success fee)
 - Damages Based Agreements (contingency fee)
 - Hybrid Damages Based Agreements
-● Driven by market demand and competition with other seats




Other factors



No restrictions on representation: parties can instruct non-legal representatives, or locally qualified or foreign lawyers




English and Chinese are official languages



Convenient location and easy access: no visa requirements for persons from most countries to conduct arbitrations



Modern hearing facilities at HKIAC



Modern business infrastructure

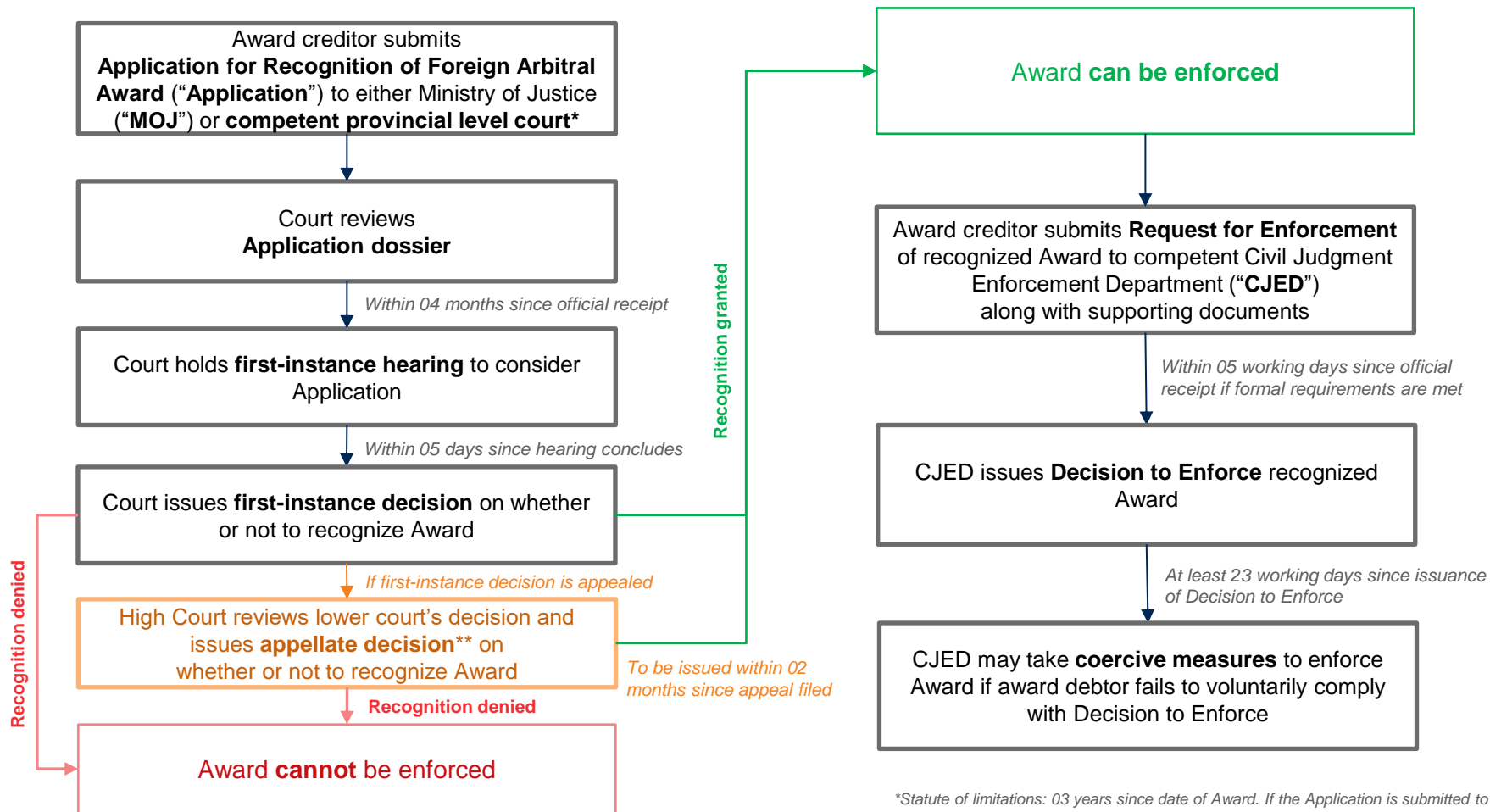
HKIAC

HKIAC Rules: effective since 1 June 2024



-● One of the leading institutions globally with almost 40 years' experience in Hong Kong seated arbitrations
-● Flexible arbitrator remuneration (capped hourly rates or *ad valorem* scale)
-● Emergency arbitrator procedures
-● Dedicated procedures for complex arbitrations (single arbitration, joinder, consolidation, concurrent proceedings), small cases, and unmeritorious issues of law or fact
-● Experienced in facilitating interim measures applications to Mainland courts
-● Part of "One-Stop" platform of China International Commercial Court

03 Recognition and enforcement of foreign arbitral awards in Vietnam



*Statute of limitations: 03 years since date of Award. If the Application is submitted to the MOJ, the MOJ will review and forward the Application to the competent court.

This decision is **final, save for exceptional cases where it may be subject to review by the Supreme Court of Vietnam under the cassation procedure.

Grounds for Denial of Recognition of Foreign Arbitral Awards

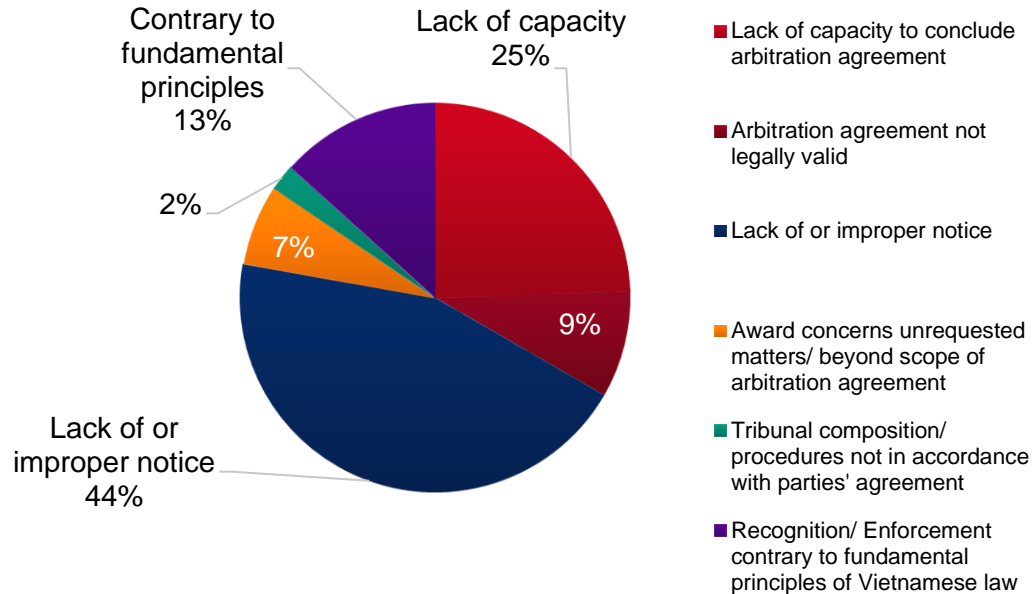
- **Article 459 CPC** prescribes the grounds under which the court will decline to recognize foreign arbitral awards.
- These grounds include:
 - i. lack of capacity to enter arbitration agreement,
 - ii. invalid arbitration agreement,
 - iii. due process violation,
 - iv. award dealing with unrequested issues or beyond scope of arbitration agreement,
 - v. composition of tribunal and procedure not in accordance with arbitration agreement,
 - vi. award not yet binding,
 - vii. non-arbitrability and
 - viii. award being contrary to fundamental principles of Vietnamese law.

“Contrary to fundamental principles” ground remains **vague** and applied **inconsistently** by courts.

The Supreme People’s Court (“**SPC**”) has clarified that a similar provision under domestic arbitration law refers to violations of *“fundamental principles of conduct with overriding effects in respect of the development and enforcement of Vietnamese law”* (Article 14.2(dd), Resolution 01/2014/NQ-HDTP). Accordingly, these “principles” might relate to arbitral procedure, merits, and even the form of relief granted in the arbitral award.

The SPC’s Resolution also instructs courts **not to re-try the merits of arbitral awards**, but courts might still do so to some extent under the pretext of “fundamental principles” consideration.

Grounds for Denial of Recognition of Foreign Arbitral Awards in Court Practice



- From 2012-2019, Vietnamese courts agreed to recognize foreign arbitral awards in **41 out of 84 applications** (approximately 48.8%).
- Grounds for non-recognition mainly related to procedure and the arbitration agreement.

Source: Database of Court Decisions on Recognition of Foreign Arbitral Awards, 2012-2019, Ministry of Justice

Questions

Appendix

HKIAC model clause



Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.

- The **law** of this arbitration clause shall be ... (Hong Kong law).
- The **seat** of arbitration shall be ... (Hong Kong).
- The **number** of arbitrators shall be ... (one or three).
- The arbitration proceedings shall be conducted in ... (insert **language**).

Interim measures

Overview

Availability	Hong Kong	Mainland China
Arbitral tribunal can grant interim measures	Yes.	No.
Courts can grant interim measures in aid of arbitration	Yes, regardless of seat.	Yes, but only for arbitrations in China, Hong Kong and Macau.
Courts enforce interim measures granted by arbitral tribunal	Yes, regardless of seat.	No.
Courts enforce interim measures granted by emergency arbitrator	Yes, regardless of seat.	No.

ORFSA overview

Type	Arrangement	Example
Conditional Fee Agreements	Success Fee only: no win, no fee	120% of normal fee if successful
	Normal or discounted fee, then a Success Fee: no win, low fee	70% of normal fee in any event; plus a 50% success fee if outcome successful
Damages-based Agreements	A percentage of the financial benefit only: no win, no fee	50% of the financial benefit
Hybrid DBAs	Normal or discounted fee, then a percentage of the financial benefit: no win, low fee	50% of normal fee in any event; plus 20% of the financial benefit

Bios



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Philipp's practice focuses on international commercial arbitration. Before joining the Firm in February 2015, he worked as an associate for a major Hong Kong law firm for 8 years. Prior to that, he worked for a leading Austrian law firm for 7 years. In 2011, he was appointed legal counsel to the Austrian Consulate in Hong Kong.

Philipp has represented parties in arbitrations under the rules of Hong Kong International Arbitration Centre (HKIAC), International Chamber of Commerce (ICC), China International Economic Trade Arbitration Commission (CIETAC), Vienna International Arbitral Centre (VIAC), International Center for Dispute Resolution (ICDR), and the UNCITRAL Arbitration Rules. Philipp is on the HKIAC List of Arbitrators and has been repeatedly appointed as sole arbitrator in ICC and HKIAC arbitrations. He is a regular contributor to the firm's moderated arbitration blog, www.globalarbitrationnews.com.



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Tri is the head of the Dispute Resolution Practice at BMVN, a strategic alliance partner of Baker McKenzie in Vietnam. With over 22 years of experience, he is a seasoned attorney specializing in dispute resolution and intellectual property matters.

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Additionally, Tri serves as an arbitrator for the Vietnam International Arbitration Center (VIAC) and was among the first registered commercial mediators in Vietnam. He is recognized as a Leading Individual for Dispute Resolution: Litigation by Legal 500 Asia Pacific 2024.

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