Rational choice of dispute resolution - arbitration

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Making a rational decision means placing emphasis on objective evaluation and selecting among possible choices based on reason and fact, not popular opinion or sentiment. In terms of arbitration, rational decisions have to be made regarding the legal seat of arbitration, whether the arbitration is *ad hoc* or institutional, and if the latter, which institution is to be chosen.

I trust many of you are familiar with the basic advantages of arbitration, such as the enforceability of awards, the flexibility of procedures and party autonomy including the choice of arbitrators. Hong Kong awards are enforceable in the Mainland as well as all New York Convention States. These are the common denominators and are not germane to the choice of the legal seat of arbitration, or in simple terms, where to arbitrate. The areas that come to mind when deciding the legal seat include the following:

(1) *Whether the arbitration laws of the seat are up-to-date and in compliance with international norms.* Hong Kong adopts the latest UNCITRAL Model Law and makes no distinction between domestic and international arbitration ensuring a regime that meets international standards. Interim relief can be obtained from arbitration tribunals and the courts.

(2) *Whether restrictions are in place on the choice of the arbitrators who adjudicate the dispute.* In Hong Kong, parties are free to appoint arbitrators of their own choice, allowing total party autonomy with no restriction on nationality.

(3) *Whether parties are able to use lawyers from their own jurisdiction if they so wish.*

Hong Kong explicitly permits the choice of lawyers without any restriction, irrespective of the applicable law to be argued before the tribunal.

(4) *Whether parties can seek effective and enforceable interim relief at the place of arbitration and abroad.* Interim relief that are enforceable is sometimes pivotal. For arbitrations seated in Hong Kong, interim relief can be granted by tribunals or the courts not just at the seat in the city but also in other jurisdictions, such as England and the Mainland. Under "One Country, Two Systems", Hong Kong enjoys a unique position. Parties to arbitral proceedings which are seated in Hong Kong and administered by designated arbitral institutions (HKIAC, ICC, eBRAM, CIETAC, HKMAG, SCIAC) are able to seek assistance from the relevant People's Courts in the Mainland, to obtain interim measures such as injunctions or freezing of assets. Hong Kong is the only jurisdiction outside the Mainland where, as a seat of arbitration, parties to arbitral proceedings administered by its arbitral institutions are able to apply to Mainland courts for interim measures.

(5) *Whether there are intervention by national courts or government.* Arbitrations in Hong Kong are conducted truly as an alternate dispute resolution process for commercial parties, independent from the court system. Arbitrators have all the power they need under the arbitration laws of Hong Kong to manage and adjudicate the disputes before them. The government does not interfere with the operation of arbitral institutions in administering their arbitrations.

(6) *The track record of the quality and enforceability of arbitral awards is also of importance.* Awards made in Hong Kong have generally been upheld by local courts and enforced in other jurisdictions, including the Mainland. This ensures finality and enforceability of awards, a much cherished advantage of arbitration.

(7) *Third party funding in arbitration is permissible.* This has been provided for in the

laws in Hong Kong.

(8) *There is no issue on arbitrability of IP disputes.* Since 2018, the laws in Hong Kong make clear that IP disputes may be resolved by arbitration and will not be a ground for setting aside or refusing enforcement.

The next area to consider is whether this is an *ad hoc* or institutional arbitration. Assuming that an institutional arbitration is preferred, one then looks at the suitability of the rules and whether they are generally in line with international practice. Nowadays, the rules of different arbitration bodies are generally similar. The choice of an institution therefore depends on the services that could be rendered by the secretariat and the fees of the arbitral institution. Again, it is advisable to look at the track record, namely the number of cases from a particular institution that have been set aside by the court of the place of arbitration or refused enforcement in overseas jurisdictions. The provision of well-trained tribunal secretary services to the tribunal is also an attraction to arbitrators.

These are some of the main factors that should be carefully considered before arriving at a rational and informed decision on the choice of the seat of arbitration.