

PRC Companies in International Arbitration: Is it costly to arbitrate in Hong Kong?

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In this part of our ongoing series, we will examine the costs of arbitration in Hong Kong and if it is expensive as thought. Arbitration costs mainly comprise of two parts: solicitors' fees and the costs attributable to arbitration tribunals and institutions.

Solicitors' Fees

Solicitors' fees (The first part of arbitration costs) usually account for a substantial proportion of total arbitration costs. Solicitors in Hong Kong normally charge hourly rates, which typically vary from HKD2,000 per hour to HKD8,000 per hour, subject to professional experience and expertise. As such, how much would an arbitration case cost, and can fee caps be set? Some procedures in arbitration can be charged on a capped fee basis. However, for the most part, it is difficult to set a capped fee structure for the entire arbitration proceedings. Why is this so?

Solicitor fees are based on time spent working on any given matter, which in turn, is determined by the complexity of the said matter, as well as approaches and strategies adopted by the claimant and respondent in the arbitration proceedings. Whilst it is obvious that a solicitor would spend more time on a complicated case, but even so, why cannot a fee cap be set? This is because it is difficult to make a comprehensive and accurate estimate on the overall workload of a case from the outset. This in turn, is partially due to Hong Kong's common law system¹ which relies on precedent and its recognition of non-written evidence, and as such, gives rise to uncertainty during the arbitral proceedings.

At this juncture, some explanation is necessary: common law can be considered case-made law. Two cases may look similar on the surface, but they can be distinguished from one and the other by matters such as a specific word used in a contractual term, a document, an email, a Wechat message, or even a telephone discussion. To put this in an arbitration context, imagine if a Wechat message with important information only came to the lawyer's attention when that Wechat message was disclosed by the

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opposing party during an arbitral proceeding. The client did not have a record of the document at all. At this point, a solicitor will need to advance the client's case with the most favourable legal standpoint, based on the unique background circumstances that arise, including the new evidence.

Another example would be certain information was exchanged in the course of a dinnertime conversation, telephone call or face-to-face meeting with no record being held. However, as long as a participant of such an exchange can testify as to its contents, such testimonies of a witness will be accepted as valid evidence under common law. Of course, the evidence may be accepted (or rejected) on its entirety, or partially by the arbitration tribunal after assessing the credibility of the witness and the evidence during the cross examination by opposing counsel and the tribunal. Quite often, other witnesses may testify on the same matter with contradicting account of the event, which will also be taken into account by the tribunal. Therefore, elements of (i) which witnesses are to provide oral testimonies, (ii) the contents of the aforementioned oral testimonies, and (iii) the availability of evidence to address any variants to, or contradictions of, facts introduced by the opposing side, have substantial impact on a case at hand. This consideration also makes it difficult for a solicitor to make a comprehensive judgement and fair estimate of fees at the beginning of arbitration.

We have discussed that the complexity of a case will have an impact on legal costs. The second factor which may also affect the costs is the strategies and approaches taken by the parties (and their lawyers) during arbitration: if either party (or both parties) take a combative stance on even the most minor issues, legal fees will be substantially higher. Whether in arbitration or litigation, naturally a lawyer should aim to fight for the best interest of his/her client; but this does not mean excessive pursuit over minor issues that would produce disproportionate fees. Some yielding of minor issues may in fact be part of a step necessary for the overall strategic considerations.

Cost of Arbitral Tribunals and Arbitration Institutions

We proceed to the second part of arbitration costs, relating to fees and costs of the arbitral tribunal and arbitration institutions. As for the cost of the tribunal, client would need to consider arbitrator rates and the number of arbitrators (1 or 3) appointed. In most cases, the arbitrators themselves are lawyers, and their rates might vary. Taking the latest rules of HKIAC as an example: the hourly rate of an arbitrator shall be no more than HK\$6,500, with an annual inflation up to 10%.

The administrative fees charged by each arbitration center may vary too. Administrative fees charged by HKIAC are capped at HK\$400,000, whereas in the ICC and CIETAC, administrative fees are capped at HK\$1,100,000 and approximately HK\$300,000 respectively.

The arbitration costs in HK are substantial. Is there any ways to control budget?

Indeed, arbitration costs are substantial; however, there are ways to control expenditure.

Firstly, lawyers can provide capped fee structure for some tasks that are normally within their control, such as issuing a legal opinion based on the documents provided by the client providing the overall arbitration strategies undertaken. As another example, if a client provides sufficient and comprehensive documents with clear instructions, the lawyer can charge a capped fee for drafting the pleadings.

Secondly, even though a lawyer may not be able to provide a capped fee for the entire arbitration proceeding, he or she can still provide a ball-park estimate of foreseeable expenses to be incurred based on his or her experience and analysis of the case. A lawyer could also introduce a budget-in-phases to a client, covering fee estimates covering pre-arbitration stage, pleading stage, and document disclosure stage. This will offer a client sufficient preparation as to costs, as well as the ability of a client to gain authorization within the organization.

Thirdly, before instructing a solicitor, a client should consult multiple law firms to make an assessment based on their quality of work and respective fee proposals before making a final decision.

Regardless, it is undisputable that arbitration costs in Hong Kong are relatively higher than in mainland China. In fact, largely due to historical reasons, solicitor rates in Hong Kong are in line with those in Europe and the USA.

Contingency Fee and Others

A frequent question raised is whether contingency fee arrangements can be provided, which unfortunately is not permitted in Hong Kong.

However, one possible get-around to consider is third-party funding, whereby a party (other than the parties in dispute) provides funds or other material support in an arbitration, in exchange for a share in the “case proceeds”, i.e. the recovered damages. For parties in arbitration, this financing solution helps spread arbitration costs to more affordable levels, the applicability and operation of which we will discuss in the next article of our series.

¹ Here, we assume that arbitration in Hong Kong is governed by Hong Kong laws. However, the choice of Hong Kong as the venue of arbitration by the parties in dispute does not necessarily mean that arbitration must be conducted in accordance with Hong Kong laws. The applicable law for any arbitration proceeding shall be subject to the terms of the relevant contract.