

Are Arbitrations Shifting Away from Hong Kong and Towards Singapore? Impact of the Hong Kong National Security Law

October 2020 | [Singapore](#)



Introduction

In the field of arbitration, Singapore and Hong Kong have been considered to be competitors for the position of regional hub for commercial dispute resolution. Both jurisdictions stand among the leading destinations for arbitration not just in Asia, but in the world.

However, Hong Kong has been facing months of demonstrations since 2019 regarding mainland China's influence in the special administrative region. Following this, on 30 June 2020, the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (more commonly known as the Hong Kong National Security Law) was enacted by the Standing Committee of the National People's Congress of the People's Republic of China.

The National Security Law has raised concerns amongst some commercial parties over the stability of Hong Kong and the implications for its legal system. While it remains to be seen whether these concerns are overstated, the current impact of such sentiment can be seen in statistical and anecdotal evidence. In this Update, we take a look at the effect of the National Security Law and what it might mean for arbitration in Hong Kong and Singapore.

What is the National Security Law?

The National Security Law was enacted with the stated aim of safeguarding national security and protecting the One Party, Two Systems policy. It imposes sanctions on four broadly worded categories of offences:

1. Secession;
2. Subversion;
3. Terrorist activities; and
4. Collusion with a foreign country to endanger national security.

The penalties for these offences vary, but sentences can extend up to life imprisonment. Corporations found in breach of these provisions could face fines or even the revocation of their licences of business permits.

In terms of jurisdiction, Article 38 of the National Security Law states that "This Law shall apply to offences under this Law committed against the Hong Kong Special Administrative Region from outside the Region by a person who is not a permanent resident of the Region." Due to its broad wording, it seems to exert extraterritorial jurisdiction over all individuals no matter where they are located. This has added to uncertainty as to how the National Security Law will be put into practice, and what effect it may have on companies in Hong Kong.

Regarding enforcement, the PRC Government will establish an Office for Safeguarding National Security in Hong Kong, which will be able to exercise jurisdiction over certain cases under the National Security Law. The Chief Executive has the power to designate the judges handling these cases.

Impact on Hong Kong

Coming after the year-long demonstrations, the National Security Law has dealt another blow to the perception of Hong Kong's stability and raised international concerns on the Hong Kong legal system. As far back as December 2019, a renowned Singapore newspaper reported that "Lawyers and other legal professionals told Reuters the unrest also risks undermining the city's position as one of the world's top centres for arbitration ... with cases moving to rival Singapore."¹ A subsequent article published after the implementation of the National Security Law stated that "[b]usinesses are instead choosing rival hubs like Singapore, Paris and London, according to interviews with arbitration lawyers".² In July 2020, the Nikkei Asian Review quoted a source stating that a "growing number of legal practitioners specializing in arbitration are moving from Hong Kong to Singapore".³

Collectively, these two developments have dampened the attraction of Hong Kong as an arbitral centre for commercial disputes due to concerns over safety and a general downturn in business activity. However, it remains to be seen whether these concerns are overstated. Several factors are in favour of Hong Kong's continued popularity:

¹ *The Straits Times*, "Firms moving arbitration cases from protest-hit Hong Kong to Singapore", published on 4 December 2019.

² *The Straits Times*, "Hong Kong losing to Singapore as venue for arbitration", published on 23 July 2020.

³ *Nikkei Asian Review*, "Security law threatens Hong Kong's arbitration and trade hub status", published on 12 July 2020.

1. Ability to seek interim relief from Chinese courts
 - a. A key reason for Hong Kong's popularity as an arbitral centre is its unique advantage in enabling parties to seek interim relief from Chinese courts to prevent companies from liquidating their assets.
 - b. Indeed, the Hong Kong International Arbitration Centre ("**HKIAC**") set a new record in 2019, handling 308 disputes worth US\$4.7 billion despite the demonstrations that started in March 2019.
2. No change to Hong Kong's arbitration laws
 - a. The National Security Law does not enact any direct changes to Hong Kong arbitration laws, allowing the cogs of the arbitral machinery to continue to turn.
 - b. While the ability of the Chief Executive to select judges to handle cases under the National Security Law has been prominently reported on in the media as a matter for concern, this is irrelevant to arbitration – arbitrators continue to be selected by the parties or an arbitral institution such as HKIAC.
3. Leading international lawyers and judges
 - a. Regarding arbitration, HKIAC is helmed and supported by leading international lawyers across numerous different jurisdictions.
 - b. Regarding litigation, the Hong Kong court system is unique in that it allows the appointment of overseas judges to serve as non-permanent members of the court. The Hong Kong Court of Final Appeal currently has 14 overseas judges, including prominent members such as Lord Sumption from the UK. While these judges may not be able to handle national security cases under the National Security Law, they will still be able to decide on civil or financial cases.
4. Support for virtual arbitration hearings
 - a. The concerns regarding Hong Kong as a physical venue may perhaps be overblown, especially with the prevalence of virtual hearings in light of the COVID-19 situation and the resultant removal of the need to be physically present in the country for the conduct of proceedings.
 - b. To facilitate the move towards virtual hearings, HKIAC offers in-house virtual hearing services and has published the "[HKIAC Guidelines for Virtual Hearings](#)".

These factors support the continuing stability and trust that arbitration parties can have in continuing to seat arbitrations in Hong Kong. Nonetheless, there are parties who may remain concerned and wish to hold their arbitrations elsewhere. They would require an alternative jurisdiction, and Singapore stands as a natural option in the region.

Effect on Singapore

Singapore's legal system has a reputation for being neutral and impartial in the resolution of commercial disputes. Singapore is also noted for its efficiency in dispute resolution as well as its well-established framework and infrastructure for alternative dispute resolution. Some of Singapore's strong points are highlighted below:

1. SIAC is one of the world's preeminent arbitral institutions. It is worth noting that although HKIAC and the Singapore International Arbitration Centre ("**SIAC**") each handled 271 matters in 2015, SIAC has since handled 479 arbitrations in 2019 in comparison with HKIAC's 308 arbitrations.
2. While it does not have in-house virtual hearing services, it works closely with Maxwell Chambers which does offer such facilities. On 23 April 2020, an article titled "Covid-19: participants in SIAC case share success of virtual hearing"⁴ reported on the success of a virtual hearing involving parties attending from Singapore, London, Sydney, and Taipei.
3. Its arbitral capabilities are complemented by the Singapore International Mediation Centre for the mediation of commercial disputes.
4. The Singapore International Commercial Court, launched in 2015, provides a specialised avenue for cross-border commercial litigation.

The above factors provide a compelling impetus for parties to opt for Singapore as the selected jurisdiction for the resolution of their disputes, whether it be as the seat of arbitration or otherwise. It is possible that the coming months will see a further shift of arbitration in the region towards Singapore. Whether this shift is of a long-term or short-term nature would depend on future developments. Industry experts will surely continue to monitor the comparative case statistics of the respective arbitral institutions to obtain a clearer picture of the effective trends.

Concluding Remarks

Parties with business activities in the region should keep informed of the developments in this area. The choice of jurisdiction is an important aspect of drafting a commercial agreement, and parties should ensure that they select the most appropriate jurisdiction in terms of the ability to manage any dispute that may arise from the agreement.

In these turbulent times, Singapore remains a stable and efficient choice as seat of arbitration, providing an avenue for parties seeking reliability and neutrality in their regional disputes.

For further queries, please feel free to contact our team below.

⁴ The article "Covid-19: participants in SIAC case share success of virtual hearing" was first published in *Global Arbitration Review* and made available on the website of Maxwell Chambers, the world's first integrated Alternative Dispute Resolution (ADR) complex housing hearing facilities and international ADR institutions.

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