

Regional competition for the international shipping center: the development of maritime arbitration center in Asia

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In chapter 57 of the 12th 5-Year plan, Hong Kong is assigned an important task to consolidate and enhance its position as an international financial, trade and shipping center. Actually, Hong Kong has long been the International Shipping Center (ISC) in Asia, not only for its high volume cargo flow, but also for its high value-added service sectors. There is a common understanding that the further development of the international shipping center in Hong Kong should be mainly focused on the shipping service sectors. However, most of such services are “footless”—these businesses do not have to be located where cargoes are actually being loaded and unloaded, ships actually being built, or shippers or shipowners stationed. Rather, they can move to any place where the environment is most suitable for them to grow. This is why London is still the maritime center of the world even without much physical cargo flow or shipbuilding activities.

The benefits of the shipping service clusters to the local economic development, both now and in the future, have induced high competition among different countries to develop its shipping service clusters. One

of the examples is the active promotion by the Singapore government for its maritime industry, the negotiation with BIMCO on standard form of ship sales agreement, and the claim by the Singapore government that it has become the Maritime Arbitration Center (MAC) in Asia.

Inevitably, disputes happen in every kind of shipping activities and services. Having a credited MAC can increase the attractiveness of a country to other shipping services. Obviously, maritime arbitration plays a key role in the development of an ISC. Therefore, it is very important to understand the current status of and potential for MACs in Asia, so as to develop appropriate policies to promote the MAC and ISC in Hong Kong, both for meeting the requirement of the 12th five-year plan, as well as long term sustainable economic development in Hong Kong.

1. Current status of Maritime Arbitration in Asia

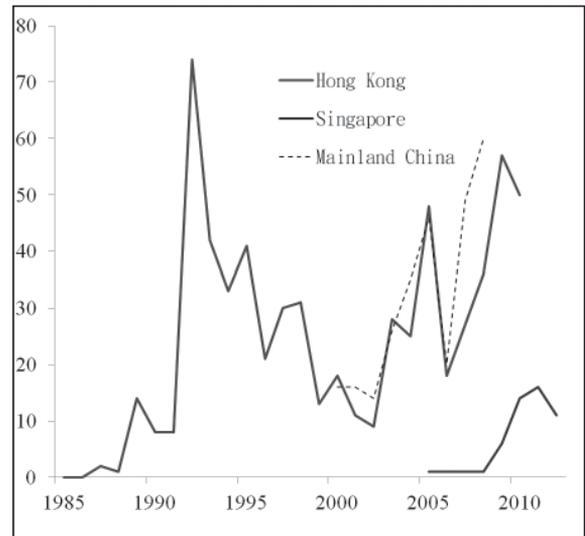
Whether a place can be the MAC in a region largely depends on the preference and confidence of the contracting parties in the shipping business in that place. Such

preference or confidence is neither a gift of the nature of the place, nor appointed by any authority or other agencies. It is established through a long history of maritime arbitration activities in the place. Therefore, a review on the history of maritime arbitration in this region can help to understand the trend of MAC development in Asia.

Hong Kong Maritime Arbitration Group (HKMAG) is a division of Hong Kong International Arbitration Centre (HKIAC). Since 1985, HKIAC has processed a total of 645 maritime disputes. In 2010, there were 131 appointments for the arbitrators listed in the HKMAG. Those arbitrators on the list are experienced in shipping and are experts in handling maritime disputes. In recent years, Hong Kong has developed into a regional leader of maritime arbitration in the Asia-Pacific region.

In Singapore, the major maritime arbitration institution is the Singapore Chamber of Maritime Arbitration (SCMA), originally established in 2004 under the umbrella of the Singapore International Arbitration Centre (SIAC). In 2009, SCMA was re-structured and separated from the SIAC. It also changed the arbitration system to use ad hoc arbitration only and the rules are similar to the London Maritime Arbitrators Association (LMAA) Terms. From 2009, SCMA has handled 49 maritime cases.

Figure 1: Maritime arbitration disputes processed in Hong Kong, Singapore and Mainland China



Sources: HK: HKIAC; Singapore: SCMA; Mainland China: China Maritime Arbitration Commission (CMAC)

Figure 1 depicts the number of disputes processed in Hong Kong, Singapore and Mainland China since 1985. From this statistics, it is clear that Hong Kong has a longer history and more experiences in dealing with maritime disputes than Singapore.

Of course, the success in the past does not necessarily ensure future achievements, especially when there are intensive regional competitions. In recent years, the Singapore government has always been very ambitious to promote its position as an international maritime centre and has introduced a number of tax incentive schemes to achieve this goal. The tax incentives for shipping and

maritime industry include MSI-Approved International Shipping Enterprise (MSI-AIS) Award, MSI-Maritime Leasing (MSI-ML) Award, MSI-Shipping-related Support Services (MSI-SSS) Award, withholding tax exemption on interest payable on loans obtained from foreign lenders to finance the purchase or construction of ships, containers and intermodal equipment. Furthermore, the Maritime and Port Authority of Singapore established Maritime Cluster Fund (MCF) to subsidize the activities to promote manpower and business development in the maritime industry. In addition to these, Singapore is actively promoting Singapore as an international maritime arbitration center. It is reported that Singapore have been added as a new arbitration venue in addition to London and New York by BIMCO to give users of the BIMCO contract a wider choice in the Dispute Resolution Clause.

2. Factors influencing the choice of place of arbitration

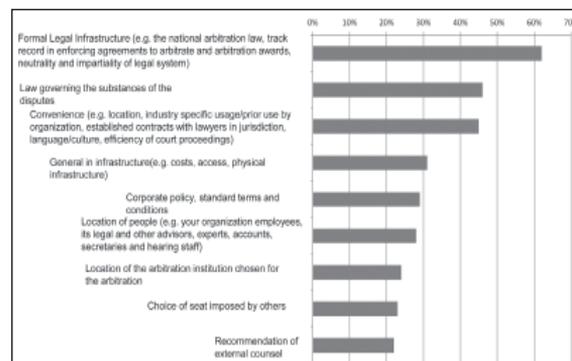
Because arbitration is a consensual process between the contracting parties, although BIMCO added Singapore as a new arbitration venue in its Disputes Resolution Clause, the parties are free to choose any arbitration venue suggested by BIMCO or even select a place that is not in the BIMCO Dispute Resolution Clause based on their specific needs. Therefore, it is necessary to analyze the important factors for the selection of arbitration venue.

White & Case's 2010 International Arbitration Survey listed and ranked major factors influencing the choice of arbitral seat, which are summarized in

Figure 2. The most important factor is the “formal legal infrastructure” at the seat (62%), followed by the law governing the substance of the dispute (46%) and convenience (45%) which includes location, language and culture, etc. General infrastructure, e.g. costs, access, physical infrastructure, also influenced parties' choice (31%). Other factors include corporate policy (28%), location of people (28%), location of the arbitration institution chosen for the arbitration (24%), choice of seat imposed by other party (23%), and recommendation of external counsel (22%).

These are the major considerations when the contracting parties in a maritime business transaction decide where to go when there are any disputes. For a MAC to attract customers, it is necessary to improve its competitiveness in these elements, especially the most important ones, such as flexible arbitration legal system and low cost. Next we compare the attributes of these two systems between Hong Kong and Singapore.

Figure 2: Major factors on the choice of the seat of arbitration



Source: 2010 International Arbitration Survey: Choices in International Arbitration

3. HKIAC Arbitration System being More Flexible

As mentioned before, after the restructuring in 2009, the current SCMA only caters for *ad hoc* arbitration. However, both ad hoc arbitration and administrative arbitration are available in HKIAC.

Ad hoc arbitration means such proceeding that is not administered by an institution. *Ad hoc* arbitration proceedings are independent of all institutions and arranged solely between the arbitrators and parties. They may adopt a readymade set of arbitration rules, such as United Nations Commission on International Trade Law (UNCITRAL) Rules of Arbitration and LMAA Terms, or draw up their own rules. The administrative arbitration is one in which a specialized institution intervenes and administers the arbitration process.

Both *ad hoc* arbitration and administrative arbitration have their own advantages and disadvantages. For example, the primary advantage of ad hoc arbitration is flexibility, because the arbitral procedures are decided by the parties and arbitrators. But this advantage would sometimes cause inefficiency, because *ad hoc* arbitration's smooth running depends on the co-operation of the parties which may be difficult to achieve when parties are in dispute. In the field of maritime arbitration, in order to avoid this inefficient situation, the parties may agree certain arbitration rules so that arbitration can be conducted on this basis. In SCMA, the applicable rules can be the SCMA Arbitration Rules (2009). In HKIAC, the

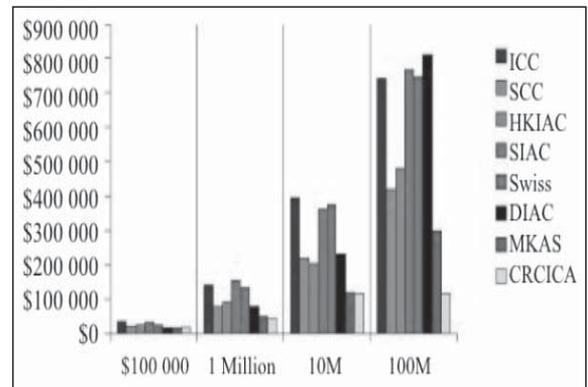
parties can choose any set of arbitration rules, e.g. the UNCITRAL Arbitration Rules and LMAA Terms, etc. As for administrative arbitration, the institution will provide professional administration service under the institutional rules during the proceeding. Thus doubts can be clarified or a deadlock can be resolved more quickly. However, there is an administration fee paid to the arbitration institution.

China is now a big player in the international maritime business. Many international contracts that involve one party in Mainland China require arbitration outside of China. However, administrative arbitration is more popular in Mainland China. The leading arbitration institutions i.e. China International Economic and Trade Arbitration Commission and China Maritime Arbitration Commission have only administrative arbitration because China Arbitration Law only recognizes the administrative arbitration, not ad hoc arbitration. When enforcing an award by foreign ad hoc arbitration in China, there should be no problem if the award is made in the countries or places which have acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), because the New York Convention recognizes ad hoc arbitration as well as administrative arbitration. But sometimes the parties may still want to question its effectiveness due to the historical opinion on ad hoc arbitration awards in China. Therefore, compared with Singapore, the arbitration system in HKIAC better caters to the needs of businessman from Mainland China.

4. Hong Kong More Competitive in Arbitration Costs

According to the White & Case's 2010 International Arbitration Survey, cost of arbitration is a factor influencing the choice of seat of arbitration. In 2010, the Arbitration Institute of the Stockholm Chamber of Commerce surveyed the arbitration cost of major arbitration centers in the world for different levels of dispute value, and the result are summarized in Figure 3. The result shows that the average cost of arbitration in Hong Kong is quite competitive. The costs in the International Chamber of Commerce (ICC) and Singapore International Arbitration Centre (SIAC) are the highest; then it is followed by the Hong Kong International Arbitration Centre (HKIAC), Swiss Chambers of Commerce Association (Swiss) and Arbitration Institute of the Stockholm Chamber of Commerce (SCC); the costs in the Dubai International Arbitration Centre, Moscow-based International Commercial Arbitration Court (MKAS) and Cairo Regional Centre for International Commercial Arbitration (CRCICA) are the cheapest. Compared with Hong Kong, the average arbitrators' fee in Singapore is higher, even with the inclusion of administration fee in Hong Kong. As arbitration cost is one of the important considerations when the contracting parties select an arbitration venue, Hong Kong has higher possibility than Singapore to be selected as an arbitration venue.

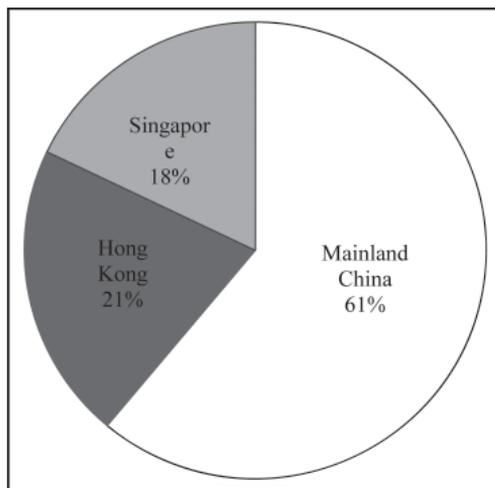
Figure 3. Comparison of arbitration cost for different dispute value



5. Hong Kong Better Prepared for Businessmen from Mainland China

Shipping business sector's confidence and acceptance of one maritime arbitration institution play a key role in selecting arbitration institution. Shipowners are in the center of shipping business. They are also frequently involved in a variety of maritime contracts. According to the UNCTAD, by the end of 2010, China was the fourth largest ship owning country with 3,651 shipowners and 108 million DWT of ships. Hong Kong is the eighth largest with 712 shipowners and 37 million DWT, and Singapore is in the 11th position with 1,021 shipowners and 32 million DWT. From these statistics, it is clear that the number of shipowners from Mainland China are more than Hong Kong and Singapore. The rise of Chinese Shipowners has induced strong demand for maritime services, including maritime arbitration in Mainland China which includes Hong Kong.

Figure 4: Percentage of owning capacities in Singapore, Hong Kong and Mainland China



In maritime arbitration, due to the constraint of legal infrastructure and lack of confidence in impartiality and neutrality of the legal system in Mainland China, the shipping businesses there always prefers having their cases arbitrated outside the Mainland, especially when the other parties are from a foreign country. Compared with Singapore, Hong Kong has more of an edge towards maritime arbitration for Chinese cases. Firstly, Hong Kong shares the cultural background with the Mainland and in the respect of language, there are a wealth of Chinese-speaking arbitrators and lawyers who have the knowledge of Chinese laws and market operation. Secondly, Hong Kong has a convenient geographic location. No long journey is required for parties from the Mainland to take part in arbitration in Hong Kong. Furthermore,

there is strong governmental cooperation between Mainland China and Hong Kong in the field of recognition and enforcement of commercial arbitration awards so that if the parties choose Hong Kong as the seat of arbitration, the recognition and enforcement of awards in China would be more direct and convenient, without unnecessary procedural requirements. The Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region was signed in 1996. Under this Arrangement the application for recognition and enforcement of Hong Kong arbitration awards is more simple and convenient than that under the New York Convention, however under the Convention the translation of award or agreement shall be certified by an official or sworn translator or by a diplomatic or consular agent.

6. Conclusion:

Whether a place can be qualified as a MAC depends on the confidence and acceptance of the business sectors in the arbitration-related systems of the place. Such confidence and acceptance are neither endowed by the nature nor can be appointed by any authority. They can only be established through a long-term international maritime arbitration practice. The long history of “Small Government, Big Market”, and fairness

and justice in Hong Kong's legal system has earned Hong Kong the reputation of "business heaven", and trusted by the shipping industries worldwide. Hong Kong has never been appointed by the BIMCO as the recommended arbitration venue, but HKIAC has become one of the world's leading international maritime arbitration institutions and consistently has large caseloads. Hong Kong is ranked as the world's freest economy by Heritage Foundation and Economic Freedom of the World in 2012. This bespeaks the confidence and acceptance of the shipping industry in Hong Kong maritime arbitration. The reputation gained by Hong Kong is unlikely to be affected by BIMCO's decision to make Singapore a choice for venue of arbitration.

However, Hong Kong should not overlook the highly competitive environment of maritime arbitration among other countries or regions in Asia. The Singapore government will not stop its promotion after being added to the BIMCO contract. Rather, it has a very strong and systematic public policy to promoting Singapore as a premier global hub port, the international maritime arbitration centre, as well as international shipping service center. Given that, Hong Kong government should setup effective policies to promote maritime arbitration as well as other high value-added maritime services, and further enhance the foundation for Hong Kong to

develop into a service oriented international shipping center.

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