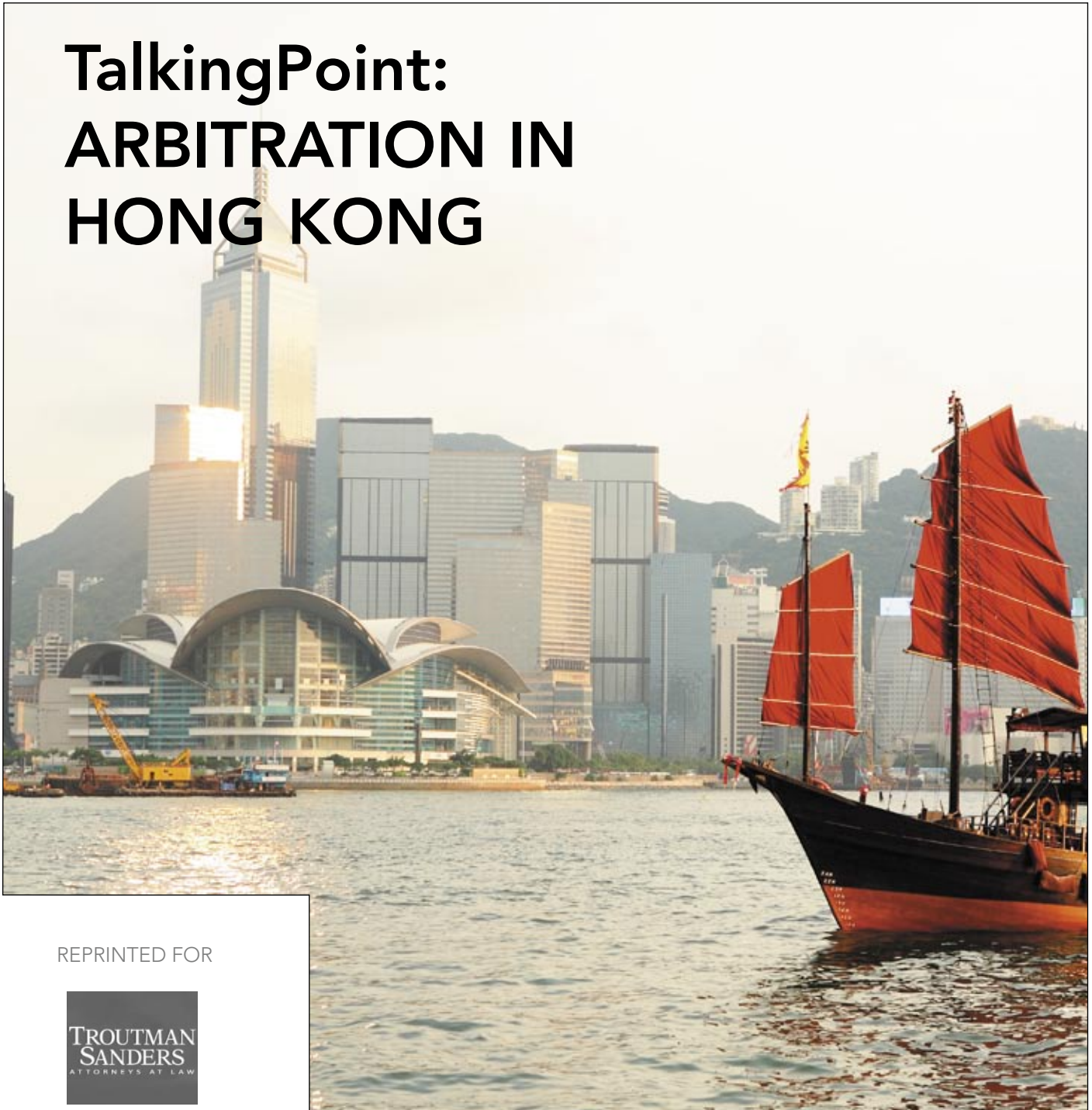




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# TalkingPoint: ARBITRATION IN HONG KONG



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FW moderates a discussion on arbitration in Hong Kong between John Choong at Freshfields Bruckhaus Deringer, David Bateson at Mallesons Stephen Jaques, and Eric A. Szweda at Troutman Sanders.

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**John Choong**  
Senior Associate  
Freshfields Bruckhaus Deringer

John Choong is a senior associate with the International Arbitration Group at Freshfields Bruckhaus Deringer. He practises in all areas of dispute resolution, specialising in China-related and cross-border arbitrations. Mr Choong has been based in Hong Kong and Singapore, and has handled matters throughout Asia, including arbitrations under the major rules and litigations up to the UK Privy Council. He is a Fellow of the Chartered Institute and Hong Kong Institute of Arbitrators, and a founding member of the HK45 arbitration group. Mr Choong can be contacted on +852 2913 2642 or by email: [john.choong@freshfields.com](mailto:john.choong@freshfields.com).

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**David Bateson**  
Partner  
Mallesons Stephen Jaques

David Bateson is a partner at Mallesons Stephen Jaques. Located in the Hong Kong office, he has specialised in dispute resolution since 1980. In the Best of the Best 2011 Expert Guide, Mr Bateson was named as one of the world's 25 leading experts in commercial arbitration. He is the author of the book 'Commercial Arbitration in Hong Kong', and has contributed chapters to a number of publications. He is a practising mediator and arbitrator, with extensive experience in over 60 arbitrations in Asia and Europe. Mr Bateson can be contacted on +852 3443 1018 or by email: [david.bateson@mallesons.com](mailto:david.bateson@mallesons.com).

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**Eric A. Szweda**  
Managing Partner  
Troutman Sanders

Eric A. Szweda is the managing partner of Troutman Sanders' Hong Kong office. He also leads the firm's International Arbitration and Dispute Resolution Team. He is admitted to practice in Hong Kong and in the United States, and Chambers recognises him as one of the leading lawyers in Asia-Pacific for arbitration. Mr Szweda is a graduate of Cornell University and Vanderbilt University School of Law, where he was editor in chief of the Vanderbilt Journal of Transnational Law. He can be contacted on +852 2533 7877 or by email: [eric.szweda@troutmansanders.com](mailto:eric.szweda@troutmansanders.com).

**FW:** What were the main reasons behind the implementation of Hong Kong's new Arbitration Ordinance? In your opinion, will they achieve their intended objectives?

**Choong:** The new Arbitration Ordinance is intended to bring into place a unitary system for international and domestic arbitrations, based on the UNCITRAL Model Law (Model Law). This will minimise the extent of judicial supervision and intervention in both types of arbitrations. I think this aim has been largely met. Under the new Ordinance, the Model Law applies to both types of arbitrations. However, certain legacy provisions which used to apply under the old Ordinance will continue to apply to domestic arbitrations, for a further six years. These legacy provisions allow for greater court intervention, and were included at the request of domestic users – in effect, this allows for a very lengthy transition period to adjust to the new unified regime.

**Szweda:** The motivation was to implement the latest thinking in the global arbitration community as to best practices in order to better achieve objectives such as cost reduction, speedier resolution of disputes, enhanced confidentiality, and in turn advance Hong Kong's position globally as a key centre for arbitrations. The new Ordinance has streamlined the arbitration process and reduced areas of uncertainty, which will help meet the intended objectives. Furthermore, the new Hong Kong Ordinance includes an innovative section of options enabling parties to tailor the process to meet the specific needs of the case. This section of the law was driven more by domestic concerns, largely arising out of local construction disputes, but has produced a law that presents a measure of flexibility that others may gravitate towards over time. We can see on one hand the drive to harmonise, and on the other, to create flexibility.

**Bateson:** The new Arbitration Ordinance was implemented to set up a unitary system of arbitration based on the Model Law, which is an internationally recognised model. Non-Hong Kong parties and their lawyers are more familiar with the Model Law, rather than the previous domestic regime. The aim is to enhance Hong Kong as a premier arbitration venue in the region.

**FW:** Broadly speaking, could you outline the primary changes that have been introduced? How influential was the UNCITRAL Model Law in their development?

**Szweda:** Overall, the primary change has been to significantly streamline the Ordinance. The Ordinance is built on the UNCITRAL model provisions, and where deviations have been made, they are spelled out. Specific provisions enhancing the powers of tribunals to order an array of interim measures are a welcome addition.

Provisions ensuring greater confidentiality than exist in most other jurisdictions are included. While certain provisions enhance the powers of the tribunals and limit the role of the courts, the 'opt in' provisions include a greater role for judicial oversight, including judicial review of awards based on grounds of serious irregularity, if the parties agree to such provisions. In an attempt to deal with the criticism that the costs of arbitrations are now nearing the cost of court litigation, the Ordinance gives tribunals the power to use procedures "appropriate to the particular case" and that parties shall be given a "reasonable" opportunity to present their cases.

**Bateson:** It is based in part on additions to the Model Law in 2006 and the notable changes are a compulsory stay of court proceedings in breach of the arbitration agreement; no right of appeal against awards, setting aside awards under limited grounds based on the New York Convention; new interim measures and preliminary orders; that tribunal will assess costs unless court taxation is agreed by the parties; and opt in provisions to previous domestic regime, for the appointment of sole arbitrator, determination of preliminary questions of law, challenging awards on grounds of serious irregularity and appeals on question of law.

**Choong:** One of the most significant changes is the abolition of the dual regime for 'international' and 'domestic' arbitrations, with the Model Law applying throughout. Another significant change is the adoption of new provisions dealing with interim measures. With the increasing pace of business, the availability of interim measures has grown in importance, and the new Ordinance gives the tribunal broad powers to order such measures. The new Ordinance also imposes a broad-ranging duty of confidentiality, with a list of circumstances in which disclosure will be allowed. The influence of the Model Law on the development of the new Ordinance has been considerable. For example, many of the new provisions on interim measures are drawn from the Model Law. In addition, the influence of the Model Law is clear from the layout of the new Ordinance, where entire Model Law provisions have been reproduced in the Ordinance proper, to emphasise its role under Hong Kong's arbitration regime.

**FW:** Drilling down slightly, could you explain the significance of the 'dual regime' which abolishes the distinction between 'international' and 'domestic' arbitration? Do you believe this will lead to more multi-jurisdictional disputes being resolved in Hong Kong?

**Bateson:** The previous regime was bifurcated into domestic and international arbitration, based on the Model Law. International arbitration was where the parties had places of business in different states, or

the place of arbitration or place substantial part of obligations is to be performed was outside Hong Kong. This caused confusion with foreign parties, or those who were governed by the domestic regime but who were more familiar with the Model Law. The new regime is unitary – subject to opt in. It is hoped more international parties will find the regime more user-friendly and either insert Hong Kong as the venue in the contracts, or hold the arbitration in Hong Kong.

**Choong:** Under the old regime, the Ordinance distinguished between ‘international’ and ‘domestic’ arbitrations, with greater court intervention in the case of the latter. Under the new Ordinance, this distinction has, at least notionally, been withdrawn. However, in reality, parties who provide that their arbitration is a ‘domestic arbitration’ will continue to be subject to legacy provisions contained in Schedule 2 of the Ordinance. These legacy provisions reproduce key features of ‘domestic arbitrations’ under the old regime, including the submission of arbitrations to a sole arbitrator, and the right to appeal to the courts on a question of law. Nonetheless, the effect of this should not be overstated. The key change under the new regime is that the Model Law provisions will apply to both types of arbitrations. This will increase the overall volume of Hong Kong arbitrations conducted under the Model Law regime, and will lead to greater familiarity of the unified regime by all users. Ultimately, this will contribute positively to the overall development of international arbitration in Hong Kong.

**Szweda:** The key considerations for multi-jurisdictional disputes always include neutrality, whether the forum’s process and procedures ensure a more cost effective and speedier resolution of disputes, and location or convenience. The unitary system is a simplifying feature, but the real promise of the new Ordinance is that it is built on the well known and understood UNCITRAL model provisions, coupled with provisions enlarging and specifying the powers of the tribunals, all decreasing uncertainty. For a lawyer having to advise a deal team on whether to accept Hong Kong as the site of arbitration, he or she, without much knowledge of the Ordinance, can have a reasonable degree of comfort there are not rules peculiar to the forum that will come as a surprise later in time and, overall, that the streamlined Ordinance presents one of the better options for realising savings.

**FW: How will the new powers issued to arbitral tribunals re-shape arbitration processes in Hong Kong?**

**Choong:** Let me touch on two new powers. First, the

tribunal has been granted more extensive powers in relation to interim measures. In particular, a party may now apply for preliminary orders from the tribunal without notice to the other party. This is important, where there is a risk that the counterparty will take steps to frustrate the purpose of an interim measure before the application can be heard. It may also obviate the need to apply to the Hong Kong courts in such situations. Secondly, the tribunal now has the express power to make peremptory orders, for a party to comply with its orders and directions. A peremptory order grants a party a certain time limit for compliance following which certain consequences will follow, such as the drawing of an adverse inference. This power will likely grow in importance, as the arbitral process becomes more adversarial.

**Szweda:** By enlarging and better specifying or clarifying powers of arbitration tribunals, there is less room for dispute and delay. I think this is most evident in the provisions relating to interim measures. Also, it may be that the provisions of Part 7, Conduct of Arbitral Proceedings, are used by tribunals to more aggressively control the procedures used, subject to the overarching goal of party authority. Apart from the tribunals, the parties have the opportunity to tailor the process in certain ways through the use of the opt in provisions.

**Bateson:** The new powers mirror Article 17 of the Model Law, which grants tribunal a wide discretion to grant interim measures, including injunctions. The problem of non-compliance with a tribunal’s order remains, however. Absent the tribunal disallowing a claim or counterclaim due to non-compliance, action in the courts may still be required for effective enforcement, or more appropriate for urgent relief. The court can in fact order interim measures for proceedings outside Hong Kong, if certain conditions are met.

**FW: As a venue for arbitration, how would you compare Hong Kong to other regional centres such as Singapore?**

**Szweda:** As the two leading common law jurisdictions in Asia, with abundant legal talent, and possessing independent judiciaries, which also seek to facilitate and not interfere with arbitration, Hong Kong and Singapore often make sense for global companies as neutral and effective forums for dispute resolution. As such, more often than not, I have seen the selection of one over the other of these two jurisdictions as coming down to location, which is driven by consideration of convenience and in turn costs, unless greater distance is regarded as better ensuring neutrality. The ICC favoured Hong

Kong by establishing its Asia-Pacific branch of the ICC Secretariat in Hong Kong in 2008, but also set up a secondary 'liaison office' in Singapore, in effect, choosing both.

**Bateson:** The two main arbitration centres in the region are Hong Kong and Singapore. Both have excellent arbitration centres – HKIAC in Hong Kong, and Maxwell Chambers in Singapore – pro-arbitration regimes, and the necessary back up of experienced professionals. Hong Kong attracts more PRC and North Asia cases, and Singapore, more from Southeast Asia and India. Frankly, there is little to choose between the centres, and enough work to sustain both. Hong Kong has a longer established track record as a neutral place of arbitration, and was the first jurisdiction in Asia to adopt the Model Law, and allow open legal services. Perceptions that the 1997 handover adversely affected Hong Kong's legal independence are misconceived. Other regional centres such as Kuala Lumpur, Seoul, and CIETAC – plus numerous other PRC arbitral institutions – are all growing and enhancing their attractiveness for consumers.

**Choong:** Although it is common to compare the two, I think the reality is that Hong Kong and Singapore cover somewhat different regions. Singapore has increasingly become the leading choice for South Asian arbitrations, including India-related arbitrations, whereas Hong Kong remains very much the pre-eminent choice for China-related arbitrations. Both venues are excellent choices, with very good infrastructure. Singapore has excellent facilities in the form of Maxwell Chambers, and the HKIAC will also be doubling the size of its premises soon. Both jurisdictions also have specialist arbitration judges and are pro-arbitration. They have 'state-of-the-art' arbitration legislation and Hong Kong's new Ordinance, in particular, is clearly one of the most progressive arbitration laws in the region. As for the selection of arbitrators, both venues also have an excellent range to choose from and I know that many leading arbitrators are happy to hold hearings in both locations. Beyond Hong Kong and Singapore, there has also been a considerable growth of arbitration throughout the region. However, when it comes to complex, high-value disputes, it is fair to say that both Hong Kong and Singapore are undoubtedly the two leading international seats, and no other venue comes close.

**FW: How difficult is it to enforce awards against Chinese companies through the local court system? What methods tend to yield the most success?**

**Bateson:** There is no problem enforcing in Hong Kong.

In the PRC, there have been historical problems over enforcement that are well documented. However, there has been an improvement since the requirement was put in place in 2000 that the Supreme People's Court must vet a copy of a local court judgement not allowing enforcement. Enforcement of arbitral awards is generally more favourable than resorting to litigation in the PRC, with its attendant problems of under-qualified judges, protectionism and discrimination against foreign companies. Also, enforcement of foreign court judgements faced a hurdle if there was no treaty in place between the two countries facilitating mutual enforcement. Based upon the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (REJV) signed between PRC and Hong Kong in 2006, court judgments are reciprocally enforceable. Tips to achieve the earliest enforcement in China are avoid mediation (which generally wastes time) and seek any interim relief in the local courts that is available, including asset seizure orders.

**Choong:** In 2010, there were a total of 25 cases where enforcement of arbitration awards was sought in Hong Kong; two of these orders for leave to enforce were later set aside. This track record speaks for itself: provided that there are assets in Hong Kong, it is generally relatively easy to enforce awards in Hong Kong against Chinese companies. That said, a recent case has highlighted the risk that in extreme cases, the Hong Kong courts will still refuse to enforce an award. In the Gao Haiyan case, the judge refused to enforce an award made by the Xian Arbitration Commission, on the ground of public policy. This arose from the apparent bias of one of the arbitrators and a Commission member during a mediation which took place in the course of the arbitration. The difficulties in that case arose from the mediation-arbitration model that is popular in China. Nonetheless, it must be emphasised that this case is an outlier and in most cases, awards are recognised and enforced in Hong Kong.

**Szweda:** We have had success by starting enforcement of arbitration awards in jurisdictions like Cayman Islands or British Virgin Islands, two offshore jurisdictions often used for holding companies by Chinese companies. An enforcement action in these jurisdictions can lead to a chain of events, including the appointment of receivers, which creates leverage and in turn, settlements.

**FW: How does the recent decision of the Court of Final Appeal in FG Hemisphere affect the law on state immunity, and arbitration generally, in Hong Kong?**

**Choong:** In FG Hemisphere, the Hong Kong Court of

Final Appeal held by a majority of three to two that the Hong Kong position on state immunity now follows the Chinese position of absolute immunity, rather than the restrictive immunity doctrine, which previously applied prior to the handover. This means that state immunity extends to a state's public, as well as commercial, activities. This decision is subject to confirmation by the Standing Committee of the National People's Congress. An interesting aspect of the CFA decision is that it makes it clear that under Hong Kong law, a state party cannot by contract waive its immunity to court jurisdiction. Instead, any such waiver can be made only when the state appears before the Hong Kong courts. This restriction does not affect arbitration agreements, and it remains the case that by agreeing to arbitration, a state party is consenting to the jurisdiction of the tribunal over the dispute. As a result, Hong Kong arbitration has actually become a much more attractive alternative to Hong Kong litigation, when it comes to contracts involving state parties.

**Szweda:** Any court opinion that opens as follows is surely significant: "It has always been known that the day would come when the court has to give a decision on judicial independence. That day has come." It may be that for some transactions, Hong Kong will not be selected as the seat of arbitration due to this opinion, but with respect to the majority of matters to be arbitrated in Hong Kong, the opinion will have no effect. In *FG Hemisphere*, a party owning an arbitration award against the Congo was precluded from using the courts of Hong Kong to in effect intercept payments being made by a Chinese state-owned enterprise to the government of the Congo, for which payments were moving through Hong Kong. Essentially, the opinion provides that foreign states are absolutely immune from suits in the courts in Hong Kong, that the courts of Hong Kong cannot be used to aid arbitrations involving states, or to enforce judgments against foreign states rendered in arbitration proceedings or other courts, unless a waiver exists. Issues over whether a state instrumentality is involved, the scope of immunity for instrumentalities, such as state-owned commercial enterprises, and the existence of an effective waiver may be subjects of future cases. On the issue of waiver, in *FG Hemisphere* a pre-dispute consent to the ICC Rules was held not to be a sufficient indication of waiver of sovereign immunity. Heightened consideration will have to be given to the effectiveness of waivers.

**Bateson:** The *FG Hemisphere* case affects the law on state immunity, but is unlikely to affect arbitrations in Hong Kong generally or its competitive edge as a pre-eminent venue. The case rules that HK must follow the

PRC's doctrine on absolute state immunity, and the Hong Kong Court can refuse execution of an arbitration award. This decision was referred by the Court of Final Appeal to the National People's Congress Supreme Court, pursuant to the Basic Law. Bearing in mind Hong Kong is a Special Administrative Region of the PRC, the decision was anticipated, as restricted immunity and absolute immunity are in conflict. Most commentators agree that there is no question of the judicial autonomy of the Hong Kong Courts being compromised or harmed. Bearing in mind state arbitrations are very few, the decision will not affect the vast majority of commercial cases in Hong Kong.

**FW:** Looking ahead, what trends do you expect to see in Hong Kong arbitration over the coming months and years?

**Szweda:** We all have witnessed massive inflows of investment into mainland China, and across the region. Hong Kong arbitration is specified in many deals involving investments into China and into other countries. We expect to see more disputes arise out of these investments.

**Choong:** We expect Hong Kong to continue to be an important international centre for China-related arbitrations, as well as other cross-border arbitrations. In addition, we are seeing an increasing number of contracts which provide for arbitration under the HKIAC Administered Arbitration Rules. Those rules were first introduced in 2008 and the number of cases administered by the HKIAC under those rules will continue to grow. This will also contribute to the growth of the HKIAC itself, as a leading arbitral institution. With the coming into force of the new Ordinance, we will increasingly see the Model Law influence arbitral practice in Hong Kong, especially on the domestic front. This in turn will mean that the Hong Kong arbitration regime will become even more aligned with best international practice elsewhere, given that the Model Law has now been adopted by over 60 jurisdictions worldwide.

**Bateson:** I expect an increase in cross-border and investor-state arbitrations, and increasing use of Hong Kong as a venue, particularly for PRC companies. Further, there will also be an increase in financial institutions using arbitration for confidentiality and easier enforcement – instead of traditional litigation usually according to UK law. A Financial Dispute Resolution Centre is to be established to allow mediation or arbitration of consumer banking disputes. All regional centres should thrive, with healthy competition. ■