4

HONG KONG SAR

John Choong and Michael J Moser

A. Introduction

(a) Overview

4.01 Hong Kong is a Special Administrative Region of the People's Republic of China (PRC). British rule ended in 1997, with the PRC assuming sovereignty under the 'one country, two systems' principle. The Hong Kong Special Administrative Region's constitutional document is the Basic Law,[1] which is akin to a mini-constitution, and ensures that the current political situation will remain in effect for 50 years.

4.02 The head of government is the Chief Executive; the Executive Council serves as the Cabinet; and Hong Kong's legislature is the Legislative Council. The highest court is the Court of Final Appeal (CFA).

4.03 Hong Kong's economy is characterized by free trade, low taxation, and minimal government intervention. Hong Kong is the world's 11th largest trading economy, its sixth largest foreign exchange market, a major banking centre, and it has one of Asia's largest stock markets. It is also a major international and regional aviation hub and the Hong Kong airport is one of the busiest airports in the world. Hong Kong also has advanced communications and related infrastructure.

4.04 In 2009, Hong Kong's GDP was HK$1,606.2 billion (US$206 billion), and GDP per capita was HK$229,329 (US$29,401).[2]

4.05 Hong Kong's population was approximately seven million in 2009. People of Chinese descent comprise the vast majority of the population, with foreign nationals comprising about 5 per cent of the population.

4.06 Chinese and English are the official languages, with English being widely used in the government and by the legal, professional, and business sectors. Trilingual professionals who speak English, Cantonese, and Putonghua[3] play a vital role in the numerous enterprises trading in Hong Kong or doing business with mainland China and Taiwan.

[1] Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China 1990.
[2] Sources: <http://www.gov.hk/en/about/abouthk/facts.htm>; <http://www.gov.hk/en/about/abouthk/docs/2009HK_in_brief.pdf> (accessed 17 August 2010).
[3] Cantonese and Putonghua are both Chinese dialects.

(b) Legal system

4.07 Under the Basic Law, Hong Kong enjoys a high degree of autonomy except in areas relating to foreign affairs and defence. In particular, the Hong Kong Special Administrative Region exercises executive, legislative, and independent judicial power, including that of final adjudication.

4.08 The Basic Law ensures that laws previously in force in Hong Kong (ie, the common law, rules of equity, ordinances, subordinate legislation, and customary law) shall, in general,[4] be maintained. The national laws of the People's Republic of China do not apply in Hong Kong, save for a few exceptions.[5]

4.09 The vast majority of statute law in force in Hong Kong is made locally and contained as ordinances in the Laws of Hong Kong. In addition to primary legislation, a great deal of legislation is made under delegated powers, called subsidiary legislation.

4.10 Apart from statute law, the common law also applies in Hong Kong. Under this system, decisions from courts within the same hierarchy are binding on lower courts, and decisions from other courts in the common law world (particularly from the superior courts of England) will be persuasive to Hong Kong courts.

4.11 Over 200 international treaties and agreements also apply in Hong Kong.

4.12 A Hong Kong arbitral tribunal will not ordinarily be 'bound' by a decision of a Hong Kong court, in the *stare decisis* sense, since it is not in the same court system. However, insofar as Hong Kong law applies, a Hong Kong tribunal will apply decisions reached by a Hong Kong court.

4.13 The courts of justice in Hong Kong include the CFA and the High Court (which comprises the Court of Appeal and the Court of First Instance). Following the handover, the CFA became the highest appellate court in Hong Kong, having replaced the Judicial Committee of the Privy Council in London. It is headed by the Chief Justice, and it consists of three permanent judges, a panel of three non-permanent Hong Kong judges, and about a dozen non-permanent judges from other common law jurisdictions.

(c) History of arbitration

4.14 Hong Kong has long been one of the leading arbitral seats in Asia. Hong Kong's prominence as a leading arbitral seat is due in large part to the establishment of the Hong Kong International Arbitration Centre (HKIAC) in 1985 and Hong Kong's adoption in 1990 of the UNCITRAL Model Law.

4.15 In 1997, the PRC resumed sovereignty over Hong Kong. Importantly, arbitration law and practice in Hong Kong has remained unaffected by the handover,[6] and today, Hong Kong continues to be widely regarded as one of the leading arbitral venues in Asia, particularly for China-related disputes. In addition, Hong Kong is also increasingly seen as one of the leading international arbitration seats worldwide.

[4] Save for laws which contravene the Basic Law, and subject to subsequent amendment by the Hong Kong legislature.

[5] In general, laws relating to defence and foreign affairs listed in Annex III to the Basic Law apply.

[6] Save for the recognition and enforcement of Hong Kong awards in the PRC and vice versa, which is discussed at Section J(d) below.

(d) Present trends in arbitration

(i) General attitude

4.16 For many years now, there has been strong support for arbitration in Hong Kong, both from the courts, and from regional users of arbitration.

4.17 The courts are respectful of party autonomy, and recognize that where parties have agreed to arbitration, the courts should uphold their agreement, and provide support to ensure that disputes are effectively resolved by arbitration. In addition, the Hong Kong courts regularly enforce arbitral awards (both foreign and domestic) in Hong Kong.

4.18 The users of Hong Kong arbitration typically come from Hong Kong and the PRC, although given Hong Kong's international links, a significant number also come from further afield. In the period leading up to and immediately after the handover, there was some concern that Hong Kong might not be considered a neutral venue for resolving PRC-related disputes. Although this is sometimes still cited as a reason in contractual negotiations, most sophisticated users realize that given the deep pool of arbitrators in Hong Kong, the independence of Hong Kong's judiciary, and the safeguards in the HKIAC's arbitrator appointment process,[7] this is no longer a genuine concern.

4.19 As a result, Hong Kong continues to be the leading international arbitration venue for PRC-related disputes, with many Hong Kong-affiliated arbitrators having the necessary expertise, cultural background, and language skills to handle such disputes. In addition, Hong Kong is also seen as a leading arbitration venue for disputes relating to the wider Asian region.

(ii) Arbitration compared to litigation

4.20 In recent years, the HKIAC has recorded a significant increase in the number of arbitration cases it handles. In 2009 the HKIAC handled 429 arbitration cases, of which 309 cases were international in nature. In addition, ad hoc arbitrations and other institutional arbitrations are also regularly conducted in Hong Kong, which are not included in the HKIAC's figures.

4.21 By comparison, in recent years, the Court of First Instance (a Hong Kong superior court) has handled about 2,500 High Court civil actions each year.[8] Many of these are purely domestic cases with no regional or international link.

4.22 In practice, a significant number of cross-border commercial contracts, including many PRC-related contracts, provide for arbitration instead of litigation. This is due to a number of reasons, including the belief that a Hong Kong arbitral tribunal is more impartial than the PRC courts or a PRC tribunal; and because a Hong Kong arbitral award is more easily enforceable in the PRC than a Hong Kong court judgment.

(iii) Ad hoc arbitration compared to institutional arbitration

4.23 Historically, unlike many regional institutions, the HKIAC has not had its own set of stand-alone arbitration rules for international arbitrations, and it has played a relatively limited

[7] See Section G(e) below.

[8] See <http://www.judiciary.gov.hk/en/publications/annu_rept_2009/eng/caseload02.html> (accessed 17 September 2010).

administrative role. Many arbitrations were carried out under the UNCITRAL Arbitration Rules, with hearings held at the HKIAC premises.

4.24 Although these arbitrations involved institutional support from the HKIAC, they were not 'institutional' in the sense that the parties were not arbitrating under a set of standalone rules from an arbitral institution, and the HKIAC itself had limited involvement in these proceedings.

4.25 Over the years, however, the HKIAC has taken on a more active administrative role. On 1 September 2008, the HKIAC introduced its Administered Arbitration Rules (the HKIAC Administered Arbitration Rules). Although the rules envisage that the HKIAC will adopt a 'light touch' approach in administering arbitrations, these are nonetheless a set of standalone institutional rules which envisage greater involvement from the HKIAC in the arbitration process.

4.26 As a result of the introduction of the new rules, there has been a significant move away from adopting rules such as the UNCITRAL Arbitration Rules, for use in Hong Kong international arbitrations, and a clear trend in favour of institutional arbitration, including under the HKIAC Administered Arbitration Rules.

4.27 Nonetheless, the UNCITRAL Arbitration Rules continue to be popular, and other institutional rules, such as the ICC Rules, are also chosen from time to time. Industry-specific rules are also popular in particular industries.

(iv) Popular places of arbitration

4.28 Given Hong Kong's status as a leading regional arbitration venue, it is unsurprising that most Hong Kong-related disputes are arbitrated in Hong Kong itself. Even where only one of the parties is connected to Hong Kong, many informed foreign parties do not view this as a major concern, given the large pool of international arbitrators available in Hong Kong.

4.29 Where there is a concern over a perceived lack of neutrality, and where parties do not agree that Hong Kong should be the place of arbitration, popular alternatives include Singapore (where a regional seat is sought, and if none of the parties are connected to Singapore) or, further afield, seats such as London or Stockholm.

4.30 Which seat is eventually chosen depends largely on the background of the parties and their lawyers. Where all the parties to the transaction are based in the region, then there would be a preference for arbitration in the region (particularly, in Singapore); if there are foreign parties which are not based in the region, then there may be a stronger likelihood for a venue outside Asia (such as London); and where Chinese parties are involved and they agree to arbitrate outside Asia, some may incline towards Stockholm (partly for historical reasons).

4.31 Given Hong Kong's close integration with the PRC, a significant number of Hong Kong transactions involve the PRC. Where both parties have connections to Hong Kong or the PRC (even if the ultimate parent companies are not based there), there is often less of a concern with agreeing to arbitration in Hong Kong. However, where one of the parties has particularly close connections with the PRC and Hong Kong, and the other does not, then in some cases, the alternatives mentioned above may be considered.

(v) Future developments

4.32 The current Arbitration Ordinance (c 609) is the culmination of a long-running review of Hong Kong's arbitration legislation. It introduces a number of innovations, and also

incorporates the Model Law amendments from 2006, and represents best international arbitral practice for the immediate future.

4.33 There are no significant legislative amendments to the Arbitration Ordinance on the horizon, although Hong Kong is currently considering enacting a standalone Mediation Ordinance, which may have a minor overlap with the arbitration regime.

B. Applicable laws

(a) Law governing the arbitration (the *lex arbitri*)

(i) The lex arbitri

4.34 In November 2010, Hong Kong passed its long-awaited new Arbitration Ordinance (c 609) (Arbitration Ordinance). The ordinance takes into account the 2006 amendments to the Model Law and, significantly, largely abolishes the previous distinction between international and domestic arbitrations, and applies to both kinds of arbitration.

4.35 As in other Model Law countries, the ordinance does not provide a complete code for the conduct of arbitrations, but is intended to provide a framework within which all kinds of ad hoc and institutional arbitrations may be carried out in Hong Kong.

4.36 In addition to adoption of the Model Law articles, the Arbitration Ordinance also contains a number of helpful amendments and clarifications. Proportionately, there are many such provisions although in reality, many of these are less significant, and the ordinance retains the original intent and approach of the Model Law.

(ii) Secondary sources

4.37 Apart from the Arbitration Ordinance, case law (precedent) is applicable, and is often referred to in arbitrations in Hong Kong.

4.38 Hong Kong international arbitral case law is relatively sparse. As a result, in practice, reference is often made to arbitral jurisprudence from England and from other common law jurisdictions.

4.39 Given the international nature of the Model Law, it is also not uncommon for reference to be made to the *travaux préparatoires*, and to international commentaries, when interpreting the provisions of the Model Law.[9]

4.40 Apart from the Arbitration Ordinance, the High Court Ordinance (c 4) and the Rules of the High Court (c 4A) also contain relevant provisions dealing with arbitration-related court proceedings.

(iii) Relationship between the lex arbitri *and the arbitration rules*

4.41 The Arbitration Ordinance does not expressly list which provisions are mandatory. However, in line with the general approach under the Model Law, many of its provisions allow the parties, either expressly or by implication, to contract out of them.

[9] See also s 9 of the Arbitration Ordinance, which gives effect to Art 2A of the UNCITRAL Model Law on the international origin of the Model Law and the need to promote uniformity in its application.

Parties to Hong Kong international arbitrations typically agree to arbitrate under a set of arbitration rules. These rules usually contain more detailed provisions governing the procedure, which often prevail over the default provisions in the Arbitration Ordinance. **4.42**

There are, however, a number of key provisions in the Arbitration Ordinance which are mandatory. These will include, for example, Article 18 of the UNCITRAL Model Law, the 'Magna Carta of arbitral procedure'.[10] **4.43**

(b) Key features of the *lex arbitri*

(i) Overview

The Arbitration Ordinance is primarily based on the UNCITRAL Model Law. **4.44**

Structurally, it is divided into 14 parts, as follows: **4.45**

- Part 1 deals with preliminary issues;
- Parts 2 to 9 are based on Articles 1 to 34 of the UNCITRAL Model Law, with various modifications to the Model Law provisions, as well as additional sections supplementing the Model Law provisions;
- Part 10 sets out the regime for recognition and enforcement of arbitral awards;
- Part 11 sets out opt-in provisions as well as those which automatically apply in certain cases;
- Parts 12 to 14 set out miscellaneous provisions.

Compared to other jurisdictions in Asia, the Arbitration Ordinance is a lengthy statute, containing over 100 sections. One of its unusual features is that in most cases, the drafters have chosen to reproduce the full text of each Model Law provision in the ordinance proper, followed by subsections under each article which modify or supplement the Model Law provision. The advantage of this approach is that readers can easily see the extent to which a Model Law provision has been adopted in Hong Kong.

In addition to the sections which reproduce the Model Law articles, the drafters have included various additional provisions. These are set out in the same part of the ordinance as the corresponding Model Law articles. **4.46**

(ii) International arbitration compared to domestic arbitration

Prior to the current Arbitration Ordinance (c 609), Hong Kong law drew a distinction between international and domestic arbitrations. However, with the enactment of the Arbitration Ordinance, this distinction has, at least notionally, been abolished. **4.47**

In reality, the Arbitration Ordinance contains a Schedule 2 which is based on some provisions which previously applied to domestic arbitrations under the old regime. These provisions allow the court to deal with preliminary questions of law, provide for challenges to the award on grounds of serious irregularity, and allow for appeals on questions of law.[11] **4.48**

[10] See further, P Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd edn (Sweet & Maxwell, 2010) 282.

[11] All with various limitations; see Sch 2 to the Arbitration Ordinance.

4.49 Parties may expressly opt into Schedule 2. More significantly, Schedule 2 also *automatically* applies (unless the parties opt out) to:

- arbitration agreements entered into *before* the commencement of the ordinance, which provide for domestic arbitration; or
- agreements entered into *within six years after* commencement of the ordinance, which provide for domestic arbitration.

In practice, parties to domestic arbitrations often fail to opt out of Schedule 2, with the result that the schedule will apply by default.

4.50 In any event, and more significantly, Schedule 2 does *not* by default apply to non-domestic arbitrations, including Hong Kong 'international' arbitrations.

(iii) Competence-competence

4.51 Article 16 of the Model Law, which embodies the competence-competence doctrine, applies in Hong Kong. Accordingly, the arbitral tribunal is authorized to rule on its own jurisdiction, including on the existence or validity of the arbitration agreement. In addition, the Arbitration Ordinance specifically provides that the arbitral tribunal has the power to decide whether the tribunal is properly constituted, and on what matters have been submitted to arbitration in accordance with the arbitration agreement.[12]

(iv) Separability

4.52 Article 16 of the Model Law also embodies the separability doctrine, and as noted above, the article applies in Hong Kong. Accordingly, the arbitration agreement is considered to be an agreement *separate* from the primary contract between the parties, even when the arbitration agreement is drafted as a single clause within a larger contract.

(v) Other key features

4.53 Although the Arbitration Ordinance adopts many provisions found in the UNCITRAL Model Law, it also contains additional provisions which clarify or supplement the Model Law provisions.

4.54 The most important of those are as follows:

- it applies the Model Law to both international and domestic arbitrations;[13]
- it omits the provision that the default number of arbitrators is three;[14]
- it states that the parties shall have a 'reasonable opportunity' to present their cases, rather than a 'full opportunity';[15]
- it adds confidentiality provisions which apply to information relating to arbitral proceedings, awards, and related court proceedings;[16]
- it adds provisions providing for mediator-arbitrators;[17]
- it expressly lists the general powers exercisable by the tribunal, and by the courts;[18]

[12] s 34 of the Arbitration Ordinance, which also gives effect to Art 16 of the Model Law.
[13] See s 5, Arbitration Ordinance. But note that the provisions of Sch 2 will often still apply to domestic arbitrations: Section B(b)(ii) above.
[14] s 23, Arbitration Ordinance.
[15] s 46(3)(b), Arbitration Ordinance.
[16] ss 16–18, Arbitration Ordinance.
[17] ss 32 and 33, Arbitration Ordinance.
[18] ss 56 and 60, Arbitration Ordinance.

- it allows arbitrators to limit the amount of recoverable costs;[19]
- it adds more extensive provisions dealing with costs, taxation of costs, and disputes over the tribunal's fees and expenses;[20]
- it adds more extensive provisions to deal with enforcement of various categories of awards which are relevant to Hong Kong;[21]
- it adds a Schedule 2, which deals with provisions which parties may opt into or opt out of;[22]
- it adds provisions which limit the liability of the tribunal and related parties.[23]

(c) Conflict of laws

(i) Substantive law

4.55 The Arbitration Ordinance adopts Article 28 of the Model Law in its entirety, which provides that the arbitral tribunal shall decide the dispute in accordance with such 'rules of law' as are chosen by the parties as applicable to the substance of the dispute.[24]

4.56 Thus, Hong Kong law recognizes that the parties have considerable freedom in their choice of governing substantive law. Under general Hong Kong conflict of laws rules, this freedom is subject to certain well-known restrictions, such as where the choice is not bona fide and legal; where there is an issue over foreign illegality and violation of foreign public policy; and where the choice violates mandatory principles of Hong Kong law.[25] These restrictions only apply in extreme circumstances, and the parties' express choice of governing law is usually respected.

4.57 In practice, most contracts which are arbitrated in Hong Kong do contain express governing law clauses, with many of them providing for Hong Kong or PRC law as the governing law.

4.58 Where no express designation has been made, the Arbitration Ordinance gives effect to Article 28(2) of the Model Law, which provides that the tribunal shall apply the law determined by the 'conflict of laws rules which it considers applicable'. It is therefore clear that the tribunal is not bound to apply the conflict of law rules of the *lex fori* (Hong Kong law), although a conflict of laws rule should nonetheless be applied.

4.59 In practice, where the arbitrators are relatively less experienced with international arbitrations, they will tend to apply Hong Kong conflict of laws rules, which focus on identifying the law with the closest and most real connection. Under this approach, factors that might be considered relevant include:[26]

- location of subject matter of contract;
- place of performance;
- place of making or negotiation of contract;
- place of residence of the parties;

[19] s 57, Arbitration Ordinance.
[20] ss 74–77, Arbitration Ordinance.
[21] Part 10, Arbitration Ordinance.
[22] Read with Part 11, Arbitration Ordinance.
[23] ss 104 and 105, Arbitration Ordinance.
[24] s 64 of the Arbitration Ordinance, which gives effect to Art 28 of the Model Law.
[25] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277.
[26] See generally *Halsbury's Laws of Hong Kong* [2006] 7(1), at [100.044].

- related contracts or past practice;
- agreed place of arbitration (or litigation), if any.

Where the arbitrators are more familiar with international arbitration, they may be less likely to apply a technical conflicts rule as such, but may instead refer to a range of factors to justify their eventual choice of substantive governing law.

(ii) Proof of foreign law

4.60 In Hong Kong, experienced international tribunals are unlikely to adopt the strict technical rule that the foreign law is assumed to be identical to Hong Kong law unless it is proven as a question of fact by expert evidence. Instead, they will adopt a variety of approaches to avoid this technical rule, where appropriate, and usually with the agreement of all parties.

4.61 Some tribunals, for example, will allow foreign law to be proven by submissions (typically, in written form), if the foreign law deals with a relatively uncontroversial or narrow point; where the supporting materials are likely to be self-evident (such as where the position is clear from primary legislation placed before the tribunal); or where the arbitrators are familiar with the foreign law in question (a typical example being where the governing law is English law and the arbitrators are from a common law jurisdiction such as Hong Kong).

4.62 Conversely, most Hong Kong tribunals would hesitate to apply the maxim *iura novit curia* (the court knows the law) in its most wide-reaching form. This is in part because of due process concerns, bearing in mind the adversarial approach that many counsel in Hong Kong are familiar with. That said, many arbitrations in Hong Kong involve difficult but recurring issues of PRC law and experienced arbitrators have, in addition to relying on the evidence before them, been known to draw on their own knowledge of such issues.

4.63 Where complex issues of foreign law arise, or where one party insists strongly that it wishes to put forward expert evidence on foreign law, many Hong Kong tribunals will permit parties to present such evidence, typically in the form of party-appointed expert witness testimony.

(iii) Procedural law

4.64 In general, if the place of arbitration is Hong Kong, then Hong Kong law will usually be the procedural law.

4.65 The procedural law will ordinarily govern the following matters:

- the constitution of the arbitral tribunal and any grounds for challenge of the tribunal;
- the arbitral tribunal's entitlement to rule on its own jurisdiction;
- the obligation to treat parties equally;
- the parties' autonomy to agree on the procedure;
- the arbitration proceedings and oral hearing;
- default proceedings;
- evidential matters;
- grounds for setting aside an award.

Previous Hong Kong cases have indicated that parties to a Hong Kong arbitration are free to choose a foreign procedural law.[27] However, such a choice would be highly unusual, and it

[27] See eg *Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (otherwise known as Pertamina)* (HCCT 28/2002) (CFI) (27 March 2003). The case was appealed to the Court of Appeal on different grounds.

can lead to legal complications as well as arguments over an overlap in the matters to be dealt with by the law of the seat (Hong Kong law) and of the chosen procedural law (the *lex arbitri*). Most tribunals (and the Hong Kong courts) will construe the arbitration agreement so as to avoid this result.[28]

(iv) Law governing the arbitration agreement

4.66 Hong Kong conflict of laws rules are based on English conflict of laws rules which apply at common law. Under those rules, an arbitration agreement is a contract, so the choice of law rules that determine which law governs the contract are the same rules for determining which law governs the arbitration agreement. Parties are usually free expressly to select a governing law for the arbitration agreement that differs from the law governing the rest of the contract. However, in practice, such a choice is rarely made.

4.67 As a result, in practical terms, the substantive law governing the underlying contract is usually also the law governing the arbitration agreement. This approach has been taken in previous Hong Kong cases.[29]

4.68 However, this view is not universally held, and the main competing view is that the law of the place of arbitration should be the law governing the interpretation of the arbitration agreement. Some recent English authorities have tended to support this competing view,[30] and the exact approach in Hong Kong remains to be seen.[31]

(v) Choice of transnational law

4.69 The question whether Hong Kong law permits parties to designate the *lex mercatoria* or 'international practice' or 'international rules of law' as their choice of law has not been directly addressed by the Hong Kong courts. In principle, the mere fact that parties have chosen a non-'State' law should not *ipso facto* render the choice invalid.[32] In addition, it is likely that an international arbitration tribunal will adopt a less rigid approach, giving effect to the parties' choice.

4.70 One argument in favour of such an approach is that under the UNCITRAL Model Law, the relevant provision allows parties to choose 'rules of law' (and not a law), and that parties may agree for the tribunal to decide *ex aequo et bono* or as *amiable compositeur* (neither of which are a strict 'legal system').[33] However, some commentators have argued otherwise.[34]

4.71 In practice, it is rare for parties to seek to choose a transnational law, although such provisions are found in certain industries and in some types of contracts, such as agreements with a foreign State.

[28] See generally the approach taken by the English courts, which are likely to be persuasive in Hong Kong: *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd's Rep 116; the *Channel Tunnel* decision [1993] 1 All ER 664; and *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127.

[29] See eg *Karaha Bodas,* n 27 above.

[30] See generally, *C v D* [2007] EWHC 1541 (Comm) (CA).

[31] See discussion in *Klockner Pentapolast GmBH & Co KG v Advance Technology (HK) Co Ltd* [2011] HKCU 1340.

[32] eg the choice of Taiwanese law is generally assumed to be valid under Hong Kong law.

[33] See s 64 of the Arbitration Ordinance, giving effect to Art 28 of the Model Law.

[34] See eg *Halsbury's Laws of Hong Kong* [2003] 1(2), at [25.146] suggesting that the wording of the UNCITRAL Model Law appears to commit the parties to designating an applicable law which is linked to an identifiable national system of law and makes no allowance for designating transnational principles of law, such as the *lex mercatoria*, as the applicable law.

(d) Key international treaties and conventions

4.72 The New York Convention continues to apply in Hong Kong, by virtue of the PRC having extended the territorial application of the convention to Hong Kong, following the handover. The PRC's accession to the convention is subject to the declaration and reservation that it will only apply the convention to recognition and enforcement of awards made in the territory of another contracting State, and that it will apply the convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under national law.

4.73 In addition to the New York Convention, on 21 June 1999, the PRC and Hong Kong signed an Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region, which specifically governs enforcement of awards between both parties. See discussion at Section J(d) below.

4.74 There is some uncertainty over whether the ICSID Convention applies to Hong Kong, although the better view is that it probably does. See discussion at Section K(i) below.

C. Arbitral institutions

(a) Leading institutions

(i) Leading arbitral institutions

4.75 The HKIAC is the leading arbitral institution in Hong Kong. It was established in 1985 to promote the use of arbitration and other forms of alternative dispute resolution. Formed as a non-profit-making company limited by guarantee under Hong Kong law, the HKIAC was originally funded by contributions from the business community and the Hong Kong government. Today the HKIAC is completely independent of both business and government and operates with its own budget and funds, and it has grown to become a major international arbitration institution. In its current role, it provides the focus for arbitration activity in Hong Kong.

(ii) Leading arbitration-related organizations

4.76 Apart from the HKIAC, other significant arbitration organizations in Hong Kong include the East Asia Branch of the Chartered Institute of Arbitrators and the Hong Kong Institute of Arbitrators. There are also a number of industry-specific organizations that are active in arbitration-related activities.

(iii) Popular foreign arbitral institutions

4.77 Apart from the HKIAC, the UNCITRAL Arbitration Rules continue to be a popular choice in ad hoc international arbitrations, and the ICC arbitration rules are also relatively popular. Typically, such rules tend to be chosen where non-Asian parties are involved, and where the contracts are more substantial and international in nature, with less of a connection to Asia.

4.78 In 2008, the ICC opened an Asia office of the ICC Court's Secretariat in Hong Kong. The office is the ICC Court Secretariat's first branch outside Paris and has a case management team which administers cases in the region under the ICC Rules of Arbitration.

(b) Caseload of the HKIAC

4.79 The role of the HKIAC has grown substantially over the last decade. In 1993 the HKIAC (acting either in an administrative capacity or as an appointing authority) handled 139 cases, rising to 218 in 1997, 257 in 1999, 307 in 2001, and 448 in 2007.

4.80 In 2010, the HKIAC handled 624 dispute resolution matters. These included:

- 291 arbitration cases;
- 107 domain name cases;
- 226 mediations;
- 18 adjudications.

These case figures do not include ad hoc arbitration and mediation proceedings or arbitrations conducted under the ICC or other institutional rules, even if the HKIAC's premises are used. Of the 291 arbitration cases in 2010, 175 cases were international in nature and 116 were domestic. Of the total, 16 cases were fully administered by the HKIAC in accordance with its own rules. Of the total number of arbitration cases, 81 were construction disputes, 160 were classified as commercial disputes, and 50 were maritime disputes.

(c) Arbitration rules of the HKIAC

(i) Overview of available arbitration rules

4.81 The HKIAC Administered Arbitration Rules are the HKIAC's rules of choice for international arbitrations. In addition to these rules, the HKIAC has a number of other arbitral rules, including the following:

- HKIAC Procedures for the Administration of International Arbitration (2005): in the past, the HKIAC adopted the UNCITRAL Arbitration Rules as its rules for international arbitrations, and parties would commonly agree that the HKIAC Procedures would apply in conjunction with the UNCITRAL Arbitration Rules. These procedures helped to clarify the administrative role of the HKIAC within the overall framework of an UNCITRAL arbitration. However, the HKIAC Administered Arbitration Rules, which are standalone rules providing for HKIAC arbitration, have increasingly superseded these procedures;
- HKIAC Domestic Arbitration Rules (1993): these rules are suitable for general use in both the private and public sector, and focus on domestic rather than international arbitrations. At the time of writing, they were being amended;
- Hong Kong International Arbitration Centre Securities Arbitration Rules (1993): these rules are suitable for resolving a range of disputes, with a focus on disputes involving listed companies;
- Short Form Arbitration Rules (1992): these rules set out a short form procedure for resolving disputes, and were originally developed by the Royal Institution of Chartered Surveyors (Hong Kong Branch) for use with the Minor Works form of contract. They may also be used in other disputes, although they are less suitable for resolving complex disputes;
- HKIAC Electronic Transaction Arbitration Rules (2002): these rules were developed to address disputes arising out of electronic transactions, although they are also suitable for resolving a wider range of disputes;
- HKIAC Semiconductor Intellectual Property Arbitration Procedure Rules (2006): there are two variants of these rules, in the form of the 'HKIAC Semiconductor Intellectual

Property Arbitration Small Claims' procedure, which is available where the claim is no more than US$50,000, and the 'HKIAC Semiconductor Intellectual Property Arbitration Documents Only' procedure, which is suitable where there is no oral hearing. Both procedures are more suitable for relatively straightforward, low value disputes;

- HKIAC Small Claims procedure (2003): this procedure was designed primarily to deal with low value shipping disputes, although the procedure is also suitable for use in non-marine disputes, such as small quality or quantity claims arising from commodities trading;
- HKIAC 'Documents Only' Procedure: this procedure is more suitable for straightforward, low value disputes where no oral hearing is needed, and the procedure is intended to encourage speed and economy.

(ii) Special features

4.82 The HKIAC Administered Arbitration Rules are based on the UNCITRAL Arbitration Rules, as well as the Swiss International Rules of Arbitration. The choice of the UNCITRAL Arbitration Rules helps to provide for some degree of continuity since, in the past, many HKIAC international arbitrations were conducted under those rules. In terms of content, the Rules are broadly consistent with accepted practice as set out in the rules of other international institutions.

4.83 Some of its more distinctive features include the following.

- 'light touch' approach: the HKIAC plays a 'light touch' role in administering arbitrations, compared to other rules which provide for a more institutionalized process, such as those of the SIAC and the ICC. Thus, for example, the HKIAC rules do not provide for a scrutiny process for the awards;
- limited role for HKIAC Secretariat and HKIAC Council: the HKIAC Secretariat and the HKIAC Council have a relatively limited role in determining procedural matters, with many issues decided by agreement of the parties, or by the tribunal. Thus, for example, the HKIAC Council has no power to fix the seat of the arbitration and no power to remove an arbitrator on its own accord (but only upon an application from one of the parties);
- confirmation by HKIAC Council: all designated arbitrators are subject to confirmation by the HKIAC Council, following which the appointments become effective;
- nationality prohibition: a sole arbitrator or Chairman of the tribunal may not have the same nationality as any of the parties, unless otherwise agreed;[35]
- no time limit: there is no time limit within which a tribunal must render its award;
- confidentiality: the rules contain strict confidentiality provisions imposed on the parties, the arbitrators, the HKIAC, and other involved parties;
- expedited procedure: the rules provide for an expedited procedure which applies where the aggregate value of the amounts in dispute is less than US$250,000, unless the parties agree or the HKIAC Secretariat decides otherwise;[36]
- flexibility on costs: the HKIAC rules give the parties considerable flexibility on the issue of costs, and they may opt to have the fees calculated according to the HKIAC's scale fees, or in accordance with fee arrangements agreed with the arbitrator(s).

[35] Or unless the parties are all of the same nationality.

[36] In practice, the Expedited Procedures are not used in substantial international arbitrations in Hong Kong, and will not be discussed further in this chapter.

At the time of writing, the HKIAC Administered Arbitration Rules were being amended to include, inter alia, provisions for an emergency arbitration procedure. The new rules are expected to come into effect in January 2012.

(iii) Secondary rules

The HKIAC has published a number of guidelines, including the following: **4.84**

- the HKIAC Challenge Rules,[37] which set out the procedure adopted by the HKIAC in handling challenges to an arbitrator;
- the Arbitration (Appointment of Arbitrators and Umpires) Rules,[38] which set out the HKIAC's procedure in appointing arbitrators;
- the Code of Ethical Conduct for Arbitrators,[39] which sets out a set of 'moral principles' according to which arbitrators may conduct their affairs;
- the Guidelines in relation to Complaints against an Arbitrator on HKIAC Panel of Arbitrators,[40] which set out the procedure to be followed where a party lodges a complaint against an arbitrator on the HKIAC Panel of Arbitrators.

D. The arbitration agreement

(a) Requirements for a valid arbitration agreement

The Arbitration Ordinance adopts option I of Article 7 of the UNCITRAL Model Law (as amended in 2006),[41] which provides that an 'arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. **4.85**

The arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The agreement shall be in writing, and for this purpose, it may be recorded in any form, whether the arbitration agreement or contract has been concluded orally, by conduct, or by other means. The writing requirement is met even where electronic communications are used (as further detailed in Article 7), and the agreement may be contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. **4.86**

In addition, section 19 of the Arbitration Ordinance expressly clarifies that the writing requirement is met if the arbitration agreement is contained in a document, whether or not it is signed by the parties; and where the agreement, although not in writing, is recorded by one of the parties to the agreement, or by an authorized third party. The effect of this amendment is to extend the meaning of a written agreement. **4.87**

[37] Adopted by the Council of the Hong Kong International Arbitration Centre on 25 March 2008, available at <http://www.hkiac.org/documents/Arbitration/Arbitration%20Rules/Challenge%20Rules.pdf> (accessed 19 August 2010).

[38] At the time of writing, made by the HKIAC pursuant to ss 12 and 34C of the old Arbitration Ordinance (c 341) with the approval of the Chief Justice, available at <http://www.hkiac.org/show_content.php?article_id=31> (accessed 19 August 2010).

[39] Available at <http://www.hkiac.org/show_content.php?article_id=219> (accessed 19 August 2010).

[40] Available at <http://www.hkiac.org/show_content.php?article_id=30> (accessed 19 August 2010).

[41] Art 7 is given effect by s 19 of the Arbitration Ordinance.

4.88 Nonetheless, it seems that arbitration agreements that are entirely oral fall outside the ordinance. In the rare event that a party seeks to commence arbitral proceedings based on a wholly oral arbitration agreement, such proceedings would be governed by the common law.[42]

4.89 The Arbitration Ordinance recognizes the doctrine of incorporation, by providing that:

- a reference in a contract to any document containing an arbitration clause satisfies the requirement for an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract; and
- a reference in an agreement to a written form of arbitration clause satisfies the requirement of an arbitration agreement if the reference is such as to make that clause part of the agreement.

Thus, parties to a contract/agreement may simply include a reference (a) to another document containing an arbitration clause or (b) to a written form of arbitration clause, provided that the reference is such as to make that clause part of the contract.

4.90 A typical (and common) example of the first situation is a reference in a signed contract to the standard terms and conditions contained in a separate document. While there is no requirement that specific words of incorporation be used, the reference has to be 'such as to make that clause part of the contract'. The test is generally whether the parties intend to incorporate the arbitration agreement by reference to the words used, and any other relevant considerations.[43] In practice, it is prudent for parties, when incorporating the terms found in another document, expressly to list the arbitration clause as one of the clauses incorporated into the signed contract.

(b) Legal capacity

4.91 In general, under Hong Kong law any person who has the capacity in law to enter into contracts may also enter into an arbitration agreement. Whether persons lack such capacity is determined under general contract law; legal infants (persons under 18 years of age) and persons lacking mental capacity do not have capacity.

4.92 Different rules may apply to certain categories of persons including bankrupts;[44] partners; and personal representatives and trustees; they are subject to the general principles which ordinarily apply in such cases.

[42] Unless, of course, there is an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other: Art 7(5) of the Model Law, given effect by s 19 of the Arbitration Ordinance. s 2AC(2)(f) of the old Arbitration Ordinance brings such an agreement within the scope of the 'writing' requirement.

[43] See generally, *Astel-Peiniger Joint Venture v Argas Engineering & Heavy Industries Co Ltd* [1994] 3 HKC 328.

[44] This used to be dealt with under s 5 of the old Arbitration Ordinance (c 341) in relation to domestic arbitrations, but the provision has been deleted from the current Arbitration Ordinance, in line with the recommendations of the *Report of Committee on Hong Kong Arbitration Law* (2003) that the subject should more appropriately be dealt with by the legislation on insolvency.

4.93 Of greater practical importance, under Hong Kong law,[45] a person dealing as a consumer[46] may not, in general,[47] agree to submit future differences to arbitration. Instead, consent will be binding only if it is made after the differences in question have arisen, or where the consumer himself or herself invokes the arbitration agreement.

4.94 Outside such situations, in most ordinary commercial transactions, parties have the capacity to agree to, and be bound by, arbitration agreements which they enter into. In addition, section 73 of the Arbitration Ordinance expressly recognizes that an award is binding on any person claiming through or under any of the parties to the arbitration.[48] Such parties may include an assignee, a successor (such as a personal representative), and a trustee in bankruptcy who adopts the contract. It is also clear that the Government is bound by the Arbitration Ordinance, as are Offices set up by the Central People's Government of the PRC, which are in Hong Kong.[49]

4.95 Hong Kong law also recognizes the alter ego or corporate veil piercing theory. However, unlike some jurisdictions, there has to date been no clear recognition of a broader basis for joining in third parties. Concepts such as the 'group of companies' doctrine, which allows non-signatories to be made party to an arbitration, have not yet been widely applied in Hong Kong. Given the relatively conservative approach under English law,[50] it is questionable if such doctrines will be given full effect under Hong Kong law.

(c) Arbitrability

(i) General position

4.96 Hong Kong law adopts a broad view of what disputes are arbitrable. Generally, any dispute affecting the civil interests of parties is arbitrable. This includes claims for breach of contract, tort, breach of trust, and claims relating to real or personal property. This broad approach is also suggested by the decision[51] in Hong Kong to extend the scope of the Model Law beyond just 'international commercial arbitrations', to cover all arbitrations 'under an arbitration agreement'[52] (as the term is defined in the Ordinance).[53]

4.97 The Hong Kong courts are also strongly supportive of international arbitration, and they regard a broad range of matters as being arbitrable, including tort claims. Recent English authorities have also highlighted the trend of construing arbitration clauses broadly and of

[45] s 15 of the Control of Exemption Clauses Ordinance (c 71).

[46] 'Dealing as a consumer' is defined in s 4 of the Control of Exemption Clauses Ordinance (c 71) and generally includes situations where the 'consumer' does not make the contract in the course of a business and the counterparty does.

[47] The limitation imposed on arbitration agreements with consumers does not apply in certain cases: See Sch 1 to the Control of Exemption Clauses Ordinance (c 71), read together with s 15(2)(b).

[48] See generally, s 18, Arbitration Ordinance, which applies to domestic arbitrations. See also *Ryoden Engineering Co Ltd v The New India Assurance Co Ltd* [2008] HKDC 19.

[49] s 6, Arbitration Ordinance.

[50] See eg *Peterson Farms v C & M Farming Ltd* [2004] EWHC 121 (Comm) where the English courts found that the 'group of companies doctrine' did not form part of English law; *The Mayor and Commonalty & Citizens of the City of London v Ashok Sancheti* [2008] EWCA Civ 1283.

[51] See the Consultation Paper: Reform of the Law of Arbitration in Hong Kong (Department of Justice, 2007) 6ff.

[52] s 5, Arbitration Ordinance.

[53] See s 19, Arbitration Ordinance.

moving away from technical constructions based on the precise wording of the clause.[54] This approach has been viewed favourably in Hong Kong.[55]

(ii) Special cases

4.98 As noted in Section D(b) above, under Hong Kong law, pre-dispute agreements to arbitrate consumer disputes may not be valid. In addition, restrictions also apply in the case of employment disputes. In particular, the Court of Final Appeal has held that in the case of claims falling within the scope of the Employees' Compensation Ordinance (c 282), the District Court has exclusive jurisdiction to deal with them to the exclusion of arbitration. Accordingly, the court has no power to stay such proceedings in favour of arbitration.[56]

4.99 In the case of matters which fall within the jurisdiction of the Labour Tribunal,[57] section 20(2) of the Arbitration Ordinance provides that the court may, if a party so requests, refer the parties to arbitration if there is 'no sufficient reason' why the parties should not be so referred to arbitration, and provided the party requesting arbitration is ready and willing to do all things necessary in the arbitration.

4.100 In addition, and in the absence of direct Hong Kong authority, it is generally believed that the usual restrictions on arbitrability which apply under English law also apply in Hong Kong. Thus, for example, disputes relating to family (marriage, divorce, children); intellectual property (where third party rights are affected—in particular, validity of copyrights, patents, registered designs, or trade marks); and crime are unlikely to be arbitrable.

4.101 More difficult questions arise in relation to claims for fraud, and competition.

4.102 In the case of fraud, the old Arbitration Ordinance[58] conferred a power on the court to order that the arbitration agreement shall cease to be effective where a question of fraud arose in domestic arbitrations. However, the Report of the Committee on Hong Kong Arbitration Law recommended that this provision be omitted, and that fraud should be treated in the same manner as any other allegation in the arbitral proceedings.[59] Accordingly, the provision has not been repeated in the new Arbitration Ordinance.

4.103 In the case of competition claims, although Hong Kong (at the time of writing) does not have a general competition law, several neighbouring jurisdictions (most notably, the PRC) do. Accordingly, questions do sometimes arise over whether issues relating to a foreign competition law are arbitrable by a tribunal sitting in Hong Kong.

(d) Split clauses

4.104 Split or hybrid clauses give one (or both) party(ies) the option to choose between two alternative forms of binding dispute resolution. Typically, the two options are arbitration and litigation.

---

[54] *Fiona Trust and Holding Corp and Ors v Privalov and Ors* [2007] UKHL 40 (HL).

[55] *UDL Contracting Ltd v Apple Daily Printing Limited and Lai Chee Ying Jimmy* HCA 1209/2007; ***廈門新景地集團有限公司*** *v Eton Properties Limited et al* HCA 961/2008 (16 March 2010, CFI); *Klockner Pentapolast GmbH & Co KG v Advance Technology (HK) Company Limited* [2011] HKCU 1340.

[56] See generally, s 20(2) of the Arbitration Ordinance and the CFA decision in *Paquito Lima Buton v Rainbow Joy Shipping Ltd Inc* [2008] 4 HKC 14, 55.

[57] s 7 and the Sch to the Labour Tribunal Ordinance (c 25) set out the contracts within the Labour Tribunal's jurisdiction. These cover a range of claims including those based on breach of a term in a contract of employment.

[58] s 26(2) of the Arbitration Ordinance (c 341).

[59] 30 April 2003, at 37.

Such clauses are valid under Hong Kong law, and are common in certain types of contracts, such as finance contracts. They tend to be more useful where the complexity or amount in dispute is difficult to predict in advance.

4.105 In Hong Kong, it is unusual for split clauses to give *both* parties the option to elect. Instead, they are typically only included where one of the parties has stronger bargaining power, and wishes to reserve for itself the option to elect an alternative form of dispute resolution. Parties entering into contracts involving China or Chinese parties are typically wary of including split clauses in their contracts. This is because such clauses may not be valid (or fully upheld) under PRC law. See Section D(d) of the PRC chapter for more details.

E. Interim measures and court assistance

(a) Interim measures from the arbitral tribunal

(i) Available interim measures and related orders

4.106 Hong Kong has largely adopted the 2006 amendments to the UNCITRAL Model Law dealing with interim measures. Correspondingly, a tribunal sitting in Hong Kong is empowered to grant a wide range of interim measures.

4.107 Article 17 of the Model Law, given effect by section 35 of the Arbitration Ordinance, defines interim measures broadly, as any temporary measure in which a tribunal, at any time prior to the final award, orders a party to:

(1) Maintain or restore the status quo pending determination of the dispute;
(2) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
(3) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
(4) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 makes clear that the interim measure may take the form of an award or another form, and section 35(3) reinforces this, by stating that the tribunal may, upon the application of any party, 'make an award' to the same effect as an interim measure which it has granted. The result of this is that the interim measure may be issued as an award, and this may increase the likelihood of it being enforceable.

4.108 Typical examples of interim measures which may be granted under Article 17 include injunctions to maintain the status quo or asset or evidence preservation orders.

4.109 In addition to Article 17, section 56 of the Ordinance also gives the tribunal the power to make various additional orders to assist the arbitral proceedings. These include orders:

- directing the discovery of documents or the delivery of interrogatories;
- directing the evidence be given by affidavit;
- in relation to 'relevant property',[60] directing the inspection, photographing, preservation, custody, detention, or sale of the relevant property by the tribunal, a party to the arbitral

[60] Relevant property refers to property owned or in the possession of one of the parties and which is a subject of the arbitral proceedings: s 56(6) of the Arbitration Ordinance.

proceedings, or an expert; or directing samples to be taken from, observations to be made of, or experiments to be conducted on the relevant property;[61]
- requiring the claimant to provide security for the costs of the arbitration.

These orders, however, are not generally considered interim measures.[62]

4.110 Among these orders, those providing for some discovery (or disclosure) of documents and for evidence to be given by way of written statements (but not necessarily by way of affidavits) are common. In contrast, interrogatories are not common in Hong Kong arbitrations.

4.111 In the case of security for costs, these are sometimes granted and section 56(4) of the Ordinance expressly provides that if the clamant fails to comply with the tribunal's order to provide security for costs, the tribunal may dismiss or stay the claim.

(ii) Procedure and applicable tests

4.112 The procedure and applicable tests for the granting of interim measures in Hong Kong largely follow those of the UNCITRAL Model Law as amended in 2006. Thus, the party may:

- apply for an interim measure from the tribunal, with a copy of the application copied to the other parties; or
- may, *without notice to any other party*, apply for an interim measure together with an application for a 'preliminary order'. The purpose of the preliminary order should be to ensure that the interim measure is not frustrated.[63]

4.113 Where a preliminary order is sought, Article 17C provides that:

- immediately after the tribunal's determination, it shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, oral or written;
- the tribunal shall also give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time;
- the tribunal shall decide promptly any objection to the order.

Significantly, the preliminary order expires after 20 days from the date on which it was issued, although the tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has presented its case. Article 17C(5) expressly recognizes that whilst the preliminary order is binding on the parties, it shall not be subject to enforcement by a court, and does not constitute an award.

[61] There is some overlap between the power granted to the tribunal under this subsection in relation to relevant property, and the power granted by s 35 (giving effect to Art 17 of the UNCITRAL Model Law), which governs the granting of interim measures. Accordingly, s 56(4) of the Arbitration Ordinance provides that Arts 17D–17G of the UNCITRAL Model Law (which apply to interim measures granted under Art 17) will also apply to this subsection, where 'appropriate'.

[62] See ss 35(2) and 56(5), Arbitration Ordinance.

[63] See s 37, giving effect to Art 17B of the UNCITRAL Model Law.

4.114 The applicable test for whether the tribunal should grant an interim measure is set out in Article 17A of the Model Law. The party requesting the interim measure has to satisfy the tribunal that:

- harm 'not adequately reparable' by an award of damages is 'likely to result' if the measure is not ordered, and such harm 'substantially outweighs' the harm likely to result to the party against whom the measure is directed; and
- there is a 'reasonable possibility' that the requesting party will succeed on the merits.

In the case of an order to preserve evidence, Article 17A states that the above requirements apply only to the extent the tribunal considers 'appropriate'.

4.115 As for a preliminary order, the tribunal 'may' grant a preliminary order, provided it considers that prior disclosure of the request for the interim measure to the other party(ies) risks frustrating the purpose of the measure. The condition for whether the order should be granted is broadly similar to that which applies under Article 17A, except that the first limb of the test looks to the harm likely to result from the *order* being granted or not (as opposed to whether the interim measure is granted).[64]

4.116 Sections 39 to 42 of the Arbitration Ordinance give effect to Articles 17D to 17G of the UNCITRAL Model Law, with no modifications. Thus, they provide that:

- modification, suspension, termination: the tribunal may modify, suspend, or terminate an interim measure or a preliminary order upon application of any party or, exceptionally and upon prior notice to the parties, on the tribunal's own initiative;
- security: the arbitral tribunal 'may' require the party requesting an interim measure to provide security in connection with the measure; and it 'shall' require the party applying for a preliminary order to provide security unless the tribunal considers it inappropriate or unnecessary to do so;
- disclosure: the tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted; and the party applying for a preliminary order shall, as a continuing obligation, disclose to the tribunal all circumstances that are likely to be relevant until the party against whom the order has been requested has had an opportunity to present its case;
- costs and damages: the party requesting an interim measure or a preliminary order is liable for costs and damages caused by the measure or order if the tribunal later determines that the measure or the order should not have been granted.

The new provisions dealing with interim measures and preliminary orders have, to date, not been widely used in Hong Kong. This is because they have only been introduced in the current Arbitration Ordinance. Nonetheless, it is likely that when these provisions are applied, Hong Kong tribunals will be influenced by the *travaux préparatoires*; by the practice in other Model Law countries; by previous international arbitration practice to the extent relevant; and also, in certain cases, by the principles applied in the courts. Whereas the last factor used to be of some importance, given the fairly extensive provisions dealing with interim measures found in the new Arbitration Ordinance, and the somewhat different regime in international arbitration, it is likely that going forward, the court authorities will diminish in importance.

[64] See Art 17B(3), given effect by s 37 of the Arbitration Ordinance.

4.117 The recognition and enforcement of interim measures is dealt with in Section J below.

4.118 As noted above, in addition to Article 17, section 56 of the Arbitration Ordinance also gives the tribunal the power to make various additional orders to assist the arbitral proceedings. However, section 56 is silent on the criteria the tribunal should apply, with one exception.

4.119 The exception is security for costs, where the Ordinance states that the mere fact that the claimant is a non-Hong Kong resident is not by itself sufficient to justify an order for the claimant to provide security for costs.[65] This provision is sensible since many claimants in international arbitrations conducted in Hong Kong are non-Hong Kong residents, and it would be inappropriate for tribunals to order security for costs simply because of that factor alone. The Ordinance does not otherwise specify what test applies in applications for security for costs.

4.120 In practice, the principles are relatively settled. In the case of discovery (or disclosure) of documents, Hong Kong tribunals have in the past often applied or referred to the IBA Rules on Evidence. Going forward, they will no doubt apply the current version of the rules: the IBA Rules on Evidence (2010).

4.121 In the case of security for costs, subject to the above proviso on non-residency, the tribunal's discretion to decide whether to order security for costs is generally unfettered. Considerations such as the solvency of the claimant and whether the application for security is being used to stifle a genuine claim are examples of factors that have in the past been considered relevant by tribunals.

(b) Court assistance

(i) Available court assistance

4.122 This section considers court-ordered interim measures. Unlike the situation with interim measures ordered by the tribunal, Hong Kong has not adopted Article 17J of the UNCITRAL Model Law, which deals with court-ordered measures. Instead, section 45 deals with this.

4.123 Section 45(2) provides that on the application of any party, the court may, in relation to arbitral proceedings 'which have been or are to be commenced', 'in or outside Hong Kong', grant an interim measure. Thus, the court's powers are broad, and they include the power to grant pre-arbitral relief, as well as relief in connection with non-Hong Kong arbitrations. Section 45(3) underscores this, by providing that the court's powers may be exercised irrespective of whether similar powers may be exercised by a tribunal under section 35.

4.124 A decision, order, or direction of the court under section 45 is not subject to appeal.

4.125 In addition to the interim measures available under section 45, section 60 of the Arbitration Ordinance sets out certain additional powers of the court, which overlap with the powers granted to the tribunal under section 56.

[65] See s 56(2) of the Arbitration Ordinance for full particulars.

4.126 Section 60(1) provides that on the application of any party, the court may, in relation to arbitrations 'which have been or are to be commenced', 'in or outside Hong Kong', make an order:

- directing the inspection, photographing, preservation, custody, detention, or sale of any relevant property[66] by the tribunal, a party to the arbitral proceedings, or an expert;
- directing samples to be taken from, observations to be made of, or experiments to be conducted on any relevant property.

4.127 This provision broadly mirrors the power granted to the tribunal under section 56(1)(d) set out in Section E(a)(i) above. Section 60 further provides that the court may direct that its order ceases to have effect, in whole or in part, on the order of the tribunal. This recognizes that in some cases, the tribunal is the more appropriate body to decide such questions, and is particularly useful where pre-arbitral relief has been sought from the courts.

4.128 An order or decision of the court under section 60 is not subject to appeal, save that an appeal may be brought from an order of the court for the sale of relevant property, with leave of the court.

(ii) Procedure and applicable tests

4.129 The procedures and applicable tests which apply to applications to the court in connection with sections 45 and 60 of the Arbitration Ordinance are set out in Order 73 of the Rules of the High Court (c 4A). In several cases, the relevant provision has to be read in conjunction with other orders in the Rules, such as the order dealing with injunctions, but with appropriate modifications taking into account differences between the orders the court is empowered to make under the Arbitration Ordinance, and the equivalent power it has in court litigations.

(c) Whether to apply to the arbitral tribunal or to the courts

(i) Relative advantages and disadvantages

4.130 There are a number of differences between applying to the tribunal or to the courts for interim measures. Advantages of applying to the courts, rather than to the tribunal, include the following:

- a court may grant pre-arbitral relief, whereas such relief is generally not available until the tribunal has been constituted;[67]
- it is generally quicker to obtain a decision from the Hong Kong courts than from a tribunal, especially where it comprises three arbitrators;
- orders granted by the courts are more likely to be effective against third parties;
- the courts have coercive powers of enforcement, and this is especially useful where the party is within its jurisdiction;
- in some cases, the courts have more extensive or different powers from those of the tribunal.[68]

[66] Property is considered relevant if it is the subject of the arbitral proceedings, or any question relating to the property has arisen in the arbitral proceedings: s 60(2) of the Arbitration Ordinance.

[67] Although a number of arbitration rules are now providing for the appointment of an emergency arbitrator, to provide urgent relief prior to the constitution of the tribunal.

[68] s 60(3) of the Arbitration Ordinance recognizes this, by providing that the powers conferred under that section may be exercised by the court 'irrespective of whether or not similar powers may be exercised' by a tribunal under s 56.

However, there are also a number of advantages of applying to the tribunal:

- the tribunal is often more familiar with the dispute and able to make a decision that is more appropriate for the case rather than one based on 'first impression';
- where the counterparty is outside the jurisdiction of the courts, an interim order from the court of the seat may be of limited value; in contrast, although a tribunal may not have coercive powers, parties may be more inclined to comply with an order made by the tribunal, knowing that the tribunal will ultimately be ruling on the merits of the case;
- Article 17 of the UNCITRAL Model Law expressly envisages that an interim measure may be made in the form of an award, and there is a greater likelihood that such an award may be more readily enforceable internationally, than an equivalent court order.

In the past, there was also one additional, and significant disadvantage of applying to the tribunal for interim relief. There were generally considerable difficulties with applying to a tribunal for urgent relief without giving notice to the other party, whereas if notice was given, the relief sought might be rendered futile. In the context of Hong Kong arbitrations, there have been cases in the past where parties have transferred liquid assets away, in anticipation of possible interim measures. This, coupled with difficulties in conducting reliable asset searches in some jurisdictions, such as the PRC, can affect the likelihood of collecting on any final award.

4.131 In Hong Kong, this issue has now been addressed, with the adoption of Article 17B, which allows for applications for preliminary orders to be made without notice to the other party(ies), where appropriate.

(ii) Practicalities

4.132 The Hong Kong courts maintain a specialist Construction and Arbitration List, and all matters concerning arbitration are set down in this list, and dealt with by a specialist arbitration and construction judge. Hong Kong judges are experienced with granting interim assistance in aid of an arbitration, and they are prepared and able to grant orders promptly, where necessary.

4.133 In practice, applications for interim measures and other orders are usually made to the tribunal, unless it has not been constituted, the case is an urgent one, or there is concern over alerting the other party in advance. This trend is likely to continue under the new Article 17 provisions, since they now allow for preliminary orders (which are effectively orders granted *ex parte*), and they also set out more extensive provisions on how interim measures are to be dealt with by the tribunal.

4.134 Several provisions in the Arbitration Ordinance also recognize that the tribunal is often the more appropriate body to deal with applications for interim assistance. Thus, section 45(4) provides that the court may decline to grant an interim measure where the measure sought is currently the subject of arbitral proceedings, and the court considers it 'more appropriate' for the interim measure to be dealt with by the tribunal. Similarly, in relation to orders made under section 60, section 60(4) provides that the court may decline to make an order where the matter is the subject of arbitral proceedings, and it is 'more appropriate' for the matter to be dealt with by the tribunal.

4.135 In previous cases, the Hong Kong courts have also refused to grant relief unless there were reasons why the court (rather than the tribunal) should grant the order.[69]

[69] See generally, *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] 4 HKC 347.

(d) Court assistance in aid of foreign arbitrations

4.136 The Arbitration Ordinance envisages that the Hong Kong courts may grant orders in aid of *foreign* arbitrations. Section 45(2) provides that the court may, in relation to arbitral proceedings outside Hong Kong, grant an interim measure. Section 60(1) provides that the court may, in relation to arbitrations outside Hong Kong, make an order relating to relevant property, as explained at Section E(b)(i) above.

4.137 However, this power is subject to certain limits. In relation to interim measures, section 45(5) provides that the court may grant an interim measure only if:

- the arbitral proceedings are capable of giving rise to an arbitral award (whether interim or final) that may be enforced in Hong Kong; and
- the interim measure sought belongs to a type or description of interim measure that may be granted in Hong Kong in relation to arbitral proceedings by the court.

4.138 Free-standing interim measures are allowed, in the sense that they may be granted even if:

- the subject matter of the arbitral proceedings would not (apart from s 45(5)), give rise to a cause of action over which the court would have jurisdiction; or
- the order sought is not ancillary or incidental to any arbitral proceedings in Hong Kong.[70]

4.139 The Arbitration Ordinance also recognizes that in exercising this power, the court must have regard to the fact that the power is ancillary to the arbitral proceedings outside Hong Kong, and for the purpose of facilitating this process.[71] In relation to orders made under section 60, section 60(6) also sets out similar provisions.[72]

4.140 Apart from the express powers under the Arbitration Ordinance, it appears that the court retains its inherent jurisdiction to grant interim measures in aid of foreign arbitral proceedings, a power which it has exercised in the past.[73]

F. Before the arbitration commences

(a) Enforceability of multi-tiered dispute resolution clauses

4.141 In many international contracts entered into with a connection to Hong Kong, it is common for parties to include a proviso that the parties should endeavour to settle their disputes by negotiation, before commencing arbitration. It is considerably less common for there to also be a provision for mediation, prior to arbitration. However, this may become more commonplace, given the current push for mediation by the Hong Kong courts.

4.142 Clauses which envisage more than one form of dispute resolution are known as multi-tiered or stepped clauses, since they usually envisage that parties will attempt to resolve their

[70] s 45(6), Arbitration Ordinance.
[71] s 45(7), Arbitration Ordinance.
[72] Save that s 60(6) does not have an equivalent proviso to s 45(5)(b), which provides that the interim measure sought should belong to a type or description of interim measure that may be granted in Hong Kong in relation to arbitration proceedings by the court.
[73] See generally, *The Lady Muriel* [1995] 2 HKC 320.

dispute using the first 'tier' or step in the dispute resolution process, and if that fails, they then proceed to the next step.

4.143 In Hong Kong, it is common for there to be a time limit imposed on the negotiation component of multi-tiered dispute resolution clauses, a typical period being 30 days. Often, the provision will provide that if no settlement is reached within the stipulated period, parties may (or shall) then proceed to the next step in the dispute resolution process, such as arbitration. Such clauses are usually straightforward, and experienced parties will often issue a formal written notice to the other disputant(s) referring to the dispute resolution clause, when they begin negotiations. This ensures that there is no subsequent dispute over whether the parties have fulfilled the negotiation step prior to moving on to the next step in the procedure.

4.144 More difficult issues arise, however, where the clause provides that the parties should carry out such negotiations 'in good faith', using their 'best endeavours' or other similar wording, and where no time limit is specified. In England, the courts have historically been reluctant to enforce obligations to negotiate in good faith, holding that these are merely agreements to agree.[74] In recent years, however, they have been more prepared to enforce agreements to engage in an alternative dispute resolution process, provided that the process is sufficiently identified and defined by objective criteria.[75] In Hong Kong, in one case, the Court of Appeal held that the clause in question lacked sufficient precision in not defining any specific steps that had to be taken. On this basis, the provision was held to be imprecise and unenforceable.[76]

4.145 In practice, objections are sometimes taken in Hong Kong arbitrations over a supposed failure to comply with the pre-arbitration provisions in a dispute resolution clause. Such objections have not always found favour with tribunals and some have adopted the view that since the arbitration has already commenced and a settlement is not likely, there is little point in suspending or terminating the arbitration in order for parties to go through the motions of carrying out a negotiation. However, this will ultimately depend on the specific circumstances of each case.

4.146 In addition to negotiation and mediation, expert determination is sometimes also used for clearly defined disputes, such as where a post-completion accounting adjustment to the share price is required. Such disagreements are usually carved out from the main disputes under the contract, which will still be subject to arbitration (or litigation). Adjudication is also sometimes found in specialist contracts, such as construction contracts, but this is not widespread among international commercial contracts in Hong Kong.

(b) Attitude towards alternative dispute resolution

4.147 Parties to Hong Kong-related arbitrations typically attempt to negotiate their differences to reach a settlement, before proceeding with a more formalized dispute resolution process. This is the case regardless of whether there is a contractual requirement that such a negotiation takes place. In addition, it is not unusual for such negotiations to continue for some time, before parties resort to binding dispute resolution processes such as arbitration.

---

[74] See generally, *Walford v Miles* [1992] 2 AC 128.
[75] See generally, *Cable & Wireless Plc v IBM UK Ltd* [2003] 1 BLR 89.
[76] *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* [2005] 1 HKC 579.

4.148 Many international arbitrations in Hong Kong are PRC-related. For historical and cultural reasons, conciliation (mediation)[77] has been an important element of the dispute resolution process in the PRC.

4.149 Similarly, in PRC-related disputes in Hong Kong, it is fairly common for PRC parties to be prepared to negotiate, to reach a settlement. However, foreign parties who are unfamiliar with the PRC-style of negotiation sometimes find such a process confusing and difficult. Foreign parties often complain that in negotiations with a PRC party:

- the goalposts are constantly shifting, with frequently changing demands on the part of the PRC party;
- the decision-making process appears to be driven by emotion rather than reasoning;
- there are difficulties in identifying the key decision-maker.

In reality, no doubt some of these complaints simply arise from cultural differences, and varying approaches taken by both sides.

4.150 In the case of mediation, this has only become more mainstream in Hong Kong in recent years. Despite support from the courts, in many commercial cases, there is still a reluctance to adopt this process. This reluctance arises due to several reasons including:

- lack of familiarity with the process by a party's professional advisors;
- a perception that mediation will only increase costs and delay the onset of formal legal proceedings;
- absence of a mediation stage in most multi-tiered dispute resolution clauses;
- the concern that if a party were to propose mediation, it may suggest weakness in its case or an unwillingness to proceed with arbitration (or litigation);
- because mediation is often considered only after negotiation has been exhausted, at which stage there is a belief that it is too late to seek to reach an amicable settlement without commencing formal legal proceedings.

Nonetheless, reported success rates for mediation in Hong Kong have been high, and it is likely that mediation will be increasingly used for resolving cross-border disputes in the future. That said, the Arb-Med procedure can be a risky one, as illustrated by a recent case where the award was refused enforcement due to apparent bias arising from the way in which an Arb-Med process was carried out in the PRC.[78]

(c) Stay of court proceedings

4.151 Hong Kong has adopted Article 8 of the UNCITRAL Model Law, with a few supplementary provisions.[79] If a party to an arbitration agreement commences court proceedings in respect of a dispute which is subject to an arbitration agreement, the other party (usually the defendant) may apply to the Court of First Instance for an order to stay those proceedings if the dispute is subject to the agreement. The only significant limitations on a defendant's right to obtain a stay of court proceedings are that:

- the request must be made not later than when the defendant submits its first statement on the substance of the dispute;

[77] The terms conciliation and mediation are used interchangeably throughout this chapter.
[78] *Gao Haiyan & Anor v Keeneye Holdings Limited & Anor* HCCT 41/2010 (CFI).
[79] Art 8 is given effect by s 20, Arbitration Ordinance.

- the court is entitled to refuse to grant a stay if it finds that the agreement is null and void, inoperative, or incapable of being performed.

If the defendant files a defence (or other pleading) without requesting a stay in favour of arbitration, it will be unable to stay the court proceedings at a later stage. Otherwise, the court must order a stay. Section 20(5) of the Arbitration Ordinance also makes it clear that where the court refers the parties to arbitration, it must also make an order staying the legal proceedings in that action.

4.152 In the unusual case where the plaintiff is the party seeking a stay of its own court proceedings, there is case authority suggesting that the court may have an inherent jurisdiction to grant the stay, and it may do so even where the plaintiff has already taken a step in the proceedings.[80]

4.153 The Hong Kong courts have made it clear that the court's role is not to investigate whether the defendant has an arguable basis for disputing the claim. If a claim is made against it in a matter which is the subject of an arbitration agreement and it does not admit the claim, then there is a dispute within the meaning of the article. If it seeks a stay of the action, the court must grant a stay unless the above limitations apply.[81]

4.154 A decision of the court to refer the parties to arbitration under Article 8 of the Model Law is not subject to appeal.[82] In contrast, if the court refuses to refer the parties to arbitration, then an appeal is allowed, with leave of the court.[83] This illustrates a pro-arbitration stance taken by the Ordinance.

4.155 In addition, it is clear that Article 8 applies regardless of whether the place of arbitration is in or outside Hong Kong.[84]

(d) Anti-suit and anti-arbitration injunctions

4.156 The Hong Kong courts recognize that they are able to grant anti-suit injunctions, and they have in a small number of cases granted such orders, outside an arbitration context.[85] In the context of anti-suit injunctions granted in relation to arbitral proceedings, in addition to their general power, it has been suggested that the courts may also be empowered by section 45(2) of the Arbitration Ordinance to grant such an injunction.[86] This would be on the basis that an anti-suit injunction qualifies as an 'interim measure' which the court is empowered to order.[87]

---

[80] See *Chok Yick Interior Design & Engineering Co Ltd v Fortune World Enterprises Limited HCA 2394/2008*; HCA 280/2009.

[81] *Tai Hing Cotton Mill Ltd v Glencore Grain Rotterdam BV and another* [1996] 1 HKC 363 (CA).

[82] s 20(8), Arbitration Ordinance.

[83] s 20(9), Arbitration Ordinance.

[84] s 5(2) of the Arbitration Ordinance expressly provides that s 20 applies where the place of arbitration is outside Hong Kong.

[85] See eg *China Light & Power Co Ltd v Wong To Sau Heung & Ors* [1993] 2 HKC 238 (CA), involving an interim anti-suit injunction.

[86] On the face of it, this might include arbitral proceedings taking place outside Hong Kong, although the fact that there are no substantive proceedings taking place in Hong Kong would be a significant hurdle.

[87] 'Interim measures' which a Hong Kong court are able to order are defined by reference to 'interim measures' which an arbitral tribunal may grant: s 45(9), Arbitration Ordinance. Correspondingly, it would seem that the reference to 'interim measures' in Art 17(2)(b) is broad enough to cover an anti-suit injunction: See P Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd edn (Sweet & Maxwell, 2010) 244, summarizing the views of the UNCITRAL Working Group.

4.157 Applications for anti-suit injunctions have failed in a number of Hong Kong cases. In the context of arbitrations, it is suggested that the Hong Kong courts may be prepared to grant such orders more readily, particularly where it is clear that a party has commenced court proceedings overseas in clear breach of an agreement to arbitrate in Hong Kong. Relevant factors would be whether the application has been brought promptly and how far advanced the foreign proceedings are. In this regard, the Hong Kong courts are likely to apply the general principles set out in English cases.[88]

4.158 PRC parties involved in Hong Kong court proceedings have sometimes commenced parallel court proceedings in the PRC. Thus far, the Hong Kong courts have been prepared to consider granting anti-suit injunctions in connection with such proceedings, on normal principles. However, in practical terms, this may raise difficult issues of comity, given the relationship between Hong Kong and the PRC under the Basic Law.

4.159 There is no published Hong Kong case where an anti-arbitration injunction has been granted to restrain a party from proceeding with an arbitration. In principle, there is no clear prohibition to such an order being made, although the actual test applied by the courts may differ.

(e) Limitation periods

4.160 It is likely that Hong Kong law adheres to the traditional common law view that limitation periods are procedural in nature. On this basis, limitation in Hong Kong arbitrations is governed by Hong Kong law and any limitation provision of the substantive governing law is ignored. However, where it is shown that the effect of a foreign limitation is to extinguish the underlying legal right (and not just to bar the remedy), the Hong Kong courts will look to the foreign substantive limitation and apply it.[89]

4.161 In the context of PRC-related disputes, it is not uncommon for parties to arbitrate their dispute in Hong Kong, but to agree to PRC law as the governing law. Arguments over limitation have arisen in some arbitrations, because of disputes over whether specific PRC law provisions act as a procedural bar, or if they extinguish the underlying substantive right altogether.

4.162 Assuming Hong Kong law governs, the limitation period is generally determined by the Limitation Ordinance (c 347).[90] For actions in simple contract or tort, the limitation period is six years from the accrual of the cause of action.

4.163 In general, the limitation period is interrupted once arbitration proceedings commence. Section 49(1), giving effect to Article 21 of the UNCITRAL Model Law, provides that the arbitral proceedings commence on the date when a request for the dispute to be referred to arbitration is received by the respondent, and section 49(2) states that the request has to comply with the requirements under section 10 of the Arbitration Ordinance. Article 21 applies 'unless otherwise agreed by the parties'; it is not uncommon for the parties to agree to a different commencement date, by virtue of their agreed rules of arbitration.[91]

---

[88] Although, of course, the complications raised by the Brussels Regulation regime are not relevant to Hong Kong.

[89] For a discussion of this issue, see G Johnston, *The Conflict of Laws in Hong Kong* (2005) 26–28.

[90] It is clear from s 34(1) that the Limitation Ordinance (c 347) applies to arbitrations. See also s 14 of the Arbitration Ordinance.

[91] In addition, the Limitation Ordinance provides that an arbitration shall be deemed to commence when, in general terms, one party serves on the other party or parties a notice requiring the appointment of an arbitrator. Section 34(4) of the Limitation Ordinance further stipulates how such a notice should be served.

G. The arbitration process

(a) Introduction

4.164 In the past, most international commercial arbitrations in Hong Kong were conducted under the UNCITRAL Arbitration Rules. This was because the HKIAC did not have its own specific rules for international arbitrations. Nonetheless, hearings were often held at the HKIAC premises, with administrative support provided by the HKIAC. In line with this, parties often also adopted the HKIAC Procedures for the Administration of International Arbitration, as a supplement to the UNCITRAL Rules.

4.165 On 1 September 2008, the HKIAC introduced its Administered Arbitration Rules. Correspondingly, for Hong Kong international arbitrations, there has been a significant move away from adopting rules such as the UNCITRAL Arbitration Rules, in favour of the HKIAC Administered Arbitration Rules.

4.166 Apart from the HKIAC Administered Arbitration Rules, other rules which are often agreed to in more substantial Hong Kong-related contracts include the:

- UNCITRAL Arbitration Rules;
- ICC Rules;
- LCIA Rules;
- CIETAC Arbitration Rules;
- Stockholm Chamber of Commerce Rules;
- SIAC Rules.

This section focuses on an arbitration conducted under the HKIAC Administered Arbitration Rules, although the broad framework will also be applicable to other Hong Kong international arbitrations.

(b) Main stages of the arbitration

4.167 In very broad terms, the main stages of an arbitration conducted under the HKIAC Administered Arbitration Rules are as follows:

- preparation (typically, for at least 1–2 months, although it could be much longer in practice);
- commencement of arbitration (1–2 months):
  - Notice of Arbitration,
  - Answer and Counterclaim (if any);
- constitution of tribunal and preliminary meeting (2 months; may be concurrent with the earlier stage):
  - appointment of arbitrators by parties,
  - appointment of presiding arbitrator,
  - challenges (if any);
- detailed submissions (3–5 months):
  - Statement of Claim,
  - Statement of Defence and Counterclaim (if any),
  - further submissions;

- production of evidence (2–4 months):
  - disclosure of documents,
  - other evidence;
- witness statements (2–4 months):
  - first round factual and expert statements,
  - second round statements (if any);
- hearing (say, 1 week);
- award (2–4 months).

The timelines set out above are very approximate estimates, and assume a reasonably substantial international arbitration proceeding which is not bifurcated into liability and quantum stages, where none of the parties deploy delaying tactics, which is not delayed by numerous procedural applications, and the tribunal has reasonable availability. In practice, a typical proceeding of this nature would take about 12 to 18 months to reach a final award.

(c) General principles

(i) Party autonomy

4.168 Article 19(1) of the UNCITRAL Model Law, which applies in Hong Kong,[92] recognizes that subject to the provisions of the Model Law, the parties are free to agree on the arbitral procedure. Section 3(2)(a) also provides that subject to the public interest, the parties are free to agree on how the dispute should be resolved.

4.169 In practice, the principle of party autonomy is widely followed by Hong Kong tribunals. Thus, the parties may opt for an elaborate, full-blown court-type proceeding with solicitors, barristers, extensive written submissions, and lengthy oral hearings involving the presentation of evidence and the examination and cross-examination of witnesses, or they may choose to conduct the proceedings by the simple exchange of written statements without any hearings at all.

(ii) Equality of treatment

4.170 Although Article 18 of the UNCITRAL Model Law has not been adopted wholesale in Hong Kong, section 46(2) of the Arbitration Ordinance provides that the parties must be treated with equality. Article 14.1 of the HKIAC Administered Arbitration Rules also recognizes the importance of equal treatment. In practice, this principle is of paramount importance and has been carefully followed by tribunals in Hong Kong.

(iii) Right to be heard

4.171 Section 46(3) of the Arbitration Ordinance provides that the arbitral tribunal is required:

- to be independent;
- to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents;
- to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate.

[92] Given effect in Hong Kong by s 47 of the Arbitration Ordinance.

Notably, section 46(3) deliberately departs from Article 18 of the UNCITRAL Model Law, which refers to the parties' entitlement to be given a 'full opportunity of presenting his case'. Instead, the Arbitration Ordinance refers to a 'reasonable opportunity to present their cases'.

4.172 In practice, this distinction has not been material. It is thought by some commentators that the use of 'reasonable opportunity' merely underscores the objective of the Arbitration Ordinance to facilitate the fair and speedy resolution of disputes while preserving the rules of natural justice.

4.173 Article 14.1 of the HKIAC Administered Arbitration Rules recognizes this balance, by providing that the tribunal shall adopt suitable procedures for the conduct of the arbitration, in order to avoid unnecessary delay or expenses, 'provided that' such procedures ensure equal treatment of the parties and afford them a reasonable opportunity to be heard and to present their case.

4.174 Article 24 of the Model Law has been adopted wholesale in Hong Kong. It expressly provides that unless the parties have agreed that no hearings shall be held, the arbitral tribunal is obliged to hold hearings at an appropriate stage of the proceedings if so requested by a party. Article 14.2 of the HKIAC Administered Arbitration Rules has a similar provision. In practice, it is rare for an entire international arbitration of any complexity to be conducted on a 'documents only' basis without oral hearings, and this would certainly not happen if at least one of the parties requests a hearing.

(iv) Place of arbitration

4.175 The Arbitration Ordinance provides that the parties are free to agree on the place of arbitration.[93] Failing such agreement, the default seat of the arbitration under the HKIAC Administered Arbitration Rules is Hong Kong.[94]

4.176 The significance of the place of arbitration is threefold. First, it determines which jurisdiction's arbitration laws govern the conduct of the arbitration. Unless the parties agree otherwise (which would be very rare), an arbitration seated in Hong Kong will be governed by the Arbitration Ordinance.

4.177 Secondly, the place of arbitration determines where the award is made. Because the PRC is a member of the New York Convention, an award 'made' in Hong Kong is a Convention award for purposes of enforcement abroad.

4.178 Thirdly, the place of arbitration specifies which court may exercise supportive and supervisory power over the arbitrations. Where Hong Kong is the place of arbitration, it is the Hong Kong courts which exercise primary supportive and supervisory jurisdiction over the arbitration.

(v) Language

4.179 Under the HKIAC Administered Arbitration Rules, there is no default language.[95] Instead, Article 16 of the HKIAC Administered Arbitration Rules allows the parties to agree on the

[93] Art 20, UNCITRAL Model Law, given effect by s 48, Arbitration Ordinance.
[94] Art 15, HKIAC Administered Arbitration Rules.
[95] But note Arts 4.5 and 5.2 of the HKIAC Administered Arbitration Rules which provide that if there is no agreement on language, the Notice of Arbitration and the Answer shall be submitted in either English or

language(s) of the arbitration, failing which it shall be determined by the tribunal. Article 16.2 allows the tribunal to order that any documents which are submitted shall be accompanied by a translation into the language(s) of the arbitration. This is in line with Article 22 of the UNCITRAL Model Law.[96]

4.180 In practice, the most common languages encountered in Hong Kong arbitrations are English and Chinese. This is because foreign parties would often be reasonably conversant in English, and many of their documents are likely to be in English, whereas PRC parties will often prefer Chinese, and many of their internal documents will be in Chinese.

4.181 A significant number of arbitrators and counsel in Hong Kong are bilingual in both English and Chinese. However, in practice, there will often only be one working language in the arbitration. As between Chinese and English, this will often be the latter, because one or more of the arbitrators may not be familiar with Chinese; or even if they are bilingual, their primary working language may still be English; or in some cases, barristers from outside Hong Kong are engaged, and they are unfamiliar with Chinese.

4.182 In these situations, it might appear logical for English to be the only language of the arbitration. In practice, however, this may not happen. First, it is fairly common practice for Sino-foreign contracts expressly to provide that the languages of the arbitration are English and Chinese. This is often considered an acceptable compromise by both parties, and little thought is given at the drafting stage to the cost consequences of such a decision. Secondly, many disputes arbitrated in Hong Kong have a strong PRC connection, with the subject matter of the dispute often being in the PRC; the governing law being PRC law (or otherwise subject in some way to PRC law principles); the core documentation in Chinese; and the agreements also often made in both languages.

4.183 As a result of these factors, the consequence is that a number of Sino-foreign disputes in Hong Kong are conducted in both English and Chinese, notwithstanding that English may still be the main working language. This can result in significant costs being spent on translating the submissions and conducting the oral hearings in both languages; and translating the eventual award. Fortunately, with respect to documentary evidence, tribunals may not always require full translations (much less certified or official translations) of all disclosed documents.

(vi) Default by a party

4.184 The Arbitration Ordinance contains provisions which extend the powers of the tribunal granted under Article 25 of the UNCITRAL Model Law, to deal with a defaulting party. This was a deliberate decision when the Ordinance was drafted[97] and is in line with the current trend in international arbitral practice to ensure that proceedings move along more quickly.

4.185 Section 53 gives effect to the Article 25 Model Law provisions, which generally allow:

- the tribunal to terminate the proceedings, if the claimant fails to communicate its statement of claim;

Chinese. After the tribunal is constituted, it is of course open to the tribunal to determine the applicable language(s).

[96] Given effect in Hong Kong by s 50 of the Arbitration Ordinance.

[97] See generally, Report of Committee on Hong Kong Arbitration Law (30 April 2003) at para 25.21ff.

- to continue the proceedings if the respondent fails to communicate its statement of defence (albeit without treating such failure as an admission of the claimant's allegations);
- to continue the proceedings and to make the award on the evidence before it, if any party fails to appear at a hearing or to produce documentary evidence.

Importantly, as noted above, even if the respondent fails to submit its statement of defence, or to appear at the hearing, Article 25 envisages that the tribunal should still continue with the proceedings to reach a final decision. In practice, this is the approach taken by most tribunals in Hong Kong, and whilst proceedings may move more quickly in a default situation, there would still be no automatic 'default award' in the claimant's favour.

4.186 Sections 53(3) and (4) expand on the above, by providing that:[98]

- if, without sufficient cause, a party fails to comply with any order or direction of the tribunal, the tribunal may make a 'peremptory order' prescribing the time for compliance; and
- if a party fails to comply with a peremptory order, the tribunal may:
  - direct that the party is not entitled to rely on any allegation or material which was the subject matter of the peremptory order,
  - draw any adverse inferences that the circumstances justify,
  - make an award on the basis of materials properly provided to the tribunal, or
  - make any order that the tribunal thinks fit as to payment of the costs of the arbitration consequent upon the non-compliance.

Article 26 of the HKIAC Administered Arbitration Rules contains less detailed provisions broadly consistent with the above.

4.187 In the past, Hong Kong tribunals, as with tribunals elsewhere in Asia, have generally been reluctant to allow for draconian consequences on defaulting parties. However, with the increasing emphasis on cost and efficiency in arbitrations, as well as more dilatory tactics by parties in recent years, Hong Kong tribunals have been taking a tougher stance. The latest provisions found in section 53 are consistent with this, although it remains to be seen how often they will be used.

(vii) Representation

4.188 The Arbitration Ordinance enshrines the principle that the parties to an arbitration have complete freedom to choose their own representatives, advisors, and advocates regardless of their qualifications or nationality.[99] This contrasts with the requirement that only Hong Kong-admitted barristers and solicitors may conduct litigation in the Hong Kong courts. Hong Kong-admitted barristers and solicitors must, however, be retained to present any arbitration-related applications in the courts.

4.189 In Hong Kong, the legal profession is divided into two distinct branches—barristers and solicitors. Solicitors have limited rights of audience before the courts whereas barristers have unlimited rights of audience. Conversely, barristers can generally only accept instructions

[98] ss 53(3) and (4) do not apply in relation to an application for security for costs: s 53(2) of the Arbitration Ordinance.

[99] s 63, Arbitration Ordinance; see also Art 5.8 of the HKIAC Administered Arbitration Rules to similar effect.

from a firm of solicitors (or members of other recognized professional bodies). Lawyers practising within one branch of the profession are not allowed to practise within the other.

4.190 In virtually all substantial international arbitration cases heard in Hong Kong, parties will be represented by solicitors or foreign lawyers. As for barristers, the practice varies among firms, and also depends on what is at stake. In law firms with a more substantial arbitration practice, it is increasingly the case that advocacy is done in-house. It is argued that counsel who are in-house will be more familiar with the case; will present the case in a more consistent manner; and no additional fees are incurred in briefing barristers. Conversely, it is argued that barristers often have specialist knowledge; they have considerably more experience with advocacy; and they are often able to bring a fresh perspective to the case.

4.191 In some cases, there may also be a case of one-upmanship: where one party engages a Queen's Counsel or Senior Counsel, the other party may feel obliged to do the same.

4.192 Difficulties can arise where barristers are only engaged (or fully instructed) when it is clear that an arbitration is proceeding to a final hearing. In such cases, after consulting with their barristers, parties may seek to make late amendments to their cases. In the past, Hong Kong tribunals have generally been more forgiving in allowing late amendments to cases. However, some Hong Kong tribunals have gradually been taking a tougher stance towards such applications.

(d) Commencement of proceedings: Notice of Arbitration and Request for Arbitration

4.193 Under the HKIAC Administered Arbitration Rules, arbitral proceedings are deemed to commence when the Notice of Arbitration is received by the HKIAC Secretariat.[100] Sufficient copies of the Notice are to be submitted, and the rules state that it shall include the following matters:[101]

- a demand that the dispute be referred to arbitration;
- names and contact details of the parties and their counsel (insofar as known);
- a copy of the arbitration agreement that is invoked;
- a reference to the contract or other legal instrument(s) out of or in relation to which the dispute arises;
- a description of the general nature of the claim and an indication of the amount involved (if any);
- the relief or remedy sought;
- a proposal as to the number of arbitrators, if not previously agreed.

In practice, these requirements are often easily met and in many Hong Kong international arbitrations, a relatively short Notice (about 10–20 pages, excluding exhibits) is usually submitted. Exhibits would usually be limited, although the relevant contract(s) and arbitration agreement(s) are usually included.

4.194 Apart from the above requirements, the Notice of Arbitration may also include:

- the claimant's proposals for the appointment of a sole arbitrator, or (if there are three arbitrators), its designation of its party-appointed arbitrator;
- the Statement of Claim.

[100] Art 4.1, HKIAC Administered Arbitration Rules.
[101] Art 4.3, HKIAC Administered Arbitration Rules.

A claimant will typically include the full Statement of Claim if it is well prepared for the case and it wishes to demonstrate this; to hasten the proceedings; or to put time pressure on the respondent.

4.195 The Notice of Arbitration is accompanied by payment of the Registration Fee, which is a relatively small amount.[102] There are limited formalities and, often, the Notice is signed off by the claimant's lawyers.

4.196 In most cases, it is unlikely that the HKIAC will reject the Notice of Arbitration. However, if the Notice is incomplete or other formalities are not complied with, the HKIAC Secretariat may request the claimant to remedy the defect. If the claimant complies, the Notice is deemed to have been validly filed on the date when the initial version was received by the HKIAC Secretariat.[103] This proviso can be important where a party files a non-compliant Notice of Arbitration very close to the expiration of a limitation period.

4.197 Within 30 days of the Notice of Arbitration, the respondent shall submit its Answer to the Notice of Arbitration. Apart from responding to the matters raised by the claimant, the Answer shall, 'to the extent possible', include any plea that the tribunal lacks jurisdiction. In addition, any counterclaim or set-off defence shall 'to the extent possible' be raised in the Answer.[104]

(e) The tribunal

(i) Constituting the tribunal

4.198 (1) **Number of arbitrators** The parties may agree upon the number of arbitrators, either in their arbitration agreement, or after a dispute has arisen. In practice, agreement will be more difficult to reach once a dispute has arisen. In Hong Kong arbitrations, there is a fairly strong tendency to agree on three arbitrators, in part because many Chinese parties are not accustomed to resolving their disputes before a sole arbitrator. In addition, in substantial international arbitrations in Hong Kong, three arbitrators are relatively more common.

4.199 Article 6 of the HKIAC Administered Arbitration Rules provides that if the parties have not agreed upon the number of arbitrators, the HKIAC Council shall decide this, taking into account the factors set out in Rule 9 of the Arbitration (Appointment of Arbitrators and Umpires) Rules, and input from the parties. Relevant factors include:

- the amount in dispute;
- the complexity of the claim;
- the nationalities of the parties;
- any relevant customs of the trade, business, or profession involved in the said dispute;
- the availability of appropriate arbitrators;
- the urgency of the case.

4.200 The HKIAC has published a guide on the basis upon which it decides on the number of arbitrators. Where the case is handled under the Expedited Procedure set out in Article 38 of the HKIAC Administered Arbitration Rules, the default is generally for a sole arbitrator.

[102] Art 4.4, HKIAC Administered Arbitration Rules.
[103] Art 4.7, HKIAC Administered Arbitration Rules.
[104] Art 5, HKIAC Administered Arbitration Rules.

4.201 (2) **Appointment of arbitrators** Where a sole arbitrator is to be appointed, the default under Article 7 of the Rules is for the parties to have 30 days to make the appointment:

- *where the parties have agreed that there shall be a sole arbitrator*, the parties shall jointly designate the sole arbitrator within 30 days from the later of (a) the date when the Notice of Arbitration was received and (b) the date the parties agreed that the dispute should be referred to a sole arbitrator;
- *where it was the HKIAC Council which decided that there should be a sole arbitrator*, the parties shall jointly designate the sole arbitrator within 30 days from the date of receipt of the HKIAC Council's decision.

4.202 If the parties fail to designate the sole arbitrator within this time limit, the HKIAC Council shall appoint the sole arbitrator.

4.203 In making the appointment, the HKIAC Council will consult at least three members of an independent Appointment Advisory Board.[105] Although the HKIAC Council is not bound by the advice received, in practice, it is invariably taken into account when reaching a decision.

4.204 The Arbitration (Appointment of Arbitrators and Umpires) Rules set out criteria to be taken into account by the HKIAC in making appointments.[106]

4.205 In practice, the HKIAC will attempt to appoint an arbitrator who is on the HKIAC's Panel of Arbitrators. Where the appointment sought requires skills and experience not readily available on the Panel, the HKIAC may appoint non-panelists.

4.206 Where a dispute between two parties is referred to a three-member arbitral tribunal (which is more often the case for substantial arbitrations in Hong Kong), the default provision under Article 8.1 is for:

- each party to designate one arbitrator;
- if a party fails to do so within 30 days after notification of the other party's appointment or within an agreed time limit, the HKIAC Council shall appoint the second arbitrator;
- the two arbitrators so appointed shall designate a third arbitrator who shall act as the presiding arbitrator;
- failing such designation within 30 days from confirmation of the second arbitrator or within an agreed time limit, the HKIAC Council shall appoint the presiding arbitrator.

In all cases, Article 11 of the Rules provide that:

- the arbitrators appointed shall be and remain at all times impartial and independent of the parties;
- where the parties are of different nationalities, a sole arbitrator or the presiding arbitrator shall not have the same nationality as any party, unless otherwise agreed in writing.

In practice, in appointing the presiding arbitrator, the two party-appointed arbitrators may sometimes consult with their respective appointing parties, on the criteria they would like to see in the presiding arbitrator. Some Hong Kong arbitrators are comfortable with

[105] Art 9.1, HKIAC Administered Arbitration Rules.

[106] These are: (a) the nature of the dispute; (b) the availability of arbitrators or umpires, as the case may be; (c) the identity of the parties; (d) the independence and impartiality of the arbitrator or umpire; (e) any stipulation in the relevant arbitration agreement; and (f) any suggestions made by the parties themselves. See r 7, Arbitration (Appointment of Arbitrators and Umpires) Rules.

conducting such *ex parte* communications with their appointing parties, prior to the constitution of the tribunal, but others (and some counsel), are less familiar or comfortable with adopting such a procedure without the explicit consent of the parties.

4.207 (3) **Multi-party appointment of arbitrators** The HKIAC Administered Arbitration Rules also address multi-party appointment of arbitrators. In such a situation, and where there are three arbitrators, the default under Article 8.2 is as follows:

- the HKIAC Secretariat sets an initial 30-day time limit for the claimant(s) to designate an arbitrator;
- it sets a subsequent 30-day time limit for the respondent(s) to designate an arbitrator;
- if the parties have designated arbitrators accordingly, then the presiding arbitrator is designated by the two arbitrators so appointed, or failing that, by the HKIAC Council.

However:

- where one or more parties or groups of parties fail to designate an arbitrator, the HKIAC Council shall appoint the arbitrator in question and the presiding arbitrator;
- prior to doing so, the HKIAC Secretariat shall give any party or group of parties which has duly appointed an arbitrator the opportunity to withdraw the appointment and allow the HKIAC Council to appoint all three arbitrators.

This provision is unusual in one respect: it envisages that where the multi-party appointment procedure fails, the HKIAC Council may step in to appoint only *one* of the party-appointed arbitrators, rather than all three arbitrators on the tribunal.

4.208 As before, the guidelines under Article 11 of the Rules, set out above, apply.

4.209 In one case,[107] the Hong Kong courts considered a multi-party arbitration involving two separate contracts with two separate arbitration agreements, in the context of enforcement under the New York Convention. The respondent argued that there had been wrongful consolidation of the proceedings, and that the arbitrators had not been properly appointed. These arguments were not accepted by the Hong Kong court.

4.210 (4) **Choice of arbitrators** The HKIAC maintains a panel of arbitrators (as well as a separate 'list of arbitrators' who possess less experience than arbitrators on the HKIAC panel). There are currently about 300 arbitrators on the panel, including many leading international and Hong Kong-based arbitrators. The HKIAC applies various criteria in deciding which arbitrators are allowed to be on its panel. The arbitrators on the HKIAC's panel possess a wide range of skill sets, including bilingual capability; specialist familiarity with a wide range of industries and areas of legal practice; cultural familiarity; and they are often familiar with international arbitration practice.

4.211 Parties to HKIAC arbitrations are not obliged to select arbitrators from the HKIAC's panel, and Hong Kong is one of the easiest places in the region to persuade foreign arbitrators to come to conduct arbitration hearings.

4.212 In substantial international arbitrations conducted in Hong Kong, it is not unusual for the tribunal to comprise arbitrators of two or more nationalities.

[107] *Karaha Bodas Company LLC* (n 27 above). The case was appealed to the Court of Appeal on different grounds.

4.213 Apart from universal considerations which apply in choosing arbitrators, in the context of Hong Kong arbitrations, there are a number of factors which are particularly important:

- language: as noted above, many Hong Kong disputes involve more than one language, particularly the Chinese language. Foreign parties are not always comfortable choosing ethnic Chinese arbitrators as their party-appointed arbitrator. Where this is the case, they may turn to the (limited) pool of well-established non-ethnic Chinese arbitrators who are familiar with the Chinese language;
- cultural affinity: as in many other jurisdictions, cultural affinity is an important trait for a successful arbitrator. In Hong Kong, there have in previous cases been difficulties in some Sino-foreign disputes, where parties have appointed arbitrators from very different backgrounds. Thus, a PRC party may appoint an eminent arbitrator who is familiar with PRC law (which places a greater emphasis on equity and justice), whereas the foreign party may appoint an arbitrator from its home jurisdiction (who may take a strictly 'black letter law' approach to the case). In such cases, unfortunate disagreements can break out among the arbitrators; a presiding arbitrator who has the necessary cultural affinity can help to bridge the gap;
- PRC law: a significant number of contracts which provide for Hong Kong arbitration are governed by PRC law. Even where the governing law is not PRC law, because the subject matter relates to the PRC, questions of PRC law often arise. Appointing an arbitrator who has the necessary experience in dealing with PRC law issues can be important, since the arbitrator is able to draw on his or her past experience, and in certain cases, realize when parties are over-stating particular propositions under PRC law.

Experienced parties are often very careful in appointing their arbitrators, and it is increasingly common for parties to substantial international arbitrations to interview prospective arbitrators, particularly where counsel are less familiar with them. This is a practice that some Hong Kong arbitrators are comfortable with, provided various safeguards are in place,[108] although others, as well as certain counsel, are less accepting of such a practice.

(ii) Impartiality and independence of tribunal

4.214 Both the Arbitration Ordinance[109] and the HKIAC Administered Arbitration Rules contain broadly similar provisions setting out the requirement for arbitrators to be impartial and independent. Thus, Article 11 of the Rules provides that:

- all arbitrators shall be and remain at all times impartial and independent of the parties;
- a prospective arbitrator shall disclose without delay any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence;
- an arbitrator, once designated, shall disclose without delay any such circumstances to the parties unless he or she has already informed them.

If there are circumstances that give rise to justifiable doubts as to an arbitrator's impartiality or independence, he or she may be challenged. However, a party may challenge the arbitrator designated by it only for reasons it became aware of or ought reasonably to have become aware of *after* the designation was made.[110]

[108] See eg the 'Guideline on the Interviewing of Prospective Arbitrators' published by the Chartered Institute of Arbitrators, although in practice not all arbitrators agree with or consider that the guidelines should be applied in their entirety.

[109] See s 25, which gives effect to Art 12 of the UNCITRAL Model Law.

[110] Art 11.4, HKIAC Administered Arbitration Rules.

4.215 Although parties and tribunals in Hong Kong often refer to the IBA Guidelines on Conflict of Interest in International Arbitrations for guidance, the extent to which the Guidelines reflect Hong Kong law is less clear. In one case, involving a challenge to an arbitrator, the Court of First Instance held that the 'apparent bias' test which applied to judges also applied to arbitrators: namely, whether a hypothetical, objective, fair-minded, and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased. On the facts, the challenge failed.[111]

(iii) Challenge and replacement of arbitrators

4.216 Section 26 of the Arbitration Ordinance gives effect to Article 13 of the UNCITRAL Model Law, which sets out the procedure for challenging an arbitrator. In addition, section 26 supplements Article 13, by providing among others, that:

- although Article 13 allows the tribunal to continue with the proceedings pending a challenge, the court may refuse to grant leave to enforce any resulting award, pending the challenge;
- an arbitrator who is challenged is entitled voluntarily to withdraw from office;[112]
- the mandate of a challenged arbitrator terminates in certain specified situations, consequent upon a challenge.

Where the parties have agreed to the HKIAC Administered Arbitration Rules, then it is the Rules, read together with the HKIAC Challenge Rules,[113] which will primarily govern the challenge.

4.217 Article 11 of the Rules sets out the basic procedure:

- the notice of challenge shall be sent:
  - within 15 days after the appointment of the challenged arbitrator has been notified to the challenging party, or
  - within 15 days after that party became aware of or ought reasonably to have become aware of the relevant circumstances;
- the challenge shall be notified to the HKIAC Secretariat, all other parties, and the arbitrators;
- the notification shall be in writing and shall state the reasons for the challenge.

If the challenged arbitrator does not voluntarily withdraw, the HKIAC Council decides the challenge. The Challenge Rules provide, among others, that:

- the other parties to the arbitration and the challenged arbitrator are given an opportunity to answer the challenge;
- thereafter, the applicant party is given an opportunity to respond to each and every answer;

[111] *Jung Science Information Technology Co Ltd v ZTE Corp* [2008] 4 HKLRD 776 (CFI); see also *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor* HCCT 41/2010 which discusses similar issues in the context of an application to enforce an award.

[112] Art 14(2) of the UNCITRAL Model Law provides that such a withdrawal does not imply acceptance of the validity of the challenge.

[113] Hong Kong International Arbitration Centre Challenge Rules (adopted by the Council of the HKIAC on 25 March 2008).

- all answers to a challenge and responses to such answers shall be copied to the other parties;
- the Council shall determine a challenge on the basis of written evidence and written submissions alone;
- the Council's determination in respect of any challenge shall be given to the parties in writing, and the rules expressly note that the Council may 'in its sole discretion' decide whether to provide reasons.

Under Article 13 of the Model Law, the parties' freedom to agree on a challenge procedure is subject to the court's overriding power to intervene. Thus, if a challenge under the agreed procedure is not successful, the challenging party may within 30 days after notice of the decision rejecting the challenge, request that the Court of First Instance decide the challenge, which decision shall be subject to no appeal.[114]

4.218 Articles 12 and 13 of the HKIAC Administered Rules also provide that in situations where an arbitrator is removed, the HKIAC Secretariat shall allow the party who designated that arbitrator to designate a replacement arbitrator, failing which the HKIAC Council shall appoint a replacement arbitrator. If an arbitrator is replaced, the proceedings resume at the stage where the relevant arbitrator ceased to perform his or her functions, unless the tribunal decides otherwise.

4.219 In practice, in recent years and consistent with the increasingly adversarial nature of arbitration proceedings, there have been more threats towards, and challenges made to, Hong Kong arbitrators. However, the challenges have generally not been successful, and the number of actual challenges is still relatively small.

(iv) Administrative and arbitrators' fees

4.220 (1) **Administrative fees** For arbitrations conducted under the HKIAC Administered Arbitration Rules, the HKIAC charges an administrative fee that is pegged to the amount in dispute, based on a sliding scale. The fees are capped at about US$27,000, where the amount in dispute is over US$50m.

4.221 The applicable scale fees are set out in Section H(f)(ii) below.

4.222 (2) **Arbitrators' fees** Although the HKIAC publishes a Schedule of Fees and Costs of Arbitration setting out the fees payable to the arbitrators, unusually, it gives the parties the option to decide whether the fees are to be determined:

- in conformity with the Schedule; or
- in accordance with fee arrangements agreed between the appointing parties and the arbitrators.[115]

4.223 The method for determining the fees of the tribunal shall be notified to the HKIAC Secretariat within 30 days from the Notice of Arbitration.[116] The Rules further provide that the default is for the fees to be fixed in accordance with the fee arrangements agreed between the parties.

[114] Art 13, UNCITRAL Model Law.
[115] Art 36.2, HKIAC Administered Arbitration Rules.
[116] Art 36.2, HKIAC Administered Arbitration Rules.

4.224 In practice, it is relatively rare for parties to provide in their arbitration agreement for fees to be determined in accordance with the Schedule. Once a dispute arises, it is often difficult for such agreement to be reached. As a result, the fees for arbitrators are often still determined based on the agreed fee arrangements.

4.225 Upon constitution of the tribunal, the HKIAC Secretariat will usually request each party to deposit an equal amount as an advance for the costs.[117]

(v) Liability of arbitrators and arbitral institutions

4.226 The Arbitration Ordinance provides that an arbitral tribunal is liable in law for an act done or omitted to be done by it (or an employee or agent) in relation to the exercise or performance, or purported exercise or performance, of the tribunal's functions only if it is proved that the act was done or omitted to be done dishonestly.[118]

4.227 In addition, the HKIAC Administered Arbitration Rules provide that, among others, the arbitrators shall not be liable for any act or omission in connection with an arbitration conducted under the Rules, unless the act was done or omitted to be done dishonestly. Furthermore, after the award is made and the possibility of a correction, interpretation, or additional award has ended, the arbitrators (among others) are under no obligation to make statements to any person about any matter concerning the arbitration, nor shall a party seek to make them a witness in any legal or other proceedings arising out of the arbitration.[119]

4.228 Both the ordinance[120] and the rules[121] also include provisions dealing with the immunity of arbitral institutions and related parties.[122]

4.229 To date, parties in Hong Kong have not challenged the authority or immunity of arbitrators, or of institutions such as the HKIAC, in court.

(f) Preliminary steps and objections

(i) Preliminary meeting

4.230 Typically, after the tribunal is constituted, it will hold a preliminary meeting to discuss procedural matters and the timetable.[123] Such a meeting will usually take half to a full day, at most.

4.231 If the counsel and the arbitrators are based in Hong Kong, then tribunals will usually hold such a meeting in person. Even if the arbitrators or counsel are not resident in Hong Kong, if the dispute is complex; it appears that the matter will not settle early; and the tribunal and counsel are unfamiliar with each other, then it is often useful for such a meeting to be held in person (although the venue of such a meeting may be outside Hong Kong, without prejudice to Hong Kong remaining as the legal place of arbitration). Conversely, if the dispute is straightforward and involves a small amount, and the arbitrators and counsel are located in

[117] Art 37.1, HKIAC Administered Arbitration Rules.
[118] s 104, Arbitration Ordinance.
[119] Art 40, HKIAC Administered Arbitration Rules.
[120] s 105, Arbitration Ordinance.
[121] Art 40, HKIAC Administered Arbitration Rules.
[122] Note, however, the UK Supreme Court decision of *Jones v Kaney* [2011] UKSC 13 which abolished the longstanding immunity from suit afforded to expert witnesses. The case may be persuasive in Hong Kong, particularly with respect to the position of party-appointed experts.
[123] See also Art 14.3 of the HKIAC Administered Arbitration Rules.

different jurisdictions, then the tribunal may sometimes hold a preliminary meeting by conference call. It is fairly common for client representatives from each side to attend the meeting, especially if they wish to demonstrate that they take the arbitration seriously.

4.232 At the meeting, the usual range of procedural issues will be discussed, including number of submissions and timing; documentary evidence; witnesses (including expert witnesses, if any); hearings (including bifurcation of proceedings, if any); any objections to jurisdiction; governing law and place of arbitration; language; and the overall timetable.

4.233 In the past, such meetings were usually a matter of course, although in recent years, it has been more common for contentious issues to be raised, resulting in oral submissions from the parties, and in some cases, for written submissions to follow after the preliminary meeting. Nonetheless, experienced Hong Kong arbitrators will usually try to persuade the parties to reach consensus on procedural matters. This is often easier where the counsel are both from Hong Kong or are familiar with each other, but may be considerably more difficult where they come from very different backgrounds or are not familiar with accepted international arbitration practice.

4.234 Following the meeting, a provisional timetable and directions will usually be drawn up. In Hong Kong arbitrations under the HKIAC Administered Arbitration Rules, it is unusual for the tribunal to draw up terms of reference, unless there is a special need for it.

4.235 Depending on the complexity of the dispute, the tribunal may also, after consulting with the parties, appoint a secretary,[124] who will only have an administrative role. Often, parties in Hong Kong arbitrations will be comfortable with the appointment of a secretary, although occasionally, some parties may be concerned that the secretary may add to (rather than reduce) the costs of the arbitration, or that he or she may interfere with the decision-making process.

(ii) Objections to jurisdiction

4.236 **(1) Procedure and practice** Article 16 of the UNCITRAL Model Law applies in Hong Kong.[125] Accordingly, any objection to jurisdiction is to be raised not later than the submission of the Statement of Defence. Where the plea relates to the tribunal exceeding the scope of its authority, this has to be raised as soon as the matter alleged to be beyond the scope of authority is raised during the arbitration. In both cases, the tribunal may admit a later plea, if justified.

4.237 The tribunal is entitled to rule on the objection:

- either as a preliminary question; or
- in an award on the merits.

4.238 The HKIAC Administered Arbitration Rules elaborate on the above, by stating that if the respondent has raised an objection to jurisdiction, the Statement of Defence 'shall' contain the factual and legal basis of such an objection.[126]

[124] Art 14.5, HKIAC Administered Arbitration Rules.
[125] Given effect by s 34, Arbitration Ordinance.
[126] Art 18.2, HKIAC Administered Arbitration Rules.

4.239 In practice, where such objections are raised, the tribunal is more likely to deal with it as a preliminary question, if the objection is not heavily fact-dependent, but can be determined based on the material before it. In addition, if the objection is a total objection to the tribunal's jurisdiction, and there is a fairly strong basis for the objection, then the tribunal may be more inclined towards ordering a stay of the proceedings, pending resolution of the objection. Conversely, if it is simply a partial objection or it appears to be an attempt to derail or delay the arbitration, then the tribunal will be more likely to continue with the proceedings.

4.240 Typically, such objections in Hong Kong arbitrations can be dealt with in a few months, and it may involve merely oral submissions (if the objection is fairly straightforward); or written submissions from all parties (eg because it is difficult to arrange an oral hearing or the objection is more complex in nature); or both. In practice, it is relatively unusual for parties to challenge the tribunal's ruling in court (see below), if it rules that it has jurisdiction. This is in part because parties often do not wish to run the risk of offending the tribunal, if their court challenge fails.

4.241 In practice, a wide range of objections may be encountered in Hong Kong arbitrations. Many of them are PRC-related, including the following:

- claims relating to an overlap between the jurisdiction of the Hong Kong and PRC courts, especially if there are concurrent proceedings before the PRC courts (which is not uncommon);
- difficulties arising from the subject matter of the arbitration being in the PRC, and issues arising from mandatory or quasi-mandatory provisions of PRC law which impact on it;
- claims that the arbitration agreement is invalid due to fraud or an allegation that the signatory is not authorized;
- claims that the relevant subject matter is not arbitrable under PRC law;
- claims that the relevant limitation period is determined under PRC law, which imposes a relatively short limitation.

4.242 (2) **Court involvement.** If the tribunal rules as a preliminary question that it has jurisdiction, any party may, within 30 days after the ruling, request the Court of First Instance to decide the matter, which decision is subject to no appeal. While such a request is pending, the tribunal may continue the arbitral proceedings and make an award.[127] Any such application to the courts can usually be dealt with in several months.

4.243 Conversely, the ordinance makes it clear that a ruling of the tribunal that it does *not* have jurisdiction cannot be appealed.[128]

(g) Written submissions

(i) Overview

4.244 Following the Answer to the Notice of Arbitration, the Statement of Claim is filed (unless it was contained in the Notice of Arbitration).[129] The time allowed for this is usually set out in the provisional timetable drawn up by the tribunal.

[127] Art 16(3), UNCITRAL Model Law, given effect by s 34, Arbitration Ordinance.
[128] See s 34(4), Arbitration Ordinance.
[129] See Art 17, HKIAC Administered Arbitration Rules.

4.245 Article 17.2 of the HKIAC Administered Arbitration Rules sets out bare requirements for the Statement of Claim, including:

- a statement of the facts supporting the claim;
- the points at issue;
- the relief or remedy sought.

4.246 Some documentary evidence is ordinarily annexed to the Statement of Claim.

4.247 Thereafter, Article 18 of the Rules provides that the Statement of Defence is filed. It replies to particulars in the Statement of Claim and also sets out details of any objection to jurisdiction. Ordinarily, documentary evidence will similarly be annexed to the Statement of Defence. If there is a counterclaim, this will be included with the Statement of Defence.[130]

4.248 Thereafter, the HKIAC Administered Arbitration Rules allows the tribunal to decide which further written statements, if any, shall be required.[131] In practice, if a counterclaim has been filed, then at a minimum, there will usually be provision for a defence or reply to the counterclaim. In addition, depending on the complexity of the dispute, provision is sometimes made for at least one other round of exchanges between the parties.

4.249 Although the relevant time periods will depend on the particular situation, a fairly common interval for initial exchanges between the parties is four weeks or 30 or 45 days, for reasonably substantial arbitrations.

4.250 The HKIAC Administered Arbitration Rules envisage that submissions will be exchanged between the parties sequentially and, in practice, this is often the case, although it is possible for parties to agree otherwise.

(ii) Format

4.251 There is no fixed format for the Statement of Claim, Statement of Defence, and further submissions. Indeed, parties sometimes file submissions which differ significantly in form from each other, and the terminology is not consistent (eg, Points of Claim, Claimant's Memorial, etc).

4.252 In general, the approach in substantial Hong Kong international arbitrations is increasingly for detailed submissions to be filed. It is not unusual for these to run into 50 pages, and they could be much longer if there are many relevant particulars. These filings will often include particulars on both fact and law, and one common approach is for the two sections to be kept separate, within the submissions. In other cases, parties who are less familiar with international arbitration may plead their cases in a more rigid court-style format, with parties traversing each and every point in the other party's submissions. Increasingly, however, the trend is to move away from this, and to adopt an approach that is closer to international arbitration practice. At the earlier stages of the proceedings, the written submissions typically deal with damages in less detail.

4.253 In addition to the written submissions, parties will often include at least some supporting exhibits. The volume of this can vary significantly, and in some cases, parties may only produce limited exhibits (such as a single bound volume), whereas in others, these may easily

[130] See Art 18, HKIAC Administered Arbitration Rules.
[131] Art 21, HKIAC Administered Arbitration Rules.

run into several folders. The general trend is towards greater production of documentary evidence at an earlier stage in the proceedings. There is no fixed practice on whether all documents exhibited with the submissions will be translated. This is sometimes discussed at the preliminary meeting, and will depend on the volume of documents involved and whether the legal representatives involved have in-house translation capability (typically from Chinese into English). Increasingly, the expectation is that counsel based in Hong Kong should have such resources available.

4.254 In some jurisdictions and in some types of arbitration, it is common for parties to produce a full memorial which includes full submissions on fact and law, together with witness statements. The counterparty will then respond to the entire memorial. This approach is not usually adopted in Hong Kong.

(h) Documents

(i) Overview

4.255 In Hong Kong international arbitrations, documentary evidence is of considerable importance and in many cases, they may be given greater weight than witness testimony.

4.256 Although both the Arbitration Ordinance and the HKIAC Administered Arbitration Rules envisage that documentary evidence will be produced, they provide limited guidance on the procedure. Article 23.3 of the Rules simply provides that the tribunal may require the parties at any time to produce documents within such a period as determined by the tribunal. The tribunal has the right to admit or exclude any document.

4.257 In practice, it is common for parties to Hong Kong international arbitrations to refer to the IBA Rules on Evidence (and now, the IBA Rules on Evidence (2010)), either because the parties have agreed that the rules apply, or because it is said that the rules codify accepted practice in international arbitration.

4.258 Typically, the disclosure of documents stage will take place after the written submissions have been filed, and before filing of witness statements. Usually, it involves two parts:

- first, production of all documents on which a party relies;
- secondly, requests from each party to the other(s) for relevant and material documents.

Ordinarily, for substantial international arbitrations, this process will take at least two months, but it may sometimes take considerably longer, depending on the volume of documents. In addition, in disputes subject to Hong Kong arbitration, parties sometimes do not maintain a proper record-keeping system, resulting in considerable delays in locating the relevant documents.

(ii) Production of documents

4.259 In Hong Kong international arbitrations, the first stage usually involves the voluntary production of all documents on which all parties rely. Where there are several stages in the arbitration (eg, where damages are dealt with separately), disclosure may be limited to documents relied on in a particular stage. There is usually no obligation for a party to disclose all relevant documents, or to produce unfavourable documents.

4.260 The disclosure often takes place concurrently, and parties are often happy to dispense with the preparation or inspection of lists of documents. The volume of documentation can vary

considerably, but in arbitrations which are paper-heavy, the documents can amount to many volumes of files. The tribunal will often not wish to be copied on such documents, especially where the volume is large.

(iii) Specific requests for documents

4.261 Ordinarily, after the first stage of disclosure, parties will have leave to apply for specific disclosure, which often takes place as a second stage in the procedure.

4.262 The format and breath of such requests can vary considerably, depending on the background of the parties' counsel and whether they are familiar with international arbitration practice. The trend in Hong Kong is towards adopting the IBA Rules of Evidence format for requests, which envisage that a 'Request to Produce' will be issued, which describes a requested document sufficient to identify it, or describes in sufficient detail (including subject matter) a 'narrow and specific requested category of Documents that are reasonably believed to exist'.[132]

4.263 The number of such requests varies depending on each case, but in a typical substantial international arbitration, it is not uncommon for the requests to run into several pages.

4.264 Such requests are usually exchanged by the parties concurrently. They are usually followed by production of documents in response to non-contested requests, as well as objections to requests which a party is not prepared to produce.

4.265 The requests are then determined by the tribunal either in writing, or in an oral hearing where the parties may be given leave to make further oral submissions. It is increasingly common for tribunals in Hong Kong to seek to reword the scope of the requests (sometimes with the parties' agreement), rather than to allow or disallow them outright.

4.266 In deciding whether to allow a request, the tribunal will ordinarily consider whether the requested documents are relevant and material to the outcome of the dispute, and may apply tests such as those set out in the IBA Rules of Evidence. Most experienced international arbitrators in Hong Kong have moved away from practices which are heavily based on court discovery, and instead, look more to international arbitration practice. Correspondingly, extensive disclosure of documents as practised in some common law court jurisdictions are not usual. Where the tribunal grants the requests, parties are obliged to produce the party's documents, which may include internal confidential documents and documents which are adverse to a party's interests, unless the document in question is legally privileged.

(iv) Legal privilege

4.267 Section 56(9) of the Arbitration Ordinance recognizes that a person is not required to produce in arbitral proceedings any document that the person could not be required to produce in civil proceedings before a court.[133] This gives effect to the doctrine of privilege. In Hong Kong, the three most commonly encountered types of privilege are:

- *legal professional privilege*, which covers communications between lawyers and their clients for the purpose of obtaining or giving legal advice;

[132] Art 3, IBA Rules on Evidence (2010).
[133] s 56(9), Arbitration Ordinance.

- *litigation privilege*, which covers documents created for, or in contemplation of, litigation or arbitration proceedings;
- *without prejudice privilege*, which covers communications made between the parties to a dispute in a bona fide attempt to settle the dispute.

In general, Hong Kong tribunals will give at least some effect to all three categories of privilege. Nonetheless, difficult questions can arise, because of different standards of privilege which may apply in the place where the document was created; where it is stored; or if counsel are from different jurisdictions.

4.268 In the context of PRC-related disputes in Hong Kong, for example, difficult questions have arisen as to how claims of privilege are to be resolved, since PRC law does not have a law of privilege as such. There is no ready answer to such questions, although it may be noted that section 56(9) does suggest that at least with respect to that subsection, the reference point is what privilege rules apply in civil proceedings in court. In addition, some tribunals may find the guidance set out in Article 9.3 of the IBA Rules on Evidence (2010) to be persuasive.

(v) Practicalities

4.269 It is common for copies of documents rather than originals to be provided at the first instance. However, copies produced should conform to the original. If there is a serious dispute between the parties as to the authenticity of documents, the originals may then be produced.

4.270 Where a party has been ordered to disclose certain documents and it fails to do so without a proper explanation, it is open to the tribunal to infer that such evidence would be adverse to the interests of that party.[134] In such circumstances, many Hong Kong tribunals may still refrain from expressly drawing an adverse inference, although they may take this into account when weighing the evidence.

(vi) Electronic disclosure and future trends

4.271 There are no specific rules on electronic disclosure, and on how electronic documents are presented and proven. In practice, where they are not voluminous, it is still common for electronic documents (such as emails) to be presented as hard copy documents. Where there is a dispute over their authenticity, the documents may be produced in their native electronic format, for verification.

4.272 Where electronic documents are voluminous, other arrangements may be necessary, and in such circumstances, the guidelines set out in the IBA Rules on Evidence (2010), as well as the principles and protocols developed in the United States and in other jurisdictions, are likely to be persuasive. Nonetheless, to date, parties to Hong Kong international arbitrations have generally been fairly conservative in dealing with electronic disclosure.

(i) Factual witnesses

(i) Overview

4.273 Under Hong Kong law, there are no strict rules on which persons may give evidence as a witness.[135] This is consistent with the general approach of disregarding technical rules on

[134] See eg Art 9.6 of the new IBA Rules.

[135] In the case of the HKIAC Administered Arbitration Rules, Art 23.5 expressly provides that any person may be a witness or an expert witness.

admissibility of evidence. Thus, for example, employees of a party to the arbitration are allowed to testify. However, the tribunal has the discretion to give less weight to the testimony of a witness, if this is justified in the circumstances.

4.274 In Hong Kong international arbitrations, written witness statements are admissible and are frequently used.[136] They are typically prepared by each witness to be called, and exchanged before the hearing.

4.275 In substantial international arbitrations, it is fairly common to have more than one round of witness statements, with supplemental or responsive statements submitted in reply to points made in first round witness statements from the other party.

(ii) Format

4.276 It is fairly common for witness statements to simply be signed by the parties, rather than produced as a formal affidavit. This particular issue may be discussed and agreed at the preliminary meeting. It is also common for witness statements to refer to and explain relevant documents, which have been previously disclosed, or, possibly, which may be attached to the witness statements. Ordinarily, witnesses are given considerable leeway in what is set out in their statements, and strict evidential rules do not apply; thus, for example, witness statements may often include hearsay.

4.277 In Hong Kong arbitrations, witness statements are sometimes also prepared in another language (typically Chinese) and then translated into English (assuming this is a language of the arbitration).

4.278 The length of the statements will vary considerably, but a reasonably substantial statement might be, for example, about 20 to 40 pages long, excluding the exhibits.

(iii) Practicalities

4.279 In Hong Kong, it is very common for witness statements to be prepared with the assistance of a party's legal representatives. These are often prepared based on interviews with witnesses, with the statements refined over several drafts. Under Hong Kong law, there are no specific restrictions against solicitors conducting such interviews, and preparing witnesses for the actual oral hearing and cross-examination.[137] However, some ethical and Bar restrictions may apply. For example, 'coaching' of witnesses is not permissible.

4.280 In Hong Kong arbitrations, witness statements can sometimes be of considerable importance. This is partly because of the relative informality in which business is sometimes carried out in the PRC and in Asia, with the result that it is not uncommon for there to be allegations of 'side agreements' which have not been properly documented in the contract.

4.281 In the course of the proceedings, a party or its counsel may approach a witness whom it has nominated, even after proceedings have started. However, once a witness has started giving evidence orally, he or she should not discuss his or her evidence with anyone else until the evidence is finished.

[136] See eg Art 23.8 of the HKIAC Administered Arbitration Rules which provides that evidence of witnesses or expert witnesses may also be presented in the form of written statements or reports signed by them.

[137] This is also reflected in Art 23.9 of the HKIAC Administered Arbitration Rules, which provides that a party, its officers, employees, legal advisors, or counsel may interview witnesses, potential witnesses, or expert witnesses.

(j) Expert witnesses

(i) Overview

4.282 In Hong Kong arbitrations, it is common for expert evidence to be adduced by way of party-appointed experts. Although tribunal-appointed experts are permitted, this is less common.

4.283 Usually, the arbitral tribunal will give specific directions on expert evidence, after consulting with the parties (usually, at the preliminary meeting). It is fairly common for the evidence to take the form of a report, although this will depend on the subject matter.

(ii) Party-appointed experts

4.284 Where party-appointed experts are used, the legal representatives of the parties will usually work closely with the expert to ensure that the expert's testimony deals with the material issues.[138]

4.285 Despite this, the primary duty owed by a party-appointed expert is to the arbitral tribunal, and not to the party who appointed him or her. An expert witness is therefore obliged to be impartial, and to be and remain independent both in preparing the report and in giving expert evidence before the arbitral tribunal.[139] Experts who fail to be impartial or independent of the parties may be successfully challenged and, in extreme cases, may also be subject to sanctions from their relevant regulatory or professional body.

4.286 In practice, it is rare for an expert to be successfully challenged on this basis, although most experienced arbitrators recognize that experts appointed by a party will often be more favourably disposed towards the case put forward by the party which appointed them. In addition, in past Hong Kong cases, some experts have been less familiar with international arbitral practice, and have sometimes taken an obviously partisan view when presenting their evidence (with the result that this evidence has simply been disregarded by the tribunal).

4.287 Evidence from party-appointed experts may be adduced concurrently, or sequentially. Where there is a clear consensus on the precise issues which each expert should address, then an exchange of expert statements may be more efficient. But where the points are unclear, a sequential filing may be more appropriate.

4.288 It is also increasingly common to consider more novel methods of dealing with expert evidence, such as expert witness conferencing (on a 'without prejudice' basis or otherwise) or joint agreed statements or reports.

(iii) Tribunal-appointed experts

4.289 In the case of tribunal-appointed experts, the tribunal will consult the parties prior to appointing any such experts. It will also usually outline the scope of the proposed advice or provide the expert's terms of reference; seek the parties' views and input; and set out the expected fee basis for the expert. In Hong Kong, on occasion, counsel who are more accustomed to an adversarial procedure may resist the appointment of tribunal-appointed experts,

[138] Art 23.9 of the HKIAC Administered Arbitration Rules provides that parties may interview expert witnesses.

[139] See generally, *UBC (Construction) Ltd v Sung Foo Kee Ltd* [1993] 2 HKC 458.

and may try to persuade the tribunal to permit party-appointed experts instead, or to allow the parties to present rebuttal expert witnesses.

4.290 The written expert report of a tribunal-appointed expert is usually communicated to both parties for comments and the parties may also apply to respond to it prior to the hearing. Article 25 of the HKIAC Administered Arbitration Rules sets out provisions dealing with this.

4.291 In addition, if a party requests (or if the arbitral tribunal considers it necessary), the expert shall, after delivery of his or her report, participate in a hearing where the parties have the opportunity to put questions to him or her and to present expert witnesses in order to testify on the points at issue.[140] In practice, it is common for such cross-examination to take place, unless the evidence of the expert is neutral or deals with a non-contentious issue.

(iv) Frequency and subject area

4.292 In many substantial international arbitrations in Hong Kong, it is common to have testimony from at least one set of expert witnesses. The subject matter will vary depending on the dispute, but some of the more common areas include matters of PRC law, technical matters, and financial issues.

(k) Interlocutory applications

4.293 In the course of the arbitration, parties will typically make a number of applications to the tribunal. These cover a range of matters, from applications for security for costs; to attempts to strike out part of a party's claim; to applications for directing the inspection of the subject matter of the dispute. The tribunal's power to deal with such applications has been discussed at Section E(a) above.

4.294 In general, Hong Kong arbitrations have become more contentious in recent years, and correspondingly, there has been an increase in such applications. Many experienced arbitrators will seek to persuade the parties to reach a sensible compromise on such matters, and will only rule on the applications where agreement is not possible. Typically, most applications are dealt with within a few days and in urgent cases, may be decided more quickly.

4.295 To some extent, such applications tend to be more common where parties or their counsel are less familiar with international arbitration. In many of the largest and most substantial arbitrations conducted in Hong Kong, experienced counsel often anticipate such issues, and also recognize that experienced tribunals frown upon unnecessary and unmeritorious applications.

4.296 In practice, it is not uncommon for the presiding arbitrator to rule on procedural matters on their own (although they may do so in consultation with the co-arbitrators). In this regard, Article 29.2 of the HKIAC Administered Arbitration Rules expressly provides that with the prior authorization of the tribunal, the presiding arbitrator may decide questions of procedure themselves.

(l) Evidence

(i) Overview

4.297 When conducting arbitral proceedings, an arbitral tribunal is not bound by the rules of evidence and may receive any evidence (excluding evidence protected by privilege) that it

[140] Art 25.4, HKIAC Administered Arbitration Rules.

considers relevant to the arbitration. However, it must give the evidence the weight 'that it considers appropriate'.[141] Thus, for example, evidence which is hearsay would carry less weight than direct evidence.

4.298 In practice, in most Hong Kong international arbitrations, tribunals will not apply strict court rules of evidence, although the underlying principles may still be relevant.

(ii) Applicable principles

4.299 The HKIAC Administered Arbitration Rules provide that each party shall have the burden of proving the facts relied on to support its claim or defence.[142] In general, evidence will be assessed on a balance of probabilities, although in some situations (eg where allegations of fraud are made), the tribunal may require more definitive proof.

4.300 Under the Arbitration Ordinance, a tribunal may take the initiative to ascertain the facts relevant to the proceedings.[143] However, the arbitrator or tribunal should not decide solely on the basis of evidence obtained through their own investigations without sharing such evidence with the parties beforehand. If an award is based in whole or in part on evidence ascertained through the arbitral tribunal's own investigations or specialized knowledge, the tribunal must first put that evidence before the parties for comment. Otherwise the award may be set aside or refused enforcement because the parties have not been given a reasonable opportunity to present their case.[144]

(m) Settlement

4.301 It is common for international arbitrations in Hong Kong to settle. Typical windows for such a settlement include:

- shortly after the filing of the Notice of Arbitration, or after parties are requested to deposit an advance on costs;
- after a jurisdictional objection, determination of a preliminary question of law, or after a significant procedural application;
- after the detailed submissions have been filed;
- after disclosure of documents;
- on the eve of the hearing, or after the hearing has ended.

4.302 Article 30 of the UNCITRAL Model Law applies in Hong Kong.[145] Thus, during the arbitration, if the parties settle the dispute, the tribunal shall terminate the proceedings and, if requested by the parties, may record the settlement in the form of an arbitral award on agreed terms.

4.303 In addition, section 66(2) of the Arbitration Ordinance provides that settlement agreements entered into by the parties are also, for purposes of enforcement, to be treated as an arbitral award.

[141] s 47(3), Arbitration Ordinance; see also Art 23.10, HKIAC Administered Arbitration Rules.
[142] Art 23.1, HKIAC Administered Arbitration Rules.
[143] s 56(7), Arbitration Ordinance.
[144] See *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd and Chen Rong* HCCT 66/2007 (10 February 2009).
[145] Given effect by s 66 of the Arbitration Ordinance.

4.304 Section 33 of the Arbitration Ordinance expressly recognizes that if all parties consent, an arbitrator may act as a mediator after the arbitration has commenced. In such a situation:

- the arbitration must be stayed to facilitate the mediation;
- the arbitrator-mediator:
  - may communicate with the parties collectively or separately, and
  - must treat the information obtained as confidential, unless otherwise agreed;
- if the mediation proceedings terminate without a settlement, the arbitrator must disclose to all parties as much of the confidential information he or she received as considered material.

Section 33(5) provides that no objection may be made against the conduct of the arbitral proceedings by an arbitrator solely on the ground that he or she acted previously as a mediator.

4.305 In practice, mediation-arbitration has not been used much in international arbitrations in Hong Kong.

(n) The hearing

(i) Opening statements

4.306 Opening statements are almost invariably made by the parties, although there is no firm practice on whether this is written or oral. Where the previous submissions are clear, the parties' cases have not changed markedly, and the issues in dispute are relatively straightforward, then opening statements may be given orally. Typically, such openings will not exceed half a day each. However, where the issues are more complex or the parties' cases have evolved over the course of the submissions, then written opening statements may be more appropriate.

4.307 In terms of the format of written submissions, there can be great divergence. In some cases, the claimant may seek to simplify the issues and present a relatively short opening. However, in many substantial international arbitrations, it is more common for parties to submit detailed written openings, with numerous cross-references to the supporting evidence. In such cases, it is not unusual for the submissions to be 50 pages or longer, and they will usually deal with both fact and law.

(ii) Procedure and practice

4.308 In the lead-up to the hearing, it is common for Hong Kong tribunals to hold a pre-hearing conference, to ensure that there is a consensus on how the hearing should proceed. In some cases, the conference may also involve various interlocutory applications, as parties seek to resolve procedural disagreements before the hearing commences.

4.309 To facilitate the actual hearing, parties will often prepare an agreed hearing bundle and a core bundle of documents. An agreed chronology and *dramatis personae* may also be supplied.

4.310 As for the hearing itself, the Arbitration Ordinance recognizes that a tribunal may, when conducting proceedings, decide to what extent it should itself take the initiative in ascertaining the facts and the law.[146]

[146] s 56(7), Arbitration Ordinance.

4.311 Despite this, historically, many Hong Kong arbitrators have hesitated to adopt an overly inquisitorial approach in the arbitration, preferring to give the parties' counsel more leeway in how they present their case and in the questions they put to the witnesses, although follow-up questions from the tribunal are common. That said, there has been a trend in Hong Kong towards greater intervention by the tribunal. Counsel are usually given some freedom in their questioning of witnesses, and technical objections by opposing counsel to the questions are not common. However, vigorous court-style cross-examination of witnesses is usually avoided. The approach of the tribunal is also often influenced by how the parties' respective counsel conduct themselves, and whether they adopt a heavily adversarial approach.

4.312 Difficulties can sometimes arise where counsel come from very different legal traditions, and one party does not expect to encounter vigorous cross-examination, or is less fluent in the language of the arbitration than opposing counsel. This has arisen in a number of cases in Hong Kong in the past, and in such cases, some tribunals will seek to balance out the differences.

4.313 In substantial international arbitrations, an oral hearing of at least one week is common, and this can run into several weeks depending on the complexity of the dispute. Increasingly, tribunals are adopting a chess-clock system to allocate the available time fairly for presentation of evidence, although this can lead to difficulties where there are a disproportionate number of witnesses or if translation is required only for witnesses on one side.[147]

4.314 Many Hong Kong arbitrators continue to adopt the traditional method of having the claimant present its case, followed by the respondent, although innovations such as agreed expert statements and witness conferencing are gradually gaining ground. Presentation of witness testimony by video conference is also accepted, where there is proper justification for it.

4.315 If a party fails to appear at the hearing, the Arbitration Ordinance gives the tribunal the power to continue the proceedings and to make a default award in the absence of the party.[148] However, the party present still has to prove its claim.

(iii) Practicalities

4.316 The most popular venue for international arbitrations in Hong Kong is at the HKIAC premises, which has modern hearing facilities. Arrangements for translation, transcripts (including live transcripts) can and are often made. Use of various presentation aids and other technological advancements are also increasingly common.

(o) Confidentiality

4.317 Article 39 of the HKIAC Administered Arbitration Rules sets out an obligation for the parties to keep confidential:

- all matters and documents relating to the arbitration, including the existence of the proceedings as well as all correspondence, written statements, evidence, awards, and orders not otherwise in the public domain;
- save in several cases, such as where a party is under a legal duty, or is enforcing the award.

[147] See *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd and Chen Rong* HCCT 66/2007 (10 February 2009) at para 76–93.

[148] Art 25(c), UNCITRAL Model Law, given effect by s 53, Arbitration Ordinance; see also Art 27, HKIAC Administered Arbitration Rules.

This undertaking also applies to the arbitrators and the HKIAC. Significantly, section 18 of the Arbitration Ordinance also contains a confidentiality provision.

4.318 Even if these express provisions do not apply, there may be an implied duty of confidentiality. Under English law, such a duty is an implied term of an arbitration agreement,[149] and it is likely that the Hong Kong courts would be influenced by the English authorities.[150]

H. The award

(a) Types of awards

4.319 In Hong Kong, two types of awards are generally recognized:

- a *final award*, which disposes of all the issues currently before the tribunal;
- an *interim or partial award*, in which the tribunal deals with some of the issues, such as jurisdiction.[151]

If the parties have reached a settlement, the terms can be incorporated into the form of a 'consent award'.[152]

4.320 In substantial international arbitrations, it is not uncommon for a Hong Kong tribunal to render more than one award. Some of the most common awards include separate awards on jurisdiction and liability.

4.321 Significantly, Hong Kong law also allows an interim measure to be made as an award to the same effect.[153] This increases the chances of its enforceability, especially outside Hong Kong.

(b) Tribunal's decision-making process

(i) Exercise of discretion

4.322 The decision-making process is very much a function of the arbitrators appointed; the subject matter; and the way the cases have been presented by the parties. A number of Hong Kong arbitrators have been known to avoid applying an overly rigorous 'black letter law' approach, preferring also to look at the underlying commercial realities. On the other hand, many arbitrators will steer away from simply applying broad principles of equity and fairness with little regard to the underlying legal position. Where PRC law is the governing law, Hong Kong tribunals have sometimes adopted a less legalistic approach than they would under the common law, in line with the perception that PRC law is more malleable.

[149] See generally, *Hassneh Insurance Co of Israel v Stuart J Mew* [1993] 2 Lloyd's Rep 243; cf the more liberal Australian position expressed by the High Court of Australia in *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

[150] See generally, *Hong Kong Housing Authority v Sui Chong Construction & Engineering Co Ltd and Anor* [2008] 1 HKLRD 84; *Nam Tai Electronics Inc v PricewaterhouseCoopers* [2008] 1 HKLRD 666 for a discussion of some of the general confidentiality issues.

[151] See also Art 24.2 of the HKIAC Administered Arbitration Rules which provide that an order for interim measures may be established in the form of an interim award.

[152] See also Art 32.1 of the HKIAC Administered Arbitration Rules which provide that the tribunal shall, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms.

[153] s 35(3), Arbitration Ordinance; see also Art 24.2, HKIAC Administered Arbitration Rules.

4.323 Difficulties can arise where parties appoint arbitrators who come from very different legal traditions. However, experienced presiding arbitrators are able to work around some of the more common challenges which may be encountered. If the tribunal is unable to reach a consensus, the majority decision is binding.[154] Article 29.1 of the HKIAC Administered Arbitration Rules further provides that if there is no majority, the award shall be made by the presiding arbitrator alone.

4.324 If a party fails to appear at the hearing, the Arbitration Ordinance gives the tribunal the power to continue the proceedings and to make a default award in the absence of the party.[155] However, the party present still has to prove its claim.

(ii) Amiable compositeur *and* ex aequo et bono

4.325 The Arbitration Ordinance expressly envisages that the arbitral tribunal may decide *ex aequo et bono* or as *amiable compositeur*; however, this is the case only if the parties have expressly authorized it to do so.[156] In reality, such agreement is very rare.

(c) **Form and content**

4.326 There are no detailed statutory requirements for an arbitral award to be valid, although the basic requirements set out in Article 31 of the UNCITRAL Model Law apply:[157]

- award in writing;
- signed by at least a majority of the tribunal, provided that the reason for any omitted signature is stated;
- states the reasons, unless the parties have agreed otherwise;
- states the date and place of arbitration.

Similar requirements are set out in Article 30 of the HKIAC Administered Arbitration Rules. In addition, for such arbitrations, the award is affixed with the seal of the HKIAC.

4.327 Other basic requirements are provided by the common law. These are, essentially, that the award must be final in relation to the issues dealt with, in a manner that is cogent, consistent, clear and unambiguous, and capable of enforcement by a court. If it is a final award, it will have to deal with all matters in dispute.

4.328 In substantial international arbitrations, detailed reasons for the decision are usually set out, and it is rare for parties to agree for them to be dispensed with. The award may run into a hundred pages or more, with close analysis of the facts, evidence, and law.

4.329 In Hong Kong, a dissenting arbitrator cannot insist that their dissenting reasons form part of the award, unless the arbitration agreement or arbitration rules provide otherwise. In practice, if the dissenting arbitrator requests, their opinion will usually be included with the award.

4.330 The Arbitration Ordinance and the HKIAC Administered Arbitration Rules do not specify any time limit for the making of an international award. However, if an arbitrator fails to act in a timely manner, he or she can be removed by agreement of both parties or by order of the

[154] Art 29, UNCITRAL Model Law, given effect by s 65, Arbitration Ordinance.
[155] Art 25(c), UNCITRAL Model Law.
[156] Art 28(3), UNCITRAL Model Law, given effect by s 64, Arbitration Ordinance.
[157] Given effect by s 67, Arbitration Ordinance.

Hong Kong courts.[158] In such a situation, a substitute arbitrator will be appointed in accordance with the rules that applied to the original appointment.

4.331 There is no requirement under Hong Kong law for Hong Kong awards to be registered to be effective. However, the HKIAC does provide an authentication service for Hong Kong awards. This can be useful if a party is seeking to enforce a Hong Kong award overseas.

(d) Remedies

(i) Available remedies

4.332 In general, a Hong Kong tribunal may award any remedy or relief that could have been ordered by the court if the dispute had been the subject of civil proceedings.[159] Thus, the tribunal is empowered to grant a wide range of remedies. In practice, the primary remedy in Hong Kong is for damages, although declarations and specific performance are also available, and are granted in appropriate situations.

(ii) Damages—applicable principles

4.333 There is some uncertainty over what law governs the recovery of damages. Hong Kong conflict of laws rules generally follow the old English position, which accepts that certain issues of damage are settled based on the substantive law, while others are subject to the procedural law. In general, questions relating to remoteness of damage and heads of damage are subject to the law governing the obligation or contract. In contrast, matters relating to the measure of damages including its quantification, may be governed by the procedural law.[160]

4.334 In practice, Hong Kong tribunals usually avoid legalistic discussions on what law governs damages, and directly apply broad principles which are consistent with commercial practice. Nonetheless, difficulties can arise, for example, where the governing law is PRC law, as the latter has a number of provisions which are not commonly found in other jurisdictions.

(e) Interest

4.335 Questions relating to interest may be subject to different laws. For example, where a party is claiming interest based on a contractual provision, this will usually be subject to the governing law of the contract. In contrast, post-award interest is usually a matter of procedural law.[161]

4.336 In practice, Hong Kong tribunals frequently rely on the relevant provisions in the Arbitration Ordinance, which gives an arbitral tribunal the discretion to award simple or compound interest on the principal sum awarded (or on an amount claimed in the arbitration but paid before the award is made) from such dates, and at such rates as it considers appropriate for any period up to the date of payment.[162] Unless the award provides otherwise, simple interest is payable on the amount of the award from the date of the award at the same rate as for a judgment debt (as determined from time to time by the Chief Justice).[163] Interest is also

158 Art 14(1), UNCITRAL Model Law, given effect by s 27, Arbitration Ordinance.
159 s 70, Arbitration Ordinance; save for specific performance relating to land: s 70(2).
160 See generally, G Johnston, *The Conflict of Laws in Hong Kong* (Sweet & Maxwell Asia, 2005) 19–20.
161 See generally, ibid, 21–23.
162 s 79, Arbitration Ordinance.
163 s 80(1), Arbitration Ordinance.

payable on costs awarded or ordered by the tribunal at the judgment rate, unless otherwise provided.[164]

4.337 Interest may be awarded in a foreign currency, provided that the award has been made in that currency. Such interest is commonly awarded, where appropriate.

(f) Costs

(i) Categories of costs incurred

4.338 Article 36.1 of the HKIAC Administered Arbitration Rules defines 'costs' to include 'only':

- fees of the tribunal;
- travel and other expenses incurred by the arbitrators;
- costs of expert advice and other assistance required by the tribunal;
- travel and other expenses of witnesses to the extent approved by the tribunal;
- costs for legal representation and assistance, only to the extent reasonable;
- the HKIAC's Registration Fee and Administrative Fees.

The tribunal is empowered to award costs, and may, having regard to all relevant circumstances, direct in the award to whom and by whom and in what manner the costs are to be paid. It is also expressly empowered to take into account, 'if appropriate', any written offer of settlement of the dispute.[165]

4.339 However, the tribunal:

- must only allow costs that are 'reasonable' 'having regard to all the circumstances';
- but may allow preparation costs incurred prior to commencement of the arbitration.

A provision in the arbitration agreement that the parties must pay their own costs is void,[166] unless contained in an agreement to submit present disputes to arbitration. In the course of the arbitration, the tribunal is also entitled to direct that the recoverable costs of proceedings are limited to a specified amount, although this provision is rarely used in substantial international arbitrations.[167]

4.340 In practice, among the various categories of costs, the single largest portion is usually the costs for legal representation and assistance. For substantial international arbitrations in Hong Kong, costs for legal representation and assistance can easily be in the six-figure US$ range, and may run into the seven-figure US$ range for complex arbitrations which proceed all the way to a final award without a settlement.

(ii) Arbitrators' fees and arbitral institution's fees

4.341 As noted at Section G(e)(iv)(2) above, parties to arbitrations under the HKIAC Administered Arbitration Rules have the option to decide whether the fees are to be determined:

- in conformity with the Schedule; or

[164] s 80(2), Arbitration Ordinance.
[165] s 74, Arbitration Ordinance.
[166] s 74(8), Arbitration Ordinance.
[167] s 57, Arbitration Ordinance.

- in accordance with fee arrangements agreed between the appointing parties and the arbitrators.[168]

4.342 In practice, fees are often decided based on fee arrangements agreed with the arbitrators. Hourly rates for leading international arbitrators based in Hong Kong are typically comparable to those for leading international arbitrators elsewhere, and average around US$600 per hour. For substantial international arbitrations, the tribunal's fees can easily be in the six-figure US$ range.

4.343 Astute parties are increasingly realizing that the HKIAC Schedule of Fees and Costs of Arbitration is in fact very competitive, when measured against the fees of comparable international and regional arbitral institutions. An express agreement in the arbitration agreement to adopt the Schedule may sometimes result in lower fees than if parties had agreed on other fee arrangements with their arbitrators.

4.344 As at the time of writing, the HKIAC's administration fees, and the arbitrator's fees per arbitrator were as follows.

Sum in dispute (in US$)	A. Administrative fees (in US$)	B. Arbitrator's fees (per arbitrator) (in US$)	
		Minimum	Maximum
1–50,000	1,500	2,000	14.00% of amount in dispute
50,001–100,000	1,500 + 0.70% of amount over 50,000	2,000 + 2.50% of amount over 50,000	7,000 + 10.00% of amount over 50,000
100,001–500,000	1,850 + 0.60% of amount over 100,000	3,250 + 1.00% of amount over 100,000	12,000 + 5.00% of amount over 100,000
500,001–1,000,000	4,250 + 0.40% of amount over 500,000	7,250 + 0.70% of amount over 500,000	32,000 + 2.60% of amount over 500,000
1,000,001–2,000,000	6,250 + 0.20% of amount over 1,000,000	10,750 + 0.40% of amount over 1,000,000	45,000 + 1.40% of amount over 1,000,000
2,000,001–5,000,000	8,250 + 0.12% of amount over 2,000,000	14,750 + 0.25% of amount over 2,000,000	59,000 + 0.70% of amount over 2,000,000
5,000,001–10,000,000	11,850 + 0.06% of amount over 5,000,000	22,250 + 0.075% of amount over 5,000,000	80,000 + 0.40% of amount over 5,000,000
10,000,001–50,000,000	14,850 + 0.03% of amount over 10,000,000	26,000 + 0.05% of amount over 10,000,000	100,000 + 0.20% of amount over 10,000,000
50,000,001–80,000,000	26,850	46,000 + 0.025% of amount over 50,000,000	180,000 + 0.14% of amount over 50,000,000
80,000,01–100,000,000	26,850	53,500 + 0.012% of amount over 80,000,000	222,000 + 0.12% of amount over 80,000,000
Over 100,000,000	26,850	55,900 + 0.01% of amount over 100,000,000	246,000 + 0.06% of amount over 100,000,000

[168] Art 36.2, HKIAC Administered Arbitration Rules.

For three arbitrators, the scale fees for representative amounts in dispute are as follows:

Sum in dispute (in US$)	Total of administrative and arbitrators' fees (for 3 arbitrators)	
	Minimum	Maximum
10m	92,850	314,850
50m	164,850	566,850
200m	224,550	944,850

In addition, the tribunal's actual fees will be fixed by the HKIAC Council in accordance with the above Schedule. They must be 'reasonable in amount' taking into account:

- the amount in dispute;
- the complexity of the subject matter;
- the time spent by the arbitrators;
- any other relevant circumstances of the case, including the discontinuation of the arbitral proceedings in case of settlement or other reasons.[169]

Where the arbitration is discontinued, the fees of the arbitral tribunal may be less than the minimum provided under the Schedule. In addition, the Chairman will typically receive 40 per cent and each co-arbitrator 30 per cent of the total fees.[170]

(iii) Allocation of costs

4.345 (1) **Applicable principles** Article 36.4 of the HKIAC Administered Arbitration Rules provides that:

- the costs of arbitration shall 'in principle' be borne by the unsuccessful party;
- however, the arbitral tribunal may apportion all or part of such costs between the parties if it determines that apportionment is 'reasonable' taking into account the circumstances of the case.

However, with respect to the costs of legal representation and assistance (which in most cases would be the bulk of the costs incurred by the parties), the tribunal is free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.[171]

4.346 Apart from the principles set out above, Hong Kong tribunals apply a wide range of factors in deciding how costs should be awarded. Many of these principles are similar to those applied in international arbitrations seated elsewhere. In the context of Hong Kong, parties do not always take equal care in preparing their cases, or hire counsel who are from the same jurisdiction. As a result, tribunals have sometimes had to consider whether it is relevant that the parties incurred significantly disproportionate costs in the preparation of their cases.

4.347 In recent years, with the rising complexity of disputes, cost recovery has become an increasingly contentious issue. Many international arbitrators in Hong Kong will decline to apply

[169] Art 36.3, HKIAC Administered Arbitration Rules
[170] Art 36.3(b), HKIAC Administered Arbitration Rules.
[171] Art 36.5, HKIAC Administered Arbitration Rules.

the court scale in awarding costs,[172] but typically, where costs are awarded in favour of a successful party, it will ordinarily recover significantly more than 50 per cent of its actual costs, subject to reasonableness.

4.348 (2) **Procedure and taxation** The decision on costs may either be included as part of the award, or issued as a separate costs award. In both cases, the tribunal will typically invite the parties to make submissions on who should be liable for costs, and on the quantum of costs, following which it will render its decision. Where proceedings are carried out in stages, separate costs awards may also be issued at each stage.

4.349 If the parties have agreed that costs are taxable by the court, the tribunal must direct accordingly in its award (other than for the tribunal's fees and expenses), and on taxation by the court, it must make an additional award of costs reflecting the result of such taxation.[173]

4.350 Where there is a dispute over the tribunal's fees and expenses, the tribunal may refuse to deliver an award, and a party may apply to court, which:

- may order the tribunal to deliver the award on the payment into court of all or part of the fees and expenses specified by the court;
- may order that the tribunal's fees and expenses are to be determined by the means and on terms the court may direct, and then paid to the tribunal from the amount paid into court.[174]

The arbitrator is entitled to appear and be heard on the determination.[175]

4.351 The above procedure is not available if there is an available arbitral process for appeal or review of the fees or expenses demanded, or the total amount of fees and expenses have been fixed by a written agreement between a party and the arbitrators.[176] In practice, both situations are not common.

(g) Correction, interpretation, and supplementing of awards

4.352 Article 33 of the UNCITRAL Model Law applies in Hong Kong. Accordingly:

- within 30 days of receipt of the award:
  - a party may request the tribunal to correct in the award any errors in computation, clerical, or typographical or other similar errors,
  - if so agreed by the parties, a party may request the tribunal to give an interpretation of a specific point or part of the award;
- if the tribunal considers the request justified, it shall make the correction or give the interpretation within 30 days of the request, and the interpretation shall form part of the award;
- it may also correct any error of the above type on its own initiative.

[172] s 74(6) recognizes that the tribunal is, in general, not obliged to follow the scales and practices in court taxation.
[173] s 75, Arbitration Ordinance.
[174] s 77, Arbitration Ordinance.
[175] s 77(8), Arbitration Ordinance.
[176] s 77(4), Arbitration Ordinance.

Where claims have been presented in the proceedings but omitted from the award, a party may also request, within 30 days, an additional award. If the tribunal considers the request justified, it shall make the additional award within 60 days.

4.353 The tribunal may extend the period within which it shall make a correction, interpretation, or an additional award.[177]

4.354 Articles 33 to 35 of the HKIAC Administered Arbitration Rules also set out more detailed provisions (with slightly different timelines) allowing for interpretation and correction of the award, and the issuance of an additional award. Notably, Article 33.1 expressly allows for an interpretation of the award, on request from any party.

4.355 In addition, section 69 of the Arbitration Ordinance sets out supplemental provisions empowering the tribunal to:

- change the award where necessitated by or consequential on the correction or interpretation process above;
- review an award of costs within 30 days if, when making the award, the tribunal was not aware of any information relating to costs (including any offer for settlement) which it should have taken into account. Following a review, the tribunal may confirm, vary, or correct the award of costs.

I. Challenge of awards

(a) Overview

4.356 A Hong Kong award may be set aside in the following circumstances:

- under section 81, which gives effect to Article 34 of the UNCITRAL Model Law, setting out grounds which mirror those found in the New York Convention;
- under section 26(5) of the Arbitration Ordinance, following a successful challenge to an arbitrator who has participated in proceedings resulting in an award.

A Hong Kong award may also be:

- the subject of a challenge under section 4 of Schedule 2 to the Arbitration Ordinance, for serious irregularity;
- appealed against on a question of law under section 5 of Schedule 2;

in the limited circumstances where those provisions apply.

4.357 In addition, a decision or award on jurisdiction may also be challenged under Article 16 of the UNCITRAL Model Law, as explained at Section G(f)(ii)(2) above.

4.358 However, the court does not otherwise have jurisdiction to set aside or remit an arbitral award for errors of fact or law on the face of the award, or to deal with appeals on the law or on the merits.[178]

[177] Art 33(4), UNCITRAL Model Law, given effect by s 69, Arbitration Ordinance.
[178] s 81(3), Arbitration Ordinance.

(b) Setting aside

(i) Procedure

4.359 An application to set aside an arbitration award under section 81 is made by originating summons to the judge in charge of the Construction and Arbitration List. An application must be made within three months of the date on which the applicant received the award or, if a request has been made to correct or interpret the award (or for an additional award), from the date on which that request has been disposed of by the arbitral tribunal.[179]

4.360 The court, when asked to set aside an award, may, 'where appropriate' and if requested by a party, suspend the setting-aside proceedings in order to give the tribunal an opportunity to resume the arbitral proceedings or to take such other action as will eliminate the grounds for setting aside.[180]

4.361 Apart from an application to set aside an award under section 81, the award may also be set aside as part of a challenge to an arbitrator. Where a challenge to an arbitrator is upheld, the court 'may', as part of that application, set aside any award which was made with the participation of the challenged arbitrator.

4.362 In practice, this provision will not be relied on much, and most applications for setting aside will be made pursuant to section 81.

(ii) Scope

4.363 The Arbitration Ordinance adopts the narrow setting-aside grounds found in the UNCITRAL Model Law, which are essentially based on the New York Convention grounds[181] for resisting enforcement. In essence, an arbitral award may be set aside only for procedural defects, lack of jurisdiction, or on public policy grounds:[182]

- the arbitral award may be set aside by the court of its own volition if it finds that:
  - the subject matter of the dispute is not capable of settlement by arbitration under the laws of Hong Kong, or
  - the award is in conflict with the public policy of Hong Kong;
- an award may also be set aside if the losing party proves that:
  - a party to the arbitration was under some incapacity or the arbitration agreement is not valid under Hong Kong law—there is therefore no valid agreement or arbitration agreement,
  - the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or the applicant was otherwise unable to present its case—thereby being in breach of rules of natural justice or due process,
  - the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration—the arbitrator exceeded the jurisdiction given to him or her, and if that part of the award can be severed it would be severed so as to preserve the rest of the award which does not exceed jurisdiction,

[179] Art 34(3), UNCITRAL Model Law.
[180] Art 34(4), UNCITRAL Model Law.
[181] Art V, New York Convention.
[182] Art 34, UNCITRAL Model Law.

- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or was not in accordance with the UNCITRAL Model Law—thereby not preserving party autonomy and being in breach of the arbitration agreement/arbitration law.

(iii) Case law

4.364 *Brunswick v Shanghai Zhonglu*[183] is a leading authority on applications to set aside an arbitral award under Article 34 of the UNCITRAL Model Law. In *Brunswick*, in construing a particular clause in the contract in dispute, the tribunal relied on certain PRC law requirements dealing with the validity of contracts, even though such an approach had not been considered by the parties. The applicant argued that the tribunal ought to have canvassed with the parties its 'secret view' on contractual requirements under PRC law before deciding the issue. In contrast, the respondent argued that the arbitrators were entitled to rely on their own expertise of PRC law.

4.365 The court decided that the requirement of contractual validity under PRC law had to be decided on the evidence before the tribunal, and that on primary factual disputes, the tribunal has to act on evidence and give a reasonable opportunity to the parties to put forward their respective cases on such evidence.

4.366 On the facts, the court held that the tribunal's failure to do so was a breach of Article 34(2)(a)(ii) of the Model Law (party was 'unable to present his case').

4.367 Despite this, the court held that it still had to consider whether the award should be set aside as a matter of discretion. The court declined to import the English law requirement that a party applying to set aside an award has to show that a violation under Article 34(2) has caused 'substantial injustice'.

4.368 Instead, it held that the test was whether the violation would affect the outcome of the dispute, or that the tribunal would have reached a different conclusion but for the matter complained of. On the facts, the court held that the violation had no real impact on the result, and even absent the violation, the tribunal would have reached the same conclusion, in light of the other reasons in its award. Therefore, the court declined to set aside the award on this ground.

4.369 In addition, the applicant also complained about a separate issue, in which both parties had argued the matter on the basis that Illinois law was the governing law for the claim. In its award, however, the tribunal considered that the claim should be governed by PRC law, and decided the matter by reference to PRC law, even though neither party had adduced any evidence of PRC law applicable to the claim.

4.370 Again, the court held that the tribunal was not entitled to apply its secret view on PRC law without giving the parties an opportunity to address it. On the facts, the court held that the applicant was successful in establishing that it had been deprived of the opportunity to present its case on PRC law pertaining to this particular claim. With respect to this claim, the award was set aside. However, on a number of other grounds, the court ruled against the applicant.

[183] *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd and Chen Rong* HCCT 66/2007 (10 February 2009).

4.371 In *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd*[184] the Hong Kong Court of First Instance set aside an ICC award, on the basis that the applicant was unable to present its case, and the procedure adopted by the tribunal was not in line with the agreement of the parties. The particular facts are case-specific but in the course of its judgment, the court considered the extent of its residual discretion to refuse to set aside an award even though the grounds for setting aside the award were established. The court accepted that it had a residual discretion, but it construed this discretion narrowly: where the applicant had already established that there were grounds for setting aside an award, the applicant only had to establish that 'it cannot be said that if the violation had not occurred the result could not have been different'. The court's role is to consider the quality of the violation, rather than the materiality and the effect on the outcome of the arbitration.

(c) Substantive challenges

4.372 In addition to setting aside, a Hong Kong arbitral award may also be the subject of:

- a challenge under section 4 of Schedule 2 to the Arbitration Ordinance, for serious irregularity affecting the tribunal, the arbitral proceedings, or the award; or
- an appeal on a question of law arising out of an award made in the arbitral proceedings under section 5 of Schedule 2.

Significantly, the provisions of Schedule 2 do *not* apply, unless:

- the parties expressly opt in to these provisions; or
- it is a domestic arbitration, and the arbitration agreement was entered into before, or within six years of commencement of the Arbitration Ordinance.[185]

In practice, parties to international arbitrations will rarely opt in to the provisions of Schedule 2. This is in part because they are often reluctant to increase the degree of oversight by the Hong Kong courts. Accordingly, the Schedule 2 provisions are, in practice, only of significance to domestic arbitrations.

J. Recognition and enforcement of awards

(a) Overview

4.373 In considering the recognition and enforcement of awards, it is useful to distinguish between:

- Hong Kong awards; and
- non-Hong Kong awards, which can be further subdivided into:
  - awards made in a New York Convention country, other than the PRC,
  - awards made in the PRC,
  - awards made in a non-New York Convention country.

Both the above categories are discussed below, at Sections J(c) and J(d) respectively.

[184] HCCT 15/2010 (29 June 2011).
[185] See also s 101, which deals with the specific case of Hong Kong construction subcontracting cases.

(b) Enforcement of orders

4.374 In addition to the enforcement of awards, the Arbitration Ordinance also allows for the enforcement of an *order or direction* made:

- in or outside Hong Kong;
- in relation to arbitral proceedings by an arbitral tribunal;

in the same manner as an order or direction of the court, with its leave.[186]

4.375 Thus, orders and directions of a tribunal (including interim measures), whether made 'in or outside Hong Kong' may be enforced subject to leave of the court.

(c) Awards made in Hong Kong

(i) Procedure and timeline

4.376 Section 84 of the Arbitration Ordinance applies to the enforcement of awards whether made in or outside Hong Kong.

4.377 The section provides that such an award is enforceable in the same manner as a judgment of the court that has the same effect, but only with the court's leave. If leave is granted, the court may enter judgment in terms of the award. Leave is required for any appeal against the court's decision.

4.378 Section 85 applies to cases where the party is seeking to enforce an arbitral award, whether made in or outside Hong Kong, as long as it is not a Convention award or a Mainland award. Thus, all Hong Kong awards fall within its scope (as do certain non-Hong Kong awards).

4.379 Under that section, the applicant must produce:

- a duly authenticated original or certified copy of the award;
- the original or duly certified copy of the arbitration agreement;
- if the award or agreement is not in English or Chinese, a translation of the same.

The enforcement process involves a two-step process:

- at the first stage, the applicant applies *ex parte* to the court for an order granting leave to enforce the award and an order entering judgment in the terms of the award;
- at the second stage, the respondent may apply to set aside the order, at an inter partes hearing:
  - where the order has been served within jurisdiction, the respondent has 14 days to challenge it,
  - where it has been served out of jurisdiction, the court will fix a period within which the respondent may apply to set aside the order.

The award shall not be enforced during this period, or if the respondent applies to set aside the order, until after the application is finally disposed of.[187]

4.380 The *ex parte* application to enforce the award is made on affidavit to the judge and on papers. The relevant supporting documents (such as the arbitration agreement and the award) must be exhibited. In addition, the applicant must make full and frank disclosure of all relevant

[186] s 61, Arbitration Ordinance.
[187] Ord 73, Rules of the High Court.

information in support of the application. The court may decline to grant the order *ex parte* and direct that a summons be issued instead.

4.381 At the second stage, the Hong Kong courts may only refuse to enforce a foreign award in circumstances broadly reflecting the New York Convention grounds for resisting enforcement of awards.

(ii) Grounds for refusing recognition and enforcement

4.382 Section 86 of the Arbitration Ordinance sets out grounds on which enforcement of an award may be refused. In general, these follow the New York Convention grounds for refusing enforcement of an award, which are set out in Section J(d)(iii) below. One notable exception, however, is that in addition to the New York Convention grounds, section 86(2)(c) provides that enforcement may also be refused 'for any other reason the court considers it just to do so'.

(d) Awards made outside Hong Kong

(i) Overview

4.383 This section deals with the recognition and enforcement of the following categories of foreign awards, made outside Hong Kong:

- awards made in a New York Convention State, other than the PRC;
- awards made in the PRC;
- awards made in a non-New York Convention State.

4.384 **(1) New York Convention awards (excluding the PRC)** Following the reversion of Chinese sovereignty over Hong Kong and Macau, the PRC extended its application of the New York Convention to these two territories.

4.385 In line with this, section 87 of the Arbitration Ordinance provides that a 'Convention award' (defined as an award made in a New York Convention State but excluding the PRC),[188] is enforceable in Hong Kong either:

- by action in the court; or
- pursuant to section 84.

Section 87 also makes it clear that an enforceable Convention award is treated as binding for all purposes and may be relied on by way of defence, set off, or otherwise in legal proceedings in Hong Kong.

4.386 In practice, there are various disadvantages to enforcing the award by action, so the section 84 route is usually preferable.

4.387 **(2) Awards made in the PRC** Prior to the handover, arbitral awards made in Hong Kong were treated as New York Convention awards, for purposes of enforcement in the PRC and vice versa. After the handover, however, it became unclear how Hong Kong awards would be treated. This issue was resolved with the signing of the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region (the Arrangement) on 21 June 1999.[189]

[188] See s 2, Arbitration Ordinance.
[189] Effective from 1 February 2000.

4.388 In line with this, section 92 of the Arbitration Ordinance provides that a 'Mainland award' (defined as an award made in the Mainland by a 'recognized Mainland arbitral authority in accordance with the Arbitration Law of the People's Republic of China')[190] is enforceable in Hong Kong either:

- by action in court; or
- pursuant to section 84.

As with a Convention award, the provision makes it clear that an enforceable Mainland award is treated as binding for all purposes and may be relied on by way of defence, set off, or otherwise in legal proceedings in Hong Kong.

4.389 As before, section 84 is the preferred route.

4.390 (3) **Non-New York Convention States** Awards made in non-New York Convention States would fall outside the definition of 'Convention awards' and 'Mainland awards'. However, such awards would still be enforceable pursuant to sections 84 and 85 of the Arbitration Ordinance, with leave of the court.

(ii) Procedure and timeline

4.391 The procedure and timeline which apply to the enforcement of foreign awards is similar to that which apply to the enforcement of Hong Kong awards pursuant to section 84, which is discussed above.

4.392 However, a few additional points should be borne in mind:

- if an enforcement order has been granted at the *ex parte* stage but the respondent has been served out of *jurisdiction*, then it is ordinarily given more than 14 days to challenge the order. This additional time could delay the enforcement process;
- in the case of a Mainland award, it is not enforceable:
  - if an application has been made on the Mainland for enforcement of the award, unless
  - the award has not been fully satisfied by way of that enforcement.

(iii) Grounds for refusing recognition and enforcement

4.393 The grounds in the Arbitration Ordinance for refusing enforcement of a Convention award follow those of the New York Convention. Notably, section 89(1) expressly states that enforcement may not be refused other than in the cases mentioned.[191] The cases where enforcement 'may' be refused are where the party resisting enforcement proves that:

- a party to the arbitration agreement was (under the law applicable to that party) under some incapacity;
- that the arbitration agreement was not valid:
  - under the law to which it was subjected by the parties, or
  - (if there was no indication of the law to which the arbitration agreement was subjected) under the law of the country where the award was made;

[190] It therefore seems clear that awards made under the auspices of a foreign arbitral institution (such as the ICC), or in ad hoc arbitrations in the PRC, would not be enforceable under s 92 of the Arbitration Ordinance.

[191] This is in contrast to the general regime for enforcement of arbitral awards under s 87 of the Arbitration Ordinance, which does not contain such an express prohibition.

- that the person:
  - was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings, or
  - was otherwise unable to present the person's case;
- that the award:
  - deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or
  - contains decisions on matters beyond the scope of the submission to arbitration, *provided that* a Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted;
- that the composition of the arbitral authority or the arbitral procedure was not in accordance with:
  - the agreement of the parties, or
  - (if there was no agreement) the law of the country where the arbitration took place; or
- that the award:
  - has not yet become binding on the parties, or
  - has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

In addition, enforcement of a Convention award may also be refused if:

- the award is in respect of a matter which is not capable of settlement by arbitration under the law of Hong Kong; or
- it would be contrary to public policy to enforce the award.

The grounds for refusing enforcement of Mainland awards are substantively similar to those for Convention awards.[192]

(iv) Recognition and enforcement—in practice

4.394 The Hong Kong courts have an excellent track record in enforcing foreign arbitral awards in accordance with the New York Convention. In particular, the Hong Kong courts recognize that they have a residual *discretion* to permit enforcement of a Convention award. This is reflected in the use of the word 'may' in the relevant provision in connection with the court's power nevertheless to permit enforcement where one or more of the statutory grounds have been made out.[193]

4.395 The Hong Kong courts are clearly pro-enforcement. For example, in considering the scope of 'public policy', the Court of Final Appeal has definitively stated that Hong Kong courts should take a 'pro-enforcement' approach to Convention awards,[194] and has held that the expression 'contrary to public policy' in the Convention and in the Arbitration Ordinance[195] means 'contrary to the fundamental conceptions of morality and justice of the forum in which enforcement was sought' and that the 'public policy' ground for refusing enforcement is to be narrowly construed and applied.

[192] s 95, Arbitration Ordinance.
[193] ss 89(2), 95(2), Arbitration Ordinance.
[194] *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665.
[195] s 44, Arbitration Ordinance.

4.396 Examples of cases in which the Hong Kong courts have exercised their discretion to refuse enforcement include where:

- one party was denied the opportunity to cross-examine experts appointed by the tribunal and to deal with their evidence;[196]
- the tribunal carried out its own investigations (as permitted under the relevant arbitration rules) but neither notified the results of its enquiries to the parties, nor invited submissions thereon before making its award;[197]
- an award was procured by unlawful or oppressive conduct by one party;[198]
- due to apparent bias arising from the way in which an Arb-Med process was carried out.[199]

Examples of cases where the Hong Kong courts have found in favour of enforcement of an award, notwithstanding a ground set out in the Ordinance having been made out include circumstances where:

- the party resisting enforcement waived (by conduct) any objection to an irregularity in the appointment of the tribunal;[200]
- the party resisting enforcement kept silent about a procedural irregularity of which it was aware during the proceedings;[201]
- the party resisting enforcement deliberately took no part in the arbitral proceedings;[202]
- the appointed arbitral body had changed its name and/or its rules had been amended.[203]

In recent cases, the Hong Kong courts have reinforced their pro-enforcement stance, by holding that when an award is unsuccessfully challenged, unless there are special circumstances, the courts will normally consider awarding costs against a losing party on an indemnity basis.[204]

K. Investor-State arbitration

(a) Overview of available protection

4.397 As noted above, Hong Kong is a special administrative region of the PRC.[205] Hong Kong's mini-constitution, the Basic Law, operates under the 'one country, two systems' principle.

4.398 Article 13 of the Basic Law stipulates that the Central People's Government is responsible for foreign affairs relating to Hong Kong but it authorizes Hong Kong to conduct relevant

196 *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39.
197 *Apex Tech Investment Ltd v Chuang's Development (China) Ltd* [1996] 2 HKC 293.
198 *JJ Agro Industries (P) Ltd v Texuna International Ltd* [1992] 2 HKLR 391.
199 *Gao Haiyan & Anor v Keeneye Holdings Ltd* HCCT41/2010.
200 *China Nanhai Oil v Gee Tai Holdings* [1995] HKLR 215.
201 *Hebei Import & Export Corp v Polytex Engineering Co Ltd* [1999] 1 HKLRD 665.
202 *Shejiang Province Garment Import and Export Co v Siemssen & Co (Hong Kong) Trading Ltd* [1996] ADRLJ 183.
203 *Tai Hing (Asia) Commercial Co Ltd v Trinity (China) Supplies Ltd* (unreported, No A6585 of 1987, digested at [1989] HKLY 57); *Shenzhen Nan Da Industrial and Trade United Co v FM International Ltd* [1992] 1 HKC 328.
204 First set out in *A v R* [2009] 3 HKLRD 389 and followed in subsequent cases.
205 See Section A(a) above.

external affairs in accordance with the Basic Law. The handling of external affairs is elaborated upon in Chapter VII 'External Affairs' of the Basic Law.

4.399 Article 151, found in Chapter VII, provides that Hong Kong, using the name 'Hong Kong, China' may maintain and develop relations and conclude and implement agreements on its own, with foreign States and regions and international organizations, in such matters as economic affairs, trade, finance and monetary affairs, shipping, communications, tourism, culture, and sport.

4.400 To date, Hong Kong has, in its own name, entered into:

- 15 bilateral investment treaties (BITs);
- two free trade agreements, with New Zealand and the European Free Trade Association;
- a Closer Economic Partnership Agreement with the Mainland.

Hong Kong is not a party to any multilateral investment treaties, and it does not have a national investment law.

(b) Relevance of PRC's BITs

4.401 In addition to the above international agreements, given Hong Kong's status as a special administrative region of the PRC, two interesting questions arise:

- first, whether Hong Kong investors may rely on BITs entered into between the PRC and another contracting party;
- secondly, whether the PRC's BITs cover investments made in Hong Kong.

(i) Applicability of the PRC's BITs to Hong Kong investors

4.402 On the first question, the PRC's BITs typically provide that in respect of the PRC, 'investors' include:

- natural persons who have nationality of the PRC 'in accordance with its laws';[206]
- economic entities established 'in accordance with the laws' of the PRC and domiciled in the 'territory' of the PRC or having their 'seats' there.

In the case of natural persons, commentators who believe that the PRC's BITs extend to some Hong Kong investors typically argue that under PRC law, certain Hong Kong investors would still qualify as Chinese nationals;[207] this is the case even if the Hong Kong investor has a right of abode in Hong Kong; and the PRC has not, under Article 70 of the ICSID Convention, excluded Hong Kong from the application of the Convention.

4.403 Conversely, commentators who believe otherwise typically focus on the fact that Hong Kong has entered into its own BITs; and the PRC's BITs may not have been extended to Hong Kong, the intention being for Hong Kong investors to rely on Hong Kong's own BITs, and not BITs entered into by the PRC.

[206] See eg Version I and Version III of the Chinese Model BIT, available in N Gallagher and W Shan, *Chinese Investment Treaties* (Oxford University Press, 2009) at 421 and 433.

[207] See Explanations of Some Questions by the Standing Committee of the National People's Congress Concerning the Implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region (adopted at the 19th Session of the Standing Committee of the 8th National People's Congress on 15 May 1996).

4.404 In one ICSID case, the above jurisdictional arguments were canvassed before the tribunal, which ultimately ruled in favour of the Hong Kong investor.[208]

4.405 In the case of Hong Kong companies, commentators who believe that the PRC's BITs extend to Hong Kong companies typically argue that the phrase 'the laws of the PRC' is broad enough to include the Hong Kong Companies Ordinance (c 32); and similarly, Hong Kong is part of the 'territory' of the PRC.

4.406 Commentators who believe otherwise argue for a narrower construction of these terms, arguing that the Hong Kong Companies Ordinance creates a regime that is independent of that which applies in mainland China.

4.407 In all cases, the answer will depend in part on the precise wording of the relevant BIT. In addition, it is important to note that a number of the PRC's BITs have departed from the 'model' provisions set out above.

(ii) Applicability of the PRC's BITs to Hong Kong

4.408 On the second question, the issue is whether the PRC's BITs cover investments made in Hong Kong. A mirror question is whether Hong Kong itself may be bound by BITs entered into by the PRC, although the stronger argument is probably in relation to the former.

4.409 On this, commentators who argue that the PRC's BITs do cover investments made in Hong Kong focus on the fact that 'territory' is typically not defined in the PRC's BITs, and there is no dispute that Hong Kong is within the 'territory' of the PRC; the fact that Hong Kong operates under the one country, two systems principle is an internal matter between the PRC and Hong Kong, and cannot affect the PRC's liability under international law for acts taking place in Hong Kong.

4.410 Conversely, commentators who believe otherwise typically argue that under Article 153 of the Basic Law, Hong Kong is empowered to and has entered into its own BITs; Article 153 of the Basic Law provides that it is for the Central People's Government to decide whether to apply the PRC's international agreements to Hong Kong; under Annex III of the Basic Law, the PRC has not extended her BITs to cover Hong Kong; and many of the PRC's BITs were entered into before the handover.

4.411 As before, the answer will depend in part on the precise wording of the relevant BIT.

(c) Overview and history

4.412 Hong Kong's first BIT was with the Netherlands, and was signed on 19 November 1992. It came into force on 1 September 1993. Since then, Hong Kong has entered into another 14 BITs. Although this may appear to be an average of about one treaty per year, in reality, almost all Hong Kong's BITs were entered into in the lead-up to the 1997 handover. Since the handover, only two BITs have been signed—one with the UK on 30 July 1998, and another with Thailand on 19 November 2005.

[208] Decision on Jurisdiction and Competence (19 June 2009), paras 42–77, in *Tza Yap Shum v Peru* (ICSID Case No ARB/07/6).

The full list of BITs entered into by Hong Kong is set out below: **4.413**

Countries	Date of entry into force	Gazette date
Australia	15 October 1993	15 September 1993
Austria	1 October 1997	26 June 1998
Belgo-Luxembourg Economic Union	18 June 2001	22 June 2001
Denmark	4 March 1994	9 February 1994
France	30 May 1997	26 June 1998
Germany	19 February 1998	6 March 1998
Italy	2 February 1998	6 February 1998
Japan	18 June 1997	26 June 1998
Republic of Korea	30 July 1997	26 June 1998
Netherlands	1 September 1993	11 December 1992
New Zealand	5 August 1995	25 August 1995
Sweden	26 June 1994	10 June 1994
Switzerland	22 October 1994	2 December 1994
Thailand	12 April 2006[209]	4 May 2006
United Kingdom	12 April 1999	16 April 1999

(d) Preconditions

(i) Qualifying investment

All Hong Kong's existing BITs contain an express definition of 'investment', and they all set out a relatively broad definition of 'investment', followed by a non-exhaustive list of similar categories of qualifying investments. Typically, these categories will cover movable and immovable property; shares and other forms of participation; claims to money or performance under a contract; intellectual property rights; and business concession and other rights, including over natural resources. **4.414**

The Hong Kong-Switzerland BIT contains a representative example of how 'investment' is defined: **4.415**

> 'investment' means every kind of asset and in particular, though not exclusively, includes:
>
> (a) movable and immovable property and any other property rights such as mortgages, liens, pledges or usufructs;
> (b) shares in and stock, bonds and debentures of a company and any other form of participation in a company including a joint venture;
> (c) claims to money or to any performance under contract having a financial value;
> (d) rights in the field of intellectual property, technical processes, know-how and goodwill;
> (e) business concessions or similar rights conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;
>
> A change in the form in which assets are invested does not affect their character as investments.

[209] This date is published by the Department of Justice of Hong Kong and is different from the date published by the United Nations at <http://www.unctad.org/sections/dite_pcbb/docs/bits_hk_china.pdf>.

4.416 In defining 'investment', however, the BITs do differ in some respects, including as follows:

- by expressly stating that 'investment' means every kind of asset, 'held or invested *directly or indirectly* . . .' See the Hong Kong-Netherlands BIT;
- by expressly stating that 'investment' means every kind of asset, '*owned or controlled* by investors of one Contracting Party'. See the Hong Kong-Australia BIT;
- by expressly stating that 'investment' means every kind of asset which has been invested '*in accordance with the laws of the Contracting Party* receiving it . . .' See the Hong Kong-New Zealand BIT;
- by expressly stating that 'investment' means every kind of asset 'admitted by the other Contracting Party *subject to its law and investment policies* applicable from time to time'. See the Hong Kong-Australia BIT;
- by expressly including '*returns reinvested*' as among the categories of asset falling within the definition of 'investment'. See the Hong Kong-Denmark BIT;
- by expressly stating that shares, etc includes 'minority participation' in a company (the Hong Kong-Germany BIT) and 'joint ventures' (the Hong Kong-Korea BIT);
- by expressly stating that a physical person or company shall be regarded as controlling a company or an investment if the person or company has a '*substantial interest*' in the company or the investment. See the Hong Kong-Australia BIT;
- by expressly including in the definition of 'investment' 'goods that, under a leasing agreement, are placed at the disposal of a lessee in the area of a Contracting Party in accordance with its laws and regulations'. See the Hong Kong-Korea BIT;
- by expressly stating that a change in form in which assets are invested does not affect their character as investments provided that 'the assets continue to be invested in accordance with the laws and regulations of the Contracting Party receiving them' (the Hong Kong-New Zealand BIT) or 'that such change has been specifically approved in accordance with' its approval requirements[210] (the Hong Kong-Thailand BIT).

(ii) Qualifying investor

4.417 All Hong Kong's existing BITs contain an express definition of 'investor'. In respect of Hong Kong, the definitions typically state that it means:

- physical persons who have the right of abode in Hong Kong; and
- generally, Hong Kong companies.

With respect to the first limb, almost all Hong Kong's BITs use identical wording, in stating that a Hong Kong investor means, among others, a physical person who has the 'right of abode' in Hong Kong. In general, a permanent resident of Hong Kong enjoys the right of abode and this includes several categories of individuals, such as a Chinese citizen born in Hong Kong before or after the establishment of Hong Kong; a Chinese citizen who has ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of Hong Kong; and a person not of Chinese nationality who has resided in Hong Kong for a continuous period of at least seven years and has taken Hong Kong as his or her place of permanent residence before or after the establishment of Hong Kong. The Immigration Ordinance sets out more detailed provisions on which individuals are entitled to the 'right of abode'.

[210] See Art 2(1) of the Hong Kong-Thailand BIT.

4.418 In the case of the Hong Kong-United Kingdom BIT, the first limb of the definition of a Hong Kong 'investor' is qualified, by including a proviso that 'British nationals' do not fall within the definition. This recognizes the fact that some British nationals are entitled to the right of abode in Hong Kong. However, other than British nationals, arguably, physical persons of other nationalities who have the right of abode in Hong Kong would fall within the definition of a Hong Kong 'investor', notwithstanding the fact that they possess another nationality.

4.419 With respect to the second limb, there is less uniformity among Hong Kong's BITs. A number of them provide for a relatively short definition of company or corporation. Typical examples include:

(Taken from the Hong Kong-Austria BIT:)

> 'investors' means:
>
> (i) in respect of Hong Kong:
>
> . . .
>
> – corporations, partnerships and associations incorporated or constituted and registered where applicable under the law in force in its area;

(Taken from the Hong Kong-Denmark BIT:)

> 'investors' means:
>
> (a) in respect of Hong Kong:
>
> . . .
>
> (ii) corporations, partnerships and associations incorporated or constituted under the law in force in its area (hereinafter referred to as 'companies');

In contrast, a small handful of BITs contain more detailed definitions. Thus, the Hong Kong-Switzerland BIT defines 'investors' to mean, among others,

> companies, including corporations, partnerships and associations, incorporated or constituted under the law in force in its area, *as well as companies which are, directly or indirectly, controlled by persons who have the right of abode* in its area or by companies incorporated or constituted under the law in force in its area;[211]

The second limb of the definition includes *non-Hong Kong* companies which are, directly or indirectly, controlled by:

- investors who have a right of abode in Hong Kong; or
- by companies incorporated or constituted under Hong Kong law.

In the case of the Hong Kong-France BIT, 'investors' means, among others,

> corporations, partnerships and associations, incorporated or constituted under the law in force in its area and having their head office in its area, or corporations, partnerships and associations controlled directly or indirectly by physical persons who have the right of abode in its area or by legal persons having their head office in its area and incorporated or constituted under the law in force in its area (hereinafter referred to as 'companies');

This appears to narrow the definition of a Hong Kong company, by imposing various head office or control requirements.

[211] Emphasis added.

4.420 Lastly, in the case of the Hong Kong-Australia BIT, 'companies' is defined to mean,

> in respect of Hong Kong: corporations, partnerships, associations, trusts or other legally recognized entities incorporated or constituted or otherwise duly organized under the law in force in its area or under the law of a non-Contracting Party and owned or controlled by entities described in this sub-paragraph or by physical persons who have the right of abode in its area, regardless of whether or not the entities referred to in this sub-paragraph are organized for pecuniary gain, privately or otherwise owned, or organized with limited or unlimited liability;

Therefore, in addition to defining a Hong Kong company on the basis of the jurisdiction of incorporation, constitution, or organization, the definition also includes non-Hong Kong companies which are 'owned or controlled' by Hong Kong companies or persons with a right of abode in Hong Kong.

(e) Substantive protections

(i) Expropriation

4.421 All 15 of Hong Kong's BITs contain articles giving investors protection from expropriation or measures having similar effect. They generally all contain certain minimum levels of protection consistent with customary international law. Broadly, the protections typically include the following:

- investors shall not be deprived of their investments (or subject to measures having equivalent effect);
- except lawfully, for a public purpose, on a non-discriminatory basis and against compensation;
- compensation shall amount to the real value of the investment immediately before the deprivation or before it became public knowledge; and
- shall include interest, shall be made without undue delay, and be realizable and freely convertible;
- investors have the right to prompt review, by a judicial or other authority of the investor's case and of valuation of the investment;
- each Contracting Party shall ensure the above provisions apply to assets of a company incorporated or constituted under its own law.

The Hong Kong-United Kingdom BIT illustrates the above protections:

> Article 5 Expropriation
>
> (1) Investors of either Contracting Party shall not be deprived of their investments nor be subjected to measures having effect equivalent to such deprivation in the area of the other Contracting Party except lawfully, for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against compensation. Such compensation shall amount to the real value of the investment immediately before the deprivation or before the impending deprivation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without undue delay, be effectively realizable and be freely convertible. The investor affected shall have a right, under the law of the Contracting Party making the deprivation, to prompt review, by a judicial or other independent authority of that Party, of the investor's case and of the valuation of the investment in accordance with the principles set out in this paragraph.
>
> (2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own area, and in which investors of

> the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee compensation referred to in paragraph (1) in respect of their investment to such investors of the other Contracting Party who are owners of those shares.

4.422 The BITs do, however, differ in some respects, including the following:

- by expressly stating that investors shall not be deprived of their investments or subjected to measures having, '*directly or indirectly*', an effect equivalent to such deprivation (the Hong Kong-France BIT) or which 'limit the enjoyment of the investment' (the Hong Kong-Italy BIT);
- by expressly stating that payment shall be without undue delay 'which, in any event, shall not extend a period of 3 months' (sic). See the Hong Kong-Denmark BIT;
- in relation to the value of the expropriated investment, expressly stating that where the value cannot be readily ascertained, the compensation shall be determined 'in accordance with generally recognised principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors.' Several BITs contain similar wording, including the Hong Kong-Australia BIT; the Hong Kong-New Zealand BIT; the Hong Kong-Belgo-Luxembourg Economic Union BIT; and the Hong Kong-Italy BIT;
- stating that the applicable interest is '*appropriate interest*, taking into account the length of time until the time of payment' (Hong Kong-Japan BIT); or 'interest at the rate applicable under the law of the Contracting Party making the deprivation' (Hong Kong-Sweden BIT) rather than 'interest at a normal commercial rate'.

(ii) Fair and equitable treatment, full protection and security, and arbitrary or discriminatory measures

4.423 Unsurprisingly, all 15 of Hong Kong's BITs contain a provision dealing with fair and equitable treatment. Article 2(2) of the Hong Kong-Korea BIT contains typical wording,

> (2) Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the area of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its area of investors of the other Contracting Party.

As can be seen, the wording typically covers both 'fair and equitable treatment' and 'full protection and security'. In addition, the articles typically refer to impairment 'by unreasonable or discriminatory measures'.

4.424 A few of the BITs contain less standard wording, including the following:

- the Hong Kong-France BIT specifically states that neither Contracting Party shall 'de jure or de facto hinder such treatment';
- the Hong Kong-Australia BIT expressly states, as part of the sub-article, that this is 'without prejudice to its laws';
- the Hong Kong-New Zealand BIT refers only to 'protection and security' rather than *full* protection and security;
- the Hong Kong-Japan BIT refers to impairment by unreasonable or discriminatory measures 'the business activities in connection with the investment' but then includes a non-exhaustive definition of relevant business activities;

- the Hong Kong-Italy BIT omits a reference to 'full protection and security', but contains a number of references to protection elsewhere in the BIT;
- the Hong Kong-Japan BIT contains a general carve out that the provisions of the BIT shall not limit the right of either Contracting Party 'to take measures directed to the protection of its essential interests, or to the protection of public health, or to the prevention of diseases and pests in animals and plants, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.'[212]

In addition, a number of the sub-articles dealing with fair and equitable treatment also contain an umbrella clause; this is discussed at Section K(e)(vi) below.

(iii) National and most favoured nation treatment

4.425 All 15 of Hong Kong's BITs contain most favoured nation treatment clauses. Typically, they provide that:

- treatment shall be no less favourable than that accorded to investments or returns of a Contracting Party's 'own investors' or 'of investors of any other State';
- as regards management, maintenance, use, enjoyment, or disposal of investments, treatment shall not be 'less favourable' than that accorded to a Contracting Party's 'own investors' or 'of investors of any other State;' and
- investors whose investments suffer losses owing to war or related incidents shall be accorded 'as regards restitution, indemnification, compensation or other settlement', treatment no less favourable than that accorded to a Contracting Party's 'own investors' or 'to investors of any other State'.

4.426 The Hong Kong-United Kingdom BIT sets out typical examples of such provisions:

> ARTICLE 3
>
> **Treatment of Investments**
>
> (1) Neither Contracting Party shall in its area subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any other State.
>
> (2) Neither Contracting Party shall in its area subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any other State.
>
> ARTICLE 4
>
> **Compensation for Losses**
>
> (1) Investors of one Contracting Party whose investments in the area of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the area of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accorded to its own investors or to investors of any other State. Resulting payments shall be freely convertible.

[212] Art 8(3), Hong Kong-Japan BIT.

Notably, as is clear from the wording above, the treatment covers both national treatment (ie, treatment accorded to a Contracting Party's own investors) and most favoured nation treatment (ie, treatment accorded to investors of any third State).

4.427 In addition, the BITs typically also carve out certain treatment from the scope of the national and most favoured nation treatment clauses. A common carve out is for tax-related agreements; or treatment, preferences, or privileges resulting from customs unions or similar international agreements. Less common examples include carve outs relating to regulations to facilitate frontier traffic;[213]regional arrangements for monetary, tariff, or trade matters and arrangements to promote regional cooperation in the economic, social, labour, industrial, or monetary fields;[214] certain aircraft and ship rights;[215] and 'reciprocal arrangements' with any third State.[216]

4.428 A few of the BITs contain less standard wording, including the following:

- by expressly stating that the treatments referred to in the relevant article are 'examples' (Hong Kong-Austria BIT);
- by expressly including 'intellectual property rights, and the raising of funds, the purchase and sale of foreign exchange' and transfers of investments and returns within the scope of the most favoured nation treatment clause (Hong Kong-Australia BIT);
- by expressly stating that in regard to remedies, national and most favoured nation treatment shall apply (Hong Kong-Korea BIT);
- the Hong Kong-Japan BIT expressly states that 'access to the courts of justice and administrative tribunals and agencies at all levels both in pursuit and in defence of their rights' and the expropriation article fall within the scope of the national and most favoured nation treatment clause, and it also expressly contains an article covering companies from a third State which are owned or controlled by qualifying investors;
- the Hong Kong-Netherlands BIT expressly includes 'full physical protection and security' within the scope of the national and most favoured nation treatment clause, and the Hong Kong-Italy BIT expressly includes 'protection'.

(iv) Transferability

4.429 All 15 of Hong Kong's BITs contain a standalone article dealing with the transfer of investments and returns. They all generally cover certain more fundamental rights, such as an unrestricted right to transfer investments and returns abroad. In addition, some of the longer form articles set out a list of more detailed transfers which fall within the scope of the article.

4.430 Article 6 of the Hong Kong-Switzerland BIT is a typical example of a shorter form version of the article:

> ARTICLE 6
>
> **Transfer of Investments and Returns**
>
> (1) Each Contracting Party shall in respect of investments guarantee to investors of the other Contracting Party the unrestricted right to transfer their investments and returns abroad.

[213] Art 4(2), Hong Kong-Austria BIT.
[214] Art 8, Hong Kong-New Zealand BIT.
[215] Art 12, Hong Kong-Japan BIT.
[216] Art 7, Hong Kong-Netherlands BIT.

(2) Each Contracting Party shall also guarantee to investors of the other Contracting Party the unrestricted right to transfer funds to maintain or increase the investment or to repay loans contracted or to meet other contractual obligations undertaken in connection with the investment.
(3) Transfers of currency shall be effected without delay in any convertible currency. Unless otherwise agreed by the investor transfers shall be made at the rate of exchange applicable on the date of transfer.

4.431 In comparison, the Hong Kong-Austria BIT sets out a longer form version of the article dealing with transfers:

ARTICLE 7

Transfers

(1) Each Contracting Party shall in respect of investments guarantee to investors of the other Contracting Party the unrestricted right to transfer abroad their investments as defined in Article 1(c) and their returns as defined in Article 1(e). Investors shall also have the unrestricted right to transfer abroad in particular, but not exclusively:
   (a) capital and additional amounts for the maintenance or extension of their investments;
   (b) amounts assigned to cover expenses relating to the management of the investment;
   (c) repayment of loans;
   (d) proceeds from the total or partial liquidation or sale of the investment;
   (e) compensation in accordance with Articles 5 and 6 of this Agreement.
(2) Transfers of currency shall be effected without delay in any freely convertible currency. Unless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer. This rate of exchange shall correspond to the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversion of the currencies concerned into Special Drawing Rights.

(v) Duration

4.432 Almost all Hong Kong's BITs expressly provide that they apply to investments made before or after the date of entry into force of the BIT. In addition, the BITs typically provide that they shall remain in force for a period of 15 years, and unless a notice of termination has been given by either Contracting Party, the BITs typically continue either indefinitely, or for further periods of ten years at a time, but subject to any future notice of termination. Where the BIT has been terminated, the BITs typically continue to be effective with respect to past investments for a further period of 15 years.

(vi) Other protections

4.433 Hong Kong's BITs typically contain provisions dealing with:

- promotion of investments and creating favourable conditions for investments;
- subrogation;
- compensation for losses arising from requisitioning of property or destruction of property in the context of war, armed conflict, and similar events;
- resolution of disputes between the Contracting Parties.

Other less common provisions found in certain BITs include:

- umbrella clauses (eg, Art 10, Hong Kong-Switzerland BIT);
- articles dealing with transparency of laws (eg, Art 4, Hong Kong-Australia BIT);

- articles dealing with situations where the investor has already invoked protection available under another agreement (eg, Art 13, Hong Kong-United Kingdom BIT).

(f) Dispute resolution options

4.434 Almost all Hong Kong's BITs contain substantively the same wording, which provides that a dispute between an investor and the host State concerning an investment which has not been settled amicably within three or six months from written notification of the claim, shall be submitted to such procedures as may be agreed between the parties to the dispute. If no such procedures are agreed within the three or six month period, then the parties are bound to submit the dispute to arbitration under the UNCITRAL Arbitration Rules.

4.435 The Hong Kong-Australia BIT sets out a typical example of such a clause:

> A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter which has not been settled amicably, shall, after a period of three months from written notification of the claim, be submitted to such procedures for settlement as may be agreed between the parties to the dispute. If no such procedures have been agreed within that three month period, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The arbitral tribunal shall have power to award interest. The parties may agree in writing to modify those Rules.[217]

Notably, all Hong Kong's BITs expressly refer to arbitration under the UNCITRAL Arbitration Rules, and none of them provide for arbitration under the ICSID Convention.

4.436 The BITs between Hong Kong and the Netherlands, Switzerland, and Japan contain a modification of the above wording, providing that at the end of the relevant period, 'the dispute shall *at the request of the investor concerned* be submitted to arbitration' under the UNCITRAL Arbitration Rules. This contrasts with the typical wording that at the end of the period, 'the *parties to the dispute* shall be bound to submit it to arbitration'.

4.437 In addition, the BITs between Hong Kong and Japan, and Korea, contain more detailed dispute resolution clauses for settling investor-host State disputes. In the case of Japan, the BIT includes two particular sub-articles of interest:

> 3. Paragraph 2 of this Article [which contains a reference to arbitration under the UNCITRAL Arbitration Rules] shall not be construed so as to prevent investors of either Contracting Party from seeking administrative or judicial settlement within the area of the other Contracting Party. In the event that an investor has resorted to administrative or judicial settlement within the area of the other Contracting Party of a dispute concerning an investment by such investor, the same dispute shall not be submitted to arbitration referred to in paragraph 2 of this Article.
> 4. In case a dispute arises out of an investment made by a company of either Contracting Party which is owned or controlled by investors of the other Contracting Party, investors of the other Contracting Party may submit the dispute to arbitration referred to in paragraph 2 of this Article on behalf of such company.[218]

Article 9(3) of the Hong Kong-Japan BIT arguably sets out a 'fork in the road' provision, which prevents an investor which has 'resorted to administrative or judicial settlement within

[217] Art 10, Hong Kong-Australia BIT.
[218] Art 9, Hong Kong-Japan BIT.

the area of the other Contracting Party of a dispute concerning an investment by such investor', from submitting it to arbitration.

4.438 Article 9(4) arguably clarifies that even though an investment is made by a Hong Kong or Japanese company, the investors from the other Contracting Party which owns or controls the company may nonetheless submit its dispute to arbitration. A typical example would appear to be a situation where shareholders of a company incorporated in the host State seek to invoke the arbitration provisions set out in the article, arising from an investment made by that company in the host State.

4.439 In the case of the Hong Kong-Korea BIT, Article 9(2) states that,

> Remedies under the laws and regulations of one Contracting Party in the area in which the investment has been made shall be available to the investor of the other Contracting Party on the basis that the investor shall be treated in this regard no less favourably than its own investors or investors of any other State in its area.

This appears to be a most favoured nation treatment clause, as well as a national treatment clause.

(g) Future trends

4.440 As noted above, although Hong Kong has entered into 15 BITs, almost all Hong Kong's BITs were entered into prior to 1997. Since the handover, only two BITs have been signed, and there is no clear indication that there will be any pick-up in the number of BITs signed in the immediate future.

4.441 The text of the BITs is broadly similar, and has generally not evolved significantly over time.

4.442 On 29 March 2010, Hong Kong and New Zealand signed the Hong Kong-New Zealand Closer Economic Partnership Agreement (the Hong Kong-New Zealand FTA). The Hong Kong-New Zealand FTA is Hong Kong's first free trade agreement (FTA) with a foreign economy, and it is also its second FTA, after the Closer Economic Partnership Arrangement with Mainland China.

4.443 The Hong Kong-New Zealand FTA has been under consideration for some time, and it comprises trade liberalization measures on both trade in goods and services. It does not contain a chapter dealing with protection of investments, but in side letters issued with the Hong Kong-New Zealand FTA, it was agreed that the parties would agree on an investment protocol to the FTA, dealing with protection of investments.[219] The letters state that the negotiations are to be concluded within two years from the date the FTA enters into force, and states that the protocol shall be broader in scope than the current Hong Kong-New Zealand BIT; and its provisions shall be drafted 'with reference' to the China-New Zealand FTA done at Beijing on 7 April 2008. The China-New Zealand FTA contains a detailed Investment chapter setting out a 'new generation' form of investment protection.[220] If Hong Kong concludes an investment protocol with New Zealand that contains similar provisions,

[219] Letter available at <http://www.tid.gov.hk/english/trade_relations/hknzcep/files/HKNZCEP321_InvestmentLetter.pdf> (accessed 11 September 2010).

[220] The China-New Zealand FTA is available at <http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php> (accessed 11 September 2010).

this would represent a significant evolution from its existing BITs, which contain older-style BIT wording.

4.444 On 21 June 2011, Hong Kong and the Member States of the European Free Trade Associations signed a comprehensive FTA. This agreement is Hong Kong's first FTA with the European economies.

4.445 In addition, it is understood that a number of other FTAs involving Hong Kong are currently under consideration or negotiation, including an FTA with Chile.

(h) National investment legislation

4.446 Hong Kong does not have any national investment legislation and, historically, this does not appear to have affected her ability to attract foreign investment.

(i) ICSID Convention

4.447 There is currently some uncertainty over whether the ICSID Convention applies to Hong Kong. Prior to the handover, the ICSID Convention applied in Hong Kong, by virtue of the UK Arbitration (International Investment Disputes) Act 1966, which was extended to Hong Kong by Order in Council in 1967. However, following the handover, the Act ceased to apply to Hong Kong. The PRC is a contracting State to the ICSID Convention and it was reportedly agreed by the Sino-British Joint Liaison Group that the Convention would continue to apply to Hong Kong. However, the PRC has not formally declared that the Convention will continue to apply, although she has also not given a written notice under Article 70 to exclude Hong Kong from the ICSID Convention.

4.448 On balance, it is generally assumed that the Convention is intended to be in force and applicable to Hong Kong.[221]

4.449 The PRC has made a notification, pursuant to Article 25(4) of the ICSID Convention, that it would only consider submitting to the jurisdiction of ICSID disputes over compensation resulting from expropriation and nationalization.

(j) Enforcement of awards against Hong Kong

4.450 It is clear that the Arbitration Ordinance applies to the Hong Kong Government, and to the Offices set up by the Central People's Government in Hong Kong.[222] For claims brought against the Hong Kong Government, the Crown Proceedings Ordinance (Cap 300) is also relevant.

4.451 However, what was previously less clear was the scope of the doctrine of State immunity under Hong Kong law generally. This uncertainty arose because prior to the handover in 1997, the UK State Immunity Act applied in Hong Kong, and the applicable doctrine was one of restrictive immunity. However, following the handover, the Act ceased to apply, and no mainland law applied in its place.

[221] eg the Department of Justice website lists the ICSID Convention under its 'List of Treaties in Force and Applicable to the Hong Kong Special Administrative Region': <http://www.legislation.gov.hk/interlaw.htm> (accessed 7 September 2010). For a discussion of some of the key issues, see A Rosa and J Choy, '"One Country, Two Systems" and Country Risk Protection for Hong Kong Listed Companies', *Hong Kong Lawyer*, June 2008, 32.

[222] s 6, Arbitration Ordinance.

4.452 In *Democratic Republic of the Congo v FG Hemisphere Associates LLC*,[223] the Court of Final Appeal, by a 3:2 decision, reached the provisional holding that absolute State immunity applies in Hong Kong, and there is no exception relating to a foreign State's commercial activities. This decision was later confirmed by the Standing Committee of the National People's Congress.

4.453 Arbitrations in Hong Kong may also involve the PRC Government and its agencies. In this context, given the relationship between the PRC and Hong Kong, the applicable doctrine is that of Crown immunity, not State immunity. The case of *Intraline Resources Sdn Bhd v The Owners of the Ship or Vessel 'Hua Tian Long'*[224] provides guidance on the applicability of Crown immunity to PRC Government-related parties. That decision now has to be read in light of the later decision of *FG Hemisphere*.

(k) Actual cases

4.454 To date, there is no publicly known case where Hong Kong has been the respondent to an investment arbitration. There have, however, been landmark cases where Hong Kong has had a connection. The most well known of these are *SPP v Egypt*[225] and *AAPL v Sri Lanka*,[226] both of which are among the earliest ICSID cases. *SPP* was the first example of arbitration without privity, whereas *AAPL* was the first case to found jurisdiction under a bilateral investment treaty. In *SPP*, the claimant was a Hong Kong corporation and the tribunal founded its jurisdiction based on Egypt's foreign investment law. In *AAPL*, the claimant was a Hong Kong corporation and the arbitration was commenced under the Sri Lanka-United Kingdom BIT which had been extended to Hong Kong by virtue of an Exchange of Notes, with effect from 1981. In addition, the more recent case of *Tza v Peru*, mentioned above, also raised issues of interest to Hong Kong. Metro Rail Transit Corporation Limited, a Hong Kong company, is also believed to be in an arbitration against the Philippines relating to a light rail system in the greater Manila area; and Standard Chartered Bank (Hong Kong) Limited has commenced ICSID proceedings against the Tanzania Electric Supply Company Limited.

L. Model arbitration clauses

All clauses in this section are for general reference only, separate legal advice should be obtained for specific transactions.

(a) Model clauses

4.455 The HKIAC recommended clause for international arbitrations administered by the HKIAC is as follows:

> Any dispute, controversy or claim arising out of or relating to this contract, including the validity, invalidity, breach or termination thereof, shall be settled by arbitration in Hong Kong under the Hong Kong International Arbitration Centre Administered Arbitration Rules in force when the Notice of Arbitration is submitted in accordance with these Rules.

---

[223] [2011] HKCFA 41.
[224] HCAJ 59/2008 (CFI).
[225] *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* (ICSID Case No ARB/84/3).
[226] *Asian Agricultural Products Ltd v Sri Lanka*, Final award on merits and damages (ICSID Case No ARB/87/3), IIC 18 (1990); 4 ICSID Rep 246; 30 ILM 580.

* The number of arbitrators shall be . . . (one or three). The arbitration proceedings shall be conducted in . . . (insert language).

Note:

** Optional*

The HKIAC recommended clause for arbitrations under the UNCITRAL Rules is as follows:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force and as may be amended by the rest of this clause.

The appointing authority shall be Hong Kong International Arbitration Centre.

The place of arbitration shall be in Hong Kong at Hong Kong International Arbitration Centre (HKIAC).

* There shall be only one arbitrator.

Notes:

** This sentence must be amended if a panel of three arbitrators is required.*

If the language to be used in arbitration proceedings is likely to be in question, it may also be useful to include in contracts:

'The language(s) to be used in the arbitral proceedings shall be . . .'

(b) Optional riders

(i) Fees

4.456 As noted above at Section H(f)(ii), the HKIAC Administered Arbitration Rules allow the parties to agree that the HKIAC's Schedule of Fees and Costs of Arbitration will apply to the determination of the tribunal's fees. These fees are competitive and parties may wish expressly to stipulate that the schedule applies, in their arbitration agreement. Absent such agreement, the schedule will not apply, and it is generally more difficult to reach agreement after a dispute has arisen:

The parties agree that the fees of the arbitral tribunal shall be determined in conformity with the HKIAC's prevailing Schedule of Fees and Costs of Arbitration.

(ii) Nationality

4.457 As noted above at Section G(e)(i)(2), the HKIAC Administered Arbitration Rules contains a nationality restriction on the sole arbitrator or chairman. A Hong Kong resident who is of Chinese descent may still be considered a Chinese national. To ensure that Hong Kong residents are not caught by this prohibition, parties may include a proviso that:

For purposes of determining the nationality of any arbitrator, the parties agree that an arbitrator who is a PRC citizen or national holding the right of abode in Hong Kong shall not for purposes of Article 11 of the HKIAC Administered Arbitration Rules be considered to be a national of the People's Republic of China.

(iii) Language

4.458 As noted at Section G(c)(v) above, in practice, parties to PRC-related contracts often agree that the language of the arbitration shall be English and Chinese; agreeing only to English is often not an option. In such circumstances, instead of agreeing to both English and Chinese

(which can have significant cost implications), parties may choose to agree to the following compromise:

> The parties agree that the language of the arbitration is English save that any oral hearings shall be conducted orally in both English and Chinese Mandarin.

or, failing that:

> The language of the arbitration shall be English and Chinese, but the parties agree that all documents submitted or produced in the course of the arbitration do not have to be translated into both languages, unless, and only to the extent ordered by the Tribunal.

(iv) Opting out of the domestic arbitration regime

4.459 As noted at Section B(b)(ii) above, the provisions of Schedule 2 to the Arbitration Ordinance apply to agreements which provide for domestic arbitration. However, in such cases, it is possible for parties to agree to opt out of the provisions of Schedule 2.

4.460 Where there is a risk that the arbitration clause may be subject to Schedule 2, they may expressly opt out of the regime which applies to domestic arbitrations, by providing that:

> For purposes of the Arbitration Ordinance, the parties agree that this clause is not a domestic arbitration agreement and that section 100 of the ordinance does not apply.

(v) Multi-party appointment of arbitrators

4.461 As noted at Section G(e)(i)(3) above, the HKIAC Administered Arbitration Rules deal with the appointment of arbitrators in a multi-party situation. However, they are unusual in one respect, as they envisage that where the multi-party appointment procedure fails, the HKIAC Council may step in to appoint only *one* of the party-appointed arbitrators, rather than all three arbitrators on the tribunal.

4.462 Parties who prefer to have the HKIAC Council step in to appoint all three arbitrators may choose to modify the multi-party appointment provision. A simple form of such a clause might provide as follows:

> Where there are more than two parties to the arbitration, and three arbitrators are to be appointed, the claimant(s) shall jointly nominate one arbitrator and the respondent(s) shall jointly nominate one arbitrator. In the absence of joint nominations by the claimant group and the respondent group within [30] days of the date the Notice of Arbitration was received by the respondent(s), or within such other period agreed by the parties, the HKIAC Council shall appoint all three arbitrators and shall designate one of them to act as the presiding arbitrator.
>
> Where there are more than two parties to the arbitration, and a sole arbitrator is to be appointed, all parties are to agree on the arbitrator. In the absence of such a joint nomination having been made within [30] days of the date the Notice of Arbitration was received by the respondent(s), or within such other period agreed by the parties, the HKIAC Council shall appoint the arbitrator.

M. Appendix

(a) National arbitration legislation and related rules

Arbitration Ordinance (c 609)[227]

[227] Available at <http://www.legislation.gov.hk>.

Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region[228]

(b) Arbitral institution rules

HKIAC Administered Arbitration Rules

(c) Resources

(i) Key publications

Ma, Geoffrey and Kaplan, Neil (eds), *Arbitration in Hong Kong: A Practical Guide*, Volumes One and Two (Sweet & Maxwell, 2003)

Halsbury's Laws of Hong Kong [2008] 1(2) (LexisNexis)

Moser, Michael and Cheng, Teresa, *Hong Kong Arbitration—A User's Guide*, 2nd edn (Kluwer Law International, 2008)

Choong, John and Weeramantry, Romesh (eds), *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Sweet & Maxwell, 2011)

(ii) Key websites

<http://www.hkiac.org/>
<http://www.asiandr.com/>
<http://www.ciarbasia.org/>

[228] Available at <http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandmutual2e.pdf> (accessed 13 May 2011).