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ARBITRATION IN HONG KONG

A PRACTICAL GUIDE

FIFTH EDITION

Editor-in-Chief
The Honourable
Geoffrey Ma Tao-li, GBM, QC, SC

General Editor
Denis Brock

and a team of
expert contributors

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adversarial process. Communications with the parties should be in writing, copied to the other side.

3.098 The parties must give effect to the expert's determination, unless and until it is revised by an amicable settlement or by an arbitration award (which usually cannot be made until after the contract has been completed). If there is no dispute as to the expert's determination, it is final and binding on the parties. If one of the parties is not satisfied with the expert's determination the contract will usually enable the matter to be referred to arbitration—see the typical clause above.

(f) Enforcement of expert determination

3.099 Expert determination clauses usually provide that the determination will be final and binding on the parties. The courts will enforce such a clause. However, the obligation on the parties to be bound by the expert determination is based in contract. Refusal to be bound only leaves the aggrieved party with recourse to sue for breach of contract.

3.100 Where a party is unhappy with an expert's determination, the statutory avenues of appeal in the Arbitration Ordinance do not apply. The court may intervene in limited circumstances, but the court has no power to vary or remit the determination and may only uphold or set aside the determination.

3.101 Three avenues for attack by a court on an expert determination are as follows:

(1) fraud or collusion;

(2) error of law. Parties to an expert determination must accept the risk of mistakes of law and be bound by the decision. Originally there was a rule that the jurisdiction of the courts as to questions of law could not be ousted by contract.[28] However, the argument that there is some rule of public policy forbidding parties from excluding appeals to the court on questions of law was rejected by Knox J. in *Nikko Hotels (UK) Ltd v MEPC Plc*.[29] In this case he confirmed that, where parties refer to the final and conclusive judgment of an expert on a question of construction, the expert's decision will be final and conclusive, and not open to review or treatment by the courts that the decision is a nullity on the ground that the decision as to the question of construction was erroneous in law, unless it can be shown that the expert did not perform the task assigned to him. This case shows a leaning of the courts towards allowing parties to do what they wish and to keep to their agreements; and

(3) error of fact. In the absence of express provision to the contrary, the parties to an expert determination, by its very nature are regarded as agreeing to be

[28] *Thompson v Charnock* (1799) 101 ER 1310.

[29] (1991) 28 EG 86, 100.The remarks made by Knox J in *Nikko Hotels (UK) Ltd* were queried by Lord Neuberger of Abbotsbury MR in *Barclays Bank Plc v Nylon Capital LLP* [2011] 2 Lloyd's Rep 347, in which he observed that an expert's determination of the value of shares in a company might not be immune from attack if it could be shown that, as a matter of law, he had valued the shares on the wrong basis.

bound by the determination even if it is based on an error of fact.[30] Anyone who agrees to accept the opinion of an expert accepts the risk that the expert will be incompetent or "muddleheaded".[31] The rationale for this principle is that the courts consider that the parties to an adjudication by an expert desire a quick and cheap procedure and a certain outcome as opposed to the delay and uncertainty in litigation.[32] However, if a mistake of fact is such as to render the expert determination contrary to the agreement under which it was made, the parties would be able to say the determination was not binding because the expert had not done what he was appointed to do.[33] In Hong Kong, Kaplan J. held that one of the classic features of an expert determination is that the decision can only be challenged in the most exceptional circumstances, such as where the expert answers the wrong question.[34]

(g) Expert immunity from suit?

3.102 Unlike arbitration, experts are liable in tort to a party suffering loss if they perform their appointed task in an expert determination negligently. An expert owes a duty to both parties to act with reasonable care and skill in making a determination, and if a mistake is made, while the decision cannot be challenged and will bind the parties, the expert will be liable in damages.[35] It is therefore recommended that an expert requires the parties to expressly agree to an immunity in the appointing agreement.

(h) Strengths of expert determination

3.103 The strengths of expert determination are:

(1) it is cheaper and quicker than arbitration, particularly if there is no legal representation; and

(2) the appointment of an experienced and respected expert often results in acceptance of a determination.

(i) Weaknesses of expert determination

3.104 There are disadvantages to expert determination:

(1) the determination is not an Award for the New York Convention or domestic enforcement processes, such that enforcement can be a problem;

(2) the investigation leading to the determination is less thorough, often without oral evidence or discovery of documents. This leaves room for error or bias;

[30] *Campbell v Edwards* [1976] 1 WLR 403.

[31] *Baber v Kenwood Manufacturing Co* [1978] 1 Lloyd's Rep 175.

[32] *Ibid.*

[33] *Jones v Sherwood Computer Services Plc* [1992] 1 WLR 277, 287.

[34] *Edward Mayers v Brian Dlugash* [1994] 1 HKLR 442.

[35] *Campbell v Edwards* [1976] 1 WLR 403.

(3) there are usually no statutory rules and few decided cases governing the procedure for expert determination, although trade or professional guidance may be helpful;

(4) the courts are powerless to help the expert arrive at his determination. The Arbitration Ordinance does not apply. Consequently, witnesses cannot be subpoenaed and orders for inspection of documents are not available. Further, the determination cannot be enforced (either within or outside the jurisdiction) as can a judgment or arbitration award;

(5) there is no right of appeal equivalent to the limited right of appeal on a point of law available in the case of an arbitration award. However, there are circumstances where the determination can be set aside by the courts. Examples include where there has been a fraud, or collusion, or because the determination is outside its terms of reference. A contract may provide that the expert's determination may be set aside for manifest error. Even in this situation, the court only has power to uphold or set aside and not to vary or remit the expert's determination; and

(6) although an expert determination may be binding on the parties to the dispute, if one of the parties refuses to honour the determination, the aggrieved party's remedy is for breach of contract. So having been through the process of expert determination, and having incurred the costs, the party is left in the position of having to go through the formal dispute resolution process, and face two sets of costs instead of one.

(j) Summary

3.105 Expert determination is a quick and inexpensive procedure, and should be used more widely in Hong Kong, notwithstanding the difficulties of enforcement.

8. Early Neutral Evaluation (ENE)

(a) What is ENE?

3.106 ENE is a process in which parties to litigation obtain from an experienced neutral person (the evaluator) an early, frank, reasoned, respected oral evaluation of their case on its merits. It is a confidential, informal and non-binding process.

(b) What is the origin of ENE?

3.107 ENE originated in the United States. Pilot schemes have been undertaken in Australia (for example, in 1992 in the Western Australian District Registry of the Court). In the Australian state of New South Wales, the Courts Legislation (Mediation and Evaluation) Amendment Act 1994 inserted provisions relating to consensual ENE into the legislation governing courts, and the courts have published rules and directions which are designed to encourage parties to resort to mediation and ENE. Hong Kong courts have not embraced ENE to date.

(c) How is the evaluator selected?

3.108 Selection of the evaluator depends on the particular scheme in operation and on what the parties agree. The evaluator usually must have expertise in the subject of the dispute. In the District Court pilot scheme which took place in Western Australia in 1992, Queens Counsel and other members of the legal profession acted as evaluators. Payment of their services was on an hourly basis, shared equally by the parties. Some evaluators offered their services on a *pro bono* basis in the case of persons of limited means. Ultimately, the evaluator must be a person agreed on by the parties.

(d) Process of ENE

3.109 ENE generally takes place as early as is feasible in the litigation process, usually within three to four months of the filing of the initiating process. Although informal, it is a structured process. However, there is no set way in which to conduct ENE. The following example will provide an insight into one version of the ENE process:

(1) the preliminary steps commence once parties have agreed to the process and have agreed on their evaluator. The parties sign a standard formal agreement agreeing with the evaluator to a time, date and place for the process, informing the evaluator of their authority to settle, agreeing to appear with their lawyers, and agreeing to forward to the evaluator and all other parties a written evaluation statement before the evaluation session. The statement should outline:

  (a) anything that might help in reducing the issues in dispute or the resolving of the dispute; and

  (b) any discovery or other procedural process which will assist in expediting case preparation and equipping the parties to assess the strengths and weaknesses of their positions;

(2) the evaluator should draw the parties' attention to the limitations of the evaluation process and to the existence of other ADR processes. The evaluator will obtain a signed ENE agreement;

(3) the next stage is the evaluation. The evaluator makes an opening statement explaining the evaluator's role and the goals and procedure to be followed. The evaluator reminds the parties that there are no rules of evidence, no testimony and no cross-examination;

(4) the next step involves the parties' lawyers outlining the relevant facts and their views on the areas in dispute, and a summary of relevant evidence. This should take no more than 30 minutes each. The evaluator then works through with the parties the areas of agreement and key facts not established, and then explores areas of dispute including joint fact finding. He concludes by assessing the strengths and weaknesses of the parties' cases;

(5) the evaluation should summarise the strengths and weaknesses of each party's case, and potential litigation outcomes. If the parties agree, the evaluator

may chair a discussion on settlement prospects, without disclosing the contents of his evaluation and not acting as a mediator. If the parties do not want settlement discussions, the evaluator provides his evaluation orally in the presence of the parties, and provides it again later in writing; and

(6) if there is a settlement, this should be recorded in writing. If there is no settlement, the evaluator records a plan for future management of the case. Any future dispute resolution processes must not involve the evaluator, unless it is a further ENE session requested by the parties. The evaluator may report to the court that ENE took place but must not disclose the contents of the evaluation.

(e) Goals of ENE

3.110 ENE's aims include:

(1) helping the parties to devise a sensible case development plan; and

(2) reducing parties' posturing on court procedures, thereby reducing delays.

(f) Strengths of ENE

3.111 The strengths of ENE include:

(1) if it persuades the parties in dispute to resolve their differences, it is a relatively cheap and quick way of dispute resolution; and

(2) it is voluntary, does not involve cross-examination and therefore tends to be informal and less antagonistic.

(g) Weaknesses of ENE

3.112 The main disadvantage of ENE is that the result is usually non-binding, so to the extent that either party chooses to ignore it, there are no repercussions and the parties will have simply thrown away the costs of carrying out the process.

(h) Summary

3.113 ENE is another quick and inexpensive option for dispute resolution, but is subject to both parties accepting the ENE's solution. ENE should be more widely used in Hong Kong.

9. PARTNERING

(a) What is partnering?

3.114 Partnering is a voluntary, non-binding collaborative process that focuses on solving common problems between different groups working on the same project or sharing a common purpose. The concept involves taking a team approach to the achievement of separate but mutually complimentary goals. It is a management approach which establishes working relationships among the parties through a mutually developed, formal strategy of commitment and communication, where trust and teamwork prevent disputes, create a co-operative bond and facilitate the success of a project. An important feature of partnering is that the parties express an intention to share the risks of unforeseen difficulties and to divide any windfall.

3.115 Parties set out in a special document (called a charter or mission statement) relationship guidelines emphasising the key attributes of the partnering process. Partnering is a formal process utilising project action plans and adopting conflict resolution processes, in particular, adopting the problem-solving negotiation approach described in [4.009]. It may be viewed as a dispute avoidance rather than a dispute resolution mechanism.

3.116 Generally the partnering charter is not a contract but a covenant describing the attitudes and consultative processes mutually approved by the parties. The charter will sit behind the contract proper, without being legally binding itself. However, parties may enter into partnering contracts which govern both commercial and legal relationships. The introduction of partnering ideas and a partnering relationship is best done using proper contractual vehicles such as the NEC Partnering option or the ACA Partnering 2000 Contract (PPC2000), rather than a simple partnering charter overlaying the traditional form of contract.

3.117 This section will focus on partnering in construction projects where it has been particularly successful in helping completion of projects on or before schedule and within budget.

(b) Origins of partnering?

3.118 Partnering originated in the United States where it was championed by Charles Cowan of the United States Army Corps of Engineers.

(c) Key elements

3.119 The key elements of partnering include:

(1) commitment to the process, which may be achieved through education of each party's organisation and team building (starting with a two- to three-day workshop) and the preparation of a formal charter;

(2) fostering and applying a win-win attitude, with the recognition that success of one means the success of the other;

(3) building trust, respect, co-operation, communication and understanding, through team building exercises and helping each other for mutual benefit;

(4) developing mutual goals by preparing specific objectives, guidelines and a formal mission statement;

(5) the implementation of those goals;

(6) continuous joint evaluation of the achievement of objectives; and

(7) a rapid response dispute resolution team which applies a specific dispute resolution process.

(d) What does the partnering process involve initially?

3.120 Initiating the partnering process will involve the following activities:[36]

(1) the education of each party's organisation about the partnering concepts and commitment;

(2) making the partnering intention clear at the inception of the project;

(3) obtaining commitment from the senior management of each party at the start of the relationship;

(4) organising the partnering workshop, attended by all levels of the project team of both the principal and contractor, before the project is started. At the partnering workshop the parties establish their common understanding of their roles, responsibilities and obligations, they establish mechanisms for feedback on performance and continuous evaluation, develop the project charter (a statement of goals and co-operation which is usually non-legally binding) and identify a common dispute (or issue) resolution mechanism;

(5) providing a method for periodic evaluation of the project partnering guidelines to ensure that maximum co-operation and problem-solving is occurring; and

(6) providing effective methods for advanced problem-solving through ADR procedures such as facilitated negotiations, dispute review boards, mediation and expert determination.

(e) How is partnering initiated?

3.121 The owner must decide to encourage partnering prior to the preparation of bidding and contract documents. If the owner favours partnering, the tender bid form to contractors should include a notice to this effect. For example:

> "Notice of opportunity to Partner. The Owner intends to permit the Contractor and its subcontractors to utilize the Partnering concept for this project: Owner, Architect, Contractor and principal Subcontractors. Upon contract award, the Contractor will be given the option to participate in Partnering. Participation in the program is voluntary (but can be mandatory on private work). An offer to participate should not be included in the bid or proposed materials. Participation in the program is not an evaluation factor for award."[37]

[36] RG Taylor and B Hinkle, "How to Use ADR Clauses with Standard Form Construction Industry Contracts" [1996] *The International Construction Law Review* 56. Also see Construction Industry Council, *Guidelines on Partnering (Version 1)* (August 2010), which provides some case studies where partnering has been applied in construction projects in Hong Kong.

(f) What is contained in a partnering charter?

3.122 The contents of a general non-binding charter depends on what the parties agree. Its objective is to focus the parties' minds on the objectives of partnering. It usually specifies that the parties will work in a manner consistent with the principles of partnering, in good faith towards the achievement of the parties' common goals, and includes an express provision that it is not intended to be legally binding and is only operative as long as the parties agree to it.

3.123 The JCT Non-Binding Charter[38] is another more structured form of charter. The charter records the signatories' agreement to act:

(1) in good faith;

(2) in an open and trusting manner;

(3) in a co-operative way;

(4) in a way to avoid disputes by adopting a "no blame culture";

(5) fairly towards each other; and

(6) valuing the skills and respecting the responsibilities of each other.

3.124 The objectives relate to cost, project duration, quality, defects, cost saving proposals and dispute avoidance.

(g) What is contained in a partnering contract?

3.125 Examples of partnering contracts include:

(i) *PPC2000*

3.126 This is a standard form of project partnering contract applicable to any partnered project in any jurisdiction. It attempts to make partnering obligations legally binding by inserting the obligations in a contract. The PPC2000 contains the following clauses:

(1) all parties sign a single partnering contract (cl.1.3);

(2) a project partnering team is selected, and design, prices and suppliers are finalised (cll.8, 10 and 12);

[37] RG Taylor and B Hinkle, "How to Use ADR Clauses with Standard Form Construction Industry Contracts" [1996] *The International Construction Law Review* 56, 58.

[38] See the JCT Partnering Charter (Non-binding) 2011 (PC/N 2011), published by the Joint Contracts Tribunal in 2011.

(3) the achievement of objectives of the partnering team is measured against key performance indicators (cll.4 and 23);

(4) partnering relationships with specialists is encouraged;

(5) a core group representing the partnering team reviews performance and identifies problems via the early warning system (cl.3);

(6) a partnering timetable is set up (cl.6);

(7) parties are encouraged to agree to shared savings and value incentives (cll.12 and 13);

(8) risk management systems are agreed (cl.18);

(9) problem resolution procedures are put in place (cl.27); and

(10) a partnering adviser to guide the process is appointed.

(ii) *NEC partnering option X12*

3.127 The NEC Option X12 adds the NEC Partnering Option into any NEC contract. It is used for partnering between more than two parties working on the same project or programme of projects. NEC Option X12 makes the partnering option a term of the bi-party NEC contract into which it is inserted, and therefore legally binding. It is part of a bi-party NEC contract which is common to all contracts in the project and is not part of a multi-party contract.

(h) Strengths of partnering

3.128 The strengths of partnering include:

(1) the parties share any unexpected windfalls or cost savings;

(2) a reduced exposure to litigation or arbitration;

(3) lower risk of cost overruns or delays;

(4) better quality product;

(5) better project management and administration;

(6) lower administrative costs;

(7) opportunity for innovation and increased productivity; and

(8) the informality of the process allows the parties to make a genuine attempt to act in good faith.

(i) Weaknesses of partnering

3.129 The problems associated with partnering include:

(1) over-estimating the measurable benefits of partnering may lead to questions as to the value of the process;

(2) commitment is key. There is no room for lip-service in the implementation of partnering. There must be total commitment at all levels of the project;

(3) if a project vehicle is flawed, the good intentions of the partnering approach may become impossible to fulfil;

(4) it is often informal and not legally binding;

(5) although a non-binding charter is not legally binding, the kinds of undertakings given by the parties may give rise to duties of good faith enforceable by a court of equity. That is, the behaviour of the parties in entering a partnering agreement (irrespective of its enforceability) may mean that the court views the parties as having assumed higher duties of fair dealing than is ordinarily the case in commercial contracts;[39]

(6) the parties share the risks of unforeseen difficulties; and

(7) the success of the process is ultimately dependent on the selection of the right partner and the culture of both parties.

(j) Summary

An increasingly popular alternative to traditional project structures, which merits wider use in Hong Kong. 3.130

10. Arbitration

(a) What is arbitration?

Arbitration is a flexible method of dispute resolution which can give an inexpensive, confidential, fair and final solution to a dispute. It involves the determination of the dispute by one or more independent third parties rather than by a court. The third parties, called arbitrators, are appointed by or on behalf of the parties in dispute. The arbitration is conducted in accordance with the terms of the parties' arbitration agreement which is usually found in the provisions of a commercial contract between the parties. 3.131

Features distinguishing a reference to arbitration from other dispute resolution techniques include: 3.132

(1) the presence of a dispute or difference between parties which has been formulated in some way or another;

(2) the dispute or difference has been remitted by the parties to a person to resolve in such a manner that he is called upon to exercise a judicial function;

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[39] D Jones, "*Relationship: Partnering, Alliancing and Other Affairs*". A paper given to members of The Society of Construction Law Hong Kong following the Annual General Meeting held in Hong Kong on 7 May 2002.

(3) where appropriate, the parties must have been provided with the opportunity to present evidence and/or submissions in support of their respective claims in dispute; and

(4) the parties have agreed to accept his decision.[40]

3.133 An arbitrator, like a judge, has to decide a dispute that has already arisen, and he usually has rival contentions before him. On the other hand, a mutual valuer is called upon before a dispute has arisen in order to avoid it.[41] The identity of the agreed tribunal, or method prescribed for choosing the tribunal, may be indicative of, for example, the choice of a lawyer as the tribunal suggests that an arbitration is intended. Inquisitorial powers are not normally given to an arbitrator.[42]

(b) How is the arbitration process started?

3.134 Disputes governed by arbitration agreements[43] trigger the arbitration process. Arbitration agreements come in two forms:

(1) where parties to a contract include a clause in which they agree to resolve any dispute which may arise under the contract by arbitration. This is known as an arbitration clause. Many Hong Kong trades and industries have applicable standard forms of contract with standard arbitration clauses, although parties can tailor clauses to suit their circumstances;

(2) where parties are already in dispute but their contract does not contain an arbitration clause, they may enter into a separate agreement to refer the matter to arbitration. This is known as a submission agreement.

3.135 Occasionally disputes are referred to arbitration by a court order or the operation of a statute.

(c) Arbitration procedure

3.136 Arbitration procedure varies, depending on the agreement between the parties and the applicable statutes and rules. The ability of the parties to agree to their own procedure provides the most fundamental distinction between arbitration and inflexible litigation.

3.137 An arbitration commences with one party serving a notice of arbitration on the other. The notice briefly describes the dispute and the questions to be put to the arbitrator. The arbitrator, or arbitrators, is selected according to an agreed procedure. The terms of reference, which lay down the framework for the rules and procedures under which the arbitration is to be conducted, are prepared and agreed. It is advisable to take guidance

[40] *Arenson v Casson Beckman Rutley & Co* [1977] AC 405, 428 (Lord Wheatley). Also see *Sutcliffe v Thackrah* [1974] AC 727. Discussed in *Edward Mayers v Brian Dlugash* [1994] 1 HKLR 442.

[41] *Arenson v Casson Beckman Rutley & Co* [1977] AC 405, at 442 (Lord Fraser). Discussed in *Edward Mayers v Brian Dlugash* [1994] 1 HKLR 442.

[42] See *Edward Mayers v Brian Dlugash* [1994] 1 HKLR 442, 453.

[43] Arbitration agreements are discussed in more detail in Chapter 10.

from those provided by local bodies such as the HKIAC Domestic Arbitration Rules or applicable specialist bodies. The arbitrator's fees are agreed.

A detailed timetable and set of ground rules for the arbitration (Directions) are agreed, or imposed by the arbitrator. If the parties are adopting any arbitration rules (see [3.152]) they should refer to those rules and make the Directions consistent with them. 3.138

Directions should specify: 3.139

(1) the manner in which the exchange of written statements of case takes place. The amount of written detail with which the arbitrator is to be furnished is to be decided by the parties. In a simple case, an exchange of brief written submissions may be required, or in a more complicated case more formal pleadings may be preferred. Documents relied upon may be required to be appended or provided subsequently during discovery of documents. If agreed, further and better particulars and amendments of a pleading may be sought where necessary;

(2) whether the parties must produce contemporaneous documents for inspection or whether the more litigious procedure of discovery and inspection should take place. Discovery (including the preparation and exchange of lists of documents, inspection, requests for copies of documents and requests for further discovery) can extend on for long periods of time in complex, document heavy arbitrations and the Directions should apply a timetable for this process;

(3) a timetable for exchange of factual witness statements and possibly reply statements;

(4) a timetable for the exchange of expert reports, if the parties agree that expert reports are required and reply reports. The experts are usually required to meet and before the hearing produce a joint report on agreements reached;

(5) a timetable for the preparation of an agreed bundle of documents to be used at the hearing;

(6) a timetable for submission of written opening submissions or skeleton arguments either by exchange, or the claimant's first, followed by those of the respondent's; and

(7) the commencement date and duration of the hearing or hearings.

Once the above procedures of the arbitration process have been completed, and settlement has not occurred, a venue is booked and the hearing takes place. The usual structure of adversarial hearings is as follows:[44] 3.140

(1) procedural and housekeeping matters are addressed;

(2) the claimant's advocate makes its brief opening statement, referring to written opening submissions;

[44] D Bateson, *Commercial Arbitration in Hong Kong (Longman Group (Far East) Ltd*, 1989) pp.13–55.

(3) the claimant calls its evidence, which involves the examination, cross-examination and re-examination of factual and expert witnesses one by one. The arbitrator may ask questions of the witness or advocate;

(4) the respondent's advocate makes its opening statement and calls its evidence in the same way as for the claimant;

(5) the respondent's and claimant's advocates make their closing submissions (or this may be done in writing). Legal argument may take place; and

(6) the hearing is closed.

3.141 The arbitrator prepares and delivers his award. This usually includes recitals, findings of liability, the relief granted, any interest component, findings as to costs, and reasons (if this was agreed in the reference). The arbitrator (or arbitrators) must execute the award, by signing and dating it.

(d) Documents-only arbitration

3.142 Where the contemporary documents record the central facts, it is frequently unnecessary for the arbitrator to receive oral testimony of witnesses in a hearing. In these circumstances the parties may agree to conduct a "documents-only" arbitration (see also [10.202]–[10.205]).

3.143 In documents-only arbitration, the arbitrator makes his determination based solely on any statements of case and an agreed bundle of documents provided to him by the parties. It dispenses with Directions, discovery, experts and the hearing. Written statements of claim are usually exchanged, as this is usually the only way for a party to put forward its case, since no oral evidence will be received.

3.144 Article 24 of the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration (Model Law) provides that, subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

3.145 In an arbitration governed by art 8.2 of the HKIAC Domestic Arbitration Rules allows documents-only arbitrations where the parties agree.[45] The HKIAC documents-only procedure requires the claimant to deliver submissions and documents within 28 days, defence and counterclaim submissions within 35 days afterwards, reply and defence to counterclaim within 21 afterwards, followed by the respondent's final submissions within 21 days.[46]

3.146 As is typical for arbitration, the parties have control over procedure, and only need to undergo documents-only arbitration if they agree to it. However, the documents-only procedure is highly economical and expeditious and should be considered for the right case. Where the parties have agreed to conduct a documents-only arbitration, the

[45] Hong Kong International Arbitration Centre, Domestic Arbitration Rules 2014 art.8.2.
[46] *Ibid.*, arts 6.2–6.5.

arbitrator must take care to ensure that he can arrive at an award fairly and ensure that all relevant documents have been submitted to him.

(e) Small claims arbitration

3.147 The HKIAC has introduced a small claims procedure, designed primarily for low value shipping disputes, for example, small claims for outstanding charter hire in cases where there are no complex issues, and witnesses are not expected to give oral evidence. The procedure may also be used in small quality or quantity claims arising from commodities trading. The procedure is only available where the parties agree to it, either by a contractual term or by agreement after the dispute has arisen.

3.148 The procedure involves:[47]

(1) the appointment of an arbitrator;

(2) the claimant sends a letter of claim containing its entire case (including relevant documents such as expert reports, and statements of witnesses) within 14 days;

(3) if the parties cannot agree on an arbitrator, the HKIAC may be asked to appoint one after considering the letter of claim;

(4) the respondent delivers its letter of defence and counterclaim containing its entire case within 28 days;

(5) the claimant delivers its letter of reply and defence to counterclaim within 21 days;

(6) the respondent delivers letter of reply to defence to counterclaim within 14 days; and

(7) within one month from any hearing, or from receiving all relevant documents and submissions, the arbitrator makes an award.

3.149 There is only a limited power to extend time for service of pleadings and late pleadings are inadmissible. There is no discovery, although the arbitrator may order the production of a relevant document. There is usually no hearing and no right of appeal to court. The fees payable by a claimant to an arbitrator are limited to a fixed HK$15,000. If there is a counterclaim which exceeds the amount of the claim, the respondent must pay the additional fee of HK$7,500. HKIAC charges HK$1,500 to appoint an arbitrator. The arbitrator has power to direct which party must bear the ultimate responsibility for the small claims fee, tribunal's expenses and the legal costs of the successful party. The arbitrator may assess the recoverable costs on a commercial basis, but not exceeding HK$30,000.[48]

[47] HKIAC Small Claims and "Documents Only" Procedures.
[48] See https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/5.f.v.%20HKIAC%20Small%20Claims%20and%20%27Documents%20Only%27%20Procedures.pdf (visited on 12 March 2021).