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INTERNATIONAL COMMERCIAL ARBITRATION IN HONG KONG

A Guide

Stephen D. Mau

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VIII. Summary

We began this chapter with an overview of the definition of the phrase international commercial arbitration and its differences with other dispute resolution processes. We then discussed the types of arbitration along with the advantages and disadvantages of this dispute resolution process including party autonomy. We concluded this chapter with an examination of the arbitration clause, its requirements, and good practices relating to the same in order to avoid disputes over the clause and wasted costs, both of which are an anathema to the arbitral process.¹⁰⁷

3

Laws and Rules of Arbitration

I. Introduction

In this chapter, we review two items which affect the manner in which arbitration is conducted. The first of these items is the laws, such as statutes or ordinances, which create the framework for the management of arbitration at the venue where those laws apply. The second of these items is the procedural rules which primarily regulate how arbitration will be conducted. Related to an arbitral institution's rules, there are also rules or guidelines commonly used in arbitration which have no binding effect unless agreed by the parties. These rules or guidelines are discussed at the end of the chapter.

II. Laws

In this section, we examine three main laws that apply to international commercial arbitration. These three laws are commonly referred to as the:

- A. UNCITRAL *Model Law*
- B. law of the seat of arbitration
- C. *New York Convention*

Each of these is reviewed. Thereafter, discussed in more detail is the Hong Kong *Arbitration Ordinance* in the event Hong Kong is chosen as the seat.

While reviewing the effect of laws on an arbitration proceeding, the reader should keep the following in mind: At times, a law, or an ordinance in the case of Hong Kong, may have some overlap with the procedural rules. It may be helpful to consider laws as being more general than procedural rules and the laws as having precedence over these procedural rules in the event of conflict between the two.

¹⁰⁷ *Lucky-Goldstar v Ng*, *supra* note 99, at para. 21.

A. UNCITRAL Model Law on International Commercial Arbitration

The United Nations Commission on International Trade Law (the "UNCITRAL")² issued in 1985 the Commission's *Model Law on International Commercial Arbitration* [hereinafter "*Model Law*"]. Commonly known as the *UNCITRAL Model Law*, this work was updated in 2006.³ As its name suggests, this *Model Law* is intended to serve as a model or a template for national laws creating their own laws on international commercial arbitration.⁴ An important purpose of the *Model Law* is to provide for universal consistency or harmonization of the arbitration laws of nations.⁵

Numerous jurisdictions have adopted the *Model Law*. Hong Kong adopted the *Model Law* for only international arbitrations in 1990, under the former *Arbitration Ordinance* (Cap. 341) which also provided for a different and separate regime for domestic arbitrations. In 2010, Hong Kong unified its international arbitration regime and its domestic arbitration regime in its current *Arbitration Ordinance* (Cap. 609) which incorporates nearly all the *Model Law* provisions.⁶

¹ The United Nations Commission on International Trade Law's website translates "*Model Law on International Commercial Arbitration*" as 貿易法委員會國際商事仲裁示範法. See the Chinese version of the *Model Law* at www.uncitral.org/uncitral/zh/uncitral_texts/arbitration/1985Model_arbitration.html (last visited 7 Jul. 2017). The English version of this website may be found at: http://www.uncitral.org/pdf/english/texts/ml-arb/07-86998_Ebook.pdf (last visited 7 Jul. 2017).

For the purposes of this book, the term *Model Law* refers to the 2006 version of the *Model Law on International Commercial Arbitration*.

² UNCITRAL's website, *supra* note 1, translates "UNCITRAL" as 聯合國國際貿易法委員會. The Hong Kong International Arbitration Centre [hereinafter HKIAC] provides an identical translation. HKIAC's website at: <http://www.hkiac.org/zh-hant/arbitration/rules-practice-notes/uncitral-ml-arb> (last visited 7 Jul. 2017).

³ See http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visited 7 Jul. 2017).

⁴ BUTTERWORTHS HONG KONG ARBITRATION LAW HANDBOOK para. [4.01] (DAMON YC SO, CHENG ET AL., eds., 2nd ed. 2018) [hereinafter SO & TO] notes: "The *Model Law* is a 'model' that States adopt in a method appropriate to their domestic legal system. Thus, the *Model Law* itself has no binding effect on UN Member States."

Certain provisions of the *Model Law* are mandatory; the parties cannot derogate or deviate from these provisions. Other provisions of the *Model Law* are default provisions in the event the parties have not made other arrangements, e.g., the number of arbitrators; parties are permitted to derogate or deviate from these provisions. *Id.* at para. [11.04] provides a list of the mandatory; the non-mandatory; and the mixed provisions. Non-mandatory provisions and with the appropriate sub-parts of the mixed provisions, there is a presumption that they are non-mandatory.

⁵ The *Model Law* website, *supra* note 1, provides:

The *Model Law* is designed to assist States in reforming and modernizing their laws on international commercial arbitration so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition of the arbitral tribunal and the extent of court intervention through to the resolution of the dispute and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal systems of the world.

⁶ The full text of the *Model Law* is set out in Schedule 1 of the *Arbitration Ordinance* (Cap. 609) [hereinafter HALSBURY'S].

For review of the sections of the *Model Law*, see 2 HALSBURY'S LAWS OF HONG KONG para. [25.00] [hereinafter HALSBURY'S].

B. Law of the Seat

As mentioned in the previous chapter, *law of the seat* refers to the forum or the venue where the arbitration is deemed to be held.⁷ Thus, the seat of the arbitration simply refers to the place of the arbitration which is usually agreed by the parties in an arbitration agreement.⁸ The seat determines the applicable procedural law for the arbitration, unless the parties have agreed otherwise.⁹ The applicable procedural law for the arbitration might include default provisions which apply in instances where the parties have not made any provisions or if the parties' chosen arbitration rules do not address a particular issue. The applicable procedural law may, for example, contain provisions to assist the parties or the arbitral tribunal in such matters as:¹⁰

- appointment of the arbitral tribunal, including how and by whom¹¹
- a party challenging the appointment of an arbitrator¹²

⁷ Sometimes also known as *lex arbitri*, *curial law*, or *lex loci arbitri*. There can be as many as six applicable national laws in an arbitration:

1. Law applicable to each party's capacity to enter into a contract or arbitration agreement
2. Law governing the arbitration agreement (governing law)
3. Law of the seat of the arbitration (*lex arbitri*)
4. Law governing the procedure of the arbitration (curial law, procedural law, *lex loci arbitri* or *lex fori*)
5. Law governing the contract giving rise to the main dispute (*lex causae* or substantive law)
6. Law of the place where the award will be enforced

Ordinarily, the laws listed in items 2–4 above would coincide so that there would be no issue. However, if the parties seek to apply laws of different jurisdictions to each of these, there would be complications and confusion. Essentially, this complexity would be centred upon which court will decide which law applies.

See ARBITRATION IN HONG KONG: A PRACTICAL GUIDE paras. 9.091–9.092 (THE HON CHIEF JUSTICE GEOFFREY MA AND DENIS BROCK, eds., 4th ed. 2017) [hereinafter MA & BROCK] for slightly differently worded list of nine; REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION para. 3.07 (NIGEL BLACKABY *et al.*, eds., 6th ed. 2015) [hereinafter REDFERN & HUNTER] for a slightly differently worded list of five.

For more information on competing laws from different jurisdictions, see THE CONFLICT OF LAWS IN HONG KONG (GRAEME JOHNSTON *et al.*, eds., 3rd ed. 2017) and DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS (LORD COLLINS *et al.*, eds., 15th ed. 2016).

See also ALAN TSANG, *Determining the Law Applicable to Arbitration Agreements: The Common Law Approach*, 29(5) MEALEY'S INTERNATIONAL ARBITRATION REPORT (2014).

⁸ MICHAEL J. MOSER AND TERESA Y. W. CHENG, HONG KONG ARBITRATION: A USER'S GUIDE para. 5-021 (3rd ed. 2014) [hereinafter MOSER & CHENG].

⁹ As noted in REDFERN & HUNTER, *supra* note 7, at para. 3.56 concerning the seat of the arbitration: "It is the territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated." The authors continue:

When one says that London, Paris or Geneva is the place of arbitration, one does not refer solely to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland or, to use an English expression, under the curial law of the relevant country. The geographical place of arbitration is the factual connecting factor between that arbitration law and the arbitration proper.

Id., quoting CLAUDE REYMOND, *Where is an arbitral award made?*, 108 LQR 1, 3 (1992).

¹⁰ REDFERN & HUNTER, *supra* note 7, at para. 3.46 provides "examples of the matters with which the *lex arbitri* might be expected to deal."

¹¹ See, e.g., § 24 of the *Arbitration Ordinance*, incorporating *Model Law* Art. 11, *supra* note 6. For a discussion of this section of the Ordinance, see, e.g., JOHN CHOONG AND ROMESH WEERAMANTRY, THE HONG KONG ARBITRATION ORDINANCE: COMMENTARY AND ANNOTATIONS paras. 24.00–24.38. (2nd ed. 2015) [hereinafter CHOONG & WEERAMANTRY].

¹² See, e.g., § 25 of the *Arbitration Ordinance*, incorporating *Model Law* Art. 12 and § 26 of the *Arbitration Ordinance*.

- a court order to terminate an arbitrator's mandate¹³
- a court order to prevent relocation of assets out of the jurisdiction¹⁴
- a court order to prevent the disposal of assets
- a court order for the production of evidence¹⁵
- a court order for a witness to attend the arbitration hearing
- a court order to stay the legal proceedings in favour of arbitration where the matter in dispute is subject to an arbitration agreement¹⁶
- deciding any challenge to the arbitral award¹⁷

Thus, the seat of the arbitration is considered to be the legal connection between the forum or venue and the arbitration. The seat of the arbitration provides the framework for an arbitration and the seat determines which courts may assist the parties or the tribunal in the arbitration and may exercise supervisory powers over the arbitration.¹⁸

The location of the seat of the arbitration, however, is not necessarily the place where the arbitration hearings and other related activities are to take place. Consider a scenario involving an American seller and an Australian buyer. The product to be delivered to Papua New Guinea where payment will be made. In this scenario, the parties could select, for example, Hong Kong as the seat of the arbitration. The parties and the tribunal may hold hearings in the United States or Australia because the witnesses and the documents are located in those countries. The parties and the tribunal may also conduct arbitration-related activities in Papua New Guinea because the product has been delivered to that location. Nonetheless, it is the courts in Hong Kong which will exercise jurisdiction over this arbitration because Hong Kong is the arbitral forum, *i.e.*, the seat of the arbitration.

The seat of the arbitration may also determine the place where the award is made.¹⁹ The place where an arbitration award is made is important when it comes to enforcing that award. We come to this point later in the chapter when we discuss the international treaty commonly known as the *New York Convention*. In Chapter 10 on the recognition and enforcement of arbitral awards, these points are discussed in greater detail.

In an international commercial contract, it is possible for two, if not more, national laws to apply to that arbitration. For example, the previous scenario

Ordinance, incorporating Model Law Art. 13, *supra* note 6. For an analysis of these sections of the Ordinance, see, e.g., CHOONG & WEERAMANTRY, *supra* note 11, at paras. 25.00–25.30 and paras. 26.00–26.23 respectively.

¹³ See, e.g., § 27 of the Arbitration Ordinance, incorporating Model Law Art. 14, *supra* note 6. For a more detailed analysis of this section of the Ordinance, see, e.g., CHOONG & WEERAMANTRY, *supra* note 11, at paras. 27.00–27.12.

¹⁴ See, e.g., § 21 of the Arbitration Ordinance, incorporating Model Law Art. 9, *supra* note 6. For an analysis of this section of the Ordinance, see, e.g., CHOONG & WEERAMANTRY, *supra* note 11, at paras. 21.00–21.16.

¹⁵ See, e.g., § 24 of the Arbitration Ordinance, incorporating Model Law Art. 11, *supra* note 6. For a detailed analysis of this section of the Ordinance, see CHOONG & WEERAMANTRY, *supra* note 11, at paras. 24.00–24.38.

¹⁶ See, e.g., § 20 of the Arbitration Ordinance, incorporating Model Law Art. 8, *supra* note 6.

¹⁷ See, e.g., § 81 of the Arbitration Ordinance, incorporating Model Law Art. 34, *supra* note 6.

¹⁸ Hence, the importance of determining the *lex arbitri* as reviewed in Chapter 2.

¹⁹ MOSER & CHENG, *supra* note 8, at para. 5-021.

involved a party in the United States which sells a product to a buyer in Australia and the product is to be delivered to Papua New Guinea. If a dispute arises, and the parties did not specify a seat or forum for their arbitration, which country's arbitration law should be applied? Should the arbitration law be that of the United States, Australia or Papua New Guinea?

In this scenario, if the parties made no selection, but agreed to arbitrate the dispute in a particular forum or venue, *e.g.*, Hong Kong, it will be assumed that Hong Kong's *Arbitration Ordinance* will apply to the parties' arbitration procedure. This assumption is expressed in the Latin maxim: *qui indicem forum elegit jus*. This translates as: "a choice of venue is a choice of law" for the arbitration.²⁰

The basic approach of the Model Law (and all national laws derived from it) is thus that the law applicable to each arbitration (the *lex arbitri*) will be the law of the place where that arbitration takes place (the *lex loci arbitri*), and the selection of a particular place (seat) of arbitration ordinarily results in the arbitration being conducted in accordance with that jurisdiction's legal framework . . . (citations omitted).²¹

There is a technical distinction between the *lex loci arbitri* (the law of the place of the arbitration) and the *lex arbitri* (the law of the arbitration). It was noted earlier that in most cases these two concepts will be entirely congruent: the *lex arbitri* will be the *lex loci arbitri* and it is unnecessary to maintain a distinction between them. Strictly speaking, however, they are separate concepts which allow for the possibility that parties will choose to modify the *lex loci arbitri* by the adoption of a foreign procedural law.²²

²⁰ BLACK'S LAW DICTIONARY 294 (10th ed. 2014) [hereinafter BLACK'S] defines "choice of law" as "the question of which jurisdiction's law should apply in a given case."

The parties are entitled to choose for themselves the law applicable to the dispute, subject to the qualifications of good faith, legality and no public policy objection. REDFERN & HUNTER, *supra* note 7, at para. 3.107.

The court's decision in the case of *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] EWHC 194 (Comm), suggested that there is a strong presumption that selection of a seat of arbitration will also select the law of arbitration:

The close link which exists between the place of arbitration and the procedure which governs the arbitration is the reason why choice of place generally carries with it an implied choice of governing procedure. . . . *Id.* at para. 28.

An agreement that the arbitration is "to be held in Hong Kong" would ordinarily carry with it an implied choice of Hong Kong as the seat of the arbitration and of the application of Hong Kong law as the curial law. Clear words or "significant contrary indicia" are necessary to establish that some other seat or curial law has been agreed. *Id.* at para. 38.

For reasons already given I do not consider that "English law to be applied" provides clear wording to that effect. Indeed, it is most naturally to be read as referring to the substantive law applicable. *Id.* at para. 39.

²¹ ALASTAIR HENDERSON, *Lex Arbitri, Procedural Law and the Seat of Arbitration*, 26 SAclJ 886, 890 (2014) [hereinafter HENDERSON]. See also ROY GOODE, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17(1) ARBITRATION INTERNATIONAL 19 (2014); ANDREW TWEEDDALE & KEREN TWEEDDALE, *ARBITRATION OF COMMERCIAL DISPUTES—INTERNATIONAL AND ENGLISH LAW AND PRACTICE* paras. 7.38–7.44 (2007) [hereinafter TWEEDDALE & TWEEDDALE].

²² HENDERSON, *supra* note 21, at 906–907.

As mentioned in Chapter 2, there is:

Much has been written concerning this complex and confusing area known as choice of law.²³ In essence, the issue is what law did the parties choose to govern their

- arbitration clause
- arbitration procedure
- contract dispute²⁴

Ordinarily, the first two items would be considered to be identical and will not present any issues or disputes. Where, however,

the parties expressly choose particular rules to be applicable to the procedural aspect of an arbitration (law governing the arbitration agreement) and specifically chooses the substantive law governing the arbitration (law of the seat of arbitration), then a difference between the law governing the arbitration agreement and the law of the seat of the arbitration is clearly established. (For example – the parties choose ICC rules to be applicable to an international commercial arbitration held in India. In this case, the curial law or lex fori or procedural law or law governing the arbitration agreement would be ICC Rules but as the seat of arbitration is India, the substantive law or lex arbitri would be [the] Indian Arbitration Act 1996, for the purpose of challenge of award, interim measures, enforcement etc.).²⁵

This issue was addressed in the United Kingdom Court of Appeal case of *Salvador Cia Nacional de Seguros SA v Enesa Engenharia SA*.²⁶ The dispute involved two parties, the insurance companies [hereinafter the “insurers”] against the company to whom the insurers issued policies [hereinafter the “insured”]. These insurance policies contained substantially the same terms, particularly the dispute resolution clauses which state:

the conceptual possibility of parties agreeing that an arbitration seated in country A should be subject to the arbitration laws of country B, to the exclusion (as far as possible) of the arbitration laws of country A. It is difficult to imagine why parties would wish to complicate their affairs in this way, such a proposal would be likely to inspire the greatest scepticism if anyone were to propose it during contract negotiations.

HENDERSON, *supra* note 21, at 903.

“This is not surprising when one considers the complexities and inconveniences which such an agreement involve.” *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* [1988] 1 Lloyd’s Rep. 120. See also *Braes of Doune Wind Farm v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (Q.B.), discussed in Chapter 2, “Considerations for Selecting Arbitration—An Introduction.”

²³ See, e.g., SAM LUTTRELL, *An Introduction to Conflict of Laws in International Commercial Arbitration* (TRADE & BUS. L. REV. 404 (2011)).

²⁴ This is also known by the terms *proper law of the contract*, *substantive law*, or *applicable law*, meaning the law applicable to the contract. This choice of law will not be reviewed here for several reasons. Firstly, most parties now sufficiently sophisticated to include a choice of law clause in their contract. Secondly, this issue can be presented to and decided by the arbitral tribunal. Hence, it is more important to ensure that the applicable law can be presented to and established its jurisdiction. See also TWEEDDALE & TWEEDDALE, *supra* note 21, at 100.

²⁵ R. V. Prabhat, ‘Lex Arbitri v. Lex Arbitri’- Choice of Law Conundrum (May 22, 2015). Available at: <http://www.linkedin.com/pulse/lex-arbitri-v-arbitri-supreme-court-india-rv-prabhat> (last visited 12 Aug. 2017). See also discussion of this topic, see, e.g., TWEEDDALE & TWEEDDALE, *supra* note 21, at Chapt. 6 and Chapt. 7.

²⁶ [2012] EWCA Civ 638.

7. Law and Jurisdiction

It is agreed that this policy will be governed exclusively by the laws of Brazil.

Any disputes arising under, out of or in connection with this policy shall be subject to the exclusive jurisdiction of the courts of Brazil.

...

11. Mediation

If any dispute or difference of whatsoever nature arises out of or in connection with this policy including any question regarding its existence, validity or termination, hereafter termed as Dispute, the parties undertake that, prior to a reference to arbitration, they will seek to have the dispute resolved amicably by mediation.

...

If the Dispute has not been resolved to the satisfaction of either party within 90 days of service of the notice initiating mediation . . . then either party may refer to [sic] the Dispute to arbitration. . . .

12. Arbitration

In case the Insured and the Insurer(s) shall fail to agree as to the amount to be paid under this policy through mediation as above, such dispute shall then be referred to arbitration . . . (emphasis added)

The Tribunal shall have the widest discretion permitted under the law governing the arbitral procedure . . .

The seat of the arbitration shall be London, England.

The court was hearing an appeal of the imposition of an anti-suit injunction preventing the insured from pursuing court proceedings against the insurers in Brazil.²⁷ The insured contended that under Brazilian law, the arbitration agreement was not enforceable against them without their consent. If the insured’s argument were correct, the reference to arbitration would be ineffective and the entire anti-suit injunction would have to be dismissed.²⁸ The court decided that the arbitration agreement was to be governed by English law by concluding:

No doubt the arbitration agreement has a close and real connection with the contract of which . . . [the arbitration agreement] forms part, but its nature and purpose are very different. . . . an agreement to resolve disputes by arbitration in London, and therefore in accordance with English arbitral law, does not have a close juridical connection with the system of law governing the policy of insurance, whose purpose is unrelated to that of dispute resolution; rather, it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective. Its closest and most real connection is with English law.²⁹

²⁷ In essence, an anti-suit injunction stops court proceedings in order to allow arbitration of the parties’ dispute, i.e., to stay legal proceedings in favour of arbitration.

²⁸ [2012] EWCA at para. 7.

²⁹ *Id.* at para. 32.

Part of the court’s reasoning follows:

4 Appointment of the Arbitrator/Tribunal

I. Introduction

In this chapter, the process involved in selecting an individual to serve as the arbitrator is reviewed. This frequently is referred to as *appointing an arbitrator(s)* to sit as the tribunal. Remember that the term *tribunal* can refer to a single arbitrator or a panel of arbitrators, usually a panel of three.¹ Also remember that the terms

¹ Theoretically, it is possible to appoint a panel of two arbitrators but the obvious difficulties which would arise in the event of a split decision render this possibility impractical. Nevertheless, Hong Kong's *Arbitration Ordinance* (Cap. 609) [hereinafter *Arbitration Ordinance*] provides for such situations in § 30 with the appointment of a person known as an *umpire*. In the event of deadlock amongst the two appointed arbitrators, § 31 of the Ordinance sets out the umpire's function in determining the dispute. These two sections provide:

30. Appointment of umpire

In an arbitration with an even number of arbitrators, the arbitrators may, unless otherwise agreed by the parties, appoint an umpire at any time after they are themselves appointed.

31. Functions of umpire in arbitral proceedings

- (1) The parties are free to agree what the functions of an umpire are to be and, in particular—
 - a. whether the umpire is to attend the arbitral proceedings; and
 - b. when, and the extent to which, the umpire is to replace the arbitrators as the arbitral tribunal with the power to make orders, directions and awards.
- (2) If or to the extent that there is no such agreement of the parties, the arbitrators are free to agree on the functions of the umpire.
- (3) Subsections (4) to (11) apply subject to any agreement of the parties or the arbitrators.
- (4) After an umpire is appointed, the umpire must attend the arbitral proceedings.
- (5) The umpire must be supplied with the same documents and other materials as are supplied to the arbitrators.
- (6) Orders, directions and awards are to be made by the arbitrators unless, subject to subsection (9), the arbitrators cannot agree on a matter relating to the dispute submitted to arbitration.
- (7) If the arbitrators cannot agree on a matter relating to the dispute submitted to arbitration in which case the umpire is to replace the arbitrators as the arbitral tribunal with the power to make orders, directions and awards, in respect of that matter only, subject to subsection (9) (b), as if the umpire were the sole arbitrator.
- (8) If the arbitrators cannot agree on a matter relating to the dispute submitted to arbitration but—
 - a. they fail to give notice of that fact; or
 - b. any of them fails to join in the giving of notice,
 - c. any party may apply to the Court which may decide that the umpire is to replace the arbitrators as the arbitral tribunal with the power to make orders, directions and awards, in respect of that matter only, as if the umpire were the sole arbitrator.
- (9) Despite the replacement by the umpire as the arbitral tribunal in respect of a matter, on which the arbitrators cannot agree, relating to the dispute submitted to arbitration, the arbitrators

arbitration tribunal, *arbitral tribunal*, and *tribunal* can be used interchangeably. Equally, the term *panel* can be interchanged with *tribunal*.

Appointing the tribunal is one of the critical stages in the arbitral process, as the actual resolution of the dispute between the parties cannot begin until the tribunal is constituted.² While this chapter concerns the selection of an individual to serve as arbitrator, it should be kept in mind that the nominated individual has the choice of declining the appointment. Generally, the reasons for rejecting the appointment may include: conflict of interest; lack of impartiality; lack of experience or qualification in the subject matter of the dispute; or, lack of availability or time. Some of these reasons are discussed briefly below in the context of the qualifications of an arbitrator.³

In the following chapter, the jurisdiction or authority of the tribunal over the parties and their dispute is analysed. We also review the obligations, the responsibilities and the powers of the arbitral tribunal.

may—

- a. still make orders, directions and awards in respect of the other matters relating to the dispute if they consider that it would save costs by doing so; or
- b. refer the entirety of the dispute to the umpire for arbitration.

For review of the purpose and role of an umpire, see 2 HALSBURY'S LAWS OF HONG KONG para. [25.074] (2nd ed. 2016) [hereinafter HALSBURY'S] which states as follows:

Where the reference is to an even number of arbitrators, the arbitrators may at any time after their own appointment appoint an umpire, unless a contrary intention is expressed in the arbitration agreement. There is no requirement . . . that they may only do so upon disagreement. The parties are free to agree what the functions of an umpire are to be and, in particular (1) whether the umpire is to attend the arbitral proceedings and (2) when, and the extent to which, the umpire is to replace the arbitrators as the arbitral tribunal with the power to make orders, directions and awards. If or to the extent that there is no such agreement of the parties, the arbitrators are free to agree on the functions of the umpire. Failing such agreement, the Arbitration Ordinance (Cap 609) provides for the functions of the umpires in relation to the foregoing.

The umpire can acquire powers to decide issues as if he was the sole arbitrator. If the arbitrators cannot agree on a matter relating to the dispute submitted to arbitration, they must forthwith give notice of that fact in writing to the parties and the umpire, in which case the umpire is to replace the arbitrators as the arbitral tribunal with the power to make orders, directions and awards, in respect of that matter only, as if the umpire were the sole arbitrator. . . . (citations omitted)

For information on the appointment of umpires, see HALSBURY'S, *supra* note 1, at para. [25.117].

For details on the function of an umpire, see HALSBURY'S, *supra* note 1, at para. [25.118].

Other countries, e.g. Brazil, avoid this scenario by requiring an odd number of arbitrators. See Arbitration Act (Law 9.307/96 as amended by Law 13.129/2015).

² BUTTERWORTHS HONG KONG ARBITRATION LAW HANDBOOK para. [26.05] (DAMON YC SO, CHRISTOPHER TO *et al.*, eds., 2nd ed. 2018) [hereinafter SO & TO] states:

The tribunal is constituted when, in the case of a sole arbitrator, his appointment becomes effective, or in the case of a tribunal of two, three or more arbitrators, when the appointment of the last arbitrator in time becomes effective.

³ For a more detailed discussion on this topic, see, e.g., ARBITRATION IN HONG KONG: A PRACTICAL GUIDE paras. 13.052–13.078 (THE HON CHIEF JUSTICE GEOFFREY MA AND DENIS BROCK, eds., 4th ed. 2017) [hereinafter MA & BROCK].

II. Appointment of the Arbitrator

Until the members of the arbitration tribunal are appointed, the arbitral proceedings cannot begin.⁴ Therefore, the parties firstly need to appoint the arbitral tribunal which will decide the dispute.⁵ Under the concept of party autonomy, the parties are to decide the number of arbitrators to be appointed to decide the dispute.⁶ If the parties cannot or refuse to agree on the composition of the tribunal, the arbitrator may be appointed by the designated institution or by the appropriate court under the law where the arbitration is seated.⁷

The usual number of arbitrators to be appointed is either one or three for an international commercial dispute.⁸ Generally, the monetary amount or the complexity of the dispute will determine the number of arbitrators. While it is possible to have more than three arbitrators, this is usually not done because of the increased costs and the increased complexity concerning coordination of schedules. Furthermore, with each increase in the number of arbitrators, there is a possibility

⁴ In relation to appointment of arbitrators, many of the major arbitral institutions now have provisions for the appointment of emergency arbitrators who would handle urgent matters which might arise before the arbitral tribunal is appointed. Emergency arbitrator provisions would allow the parties to seek interim relief from an emergency arbitrator rather than from national courts prior to the appointment of the arbitral tribunal. See REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION paras. 4.17–4.21 (NIGEL BLACKABY et al., eds., 2015) [hereinafter REDFERN & HUNTER].

More information on emergency arbitrators can be found in Chapter 11, "Cost-saving Techniques in Arbitration".

⁵ As noted by one source:

It is not usually necessary to include much in the arbitration agreement to deal with the appointment of arbitrators in the absence of agreement. Most arbitration rules, be they "institutional" or *ad hoc*, contain provisions for the default appointment of arbitrator(s). Incorporation of those rules means that further provisions for default appointment are unnecessary, provided that the parties do not wish to specify a "default appointment organisation" that may be more able in selecting an appropriate arbitrator; for example, an engineering contract may lead the parties to choose a professional body of engineers to select the arbitrator.

... The "default appointment" mechanism usually is that the court makes the appointment. Hong Kong has a default provision for arbitrations so that the HKIAC makes the appointment from a designated and approved panel which is in existence for that purpose. The HKIAC also decides disputes as to whether there should be one or three arbitrators.

MA & BROCK, *supra* note 3, at paras. 10.077–10.079 (citations omitted).

⁶ See *id.* at para. 13.065.

⁷ As one authority noted:

If the parties fail to make any choice at all in this regard, including a failure to incorporate rules that address the issue, the Arbitration Ordinance provides as a final default that the number of arbitrators is to be either one or three, as decided by the HKIAC. However, this is the case only where s. 1 of Sch. 2 of the Arbitration Ordinance does not apply. ... If s. 1 of Sch. 2 applies, then any dispute between the parties to an arbitration agreement is to be submitted to a sole arbitrator for arbitration.

Id. at para. 13.068 (citations omitted).

Section 1 of Schedule 2 of the Arbitration Ordinance, *supra* note 1, pertains to domestic arbitrations, which are discussed in Chapter 3, "Laws and Rules of Arbitration."

See also HALSBURY'S, *supra* note 1, at paras. [25.075]–[25.081] in relation to the default appointment of arbitrators.

⁸ For a discussion on the advantages and disadvantages of having one or three arbitrators, see, e.g., MA & BROCK, *supra* note 3, at paras. 10.088–10.096.

⁹ As noted in *id.* at para. 10.088: "Five arbitrators, or some other larger number being appointed, are not unknown of, but remain rare in practice given the additional expense and lack of obvious immediate advantage."

of a greater delay in reaching an award. If the parties had failed to designate the number of arbitrators and when a dispute arises the parties cannot agree, the default provisions would apply.¹⁰ If the seat of the arbitration is in Hong Kong and if there is no administering institution, the Arbitration Ordinance (Cap. 609) [hereinafter "Arbitration Ordinance"] will apply. Pursuant to this Ordinance, the Hong Kong International Arbitration Centre [hereinafter "HKIAC"] will serve as the appointing authority and will appoint either one or three arbitrators.¹¹ If the parties had agreed on an arbitration administered by an institution, that institution's arbitration rules would apply.¹²

¹⁰ See *id.* at paras. 13.067–13.069.

¹¹ § 23 of the Arbitration Ordinance, incorporating Model Law Art. 10, *supra* note 1, provides:

(1) Article 10(1) of the UNCITRAL Model Law, the text of which is set out below, has effect—

"Article 10. Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) [Not applicable.]"

(2) For the purposes of subsection (1), the freedom of the parties to determine the number of arbitrators includes the right of the parties to authorize a third party, including an institution, to make that determination.

(3) The number of arbitrators in an arbitration is to be either 1 or 3 as decided by the HKIAC in the particular case if—

(a) the parties fail to agree on the number of arbitrators; and

(b) section 1 of Schedule 2 does not apply.

¹² For example, the Hong Kong International Arbitration Centre's Administered Arbitration Rules (2018) [hereinafter HKIAC Arbitration Rules], state:

Article 6—Number of Arbitrators

6.1 If the parties have not agreed upon the number of arbitrators before the arbitration commences or within 30 days from the date the Notice of Arbitration is received by the Respondent, HKIAC shall decide whether the case shall be referred to a sole arbitrator or to three arbitrators, taking into account the circumstances of the case.

... Article 7—Appointment of a Sole Arbitrator

7.1 Unless the parties have agreed otherwise:

(a) where the parties have agreed before the arbitration commences that the dispute shall be referred to a sole arbitrator, they shall jointly designate the sole arbitrator within 30 days from the date the Notice of Arbitration was received by the Respondent.

(b) where the parties have agreed after the arbitration commences to refer the dispute to a sole arbitrator, they shall jointly designate the sole arbitrator within 15 days from the date of that agreement.

(c) where the parties have not agreed upon the number of arbitrators and HKIAC has decided that the dispute shall be referred to a sole arbitrator, the parties shall jointly designate the sole arbitrator within 15 days from the date HKIAC's decision was received by the last of them.

... Article 8—Appointment of Three Arbitrators

8.1 Where a dispute between two parties is referred to three arbitrators, the arbitral tribunal shall be constituted as follows, unless the parties have agreed otherwise:

a. where the parties have agreed before the arbitration commences that the dispute shall be referred to three arbitrators, each party shall designate in the Notice of Arbitration and the Answer to the Notice of Arbitration, respectively, one arbitrator. If either party fails to designate an arbitrator, HKIAC shall appoint the arbitrator.

b. where the parties have agreed after the arbitration commences to refer the dispute to three arbitrators, the Claimant shall designate an arbitrator within 15 days from the date of that agreement, and the Respondent shall designate an arbitrator within 15 days from receiving notice of the Claimant's designation. If a party fails to designate an arbitrator, HKIAC shall appoint the arbitrator.

A. Procedure for the Appointment

There are several ways in which an arbitrator can be appointed.¹³ As mentioned above, party autonomy permits the parties to the arbitration agreement to specify

- a particular individual who will be nominated in the arbitration agreement
- the expertise which an arbitrator should possess, e.g., a geotechnical engineer with 20 years' experience in tunneling works
- the language in which the arbitrator should be conversant, e.g., a person fluent in the language of the contract or the language of the dispute¹⁴
- the nationality of the sole or a presiding arbitrator in the context of an international arbitration, e.g., a person who is not of the same nationality as either of the parties¹⁵
- the professional qualification of the arbitrator, e.g., a solicitor with a practicing certificate
- a professional organization in which an arbitrator should hold a membership, e.g., a Fellow of the Chartered Institute of Arbitrators or a Fellow of the Hong Kong Institution of Engineers
- a particular institution to make the appointment on behalf of the parties, e.g., the president of the Hong Kong Institute of Surveyors

c. where the parties have not agreed upon the number of arbitrators and HKIAC has decided that the dispute shall be referred to three arbitrators, the Claimant shall designate an arbitrator within 15 days from receipt of HKIAC's decision, and the Respondent shall designate an arbitrator within 15 days from receiving notice of the Claimant's designation. If a party fails to designate an arbitrator, HKIAC shall appoint the arbitrator.

d. the two arbitrators so appointed shall designate a third arbitrator, who shall act as the presiding arbitrator. Failing such designation within 30 days from the confirmation or appointment of the second arbitrator, HKIAC shall appoint the presiding arbitrator.

See also the HKIAC's Practice Note on the Appointment of Arbitrators (2018). A copy of this Practice Note can be found here: http://hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/Practice%20Note%20on%20Appointment%20of%20Arbitrators%20-%202018%20Oct%202018.pdf

Another example is the London Court of International Arbitration's Arbitration Rules (2014) [hereinafter LCIA Rules] which provide:

5.7 No party or third person may appoint any arbitrator under the Arbitration Agreement: the LCIA Court alone is empowered to appoint arbitrators (albeit taking into account any written agreement or joint nomination by the parties).

5.8 A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise or if the LCIA Court determines that in the circumstances a three-member tribunal is appropriate (or, exceptionally, more than three).

5.9 The LCIA Court shall appoint arbitrators with due regard for any particular method or criteria of selection agreed in writing by the parties. The LCIA Court shall also take into account the transaction(s) at issue, the nature and circumstances of the dispute, its monetary amount or value, the location and languages of the parties, the number of parties and all other factors which it may consider relevant in the circumstances.

The LCIA Rules may be found here: http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules.aspx (last visited 12 July 2017).

¹³ See, e.g., MA & BROCK, *supra* note 3, at paras. 13.065–13.078.

¹⁴ REDFERN & HUNTER, *supra* note 4, at para. 4.50 and para. 4.61.

¹⁵ *Id.* at paras. 4.61–4.67.

Note that sometimes future problems are caused by specifying too-exacting qualifications for the arbitrator before a dispute develops. We present two examples. In the first example, the parties in their contract specify a particular person to serve as arbitrator. In one relatively recent case, an arbitration agreement named a specific individual to serve as arbitrator. The Supreme Court of India in *ACC Limited v Global Cements* (2012) 7 SCC 71 needed to decide whether the arbitration clause would remain valid if the arbitrator named in the arbitration clause was no more. The court came to the conclusion that the arbitration clause remained in effect even if the arbitrator did not.

In the second example, the contract gives rise to disputes of an entirely different nature than that anticipated by the parties. For example, in negotiating the contract for a tunneling project, the parties may anticipate disputes concerning ground conditions and progress of the Works and thus require the appointment of a geotechnical engineer with 20-years' experience in tunneling work. Subsequently, if a dispute arises concerning fraud in the inducement of the contract, an arbitrator with a legal background might be more suitable. Therefore, the parties should consider whether there is the need to over-specify the arbitral tribunal's qualifications before a dispute has arisen in order to maintain flexibility to choose the most suitable person to be the arbitrator.¹⁶

Proceeding on the presumption that the parties already know the characteristics or type of arbitrator that they desire to decide their dispute, we address the topic of appointment of the tribunal. We start first with the appointment procedure for a single arbitrator before discussing the appointment procedure for a tribunal of three arbitrators.¹⁷ Later in the chapter some of the criteria for deciding the composition of the arbitral tribunal are reviewed, that is, the suitability of an individual to serve as arbitrator.

The simplest way to appoint a single arbitrator is for the parties to agree on a suitably qualified individual and for that individual to accept the appointment to

¹⁶ *Id.*

As noted:

It is possible, and indeed sometimes desirable, to set out additional pre-requisites in the arbitration agreement itself. A typical example might be that "the arbitrator shall be a commercial barrister practising in London and have been appointed as Queen's Counsel for not less than 10 years" . . . Different contracts require discrete consideration at the drafting stage, but this tool for "targeted appointment" is not much used in practice. It can be difficult to predict the nature of all disputes which will arise, and it is not always possible to have set out in advance in the arbitration agreement the desirable qualities of the relevant arbitrator.

A risk also can be created by express qualifications being required of an arbitrator. It is possible that the individual(s) appointed will not satisfy the requirements, and also entirely feasible that the parties may not know this until the arbitration is underway . . . The problem is not peculiarly a drafting one however, but more the subject of proper administration of the process if such expertise specification specifically is required.

MA & BROCK, *supra* note 3, at paras. 10.085–10.086.

¹⁷ For further details, see, e.g., MA & BROCK, *supra* note 3, at paras. 13.069–13.078.

B. Qualifications and Qualities Expected of the Tribunal

In Hong Kong under its *Arbitration Ordinance*, there are certain requirements which the arbitral tribunal must meet and maintain throughout the arbitration. Failure to meet these requirements may result in an arbitrator being challenged as unsuitable or unqualified for the arbitration. Failure to meet these requirements and maintain them throughout the arbitration may further subject the tribunal's award to a challenge for being in violation of the Ordinance.

One of these requirements relates to the arbitrator's qualifications.²³ As the parties may specify the professional qualifications of the individual, the person appointed as arbitrator must possess these professional qualifications.²⁴ For

shall be appointed, upon request of a party, by the court or other authority specified in article 6.

- (4) Where, under an appointment procedure agreed upon by the parties,
- a party fails to act as required under such procedure, or
 - the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
 - a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

²³ For additional information on this topic, see, e.g., MA & BROCK, *supra* note 3, at paras. 11.075-11.077.

²⁴ Along with the expressed qualifications of a tribunal, there are other characteristics which might not be expressed but are nonetheless desirable. For example, this excerpt:

It is not possible to formulate general rules as to who should be appointed as arbitrators. Commercial disputes cover an infinite range of issues whereas the choice of tribunal will depend completely on the nature and circumstances of the particular dispute under consideration. Nevertheless, certain factors are commonly found to be relevant to the decision:

(1) *Professional experience and qualifications.* This is a critical consideration. It is vital to select arbitrators whose experience and skills suit the subject matter of the claim. . . .

(2) *A mix of skills.* The principal advantage of having a three-person tribunal is that the parties can procure a mix of skills that are all relevant to the matters in issue. Particularly in large and complex cases, there may well be a range of different issues arising for decision, some legal, some factual and some technical, possibly involving a number of different technical disciplines. In construction disputes, for example, it may well be desirable for the tribunal to possess both technical knowledge of the relevant construction issues and legal knowledge relevant to the contested issues of law. . . . the ultimate goal is to procure a tribunal whose collective skills allow it to deal effectively with all the issues arising for determination.

(3) *Language and cultural factors.* It is plainly sensible to appoint arbitrators who will be able to understand the majority of witnesses without the need for interpretation and who can read the majority of relevant documents. . . . More subtly, it may also be necessary to consider any cultural issues that are likely to arise during the course of the proceedings, and to ensure as far as possible that the tribunal possesses the cultural understanding necessary to ensure that such issues are properly understood.

(4) *Integrity.* Arbitration is an independent process. The avoidance of any perception of local bias or favouritism is often seen as one of the major advantages of arbitration over litigation. . . . it will be important to ensure that appointed arbitrators are people of undoubted integrity who will decide the dispute on its merits without reference to external factors.

(5) *Familiarity with law.* . . . it is generally desirable for arbitrators to be familiar with the law and practice of arbitration. Arbitration is . . . a formal process for determining legal rights, and it is obviously important that the determination should be made in a way that complies with the law. Further, whilst technical skills and experience may be crucial in relation to the final

example, if the parties are involved in a shipping contract, most likely the parties would require their arbitral tribunal to possess knowledge of commercial shipping law and maritime law. To appoint an arbitrator for this dispute who is knowledgeable about construction works would not be suitable. Thus, this individual could be challenged under UNCITRAL's *Model Law on International Commercial Arbitration* [hereinafter "*Model Law*"] on the grounds that this individual does not possess the qualifications upon which the parties agreed.²⁵ In this situation, the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (done in New York, 1958) [hereinafter "*New York Convention*"] provides similar grounds on which to challenge the arbitral award: the arbitral tribunal's composition was not in accordance with the parties' agreement.²⁶

i. Qualifications required by the *Arbitration Ordinance*

The Ordinance sets out certain standards required of an arbitrator. Amongst these standards, the two most obvious prohibitions are conflict of interest resulting in bias, and a lack of independence.²⁷ There are several forms of bias which will be reviewed below.

First, one requirement of an arbitrator is impartiality or a lack of bias. An arbitrator should keep an open mind and render an award based on the evidence presented. The arbitrator should not have any preconceptions or any connections

determination, prior procedural experience and legal knowledge will be invaluable in ensuring that the tribunal guides the arbitration effectively through its preparatory phases and into the final hearing. . . . In the worst case, inadequate procedures may even give rise to later grounds on which to set aside or oppose enforcement of the resulting award, for example, on the basis that the losing party was effectively unable to present its case.

(6) *Additional attributes.* Where there are three arbitrators on the tribunal . . . the presiding arbitrator should ordinarily have certain additional attributes, in addition to what has been set out above. The presiding arbitrator should typically have strong personal qualities enabling him to work with the two party-appointed arbitrators; he should have sufficient experience and be of sufficient seniority, compared to the other two arbitrators; he should be procedurally robust and able to drive the arbitration process; be culturally sensitive; and ideally, to know both the party-appointed arbitrators.

MA & BROCK, *supra* note 3, at para. 13.059.

²⁵ UNCITRAL *Model Law on International Commercial Arbitration* [hereinafter "*Model Law*"] Art. 12(2) provides in part: "An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties."

²⁶ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (done in New York 1958) [hereinafter "*New York Convention*"] Art. V(1)(d) provides in relevant part: "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties."

²⁷ As noted in HALSBURY'S, *supra* note 1, at para. [25.084]:

Section 25 of the Arbitration Ordinance (Cap 609) provides that a prospective arbitrator . . . must disclose any circumstances that could give rise to justifiable doubts as to his impartiality or independence. After the appointment has been accepted, he is under a continuing obligation to inform the parties without delay of any such circumstances or further circumstances which may arise. . . . In international cases justifiable doubts as to an arbitrator's impartiality or independence forms a ground of challenge in its own right. Satisfaction of the requirement of independence may be demonstrated by compliance with any applicable professional or institutional ethical guidance, [for] example, the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (2004). (citations omitted)

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 decision should be made after consultation with the parties and review of the appropriate institutional rules or national law.⁶⁹

IV. Summary

In this chapter, we set out the appointment process for an arbitrator. The methods available to the parties in appointing a single arbitrator or a panel of arbitrators were reviewed. Also addressed were the qualifications required of one being appointed as an arbitrator. This was followed by a discussion of the grounds for challenging the appointment of an arbitrator. In the next chapter, we analyze the authority and powers of a person appointed as arbitrator.

5

Jurisdiction, Duties, and Powers

I. Introduction

In this chapter, we discuss the next phase of the arbitration process following the appointment of the arbitral tribunal. This phase addresses a tribunal's authority, the exercise of that authority, and, the obligations of the tribunal. As usual, we begin with a definition of the terms before proceeding to examine each of these terms.

The first term to be defined is *jurisdiction* which sometimes is also referred to as *mandate*. This term refers to the overall authority given to the arbitrator to resolve or determine the dispute. Jurisdiction is the arbitral tribunal's scope of authority in deciding a dispute.¹ As noted by one source:

It is the parties who give a . . . tribunal the authority to decide disputes between them, and the arbitral tribunal must take care to stay within the terms of its mandate. The rule to this effect is expressed in several different ways. Sometimes, it is said that an arbitral tribunal must conform to the mission entrusted to it, or that it must not exceed its mandate, or that it must stay within its terms of reference, competence, or authority. Another way of expressing the rule . . . is to state that an arbitral tribunal must not exceed its jurisdiction (this term being used in the sense of mandate, competence, or authority).²

The next term to be defined is *duties*. This term indicates the mandatory requirements which regulate the arbitrator's exercise of powers, *i.e.*, what the appointed individuals must observe or undertake as members of an arbitral tribunal.

The final term relates to the word *powers*. This refers to the mechanisms conferred on the arbitrator by the arbitration agreement and by, *e.g.*, the *Arbitration*

⁶⁹ See, *e.g.*, HKIAC Arbitration Rules, *supra* note 12, at Art. 12.2 and 12.3 which provides:
 12.2 If . . . to designate a substitute arbitrator, HKIAC may, after giving an opportunity to the parties and the remaining arbitrators to express their views:

(a) . . .

(b) authorise the other arbitrators to proceed with the arbitration and make any decision or award.
 12.3 If an arbitrator is replaced, the arbitration shall resume at the stage where the arbitrator was replaced or ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

Similarly, ICC Rules, *supra* note 56, at Art. 15(4) and 15(5) provide:

4)

When an arbitrator is to be replaced . . . Once reconstituted, and after having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal.

5)

Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed . . . pursuant to Articles 15(1) or 15(2), the [ICC International] Court [of Arbitration] may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances.

¹ As noted by one source:

arbitrators must conduct proceedings in accordance with the requirements of the parties. The parties vest the arbitrator with procedural powers and, to the extent that requirements are laid down in any arbitration agreement such as notice, rules or terms of reference, the arbitrator is obliged to observe these. This is subject to overriding considerations of public policy.

ARBITRATION IN HONG KONG: A PRACTICAL GUIDE para. 14.002 (THE HON CHIEF JUSTICE GEOFFREY MA AND DENIS BROCK, eds., 4th ed. 2017) [hereinafter MA & BROCK].

² REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION para. 5.91 (NIGEL BLACKABY *et al.*, eds., 6th ed. 2015) [hereinafter REDFERN & HUNTER] (citations omitted).

Ordinance (Cap. 609) [hereinafter "Arbitration Ordinance"]. These conferred mechanisms allow the exercise of the arbitral tribunal's authority, i.e., the actions which the tribunal may take.³ "The powers of the arbitral tribunal are the tools of the arbitral tribunal for the conduct of the arbitration."⁴ Arbitral tribunals exercise powers in order to perform their mandate to resolve the parties' dispute.⁵

II. Jurisdiction

From where does the tribunal's authority to resolve the dispute come? The usual sources of a tribunal's authority are:

- the arbitration agreement which states the particular dispute or types of disputes which the parties may refer to arbitration proceedings before a tribunal⁶
- the *notice of arbitration*, also known as the *submission to arbitration*, which would specify the particular dispute or disputes which are being referred to arbitration⁷

³ *Id.* at para. 5.06 states:

The powers of an arbitral tribunal are those conferred upon it by the parties within the limits allowed by the applicable law, together with any additional powers that may be conferred automatically by operation of law. These powers are established to enable the arbitral tribunal to carry out its task properly and effectively. (citations omitted)

⁴ ANDREW TWEEDDALE & KEREN TWEEDDALE, *ARBITRATION OF COMMERCIAL DISPUTES—INTERNATIONAL AND ENGLISH LAW AND PRACTICE* para. 9.01 (2007).

⁵ REDFERN & HUNTER, *supra* note 2, at para. 5.06.

For example, § 46 of the *Arbitration Ordinance* (Cap. 609) [hereinafter *Arbitration Ordinance*] provides in part:

(2) The parties must be treated with equality.

(3) When conducting arbitral proceedings or exercising any of the powers conferred on an arbitral tribunal by this Ordinance or by the parties to any of those arbitral proceedings, the arbitral tribunal is required—

(a) to be independent;

(b) 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; and

(c) 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.

See also 2 HALSBURY'S LAWS OF HONG KONG paras. [25.101]–[25.1088] (2nd ed. 2016) which discuss the powers of the tribunal.

⁶ REDFERN AND HUNTER, *supra* note 2, at para. 1.59 states:

The 'agreement to arbitrate' also establishes the jurisdiction of the arbitral tribunal. In the ordinary legal process whereby disputes are resolved through the public courts, the jurisdiction of the relevant court may come from several sources. An agreement by the parties to submit to the jurisdiction will be only one of those sources. Indeed, a defendant will often find itself in court against its will. In the arbitral process, the jurisdiction of the arbitral tribunal is derived simply and solely from the express or implied consent of the parties. (footnote omitted)

⁷ Not to be confused with *submission agreement* which is the document whereby parties agree to arbitrate an existing dispute, i.e., the dispute arose before the parties' agreement to arbitrate. Confusingly, a *submission agreement* is also known as an *arbitration deed* or *terms of reference*. A *notice of arbitration* is sometimes also referred to as *terms of reference*. In the past, some jurisdictions such as Argentina, Brazil and possibly the United Arab Emirates required a submission agreement to be entered into between the disputing parties, despite the existence of an arbitration agreement.

The distinction between the submission agreement and the arbitration clause is generally founded on whether or not the arbitration agreement precedes the disputes.

- the document appointing the tribunal⁸
- the arbitration rules which the parties have selected, if any
- the relevant arbitration law. For arbitrations seated in Hong Kong, the relevant law is the *Arbitration Ordinance*. For example, this law gives the tribunal the authority to award interest in a dispute.⁹ The Ordinance also authorises a tribunal to award costs of the arbitration proceedings.¹⁰

The arbitration clause has in practice become a synonym of a clause preceding the dispute, while the submission agreement is a synonym of an agreement entered into subsequent to a dispute.

... Therefore, it is suggested that the most acceptable distinction between a submission agreement and an arbitration clause is the one that, rather than being based on the form ... is based on the timing of the agreement, i.e., whether it was made before or after the dispute arises.

MAURO RUBINO-SAMMARTANO, *INTERNATIONAL ARBITRATION—LAW AND PRACTICE* 256 (3d ed. 2014).

For example, Art. 23(1) of the International Chamber of Commerce's Rules of Arbitration (2017) [hereinafter ICC Rules] uses *terms of reference* to designate the document which sets out the following information:

1)

As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars:

a) the names in full, description, address and other contact details of each of the parties and of any person(s) representing a party in the arbitration;

b) the addresses to which notifications and communications arising in the course of the arbitration may be made;

c) a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;

d) unless the arbitral tribunal considers it inappropriate, a list of issues to be determined;

e) the names in full, address and other contact details of each of the arbitrators;

f) the place of the arbitration; and

g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as amiable compositeur or to decide ex aequo et bono.

The Hong Kong Mediation and Arbitration Centre uses *terms of reference* to refer to the notice of arbitration:

The party who wishes to refer the dispute to arbitration should give a written notice to the other party that the dispute shall be referred to arbitration. The notice of the dispute will become the terms of reference of the arbitration. Care must be taken to make sure that the dispute is described in a sufficiently wide manner in the notice to enable the arbitrator to deal with all issues in dispute between the parties.

The Hong Kong Mediation and Arbitration Centre's website is at: https://www.hkmaac.org/arbitration/arbitration_services.php (last visited 11 Jul. 2017).

⁸ MA & BROCK, *supra* note 1, at paras. 15.030–15.037; REDFERN AND HUNTER, *supra* note 2, at para. 1.59 and para. 5.91.

⁹ § 79(1) of the *Arbitration Ordinance*, *supra* note 5, provides:

(1) Unless otherwise agreed by the parties, an arbitral tribunal may, in the arbitral proceedings before it, award simple or compound interest from the dates, at the rates, and with the rests that the tribunal considers appropriate, subject to section 80, for any period ending not later than the date of payment—

(a) on money awarded by the tribunal in the arbitral proceedings;

(b) on money claimed in, and outstanding at the commencement of, the arbitral proceedings but paid before the award is made; or

(c) on costs awarded or ordered by the tribunal in the arbitral proceedings.

The purpose of awarding interest is to compensate the innocent party, rather than to punish the defaulting party. JOHN CHOONG AND ROMESH WEERAMANTRY, *THE HONG KONG ARBITRATION ORDINANCE: COMMENTARY AND ANNOTATIONS* para. 79.09 (2nd ed. 2015) [hereinafter CHOONG & WEERAMANTRY]. Discussion of awards of interest or costs is found in Chapter 9, "Contents of the Award."

¹⁰ § 74(1) of the *Arbitration Ordinance*, *supra* note 5, stipulates: "An arbitral tribunal may include in an award

There are two types of challenge to an arbitral tribunal's jurisdiction. The first type is a *partial challenge* which contends that some, but not all, of the claims or matters being submitted to arbitration are beyond the tribunal's jurisdiction under the arbitration agreement. This type of challenge does not fundamentally attack the tribunal's jurisdiction. The second type of challenge, in contrast, is a *total challenge* which questions the whole basis of the tribunal's jurisdiction. An example of a total challenge is the instance of one party contesting the validity of the arbitration agreement which would thus challenge the tribunal's overall jurisdiction to decide the parties' dispute.¹¹

A party may object to a tribunal's substantive jurisdiction.¹² What happens in this situation? Let us review as an example the relevant provision of the *Arbitration Ordinance* governing jurisdiction. This provision would be § 34 of the Ordinance which incorporates Art. 16 of the *UNCITRAL Model Law on International Commercial Arbitration* [hereinafter "*Model Law*"].¹³ Referring to § 34(1)(1) of

directions with respect to the costs of arbitral proceedings (including the fees and expenses of the tribunal);

¹¹ REDFERN & HUNTER, *supra* note 2, at para. 5.92.

¹² *Id.*

"A partial challenge is usually dependent on whether the particular matters referred to arbitration fall within the scope of the arbitration agreement. A total challenge usually questions whether there is a valid arbitration agreement at all." *Id.*

While on the topic of challenges, note this authority's comment upon submission agreements arising from arbitrations where the dispute arose before the parties' agreement to arbitrate:

An arbitral tribunal that derives its authority from a submission agreement is unlikely to face a total challenge to its jurisdiction. The purpose of a submission agreement is to give the arbitral tribunal jurisdiction to determine specific disputes between specific parties. Total challenges to jurisdiction are therefore likely to arise in practice only where the authority (or purported authority) of the arbitral tribunal is derived from an arbitration clause.

Id. at para. 5.98.

For further analysis of these two types of challenge, see *id.* at paras. 5.93–5.99.

¹³ UNCITRAL is the acronym for the United Nations Commission on International Trade Law. It is responsible for the creation of the *Model Law on International Commercial Arbitration* [hereinafter *Model Law*], § 34 of the *Arbitration Ordinance*, incorporating *Model Law* Art. 16, *supra* note 5, provides in full:

(1) Article 16 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(5)—

"Article 16. Competence of arbitral tribunal to rule on its jurisdiction

- (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
- (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
- (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to

the Ordinance which is the equivalent of Art. 16(1) of the *Model Law*, the provision states: "The arbitral tribunal may rule on its own jurisdiction." This ability of the tribunal to decide its own jurisdiction is commonly known as the doctrine of *Kompetenz-Kompetenz*. This doctrine is also known as the *Principle of Competence-Competence*. Essentially, this concept states that a tribunal is competent to determine its own competence to settle a dispute. In other words, the arbitral tribunal has the power to determine its own jurisdiction over a particular arbitration.¹⁴ As one source noted:

An arbitral tribunal may rule on its own substantive jurisdiction, including the question of whether there is a valid arbitration agreement. Some other matters that an arbitral tribunal may decide on when it rules on its own jurisdiction . . . include:

- (1) whether the tribunal is properly constituted; or
- (2) what matters have been submitted to arbitration in accordance with [the] arbitration agreement¹⁵

Section 34(1)(2) of the Ordinance, which is the equivalent of Art. 16(2) of the *Model Law*, provides the procedure for objecting to a tribunal's jurisdiction:

that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.¹⁶ A party is not precluded from raising

decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

- (2) The power of the arbitral tribunal to rule on its own jurisdiction under subsection (1) includes the power to decide as to—
 - (a) whether the tribunal is properly constituted; or
 - (b) what matters have been submitted to arbitration in accordance with the arbitration agreement.
- (3) If a dispute is submitted to arbitration in accordance with an arbitration agreement and a party—
 - (a) makes a counter-claim arising out of the same dispute; or
 - (b) relies on a claim arising out of that dispute for the purposes of a set-off, the arbitral tribunal has jurisdiction to decide on the counter-claim or the claim so relied on only to the extent that the subject matter of that counter-claim or that claim falls within the scope of the same arbitration agreement.
- (4) A ruling of the arbitral tribunal that it does not have jurisdiction to decide a dispute is not subject to appeal.
- (5) Despite section 20, if the arbitral tribunal rules that it does not have jurisdiction to decide a dispute, the court must, if it has jurisdiction, decide that dispute.

¹⁴ CHOONG & WEERAMANTRY, *supra* note 9, at para. 34.06 states:

Thus, by applying the twin concepts of competence-competence and separability, even though a tribunal's competence is challenged by one of the parties, it is nonetheless empowered to rule on whether that challenge is valid. This is the case even where the challenge relates to the existence or validity of the arbitration agreement itself, or to the validity of the contract containing the arbitration agreement. . . . this competence extends to the tribunal's power to rule on the "foundation, content and extent of its mandate and power." (citations omitted)

¹⁵ MA & BROCK, *supra* note 1, at para. 14.016 (citation omitted).

This position seems to have been confirmed once again in the United States by its Supreme Court decision in *Henry Schein, Inc. v Archer & White Sales, Inc.*, 2019 WL 122164, 586 US ____ (2019). The Court decided that the arbitrability of a dispute is to be decided by the arbitral tribunal as the parties had contracted to do so. The Court held that contracts are to be enforced.

¹⁶ This requirement that objections to the arbitral tribunal's jurisdiction be raised at an early stage is sensible