(c) 法院“固有的”的干预仲裁的权力都被排除（第 5 条）；

(d) 不应以国籍为理由，排除任何人担任仲裁员（第 11.1 条）；

(e) 当事各方应享受平等的待遇，应有适当的机会陈述其主张（第 18 条）；以及

(f) 法院的参与仅限于少数特定事项；仅在很有限的情况下，才能撤销仲裁裁决（第 8、9、12、14、16、27 和 34 条）。

现行《仲裁条例》的结构如下：

《仲裁条例》第 I 和 IA 部分（第 1 条至 2GN 条），既适用于国际仲裁，也适用于本地仲裁。

第 II 部分（第 2L 条至第 33 条），适用于本地仲裁（或者按第 2M 条的规定，经当事人同意，适用于国际仲裁）。

第 IIA 部分（第 34A 条至第 34C 条），将《示范法》适用于香港的国际仲裁（或者按第 2L 条的规定，经当事人同意，适用于本地仲裁）。《示范法》列为《仲裁条例》的附件 5。

第 III 部分，是关于在香港根据《1923 年日内瓦仲裁条款议定书》和《1927 年关于执行外国仲裁裁决的日内瓦公约》承认和执行某些外国裁决。从 1997 年 7 月 1 日起，上述文件不再适用于香港，第 III 部分因此已废止。

第 IIIA 部分（第 40A 条至第 40G 条），是关于在香港承认和执行内地裁决。

第 IV 部分（第 41 至第 46 条），是关于在香港根据《纽约公约》承认和执行境外裁决。《纽约公约》列为《仲裁条例》的附件 3。

第 V 部分（第 47 条和第 48 条），是与 1996 年修订《仲裁条例》有关的必要的过渡性安排。

¶3-020 香港仲裁历史

《仲裁条例》现行结构和各部分复杂的序号，源于多次的修订，是一个持续的立法演进过程的产物，受到了各种因素的影响，包括英国法的变化、本地法律改革建议、响应国际仲裁法律的发展以及最近的因香港回归中国而必须作出的修订。

(c) any “inherent” jurisdiction of the courts to interfere in the arbitral process is excluded (Article 5);

(d) no person shall be prevented from acting as an arbitrator by reason of nationality (Article 11.1);

(e) each party should receive equal treatment and be given a proper opportunity to present its case (Article 18); and

(f) the involvement of the courts is limited to a small number of specific functions, with very narrow grounds on which an arbitral award may be set aside (Articles 8, 9, 12, 14, 16, 27 and 34).

In its current form, the Ordinance is organised as follows:

Parts I and IA (Sections 1 – 2GN) of the Ordinance apply to both international and domestic arbitrations.

Part II (Sections 2L – 33) is applicable to domestic arbitrations (or to international arbitrations by the agreement of the parties pursuant to Section 2M of the Ordinance).

Part IIA (Sections 34A – 34C) applies the Model Law to international arbitrations conducted in Hong Kong (or to domestic arbitrations by the agreement of the parties pursuant to Section 2L of the Ordinance). The text of the Model Law is contained in the Fifth Schedule to the Ordinance.

Part III had governed the recognition and enforcement in Hong Kong of certain foreign awards made abroad under the *Geneva Protocol on Arbitration Clauses* 1923 and the *Geneva Convention on the Execution of Foreign Arbitral Awards* 1927. These instruments ceased to apply in Hong Kong from 1 July 1997. Part III has consequently been repealed.

Part IIIA (Sections 40A – 40G) governs the recognition and enforcement in Hong Kong of awards made in Mainland China.

Part IV (Sections 41 – 46) governs the recognition and enforcement in Hong Kong of awards made overseas under the *New York Convention*. The text of the New York Convention is contained in the Third Schedule to the Ordinance.

Part V (Sections 47 and 48) contains miscellaneous transitional arrangements that were necessary in light of the amendments to the Ordinance made in 1996.

¶3-020 The history of arbitration in Hong Kong

The Ordinance in its present form (with the complicated numbering of its sections) is a result of the many amendments that it has undergone. It is a product of a continuous legislative evolution which has been driven by changes in English law, local legal reform proposals, reactions to developments in the sphere of international arbitration law, and, more recently, by amendments made necessary by Hong Kong's reversion to PRC sovereignty.

香港仲裁的历史可以追溯到英国殖民时代的早期。考虑到英国殖民地明显的商业色彩，这并不奇怪。香港第一部《仲裁条例》制定于 1844 年，试图授予港督广泛的权力，以将民事争议交付仲裁。随着香港高等法院的设立，这部《仲裁条例》于当年被英国 Colonial Office 废止。1855 年《民事司法管理条例（修订版）》的制定，最终确认了仲裁在香港的重要性。[1]

从那时起，直至 1997 年的主权移交，香港仲裁的法律和程序总体上是追随英国的发展。目前的《仲裁条例》是 1963 年制定的，基本上是英国《1950 年仲裁法》的翻版。《仲裁条例》后续的修订，也是追随英国《1950 年仲裁法》的不断发展。

以下是《仲裁条例》所经历的一些值得注意的变化。

¶3-030 加入《纽约公约》（1977 年）

《1975 仲裁（修订）条例》（1975 年）将《纽约公约》列为其第 IV 部分，确认香港和其它公约成员国之间相互执行仲裁裁决。英国批准《纽约公约》并宣布《纽约公约》延伸适用于其殖民地后，《1975 仲裁（修订）条例》（1975 年）于 1977 年生效。

¶3-040 1982 年修订案

1982 年，香港法律改革委员会发布了“商事仲裁报告”。除其它内容外，报告针对合并仲裁和驳回怠于追讨的案件，提出了建议。《1982 仲裁（修订）条例》（1982 年第 10 号）采纳了这些建议。

¶3-050 香港国际仲裁中心的成立（1985 年）

香港国际仲裁中心成立于 1985 年，从那时起，便为国际仲裁和本地仲裁的当事人提供一系列服务。香港得以发展成为亚洲主要的仲裁地点之一，香港国际仲裁中心起了重要作用。同时，香港日益对仲裁有吸引力，也极大地促进了香港立法的发展。尤其是，这意味着香港更加需要采用《示范法》。

[1] 见 Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary*,（Butterworths, 1997 年版）第 2 页。

The history of arbitration in Hong Kong stretches back to the earliest days of the British colonial presence, something which is not surprising given the predominantly commercial nature of the British settlement. Hong Kong's first Arbitration Ordinance was enacted in 1844, and attempted to give broad powers to the Governor to refer civil disputes to arbitration. This Ordinance was revoked later that year by the Colonial Office, following the establishment of the Hong Kong Supreme Court. Official recognition of the importance of arbitration in Hong Kong was finally confirmed by the enactment of the Civil Administration of Justice (Amendment) Ordinance in 1855.[1]

Since that time, and until the handover in 1997, arbitration law and procedure in Hong Kong has generally shadowed developments in England. The current Ordinance was enacted in 1963, and was largely a replica of the UK Arbitration Act 1950 (the "1950 Act"). The subsequent amendments to the Ordinance have been heavily influenced by the developments to the 1950 Act over time.

The following sections identify some of the notable changes that the Ordinance has undergone.

¶3-030 Incorporating the New York Convention (1977)

The New York Convention on the Recognition and Enforcement of Arbitral Awards was incorporated as Part IV of the Ordinance by the Arbitration (Amendment) Ordinance 1975, allowing for reciprocal enforcement of arbitral awards between Hong Kong and other parties to the Convention. This amendment to the Ordinance took effect in 1977, following the United Kingdom's ratification of the New York Convention and its declaration that the application of the Convention would extend to the territories it then regarded as its colonies.

¶3-040 The 1982 amendments

In 1982, the Law Reform Commission of Hong Kong (the LRCHK) published its *Report on Commercial Arbitration* which made recommendations, inter alia, in relation to the consolidation of arbitrations and dismissal of claims for want of prosecution. These recommendations were implemented by the Arbitration (Amendment) Ordinance No 10 of 1982.

¶3-050 The establishment of the HKIAC (1985)

The HKIAC was established in 1985. Since that time, it has offered a range of services to parties to arbitrations, both international and domestic, helping Hong Kong to flourish as one of the principal sites for arbitration in Asia. The development of Hong Kong as an attractive venue for arbitration under the auspices of the HKIAC also proved to be a significant catalyst for legislative change. In particular, it meant that the need for Hong Kong to adopt the Model Law became increasingly apparent.

[1] See Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary*, (Butterworths, 1997) at page 2.

¶6-011 撤销国际裁决的理由

只有在极有限的情况下，香港法院才有可能撤销香港的国际裁决。主要涉及管辖权或仲裁庭组成中的缺陷，或是重大的程序不当。不得针对国际裁决中的实体问题，向香港法院上诉。

《示范法》第 34 条几乎完全采用了《纽约公约》第 5 条关于拒绝执行公约裁决的规定，规定：如果法院认定存在下述情况，则可主动撤销国际裁决：

(a) 根据香港的法律，争议的标的不能通过仲裁解决；或

(b) 该裁决与香港的公共政策[1]相抵触。

《示范法》第 34(2)条规定，如果申请人，即仲裁败诉方，能证明存在下述情况，法院也可撤销国际裁决：

(i) 仲裁协议的当事一方欠缺行为能力；或仲裁协议根据香港法律是无效的——即不存在有效的协议或仲裁协议；或

(ii) 未将有关指定仲裁员或仲裁程序的事情适当地通知提出申请的当事一方，或该方因其它理由未能陈述其案情——即违反了自然正义或正当程序原则；或

(iii) 裁决所处理的争议，并非交付仲裁的标的或不在其条款之列，或裁决载有关于交付仲裁范围以外事项的决定——即仲裁员超越了其管辖权，但如果越权裁决部分能与未越权部分分开，只能撤销越权的那部分；或

(iv) 仲裁庭的组成或仲裁程序与当事人的协议不一致，或与《示范法》不符——即未能尊重当事人的自主权或违反了仲裁协议/仲裁法。

申请撤销国际裁决的一方必须向负责“建筑和仲裁诉讼案审讯表”的法官提交原诉传票。申请必须在申请人收到裁决日后 3 个月内提出。如果根据《示范法》第 33 条请求了更正或解释裁决，则须在仲裁庭处理完该请求之日后 3 个月内提出（《示范法》第 34(3)条）。

至写作本书时止，还没有根据《示范法》第 34 条请求撤销香港的国际裁决的案例。但是，根据《仲裁条例》第 44 条请求拒绝执行公约裁决的案例，可供参

[1] 本文中“公共政策”的含义见¶6-030。

¶6-011 Grounds for setting aside international awards

Recourse to the Hong Kong courts to set aside an international arbitral award made in Hong Kong may only be made on very limited grounds. These relate primarily to defects pertaining to the jurisdiction or constitution of the tribunal, or for a substantial procedural irregularity. There is no right of appeal to the Hong Kong courts on the merits of an international arbitration award.

Article 34 of the Model Law (which closely follows the grounds for refusing to enforce a Convention award set out in Article V of the New York Convention) provides that an international arbitral award may be set aside by the court of its own volition if it finds that:

(a) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Hong Kong; or

(b) the award is in conflict with the public policy of Hong Kong.[1]

Article 34(2) of the Model Law provides that an international arbitral award may also be set aside if the applicant, that is, the losing party in the arbitration, proves that:

(i) a party to the arbitration was under some incapacity or the arbitration agreement is not valid under Hong Kong law — there is therefore no valid agreement or arbitration agreement;

(ii) the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or the applicant was otherwise unable to present its case — thereby in breach of rules of natural justice or due process;

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration — the arbitrator exceeded the jurisdiction given to him, and if that part of the award can be severed, it would be severed so as to preserve the rest of the award which does not exceed jurisdiction;

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

An application to set aside an international arbitral award must be made by originating summons to the Judge in charge of the Construction and Arbitration List. An application must be made within three months of the date on which the applicant received the award or, if a request has been made to correct or interpret the award under Article 33 of the Model Law, from the date on which that request has been disposed of by the arbitral tribunal (Article 34(3) of the Model Law).

At the time of writing, there is no case law relating to applications to set aside international awards made in Hong Kong under Article 34 of the Model Law. However, guidance may be had from case law relating to applications to deny enforcement of

[1] As to the meaning of “public policy” in this context, see ¶6-030.

考。（《仲裁条例》第 44 条除很小的修改外，完全采用了《纽约公约》第 5 条的规定。）（请见¶6-030 "承认和执行外国裁决"。）

¶6-012 质疑本地裁决的理由

不同于国际裁决，质疑本地裁决，《仲裁条例》赋予了香港法院更大的权力。但质疑本地裁决和撤销国际裁决的时限不同，是自裁决作出（而不是收到）后起算。《高等法院规则》第 73 号命令规定了 21 天的期限。

根据《仲裁条例》第 25(2)条的规定，如果仲裁员或公断人自身有不当行为，或在仲裁程序中有不当行为，法院可撤销本地裁决。这里的"不当行为"包括仲裁员未能公平行事或存在重大程序不当。但不包括轻微的程序不当和事实或法律上的错误。根据《仲裁条例》第 25(2)条提出撤销本地裁决的申请后，法院可命令将依裁决应付的款项交存法院或提供其它保证。《高等法院规则》第 73 号命令第 5 条规定了这类申请的程序。

根据《仲裁条例》第 23(1)条的规定，香港法院无权以认定事实有误为由，撤销本地裁决。但是，根据《仲裁条例》第 23(2)-(4)条，在下述情况下，可针对本地裁决中的法律问题，向法院上诉：

(a) 仲裁当事各方均同意上诉；或

(b) 没有当事各方的同意，但法院认为，相关法律问题对仲裁一方或多方的权利有重大影响，应准予上诉。

向法院上诉，申请人应取得法院许可。仲裁裁决被看作是终局的，必须推翻仲裁裁决的终局性，法院才能许可上诉。如果合同是格式合同，申请人须证明，法律问题所涉的事实和法律背景，在争议涉及的商业领域中很常见；仲裁庭明显是错了或不可能是对的；由法院决定法律问题，对此商业领域有普遍意义。如果不是格式合同，申请人若能证明仲裁员对相关合同条款的解释明显是错的，法院通常会许可上诉。这些原则，通常称为 Nema 原则，一直为香港法院采用。权威案件 *PT Dover Chemical Company v Lee Chang Tung Chemical Industries Corporation* [1990] 2 HKLR 257 重申了这些原则，终审法院在最近的 *Swire Properties Limited & others v The Secretary for Justice* [2003] 2 HKLRD 986 案中确认了这些原则。

Convention awards under Section 44 of the Arbitration Ordinance which replicates with minor amendments of Article V of the New York Convention (see "Recognition and Enforcement of Foreign Awards" at ¶6-030).

¶6-012 Grounds for challenging domestic awards

The Arbitration Ordinance gives to Hong Kong courts broader powers in respect of recourse against domestic awards as compared to international awards. Note that the time frames within which domestic awards can be challenged are different from those set aside for international awards. Time starts to run when the award is published (not received). Order 73 provides for a 21-day limit.

Under Section 25(2) of the Ordinance, the courts may set aside a domestic arbitral award where an arbitrator or umpire has himself committed misconduct or has misconducted the arbitral proceedings. The notion of "misconduct" here includes an arbitrator's failure to act impartially as well as instances where a substantial procedural irregularity has occurred. It does not extend to minor procedural irregularities or to errors of fact or law. Where an application to set aside a domestic award is made under Section 25(2), the court may order that the money payable under the award be paid into court or otherwise secured. The procedure for such applications is set out in Order 73, Rule 5 of the Rules of the High Court.

Under Section 23(1) of the Ordinance, Hong Kong courts have no jurisdiction to set aside a domestic arbitration award on the ground of errors of fact. However, under Section 23(2)-(4) of the Ordinance, an appeal may be brought before the courts on a question of law arising out of a domestic arbitration award where:

(a) all parties to the arbitration consent to the appeal; or

(b) absent such consent, the Hong Kong courts are of the opinion that the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration and leave should be granted.

Before the Court would hear the substantive appeal on the point of law, the applicant has to obtain leave from the Court. Leave would only be granted where the presumption of finality of arbitral awards is displaced. To obtain leave where the contract is a standard form, the applicant has to demonstrate that the factual and legal context in which the question of law arises is one that is common in the commercial sector with which the dispute relates, that the arbitrator was obviously wrong or so wrong that he could not be right, and finally that the determination of the Court on this question of law would be of general importance to that commercial sector. Where the contractual provisions were "one-off" provisions, leave should normally only be granted where the applicant can demonstrate that the arbitrator's construction of the relevant contractual provision appeared to be obviously wrong. These criteria are commonly known as the Nema guidelines which have been adopted in Hong Kong and repeated in the leading case of *PT Dover Chemical Company v Lee Chang Tung Chemical Industries Corporation* [1990] 2 HKLR 257. These principles are approved in the recent Court of Final Appeal decision of *Swire Properties Limited & others v The Secretary for Justice* [2003] 2 HKLRD 986.