(iii) *Sole mediation or co-mediation?*

4.035 Co-mediation is useful in a demanding mediation so the mediators can "share the load." While one mediator listens and reflects the other can interact with the parties. It is also useful where multidisciplinary skills would be beneficial. Sole mediation is better from a cost savings point of view and minimises the chances of mediator conflict.

(c) When Should Parties Mediate?

4.036 Examples of when mediation can arise include:

(1) where a contract clause stipulates that the parties to the contract must attempt to mediate a dispute under the contract before entering into arbitration or litigation;

(2) in the absence of a contractual requirement, the parties agree to mediate on the occurrence of a dispute, or where litigation or arbitration is underway and the parties agree to take time out to attempt to mediate a resolution. A useful time to consider mediation is after the exchange of pleadings and discovery.

(d) Which Institutions Facilitate Mediation in Hong Kong?

4.037 Five institutions linked to mediation in Hong Kong are:

(1) the Hong Kong International Arbitration Centre (HKIAC) and the HKMC;

(2) the Hong Kong Institute of Arbitrators (HKIArb);

(3) the International Chamber of Commerce (ICC);

(4) the East-Asia Branch of the Chartered Institute of Arbitrators; and

(5) the Hong Kong Mediation Accreditation Association Limited (the "HKMAAL").

(e) Are There any Rules which Apply to Mediations?

4.038 The parties to a mediation agreement may agree which rules will apply to mediation in the event that the parties end up in dispute. Although they may agree to their own rules, it is better to apply rules which are commonly used, have been tried and tested and which have been prepared by a body with experience in the mediation process. Some examples of mediation rules include the HKIAC Mediation Rules (effective from 1 August 1999), the Government of Hong Kong SAR Construction Mediation Rules (1999 Edition, revised in 2003) (Government Mediation Rules) and the ICC ADR Rules (in force as from 1 January 2008) (ICC ADR Rules). A flow chart of a typical HKIAC mediation procedure is appended (see para.4.001). It is of note that both the HKIAC Mediation Rules and the Government Mediation Rules have been revised to remove the requirement for a mediator to provide an opinion in a report

upon request by one of the parties. Many mediators were of the view that providing an opinion and report writing were inconsistent with the fundamentals of mediation. Mediators are usually barred from subsequently acting in any capacity in the future conduct of the dispute, e.g. HKIAC Mediation Rule cl.14. However, a mediator can act as an arbitrator and *vice versa* pursuant to s.32 of the Arbitration Ordinance (Cap.609).

4.039 Practice Direction 31 lays down procedures for encouraging parties to resolve their disputes by ADR in civil proceedings begun by writ in the Court of First Instance and the District Court, with the exception of proceedings in specialist lists. Solicitors for the parties are required to file in Court a mediation certificate and a time tabling questionnaire so that the Court can decide on appropriate directions for the conduct of a case. If a party wishes to attempt mediation, he will serve a mediation notice on the other party as soon as the mediation certificate has been filed. The applicant will state in the mediation notice that he wishes to attempt mediation, and will propose details of mediation such as the appointment of mediator, the venue for mediation, rules to be applied, fees and costs of mediation, etc. The respondent, upon receiving a mediation notice, must serve a mediation response within 14 days and to state whether he agrees to engage in mediation. If the parties agree to mediate, they may apply to court for an interim stay of proceedings and proceed in accordance with the stipulated rules and timetable.[14] Otherwise, the Court may make an adverse costs order if it considers a party unreasonably fails to engage in mediation.[15]

4.040 The MO provides a regulatory framework for the conduct of mediation: the Ordinance sets out all important definitions of "mediation", "agreement to mediate" and "mediation communications" (s.2) and the extent of its application (s.5 and Sch.1) including to the Government (s.6). The main focus of the MO is in relation to the rights and obligations of participants in mediation especially in relation to confidentiality and the non-admissibility of mediation evidence in court and other determinative tribunals (ss.8–10). Essentially mediation participants cannot disclose what has occurred in mediation to anyone outside the mediation, subject to certain exceptions.

4.041 The exceptions are limited and are a reinforcement of the mediation practice. They essentially fall into two categories:-

(1) 7 circumstances that do not require the courts' intervention: they are (a) the parties' agreement to the disclosure, (b) the necessity to protect someone from danger, (c) where the contents of the intended communication is already in the public domain through lawful means, (d) where the law requires it, (e) where the communication would normally be discoverable in civil proceedings, (f) where the communication is used for research, evaluation or educational purposes, and (g) for the purpose of seeking legal advice. It is suggested that (e) requires the courts' clarification and presumably will necessitate leave of the court (Section 9). The vague definitions of 'research, evaluation or education purpose' in (f) also leave room for abuse and require further clarification. The other circumstances are more straightforward and are an endorsement of current practice;

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[14] Practice Direction 31.

[15] *Golden Eagle International (Group) Ltd v GR Investment Holdings Ltd* [2010] 3 HKLRD 273.

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.

4.111 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 para.4.009. It may be viewed as a dispute avoidance rather than a dispute resolution mechanism.

4.112 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.

4.113 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?

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

(c) Key Elements

4.115 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, obtained 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?

Initiating the partnering process will involve the following activities:[36] 4.116

(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;

(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?

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: 4.117

> "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]

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[36] Taylor, R.G. and Hinkle, B., "How to use ADR clauses with standard form construction industry contracts" (1996) *The International Construction Law Review*, p.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.

[37] Taylor, R.G. and Hinkle, B., "How to use ADR clauses with standard form construction industry contracts" (1996) *The International Construction Law Review*, p.56, 58.

5.017 Unlike arbitration, under the facilitative mediation model, it is believed that if mediators bring their own ideas and interests to the mediation, this will very likely lessen the mediator's ability to build trust with both (or all) parties, which is an essential part of the mediator's role. Once one of the parties feels that the mediator has chosen the other party's argument over theirs, the trust between them will break down. In Western facilitative mediation practice, parties do not want to be told what to do, if that is what they had wanted they could have chosen another dispute resolution process such as arbitration, where the neutral will make a decision.

(i) *Purpose of private sessions*

5.018
- Allows the parties to share additional information in private and confidentially with the mediator
- Parties can release emotion and anger without the other parties being present
- Allows the mediator to build rapport and trust
- Mediator can be much more direct and probe deeper into sometimes sensitive issues
- Allows the parties to start creating a wider variety of options to settle
- Options can be tested or the parties can use the mediator as a sounding board
- Allows the mediator to reality test offers and options
- Allows parties to share "secret" information

5.019 Nearly all training courses will suggest that mediators should always mention confidentiality again to the parties prior to the start of a private session. The role of confidential private meetings is clearly an essential factor in the facilitated mediation process.

> "The unique value of private meetings is in giving each team the chance to talk openly with the mediator and each other about all aspects of the case, trusting that the mediator will not take any confidential content to the other party without permission to do so."[16]

(ii) *Advantages of Mediation*

5.020
- Focus on Interests: The Mediator will encourage the Parties to listen and appreciate the underlying interests and concerns of each other. The appreciation of the real interests underpinning the positions being taken by each party is the key which opens the door to compromise and agreement.
- Informed Decision: In Mediation, the Parties have the responsibility for decisions, having regard to various options for settlement.

[16] CEDR workbook, 62.

- Flexible: The Parties set the agenda and decide what issues need to be addressed.
- Direct Communication: The Parties can express their own opinions and concerns in finding ways to communicate directly and to resolve differences in a positive way.
- Consensus: The Parties negotiate and reach settlement on a voluntary basis in terms acceptable to both. Relations between the Parties could sometimes be preserved by Mediation.
- Confidentiality: Mediation is conducted in a confidential way. The Mediator, the Parties and all present at the Mediation will sign agreements to agree to maintain confidentiality.
- Efficient and Effective: Mediation can be more efficient and effective as a dispute resolution process for the resolution of financial disputes.

5. Facilitative and Evaluative Mediation Models Compared

5.021 As noted previously the most favoured model of mediation practiced in common-law jurisdictions like Hong Kong is the facilative type. Whilst what becomes apparent in the Keeneye case, discussed below, was the model used in China is what would be classified as an evaluative model. But what does this mean in terms of what parties and lawyers might expect if entering a mediation using either one of these models?

(a) Facilitative Mediation

5.022 The HKMAAL guidelines for mediation course providers make clear what it regards as the key elements of the facilitative model. A mediation training body to satisfy HKMAAL's criteria to become registered as a training body requires that the students be trained to understand:

a. Principles of Mediator impartiality and **non-directedness**, and Party empowerment and **self-determination**, and their application

b. Providing legal and other information **without advising**, and how to effectively involve other professional advisers in mediation

c. Managing the mediator's own pre-conceived prejudices, assumptions and judgments; how to remain open minded, facilitate creativity and address parties' interests

d. Facilitation of discussions, negotiations, option development; reality testing and reaching workable mutual agreements.[17]

[17] Guidelines for HKMAAL Stage 1 Mediation Course Providers www.hkmaal.org.hk

5. Privacy and Confidentiality

6.027 Parties often cite confidentiality as one of the reasons for preferring arbitration over litigation.[64] In some cases, what these parties are referring to rather is the right to privacy which allows parties to conduct their hearings without the attendance of individuals other than the parties counsel, witnesses and arbitrators.[65] Such right is generally expressly provided for in arbitration rules. For example, art.22.7 of the HKIAC Rules states that "[h]earings shall be held in private unless the parties agree otherwise …" Privacy allows parties to keep commercial secrets from being publicised and minimises public attention which may detract from the fundamental issues in dispute.[66]

6.028 Confidentiality on the other hand is not an inherent feature of arbitration in some jurisdictions. The extent to which confidentiality is provided for in arbitration, if it is at all, is subject to significant debate and often determined based on the arbitration legislation of each jurisdiction and any arbitration rules chosen.[67] First, inconsistent expectations exist as to whether there is a duty imposed on parties and arbitrators not to disclose information related to the arbitration. Secondly, if there is such a duty, the exceptions to the duty also vary depending on the jurisdiction and the arbitration rules.

6.029 It is well established that, as with many other aspects of the arbitral process, courts will give effect to the parties' freedom to choose whether an arbitration is confidential.[68] Parties may contractually agree to confidential proceedings as part of the arbitration agreement or subsequent to the dispute arising. The opposite is also true. Parties may expressly provide that aspects of an arbitration shall not be confidential. There are, however, certain exceptions which will prevail over an agreement of this nature, such as legitimate public interest or compulsion by law.[69]

6.030 In the absence of an express confidentiality agreement by the parties, there are three general approaches regarding the duty of confidentiality: (1) no implied duty of confidentiality; (2) an implied duty of confidentiality through case law; and (3) an duty of confidentiality expressed in legislation. In the famous case, *Esso Australia*

[64] Queen Mary University of London, *2010 International Arbitration Survey: Choices in Arbitration* (University of London, 2010) 6. This survey of corporate counsel revealed that 62% of respondents viewed confidentiality as a "very important" part of international arbitration. 50% of respondents erroneously believed that arbitration proceedings are always confidential even in the absence of an express clause. In a more recent survey conducted by Queen Mary University of London examining the energy, construction and financial services sectors, respondents reinforced the importance of confidentiality of the arbitral proceedings (*Corporate Choices in International Arbitration: Industry Perspectives* (Pricewaterhouse Coopers, 2013), 8).

[65] Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) 88.

[66] Thomas Carbonneau, *Cases and Materials on the Law and Practice of Arbitration* (Juris Publishing, 3rd edn 2002) 3; Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) 88. Born suggests that the ability to avoid "trial by press release" is an important feature of arbitration for its users.

[67] For a thorough review of this topic, see Michael Hwang and Katie Chung, "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration" (2009) 26(5) *Journal of International Arbitration*, 609.

[68] Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2009) 88.

[69] See Simon Greenberg, Christopher Kee, *et al.*, *International Commercial Arbitration: an Asia-Pacific Perspective* (Cambridge University Press, 2011) 18 for a list of exceptions to party autonomy to expressly agree on whether aspects of an arbitration are confidential.

Resources Ltd v Plowman,[70] the Australian High Court took the view that only by express agreement by the parties could a duty of confidentiality be imposed and the mere existence of an arbitration agreement would not imply such an obligation. This approach has been adopted by a few other jurisdictions as well.[71] Arguably the more common view is of an implied duty of confidentiality recognised through case law. As explained in *Emmott v Michael Wilson & Partners Ltd*:[72]

> "There is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration. The obligation is not limited to commercially confidential information in the traditional senses.
>
> … this is in reality a substantive rule of arbitration law reached through the device of an implied term."

6.031 This decision from the English courts has been followed in other jurisdictions as well, including Singapore.

6.032 Hong Kong has taken the third approach and included express provisions on confidentiality in the Arbitration Ordinance. Under s.18 of the Arbitration Ordinance, "Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to: (a) the arbitral proceedings under the arbitration agreement; or (b) an award made in those proceedings." This is balanced with s.18(2) which recognises that disclosure may be necessary in some circumstances. Section 18(2) lists certain exceptions where publication, disclosure or communication of information is permissible such as where a party is obliged by law or in order to protect a legal right in court proceedings.[73] It is unclear whether s.18(2) was designed to provide an exhaustive list of exceptions.[74] Section 18 of the Arbitration Ordinance was modelled on s.14 of the New Zealand Arbitration Act 1996 which was amended in 2007 due to inadequacies in the old provision.[75] Interestingly however, the Arbitration Ordinance retains the old New Zealand provision, rather than the more detailed 2007 amendments.[76] Few other jurisdictions have also statutorily imposed a duty of confidentiality.[77]

[70] (1995) 183 CLR 10, 26 (High Court of Australia), reprinted in Anthony Mason, Brennan *et al.*, "High Court of Australia Esso Australia Resources Ltd. and Ors, Appellants and the Honourable Sidney James Plowman (The Minister For Energy And Minerals) And Ors, Respondents" (1995) 11(3) *Arbitration International* 235.

[71] Such as in the United States and Sweden.

[72] [2008] Bus LR 1361, [105].

[73] Arbitration Ordinance (Cap. 609) s.18(2) (a)–(c).

[74] See John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations*, 2nd edn (Sweet & Maxwell Asia, 2015) 3–5.

[75] *Ibid.*

[76] *Ibid.*, 92

[77] Australia (as of 2010), Scotland and Spain are a few examples. See John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations*, 2nd edn (Sweet & Maxwell Asia, 2015) 3–5.

9.004 The non-Hong Kong nature of an arbitration conducted in Hong Kong may be by reason of:

(1) the origin of one or more of the parties;

(2) the place where their contract was made;

(3) the place(s) where their contract was performed;

(4) location of the relevant property or assets, outside Hong Kong, including China among others, as discussed further in this chapter.

9.005 As discussed further below the law applicable to the arbitration agreement or the legal place or "seat" of the arbitration may be different from the law governing the contract setting out the rights and obligations of the Parties.

(c) Sources of Hong Kong's conflict of laws principles

(i) *Legal status of Hong Kong*

9.006 Following the return of Hong Kong's sovereignty by the United Kingdom to the Peoples' Republic of China ("China" or the "Mainland") on 1 July 1997, the Hong Kong Special Administrative Region (Hong Kong) was established by China's National People's Congress (NPC) pursuant to art. 31 of the Chinese Constitution. The NPC did so by promulgating the Basic Law[5] on 4 April 1990 which mirrored the terms of the Joint Declaration agreed upon by the Chinese and UK Governments on 19 December 1984 that came into force on 30 June 1985.[6] The Basic Law was incorporated into Hong Kong's law by the 1997 Hong Kong Reunification Ordinance (Cap.110).

9.007 The Preamble to the Basic Law refers to the principle of "one country two systems" as applying to Hong Kong. Thus art.2 of the Basic Law authorises Hong Kong "to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of the Basic Law."

9.008 As discussed further below, Hong Kong's autonomy is subject to a few reservations, chiefly with respect to "acts of state" such as foreign affairs and defence, as the Hong Kong Court of Final Appeal has explained in its 8 June 2011 Judgment in *Democratic Republic of Congo v FG Hemisphere LLC* (*DRC v FG Hemisphere*).[7]

9.009 Hong Kong has a separate legal system from China. For the purposes of arbitration, China and Hong Kong treat each other as separate jurisdictions.

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5 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the Third Session of the Seventh National People's Congress on 4 Apr 1990, promulgated by Order No. 26 of the President of the People's Republic of China on 4 Apr 1990 and effective as of 1 July 1990: see: Order of the State Council of the People's Republic of China No. 221, the Promulgation of National Laws 1997 (LN378/1997), Promulgation of National Laws 1997 (No. 2) 117 (LN386/1997) and Promulgation of National Law 1998 (LN393.19980. For a detailed discussion of the Basic Law see P Y Lo, *The Hong Kong Basic Law* (Lexis-Nexis, Butterworths, 2011).

6 *Democratic Republic of the Congo v FG Hemisphere Associates LLC* (2011) 14 HKCFAR 95, [307] - [331] of the Majority Decision.

7 *Ibid.*, [346] - [355] of the Majority Decision.

(ii) *Sources of Hong Kong's conflict of laws rules*

9.010 The sources of Hong Kong's conflict of laws principles are:

(1) the Basic Law;[8]

(2) Hong Kong's statutory law (each known as an Ordinance) including the Hong Kong Reunification Ordinance (Cap.110),[9] the Interpretation and General Clauses Ordinance (Cap.1), the Arbitration Ordinance (Cap.609), (the "Ordinance" and /or "Arbitration Ordinance"); and

(3) principles of common law constituting Hong Kong's law as of 30 June 1997, as modified the return of Hong Kong's sovereignty to China,[10] and incorporating international law by reason of Hong Kong's accession[11] to various treaties and international conventions,[12] including the New York Convention[13] and rules of customary international law.[14]

9.011 Hong Kong's conflict of laws principles, although based on the English common law, are not identical to it; for example, the European Union law with regard to conflict of laws is not part of Hong Kong law.[15]

9.012 Article 19 of the Basic Law provides that Hong Kong shall be "vested with independent judicial power, including that of final adjudication."

9.013 Generally the Hong Kong Court of Final Appeal (the "CFA") will be the final adjudicator of Hong Kong legal issues submitted to the Hong Kong Courts.[16] The CFA's jurisdiction is set out in art.19 of the Basic Law: see *Democratic Republic of Congo v FG Hemisphere LLC* as to the scope of its jurisdiction thereunder.[17] By reason of Hong Kong's special administrative region status as a part of China, the CFA has

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8 See in particular arts.8 (preservation of common law pre 1 July 1997), 13 (Central People's Government (CPG) responsible for foreign affairs), 18 (specifying which pre-Handover laws continue in effect) and 19 (jurisdiction of the Hong Kong Courts) of the Basic Law.

9 Section 7, Hong Kong Reunification Ordinance (Cap.110). The Hong Kong Reunification Ordinance (Cap.110) provides by s.5 for the addition of s.2A(1) to the Interpretation and General Clauses Ordinance. This states that all laws previously in force and adopted as laws of the HKSAR: "shall be construed with such modifications, adaptations, limitations and exceptions as may be necessary so as not to contravene the Basis Laws and to bring them into conformity with the status of Hong Kong as a Special Administrative Region of the People's Republic of China".

10 Article 8 of the Basic Law provides that: "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravenes this Law, and subject to any amendment by the Legislature of the Hong Kong Special Administrative Region."

11 Via China's notifications to the relevant bodies.

12 Hong Kong international treaties and conventions such as the New York Convention do not have the force of law automatically once ratified. Each must be implemented in Hong Kong law by statute or statutory instruments: *AG for Canada v AG for British Columbia* [1937] AC 362 (PC).

13 The New York Convention is also concerned with arbitration agreements. See art.II.

14 It has yet to be decided whether incorporation of customary rules is limited to rules of customary international law which bind the Chinese State: *Democratic Republic of Congo v FG Hemisphere Associates LLC* (2011) 14 HKCFAR 95 [410] of the majority decision.

15 See particularly the Brussels Convention of 1968 and the Lugano Convention of 1988 on jurisdiction and the Rome Convention of 1980 on choice of law.

16 This however, is subject to the powers reserved to the Chinese National Government—see for example the reservation of powers as to Foreign Affairs to it in art.13.

17 Pursuant to art.19 of the CFA cannot determine matters which the CPG has jurisdiction over, primarily foreign affairs and defence, as discussed earlier. Otherwise it can finally adjudicate Hong Kong matters.

4. Institutional Rules

10.038 Institutional rules vary not only between institutions but over time, and it is a sensible, albeit time-consuming, step for the rules to be reviewed on each occasion they are to be incorporated. In practice, the assumption often is made that the rules, having been drafted by a committee of "experts", will be good enough and should suffice. Changes to the rules are often, but not inevitably, for the better; a further issue is as to whether to enshrine the rules as at the date of contract or to express an intention to "catch" interim changes as have been made from time to time. In a practical administrative sense, the latter is generally the more preferable.

10.039 There are common features to the various major institutional rules. They all set out methods for the appointment of arbitrators, the setting out of each party's case in written form, how relevant evidence is to be identified, the duty to provide a fair hearing to each party, the use of experts and so on.

10.040 There are variations however. It is beyond the scope of this chapter to set out a detailed comparison of each of the sets of rules.[31] The general message conveyed is that although it is possible simply to incorporate the rules by specific reference in the arbitration agreement, it is better to consider them prior to such incorporation, and where it is thought desirable, to set out any preferred changes in the arbitration agreement itself. Those changes should be expressed to have precedence over any conflicting provisions in the rules themselves, the better to avoid any later difficulties in understanding what procedures are to apply. Some institutions (and arbitrators appointed under those rules) historically have been reluctant to depart from the scheme of the institutional rules to give effect to different provisions as agreed to by the parties. Problems potentially arise in those circumstances, particularly in settling the arbitrator's jurisdiction and, as a result, possible arguments against the enforcement of the resulting award. However, arbitration is quintessentially a contractual process and should be operated within the bounds of the relevant clauses as specified in the arbitration agreement; thus it follows that clarity in the drafting (including the order of precedence) assists greatly in application of this principle.

10.041 When we refer to institutional administered arbitrations, we are generally referring to arbitrations under the rules of the ICC, LCIA and the American Arbitration Association (AAA). It is also possible to have an administered arbitration under the rules of the Singapore International Arbitration Centre (SIAC), the Kuala Lumpur Regional Centre for Arbitration (KLRCA) or CIETAC but these almost certainly will take place in Singapore, Malaysia and China respectively.

10.042 The fact remains, however, that many arbitrations have been heard in Hong Kong as the stipulated venue of the arbitration under the rules of the ICC or the LCIA or the AAA, although it should be noted that the HKIAC, whilst offering administered arbitrations, rarely gets involved in this sort of administered arbitration in the sense

[31] This exercise has been done in Smit, H. and Pechota, V., Smitis Guides to International Arbitration Series, *Unit 3: Comparison of International Arbitration Rules*.

that it does not fix arbitrators' remuneration, nor does it scrutinise awards in draft, which of course is the practice of the ICC.

10.043 Since the ICC is the most popular form of "administered arbitration" currently used in Hong Kong, we intend to concentrate on that system when discussing the pros and cons of this form of arbitration.

10.044 The argument for ICC arbitration basically amounts to issues of cost and quality control. The cost of ICC arbitration is governed by the amount in dispute. The administrative fee of the ICC is based upon a sliding scale depending upon the value of the claim (and the counterclaim if any) up to a maximum of US$113,215. There is also a sliding scale for the fees and expenses of the tribunal. This shows a "minimum" and "maximum" remuneration that an arbitrator will receive, once again dependent on the amount at stake. It should be noted that Appendix 3 art.2 of the ICC Rules enables the court, in exceptional circumstances, to fix a sum higher or lower than the limits as defined by the ICC scale.

10.045 It should also be emphasised that the ICC scales have no relevance whatever to the amount of legal or other fees which the parties' respective lawyers and other expert advisers may incur. As this is the major item of cost in any arbitration, it follows that the ICC system controls on the fees and expenses of the tribunal in practice have little effect upon the overall costs of the arbitration. Little can be done by institutional rules in themselves to limit overall cost, save that limits on cost recovery can be imposed (see, for example, CIETAC, art.59). It is also possible for the parties to agree in the arbitration agreement that no costs will be recovered whatever the outcome of the dispute, although this is not an intention readily to be imputed. Section 57 of the Hong Kong Arbitration Ordinance empowers an arbitral tribunal to direct "that the recoverable costs of the arbitral proceedings before it are limited to a specified amount".

10.046 It might seem illogical and unfair (perhaps both to the arbitrators and the parties) to base an arbitrator's remuneration solely upon the amount at stake in any individual case, since it is trite that a dispute involving a modest sum potentially may raise most difficult points of law and fact, and conversely a case involving several hundred million dollars may, in substance, be relatively simple.

10.047 The general consensus in Asia is that the ICC costs-system is not really appropriate for "fact heavy" cases which may require substantial time to resolve; in particular huge construction cases are regarded as particularly unsuitable to this procedure, especially where the sum involved bears no relationship to the factual/legal complexity of the particular case.

10.048 On the other hand, a fixed fee or a fee set within a range does much to encourage efficiency on the part of the tribunal, although there are circumstances where such a fee can or may lead to undesirable results.

10.049 In particular, where the arbitration is complex and the volume of documentation is substantial, time-constraints—often referred to as "the chess-clock approach"—imposed by a tribunal may be seen by the parties to be inappropriate or perhaps even unfair. The tribunal understandably will wish to limit the parties' submissions and the

10.133 The authors have come across cases where the parties do not make a choice of language. This then often gives rise to enormous difficulties. In fact, failure to choose the language of the arbitration can in some jurisdictions completely "freeze" the whole arbitration. When each party has appointed an arbitrator, and these arbitrators are only fluent in their own language, and where the parties themselves speak different languages, which and whose language is to prevail? It must not be forgotten that the facility in language may well be a factor in the choice of the third arbitrator, and again this could lead to an impasse. Our overwhelming advice is to make a specific choice in the arbitration clause and not to put it off on the basis that the problem may never arise. It often does, and frequently comes back to haunt the contract drafter.[55]

10.134 Particularly for "fact heavy" cases involving many documents, the issue of translation of materials also is a focus of procedural dispute, and can have many cost consequences. Having to translate, for example, all Chinese documents into English may take a long time, and in very many cases much of that which has been translated will be of peripheral relevance only. It is possible to include simple provisions in the arbitration agreement providing that those seeking to rely on documents at any hearing shall provide translations of them, at their interim cost. This cost usually would form part of the costs covered in the arbitrators award, and such costs generally would be recoverable by the winning party.

21. Rights of Appeal—Opting out/Contracting in

10.135 One of the approaches adopted by the arbitration legislation and the courts, but not always appreciated by contract drafters, is that selection of arbitration as the method of dispute resolution means that the parties accept that the decision of the arbitrator(s) will be final. This is a significant and major difference from the court system. It brings with it the benefit of a limited process which, when concluded, will allow the parties to apply their energies to the productive pursuit of their ordinary business. However, it also means that the ability to challenge decisions which are suspected to be "wrong" or otherwise in significant error is severely curtailed.

10.136 The well-informed contract drafter can include provisions which either further limit the possibility of any appeal, or others which significantly increase it. The rights of recourse against the award in Hong Kong is sanctioned by s.81 of the Ordinance, incorporating art.34 of the UNCITRAL Model Law, the full text of which is set out in s.81, which provides that any exclusion agreement shall be of no effect in relation to an award made on, or a question of law arising in the course of a reference under an arbitration agreement unless the exclusion agreement is entered into after the commencement of the arbitration in question.

10.137 In bygone times there was some interest is the possibility of inclusion of express contractual rights of appeal, particularly if parties may appreciate the other benefits of arbitration (privacy, procedural flexibility, choice of appropriate tribunal and so forth)

[55] See Model Arbitration Clauses at Sample Document 10.1, [10.210].

but nevertheless required the ability to have some right of further challenge. Under s.81 of the legislation, however, *via* express incorporation of art.34, the circumstances in which an arbitral award may "only" be set aside by the court is covered within in the four circumstances adumbrated within art.34(2), namely incapacity of a party to the arbitral agreement or invalidity under the proper law of the agreement or under the law of the state seized with the application, lack of proper notice of the appointment of an arbitrator or of the arbitral proceedings, that the award deals with a dispute not falling within the terms of the submission to arbitration, or containing decisions on matters beyond the scope of the submission to arbitration, and finally that the composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Model Law; alternatively that on any such application to set aside the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of the state seized with the application or that the award is in conflict with the public policy of that state: in this context, see the 10 propositions adumbrated by a former judge of the Hong Kong Commercial Court purporting to summarise the "public policy" doctrine as it currently applies in Hong Kong.[56]

22. Excluding the Courts Supervisory Jurisdiction

10.138 The court in Hong Kong will retain the powers it has whatever the arbitration agreement might purport to say. It is not possible to attempt to agree positively to exclude the court's role of supervision and assistance to arbitrations, and it seems that any attempt so to do will be struck down as void and unenforceable.

23. Interim Relief

10.139 It is sometimes the case that particular contracts may be very sensitive to breach. For instance, breach of an agreement for the use of intellectual property may require speedy injunctive relief. The time taken to appoint an arbitrator can be too long to satisfy the commercial needs of the dissatisfied party, although for other reasons, perhaps ease of enforcement of damages, arbitration may be desirable to resolve disputes.

10.140 In Hong Kong, arbitrators have powers to grant interim relief, an aspect which specifically is dealt with in the Ordinance at s.37 *et seq.*, wherein art.17B–17G of the UNCITRAL Model Law are incorporated: it is worth emphasising that under s.38, incorporating art.17C of the Model Law, it is specifically provided that a preliminary order shall be binding on the parties, but that it does *not* constitute an award, and "shall not be subject to enforcement by a court".

10.141 As to the powers of the Hong Kong court, s.45 of the Ordinance provides that on the application of any party, "the Court may, in relation to any arbitral proceedings

[56] William Stone QC, "Public Policy in the Enforcement of New York Convention Awards: A Hong Kong Perspective" (July 2011) *Asian Dispute Review*.

11.041 In *AT&T Corp v Saudi Cable*, the English Court of Appeal rejected an application to remove a highly respected arbitrator because he was a non-executive director of a main competitor to one of the parties.[77] The Court analysed all relevant circumstances and concluded that the non-executive directorship was simply an incidental part of the arbitrator's varied professional life, and therefore could not properly be said to have exerted any influence on him when acting in his capacity as arbitrator.[78] In *Taylor v Lawrence*, the English Court of Appeal found it "unthinkable" from an informed observer's point of view that a judge would be influenced to favour a party merely because that party happened to be represented by lawyers who were acting for the judge in a personal matter in connection with a will.[79]

11.042 More recently in Hong Kong, the Court of First Instance dismissed a challenge against an arbitrator on the basis of his social and professional relationship with one of the defendants' lawyers, and in particular the fact that the arbitrator and the lawyer both sat on the HKIAC Council and spoke at several conferences together. Applying the "reasonable apprehension of bias" test, the Court concluded that the circumstances did not give rise to a real possibility of bias. In support of the conclusion, the Court reasoned that ordinary contacts between two highly regarded practitioners did not constitute a disqualifying relationship, given that the international arbitration circle in Hong Kong was small.[80]

11.043 More direct links between an arbitrator and a party will give rise to removal. An arbitrator's appointment was terminated on the basis that he had been a close friend of the authorised representative and expert witness for the respondents for 25 years.[81] Similarly a judge was removed because of his close personal relationship over a period of 30 years with a witness.[82] An arbitrator was removed where a firm in which he was a salaried partner carried out a large amount of separate legal work for an associated company of one of the parties.[83] Note however that a similar argument was rejected by the English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd*, where the Court found that the link between the large firm of solicitors in which the judge was a senior partner and one of the parties was too remote to allow disqualification on the basis of either a direct financial interest or apparent bias.[84]

11.044 A challenge to a sole arbitrator in a trade arbitration, because the arbitrator had previously been in dispute with one of the parties, also failed. The English High Court held that this was no more than "an ordinary incident of commercial life" occurring in the relatively small field of trade arbitration.[85]

[77] The competitor had also been a disappointed bidder for the contract subject to arbitration in the case.

[78] Note also the similar decision of the Privy Council in relation to the Hong Kong Panel on Takeovers and Mergers, *Panel on Takeovers and Mergers v William Cheng Kai Man* [1995] 2 HKLR 302. The Privy Council dismissed an application relating to a member of the Panel on the basis that the member was a director and substantial shareholder in another company which would benefit if a company which the Panel was investigating was ordered by the Panel to take a particular step. The interest of the Panel member was found to be too remote and contingent to give rise to the necessary apprehension of bias.

[79] [2002] 3 WLR 640, para.73.

[80] *Jung Science Information Technology Co Ltd v ZTE Corp* [2008] 4 HKLRD 776.

[81] *Chan Man Yiu v Kiu Nam Investment Corp Ltd* (unrep., HCCT 110/2000, [2000] HKEC 1355).

[82] *Sir Alexander Morrison v AWG Group Ltd* [2006] 1 WLR 1163, para.22.

[83] *Save & Prosper Pensions Ltd v Homebase Ltd* [2001] L&TR 11.

[84] See *Locabail*, [2000] 2 WLR 870, *Locabail (UK) Ltd v Waldorf Investment Corp* [2000] HRLR 623.

(b) Previously expressed views of the arbitrator

11.045 In certain circumstances, previously expressed views of an arbitrator which suggest a certain pre-disposition to a particular party or a particular issue can constitute grounds for removal.[86] For example, where an arbitrator sits in related proceedings involving the same or related issues and reaches a substantive determination in one arbitration of issues which remain to be decided in another arbitration, the arbitrator will be subject to challenge for bias or prejudice by reason of pre-determination.[87] By way of illustration, in *Sphere Drake Insurance*, a reinsurance expert was appointed to give advice to several defendants at an early stage in fraud litigation before the English Court. He was later nominated as an arbitrator in related arbitration proceedings. The other party in the arbitration applied for him to be removed on grounds of apparent bias. The Court granted the application, observing that the arbitrator's involvement in the fraud litigation was "with the very issues that are central to the case which he may have to decide [in the arbitration]" and that "he must inevitably have formed some view about the individuals concerned and their methods of underwriting and the probity or otherwise of it"[88] amongst other facts that may cause a fair-minded and informed observer to conclude that there is a real possibility of apparent bias.

11.046 Guidance can also be found in a number of decisions dealing with issue conflict in the investment treaty arena. For example, in *Telekom Malaysia Berhad v Republic of Ghana*, an arbitrator's role as counsel in an unrelated matter advocating a position which was adverse to one of the parties in the arbitration proceedings in which he was sitting as arbitrator was said to give rise to justifiable doubts about his impartiality.[89] In *Eureko v Poland*, a question was raised as to whether an individual could act as arbitrator and render an award in one arbitration which may potentially aid his case in another arbitration where he acted as a counsel. Although the question was not addressed in the subsequent court proceedings, commentators have suggested that a similar conclusion to the one in *Telekom Malaysia Berhad v Republic of Ghana*

[85] *Rustal Trading Ltd v Gill & Duffas SA* [2000] 1 Lloyd's Rep 14.

[86] One of the five applications in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 2 WLR 870 & *Timmins v Gormley* [2000] QB 451 against a judge was successful on this basis. The judge had written four strongly worded articles which suggested a pre-disposition to the interest group represented by one of the parties. The decision articulated a general position that an objection on the basis of a real danger of bias could not be soundly based on a judge's "previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers" (see para.25).

[87] See Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (2000, 3rd edn) 233, citing *Setec Batiment v SICCA*, 1987 Rev. Arb., 63 note Pierre Bellet. See also Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test* (Kluwer Law International, 2009) 1–28, "outcome preferences based on legal opinion are actionable when a decision maker gives the appearance that he or she has judged the facts or merits prior to the scheduled hearing. This substantive bias may be the result of an arbitrator's prior determination of a matter that is factually or legally similar to the case now before him or her."

[88] *Sphere Drake Insurance v American Reliable Insurance Company* [2004] EWHC 796 (Comm), [27] and [32].

[89] Case No. HA/RK 2004, 667 & HA/RK 2004, 788.

13.006 The courts are generally reluctant to allow parties to avoid an apparent obligation to arbitrate pursuant to an arbitration agreement. More often than not, they are likely to enforce arbitration agreements and to dismiss litigation brought in breach of them. Despite this, law reports and court schedules show that courts are frequently required to resolve disputes between parties who disagree as to whether claims should be arbitrated or litigated, and who are seeking to stop proceedings brought in one or another forum. In many cases, such disputes arise because parties wish to commence litigation (or arbitration) proceedings, for tactical reasons. For example, in some cases, a foreign party may wish to commence court proceedings in its home jurisdiction to put the other party at a disadvantage. In other cases, a party may argue that the dispute in question is outside the scope of the arbitration agreement, in order to delay or derail the arbitration. Regardless of the underlying reasons, it is clear that many parties regard the choice between arbitration and litigation as having real significance, and that they are prepared to disregard or to try to avoid previous agreements in order to pursue the different means of dispute resolution that they now favour.

3. Time Limits

13.007 The law and rules on limitation of actions (prescription) apply equally to arbitrations as they do to litigation.[2] Just as an intending plaintiff must issue court proceedings within the appropriate period laid down by the Limitation Ordinance (Cap.347), the intending claimant in an arbitration must also commence the arbitration within those same periods. Claimants who fail to do so may find that the claim has become time barred.[3]

13.008 The Limitation Ordinance merely prescribes the maximum periods within which a claimant must begin proceedings. It is open to the parties to agree to more restrictive time limits in their arbitration agreement or associated commercial contract. Depending on the agreement between the parties, the effect of non-compliance with contractual time limits may be to remove the right to commence an arbitration after the contractual time limits have expired, leaving unaffected the claimant's right to begin litigation within the longer time limits prescribed by law. Alternatively, the effect of the parties' agreement may be to extinguish the right to claim altogether upon expiry of the contractual time limits.

(a) The Limitation Ordinance

13.009 The Limitation Ordinance contains a variety of time limits applicable to different kinds of claims. The time limits most commonly encountered in relation to arbitrations are as follows:

[2] Arbitration Ordinance (Cap.609) s.14(1), see Appendix A1.

[3] In these circumstances, the arbitration agreement is regarded as still capable of being performed, but any claim brought under it may be dismissed by reason of the time bar if this is relied on as a defence: *Tommy CP Sze & Co v Li & Fung (Trading) Ltd* [2003] 1 HKC 418, 432.

(1) Actions based on contract must generally be brought within six years from the date on which the cause of action accrued.[4] The law on accrual of causes of action is complex but provides in essence that an action for breach of contract accrues on the date when the breach occurs, not on any later date when the resulting damage is suffered or discovered;

(2) Actions based in tort[5] must also be brought within six years from the date on which the cause of action accrued.[6] However, this time limit can be extended in the case of actions for damages for negligence, to facilitate cases where the damage has not been discovered until long after the negligent act that caused the damage. In such cases the claim must be brought within three years from the date of knowledge of the relevant facts giving rise to the claim, subject to an overriding time limit of 15 years from the accrual of the cause of action;[7]

(3) In general, a limitation period of six years applies for breaches of fiduciary duty in connection with trust property. This would cover, for example, situations where a company director commits a breach of trust in relation to company trust property. However, where it is shown that the breach of trust is fraudulent, then no limitation period will apply in relation to such breaches.[8]

13.010 Any failure to comply with these time limits may be fatal to the claimant's claims. The Limitation Ordinance is clear that actions "shall not be brought" after the expiry of the applicable period.[9] If a claimant commences proceedings after the expiry of the applicable limitation period, the respondent will be able to raise limitation as a complete defence to the claim.[10]

(b) Date of commencement of an arbitration

13.011 Clearly, therefore, it may be vitally important to identify the exact date on which an arbitration begins (when the claim "is brought", in the words of the Limitation Ordinance).

13.012 Hong Kong law provides that unless otherwise agreed by the parties, arbitral proceedings commence on the date on which a request for a dispute to be referred to arbitration is received by the respondent.[11] As for the receipt of the request, the Arbitration Ordinance provides that unless otherwise agreed by the parties:

[4] Limitation Ordinance, s.4(1). Exceptionally, the limitation period for actions based on contract may be 12 years. In particular, this is the case for contracts executed under seal: s.4(3).

[5] It should, however, be noted that absent a contractual agreement to arbitrate, claims brought in tort are unlikely to be arbitrated, unless parties agree to a post-dispute arbitration agreement.

[6] Limitation Ordinance, s.4(1).

[7] *Ibid.*, ss.31–32.

[8] See *Halsbury's Laws of Hong Kong* (LexisNexis), vol. 26(2), 2009 Reissue, para.400.432; *Peconic Industrial Development Ltd v Lau Kwok Fai* [2009] 2 HKLRD 537, CFA; s.20, Limitation Ordinance (Cap.347).

[9] *Ibid.*, s.4(1).

[10] It should be added that the onus is on the respondent to raise any available limitation defence. Courts and arbitrators are not required to consider limitation issues of their own motion, and in practice they rarely do so.

[11] Arbitration Ordinance (Cap.609) s.49(1), giving effect to art.21 of the UNCITRAL Model Law.

confidential basis (in contrast to legal correspondence in respect of the sale of land, for example) and while the relationship of client and legal advisor subsists.[27] It also includes litigation privilege, where confidential communications are made, after litigation is commenced or contemplated, between a lawyer and client, a lawyer and non-professional agent, and a lawyer and third party, for the sole or dominant purpose of such litigation.

(2) The documents are subject to public interest immunity, where disclosure of a document would be injurious to the national interest.[28]

(3) The documents in question may tend to incriminate the party or his or her spouse (i.e. the disclosure would tend to expose that person to a real risk of criminal charge or penalty).

(4) The production is contrary to an agreement between parties, where communications are "without prejudice".[29] To encourage settlement of disputes, the courts recognise correspondence between the parties or their lawyers made in good faith to attempt to settle the dispute, as privileged. This rule operates whether or not the communication was expressed to be "without prejudice," but it is prudent to endorse the communication as such. The presence of such an endorsement is not conclusive as to whether a document is privileged. The protection extends to subsequent litigation connected with the same subject-matter.[30]

(5) Production would be oppressive in the circumstances of the case.[31]

(6) If a document in respect of which a party is entitled to claim privilege comes into the possession of another party without fraud or improper conduct, the privilege will be lost.

(h) Inadequate discovery—background

16.027 A typical obligation for discovery is that the parties disclose documents which relate to the issues in dispute, and which are in the "possession, custody or power" of the party making the discovery. This includes documents which are or have been in the possession, custody or power of the party making discovery, or its agents. Parties to an arbitration usually agree to limit the scope of documents to be disclosed by requiring documents "relied upon" rather than documents which "relate to the issue in dispute." Arbitral tribunals encourage an even greater narrowing of the scope of disclosure

[27] See *Minter (Pauper) v Priest* [1930] AC 558, 566, which was considered in *Three Rivers District Council v Governor and Company of the Bank of England (No. 6)* [2004] 2 WLR 1065. *Three Rivers District Council* was applied in a Hong Kong CFA case *HKSAR v Wong Chi Wai* (unrep., HCAP 8/1999, [2002] 2 HKLRD G4).

[28] *Conway v Rimmer* [1968] AC 910 at 953–954, which was applied in Hong Kong in *Apple Daily Ltd v Commissioner of the Independent Commission Against Corruption (No 2)* [2000] 1 HKLRD 647, 660.

[29] See *Rabin v Mendoza & Co* [1954] 1 WLR 271, which was followed in a Hong Kong case of *Chow Sin Kim v Cambo Enterprises Ltd* (unrep., DCCJ 4205/2006, [2008] HKEC 1726).

[30] *David J Instance v Denny Bros Printing Ltd* [2000] FSR 869.

[31] Also see RHC O.24, r.2(5), r.3(3) and r.8(1).

required.[32] A limit on the relevance element of discovery is the most effective way to reduce the volume of disclosable documents.

16.028 Full litigation style discovery can be onerous and wasteful. The time and money may well be better off spent on other preparation, particularly when the great majority of the documents disclosed are of peripheral value only and are not relied upon or referred to by either of the parties at the hearing.[33]

16.029 Further, where one party discloses all documents in accordance with its discovery obligations, and the other party does not, this makes it difficult for the obedient party to advance its case, and is unfair.[34]

(i) Inadequate discovery—further and better list

16.030 Where a party is of the view that a list of documents is deficient, it may write to its opponent and request that it provide a further and better list of documents. If the response is unsatisfactory, and the offending party refuses to rectify the deficiency, the requesting party may apply to the arbitral tribunal for an order for a further and better list of documents. The application may be granted where:

(1) from the list of documents, or from documents referred to in it, or from admissions of the party making the discovery, there is reasonable ground for supposing that the party has, or has had other documents relating to the matter in issue, in its possession, custody or power which have not been disclosed; or

(2) it appears that the party has misconceived the principles upon which discovery should be made or has misconceived its case so that the arbitral tribunal is confident that if it had conceived it properly it would have disclosed further documents.[35]

16.031 The arbitral tribunal has power to make an order in respect of the list of documents by virtue of its powers under s.56(1)(b), unless otherwise agreed by the parties.

16.032 An application for a further and better list may be coupled with an application for specific discovery. Unlike specific discovery, the party seeking further and better discovery need not prove that there are further documents, so long as there is a reasonable suspicion that there are further documents. Accordingly, an application for further and better discovery is recommended, on its own where the applicant cannot precisely identify the documents sought.

[32] For example, discovery may be dispensed with, specific discovery only may be ordered or bundles of critical documents may be agreed by the parties.

[33] *Sunderland Steamship P and I Association v Gatoil International Inc (The Lorenzo Halcoussi)* [1988] 1 Lloyd's Rep 180, 184, which was applied in Hong Kong in *Wong Din Shin v Kung* [2002] 2 HKLRD G4 (CFI). C.f. *Sunderland* case was distinguished in *Joint & Several Liquidators of Kong Wah Holdings Ltd v Grande Holdings Ltd* [2007] 1 HKLRD 116 (CFA) due to the specific facts in that case.

[34] Sir Michael Mustill and Boyd S.C., *Commercial Arbitration* (2nd edn), (Butterworths, 1989), 325.

[35] *Jones v The Monte Video Gas Co* (1879-80) LR 5 QBD 556 and Matthews, P. and Malek, H.M., *Discovery* (Sweet & Maxwell, 1992), 125.

or formed under the law of a place, or the central management or control of which is exercised, outside Hong Kong, which normally would have been sufficient basis to order security in court actions (albeit, of course, on applications for security in court actions, all circumstances of the case are taken into account). Section 7(4) reflects the position under s.56(2) concerning security for costs of the arbitration. This is consistent with the rationale that arbitrations tend to be international in nature, and parties may choose arbitration in Hong Kong even though one or more of them are located outside Hong Kong. Therefore, the Court may only order security for costs if it also has other grounds apart from the fact that the applicant is located outside Hong Kong.

20.087 The Arbitration Ordinance does not provide a list of factors which the Court should consider when deciding whether or not to grant security. An important factor is whether the applicant will be able to pay the costs of the application if the application is unsuccessful.[158] In the English case of *X v Y, Y v X*[159] security for costs was ordered on the basis that there was a real risk that the assets of X (the major asset being an illiquid shareholding in a subsidiary company) were not readily available for the satisfaction of any order for costs. Further, several awards had been made against X, which remained unpaid, and in such circumstances, it was expected that X would resist any attempt at enforcement and enforcement of any costs order would involve considerable delay and expense on the part of Y. As for the relevance of the point that X, by challenging jurisdiction[160], was seeking to have a second bite of the cherry by re-arguing the question of jurisdiction, which it had already lost as per an earlier award, this would only have tipped the scale if the court was uncertain on the question as to whether X had sufficient assets available for execution.

20.088 In *Peterson Farms v C & M Farming Ltd*,[161] the court was of the view that generally the party against whom a challenge is made should first demonstrate that the challenge is flimsy or lacks substance as a threshold requirement for the court to then consider whether in all the circumstances of the case, it would be appropriate to require security (or monies payable under the award to be paid into court) from the applicant. On the facts of the case, based on what evidence there was before the court, this threshold requirement was held not to have been met. Further, on the facts of the case, enforcement proceedings were on foot in the United States, and the need to order security was seen to be diminished.

[158] *Golden Sand Marble Ltd v Hsin Chong Construction Co Ltd* [2005] 1 HKLRD 598. See also *Guo Shun Kai v Wing Shing Chemical Co Ltd* [2013] 3 HKLRD 484, which considered whether security ought to be given by Wing Shing in the context of adjournment of an application to set aside leave to enforce an award of the South China Sub-Commission of CIETAC for payment of over RMB 40 million by Wing Shing to Guo pending the decision of the Shenzhen Intermediate People's Court (the "Shenzhen court") on an application for setting aside the award. Security in the amount of HK$20 million was ultimately ordered for the following reasons: Wing Shing had produced no documents as to the grounds or merits of the application for setting aside before the Shenzhen court; Wing Shing had changed its registered office to that of a service company; Wing Shing had sold its industrial property; Wing Shing's financial performance was deteriorating and its former parent company sold its shareholding in Wing Shing shortly after the award was made, and Wing Shing's total assets were approximately HK$45.04 million with unaudited net liabilities of approximately HK$143.5 million.

[159] [2013] EWHC 1104 (Comm).

[160] Under section 67 of the English Arbitration Act 1996, which provides that an award may be challenged as to the tribunal's substantive jurisdiction and the court may affirm, vary or set aside the award.

[161] [2004] 1 Lloyd's Rep 614.

(v) *Payment into court*

20.089 Section 7(6) provides that the Court may order an award debtor to pay monies payable under the award into court, or otherwise provide security for the same, pending determination of the serious irregularity challenge (or appeal on a question of law). The Court may also direct that such challenge or appeal be dismissed if the money or security is not paid or provided.

20.090 The *X v Y, Y v X*[162] case also considered the question of payment into court. The court considered whether X's challenge prejudiced Y's ability to enforce the relevant award including whether there was risk of dissipation of assets. The application for payment in failed because a freezing order was already in place in Australia where Y's enforcement attempts were concentrated and X had substantial, albeit illiquid, assets.

(b) Grounds for challenge

20.091 The grounds for challenging an award for serious irregularity are contained in s.4(2). From the words, "Serious irregularity means an irregularity of one or more of the following kinds", it appears that the list of serious irregularities on which an award may be challenged is exhaustive. The same wording is used in the English equivalent, s.68 of the 1996 English Arbitration Act. The list contained in s.68(2) is taken to be exhaustive,[163] and it is likely that s.4(2) will be read in the same way in Hong Kong.

20.092 Serious irregularity which relates essentially to procedural unfairness should be distinguished from errors or mistakes of law or fact.[164] Challenges for serious irregularity should not be challenges on the merits or substantive rulings. The distinction should be maintained. Challenges for serious irregularity should not be used as a means to circumvent the restrictions on the Court's power to intervene in arbitral proceedings in appeals on questions of law pursuant to s.5 of Sch.2.[165]

(i) *Substantial injustice*

20.093 To challenge an award successfully, apart from establishing one or more of the grounds of serious irregularity, an applicant must show that substantial injustice has been (or will be) caused to it. S.68 of the 1996 English Arbitration Act was intended to be a longstop and only available in extreme cases where the arbitral tribunal has gone so wrong in its conduct of the proceedings that justice calls out for such wrong

[162] [2013] EWHC 1104 (Comm).

[163] See Harris, Planterose and Tecks, *The Arbitration Act 1996: A Commentary* para (fn 108). Paragraph 68C states: "The list of grounds is exhaustive and deliberately so, since the DAC [Departmental Advisory Committee on Arbitration Law (England & Wales)] thought that the courts should not be free to invent more. The court's power is essentially designed to be supportive of arbitration in the sense of maintaining its good reputation by being available to rectify glaring and indefensible irregularities that would occasion injustice. The limitations on that power restrain the court from interfering with the arbitral process on any lesser occasion."

[164] The focus of the enquiry is due process and not the correctness of the tribunal's decision: *Primera Maritime (Hellas) Limited v Jiangsu Eastern Heavy Industry Co Ltd* [2013] EWHC 3066 (Comm) at para 6 citing *Abuja International Hotels v Meridian SAS* [2012] EWHC 87 (Comm) at paras 48 –49.

[165] See *Petroships Pte Ltd of Singapore v Petec Trading and Investment Corporation of Vietnam* [2001] 2 Lloyd's Rep 348, which summarised the DAC Report, in which the approach intended to be adopted by the courts in applications under s.68 was set out and *Weldon Plant Ltd v The Commission for the New Towns* 1 All ER (Comm) 264.

23.092 ***Prior UDRP decisions***—When preparing a complaint, it is the author's view that complainants ought to cite relevant past UDRP cases where possible. Although the UDRP does not require panels to defer to prior decisions, what has become common practice amongst many panellists is the practice of referring to previously published UDRP decisions as if they were binding precedents.

23.093 By the same token, however, complainants ought to be careful in their selection of prior UDRP decisions. Those decisions may be premised on specific regional statutes or case laws that are inapplicable to the complainant's case. Further, as the UDRP is, in certain respects, loosely worded without much guidance on interpretation, there are more often than not degrees of discrepancies or inconsistencies between UDRP decisions on similar issues. Hence, a cited UDRP decision may not necessarily be the leading authority on an issue in dispute.

23.094 Although the precedent value of past UDRP decisions is questionable, it probably cannot harm a complainant to set out in its complaint those principles and authorities that it believes ought to be applied by a panel.

23.095 ***Choice of Law***—On a related point, a complainant ought to state in the complaint which law it believes should be applied by a panel in reaching its decision. It is generally accepted that if both the complainant and respondent are residents of one country and the domain name is registered in that country, it is appropriate for a panel to refer to that country's laws. However, a problem arises where the parties are from different countries and each asserts competing rights to a domain name based on local law. Here, complicated choice of law issues arise. The UDRP provides no guidance on which country's laws should apply and prevail.

23.096 Panels are thus free to decide which country's laws should be applied to determine whether the domain name registrant has a legitimate interest. Panellists are drawn from a number of different legal, cultural and other backgrounds. In these circumstances, more often than not, the panellist exercises discretion to apply the law of his or her own country, rather than the laws of the countries where the complainant or respondent reside, as they are influenced by the laws with which they feel most comfortable.

23.097 ***Exhibits***—Complainants ought to attach all exhibits referenced in the complaint. It is useful for a table of contents to be included when annexing the exhibits. Although UDRP proceedings do not provide for discovery procedures that are typically found in litigation, it will be prudent for a complainant who cites a fact and has documentary evidence to support this fact to annex this evidence. For instance, if a complainant receives a letter from a respondent offering to sell the domain name for a large sum of money, a copy of that letter should be exhibited. A panel should not need to guess the veracity of facts presented in the complaint. However, that is not to say that panels should be burdened with excessive insignificant documents.

23.098 ***Transmission***—When forwarding the complaint electronically to the respondent, it is the provider's responsibility to employ reasonably available means calculated to achieve actual notice to the respondent. This responsibility could be discharged if the complaint is sent by email, post or fax to the addresses recorded in the domain name's registration data, or such other email addresses as notified by the respondent (para.2(a), Rules).

23.099 ***Fees***—The complainant must pay to the provider an initial fixed fee, in accordance with the provider's supplemental rules, within the time and in the amount required (para 19(a), Rules). All fee schedules are based on the number of domain names in issue and the number of panellists involved. If a complainant takes issue in relation to multiple domain names registered by a respondent or if it elects a three rather than one-person panel, the costs will be higher.

23.100 A complainant must pay all applicable fees before the provider will forward a copy of the complaint to the respondent. It is crucial that payment is made at the time of submission of the complaint, as time does not run for the respondent to answer the complaint until after the complaint is forwarded to it by the provider. Further, the registrar of the domain name is not notified of the commencement of the action until the provider has forwarded the complaint to the respondent, and unless the registrar is appropriately notified, the domain name will not be put on hold and may be sold or transferred during this time.

23.101 ***Mistakes***—If a complainant finds that it has made a mistake in the complaint, and a response has not yet been filed, the complainant can either amend the complaint and ask if the provider can replace the original complaint with the amended version, or submit a new complaint and withdraw the original version. The complainant will probably lose the fees paid in respect of the original filing. Alternatively, if a response has already been filed, a complainant can either seek to file a reply which answers the response and corrects the mistake previously made, or withdraw the original complaint and file a new claim.

Compliance review

23.102 After a complaint is filed, the provider will appoint a case administrator through whom all communications must be made.

23.103 The next step is for the provider to review the complaint for compliance with formalities under the UDRP, the Rules and the provider's supplemental rules. If the complaint is in compliance, the provider will forward the complaint to the respondent within three days of receiving the application fees from the complainant (para 4(a), Rules). When the complaint is forwarded by the provider to the respondent, the proceeding is deemed to have commenced (para 4(c), Rules).

23.104 If the complaint is somehow deficient, the provider will notify the complainant and the respondent of the deficiencies. The complainant will be given five days to make corrections. If the complainant fails to remedy the defects within five days, the complaint will be withdrawn, without prejudice to another complaint being filed in respect of the domain name (para 4(b), Rules). Any fees paid by the complainant will not be refunded.

The response

23.105 A respondent wishing to file a response must do so within 20 days of the commencement of the proceedings (para 5(a), Rules). If a respondent receives a complaint from the complainant and not the provider, the proceedings are not yet deemed to have commenced; however it will be prudent for the respondent to begin preparing the response in the interests of gaining time.

aside an arbitral award, the court shall under the same authority simultaneously revoke any enforcement ruling which has been issued in respect to the arbitral award.[33] Once an arbitral award has been revoked by a final judgment of a court, a party may bring the dispute to the court unless otherwise agreed by the parties.[34]

8. Enforcement of the Arbitral Award: Enforcement Ruling Required

25.037 Taiwan Arbitration Law provides that an arbitral award rendered by arbitrators has the same force as a final judgment of a court. An arbitral award is enforceable only after the court grants an enforcement ruling upon a party's petition. Nevertheless, an arbitral award may be enforced without the court's enforcement ruling if the contending parties so agree in writing and the arbitral award concerns any of the following subject-matters:[35]

(1) payment of a specified sum of money or certain amount of fungible things or valuable securities;

(2) delivery of a specified movable property.

25.038 The court will deny an application for enforcement ruling if:[36]

(1) the arbitral award concerns a dispute not contemplated by the terms of the arbitration agreement, or exceeds the scope of the arbitration agreement, unless the offending portion of the award can be severed without affecting the remainder of the award;

(2) the reasons for the arbitral award are not stated as required by law, unless the arbitral tribunal subsequently corrected the omission; or

(3) the arbitral award directs a party to act in contravention of the law.

9. Enforceability of Foreign Arbitral Awards in Taiwan

(a) General principle

25.039 Parties may apply for enforcement of a foreign arbitral award only after first applying for and securing a Taiwan court order recognising the award. Article 47 of the Arbitration Law provides that a foreign arbitral award is an arbitral award rendered outside the territory of Taiwan or pursuant to foreign laws within the territory of Taiwan. The legislative interpretation of art.47 provides that the "foreign laws" refer to: (1) the

[33] Article 42 of the Arbitration Law.
[34] Article 43 of the Arbitration Law.
[35] Article 37 of the Arbitration Law.
[36] Article 38 of the Arbitration Law.

foreign arbitration laws and rules; (2) the rules of foreign arbitration organisations; or (3) the arbitration rules of international organisations. As Taiwan is not a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (New York Convention), Taiwan courts do not apply the New York Convention to the recognition and enforcement of foreign arbitral awards, but apply only Taiwan Arbitration Law.

25.040 Article 49.1 of the Arbitration Law provides that the court shall dismiss an application for recognition of a foreign arbitral award when (1) the recognition or enforcement of the arbitral award is contrary to the public order or good morals of Taiwan, or (2) the dispute is not arbitrable under the Taiwan law. Moreover, under art.47.2 of the Arbitration Law, the court "may" dismiss an application for recognition of a foreign arbitral award if the country where the arbitral award was made or whose laws govern the arbitral award does not recognise arbitral awards rendered in Taiwan. In a Supreme Court ruling rendered in 1986, with respect to recognition of an arbitral award made in the United Kingdom, the Supreme Court pointed out that based on comity and promotion of international judicial co-operation, the court has the discretion to decide whether to recognise a foreign award if the country where the arbitral award was made does not recognise Taiwan arbitral awards. In practice, most Taiwan courts recognise foreign arbitral awards even in the absence of reciprocity. There are, however, a few previous court judgments which did not recognise foreign arbitral awards due to this lack of reciprocity.

25.041 Article 50 of the Arbitration Law provides that if a party applies for recognition of a foreign arbitral award, the respondent may request the court to dismiss the application within 20 days from the date of receipt of the notice of the application on any of the following grounds:

(1) the arbitration agreement is invalid as a result of the incapacity of a party according to the law chosen by the parties to govern the arbitration;

(2) the arbitration agreement is null and void according to the law chosen to govern the arbitration or, in the absence of a choice of law, the law of the country where the arbitral award was made;

(3) a party is not given proper notice of the appointment of an arbitrator or of any other matter required in the arbitral proceedings, or any other situation giving rise to a violation of due process;

(4) the arbitral award is not relevant to the dispute subject to the arbitral agreement or exceeds the scope of the arbitration agreement, unless the offending portion can be severed without affecting the remainder of the arbitral award;

(5) the selection of the arbitral tribunal or the arbitration procedure contravenes the arbitration agreement or, in the absence of an arbitration agreement, the laws of the arbitration venue; or

(6) the arbitral award is not yet binding on the parties or has been suspended or revoked by a competent court.

(c) may order that—

(i) the fees and expenses as determined under paragraph (b) to be payable are to be paid to the tribunal out of the money paid into the Court; and

(ii) the balance of the money paid into the Court, if any, is to be paid out to the applicant.

(3) For the purposes of subsection (2)—

(a) the amount of the fees and expenses payable is the amount which the applicant is liable to pay—

(i) under section 78; or

(ii) under any agreement relating to the payment of the arbitrators; and

(b) the fees and expenses of—

(i) an expert appointed under article 26 of the UNCITRAL Model Law, given effect to by section 54(1); or

(ii) an assessor appointed under section 54(2),

are to be treated as the fees and expenses of the arbitral tribunal.

(4) No application under subsection (2) may be made if—

(a) there is any available arbitral process for appeal or review of the amount of the fees or expenses demanded; or

(b) the total amount of the fees and expenses demanded has been fixed by a written agreement between a party and the arbitrators.

(5) Subsections (1) to (4) also apply to any arbitral or other institution or person vested by the parties with powers in relation to the delivery of the arbitral tribunal's award.

(6) If subsections (1) to (4) so apply under subsection (5), the references to the fees and expenses of the arbitral tribunal are to be construed as including the fees and expenses of that institution or person.

(7) If an application is made to the Court under subsection (2), enforcement of the award (when delivered to the parties), but only in so far as it relates to the fees or expenses of the arbitral tribunal, must be stayed until the application has been disposed of under this section.

(8) An arbitrator is entitled to appear and be heard on any determination under this section.

(9) If the amount of the fees and expenses determined under subsection (2)(b) is different from the amount previously awarded by the arbitral tribunal, the tribunal must amend the previous award to reflect the result of the determination.

(10) An order of the Court under this section is not subject to appeal.

Section:	78	**Liability to pay fees and expenses of arbitral tribunal**	L.N. 38 of 2011	01/06/2011

A1.080 (1) The parties to proceedings before an arbitral tribunal are jointly and severally liable to pay to the tribunal reasonable fees and expenses, if any, of the tribunal that are appropriate in the circumstances.

(2) Subsection (1) has effect subject to any order of the Court made under section 62 or any other relevant provision of this Ordinance.

(3) This section does not affect—

(a) the liability of the parties as among themselves to pay the costs of the arbitral proceedings; or

(b) any contractual right or obligation relating to payment of the fees and expenses of the arbitral tribunal.

(4) In this section, a reference to an arbitral tribunal includes—

(a) a member of the tribunal who has ceased to act; and

(b) an umpire who has not yet replaced members of the tribunal.

Section:	79	**Arbitral tribunal may award interest**	L.N. 38 of 2011	01/06/2011

A1.081 (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.

(2) Subsection (1) does not affect any other power of an arbitral tribunal to award interest.

(3) A reference in subsection (1)(a) to money awarded by the tribunal includes an amount payable in consequence of a declaratory award by the tribunal.

Section:	80	**Interest on money or costs awarded or ordered in arbitral proceedings**	L.N. 38 of 2011	01/06/2011

A1.082 (1) Interest is payable on money awarded by an arbitral tribunal from the date of the award at the judgment rate, except when the award otherwise provides.

(2) Interest is payable on costs awarded or ordered by an arbitral tribunal from—

(a) the date of the award or order on costs; or

(b) the date on which costs ordered are directed to be paid forthwith,

at the judgment rate, except when the award or order on costs otherwise provides.

(3) In this section, "judgment rate" (判定利率) means the rate of interest determined by the Chief Justice under section 49(1)(b) (Interest on judgments) of the High Court Ordinance (Cap 4).

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

A3.001 1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

A3.002 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

A3.003 Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

A3.004 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(*a*) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

A3.005 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.