CHAPTER 8

DOMESTIC AND INTERNATIONAL ARBITRATION

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1. Arbitration Framework

When the Arbitration Ordinance (Cap.609) (the Ordinance) came into force on 1 June 2011,[1] it abolished the distinction between "domestic" and "international" arbitration envisaged by the previous Arbitration Ordinance (Cap.341) (the Old Ordinance).[2] In place of the previous dual regime, the Ordinance creates a unitary framework for the conduct of all arbitrations in Hong Kong. However certain provisions that applied to domestic arbitrations under the Old Ordinance were retained by an "opt-in" system within the new law's framework. **8.001**

The Old Ordinance[3] provided two distinct regimes governing the operation of Hong Kong arbitrations: **8.002**

(1) for domestic arbitrations—modelled in part on the English Arbitration Act 1996 and featuring significant powers of court intervention; and

(2) for international arbitrations—based on the UNCITRAL Model Law on International Commercial Arbitration (as adopted on 21 June 1985) (the 1985 Model Law) and featuring minimal court involvement.

2. Arbitrations Commenced On Or After 1 June 2011—The Ordinance

All arbitrations which are seated in Hong Kong and commenced on or after 1 June 2011 are governed by the provisions of the Ordinance which, as mentioned above, no longer distinguishes between "domestic" and "international" arbitration. In order to maximise user-friendliness and overall familiarity to international practitioners, the content and layout of the Ordinance is based on the UNCITRAL Model Law on International Commercial Arbitration (as adopted on 21 June 1985 and amended on 7 July 2006) (the Model Law), with Hong Kong specific modifications and supplements. Parts and sections of the Ordinance follow the Chapters of the Model Law, and where a Model Law provision is adopted by the Ordinance, the text of the relevant Article is set out in full in the body of the relevant section of the Ordinance. In addition, an annotated copy of the entire Model Law is set out at Sch.1 of the Ordinance, illustrating where and how each Article has been adopted in the legislation. The Ordinance was amended in 2013 and 2015 to reflect the latest developments in arbitral practice, including to cater for the enforcement of emergency relief granted by an emergency arbitrator, to improve effective enforcement of arbitral awards, and to clarify certain provisions whose interpretation was considered unclear. **8.003**

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1 Applicable to arbitrations commenced on or after 1 June 2011 (and proceedings related to those arbitrations).

2 *Ibid*; Ordinance, para.1 of Sch.3.

3 Applicable to arbitrations commenced on or before 31 May 2011 (and all proceedings related to those arbitrations).

(a) Opt-in system for "Domestic" provisions

8.004 In an effort to preserve certain features of the domestic regime under the Old Ordinance, and to afford transitional arrangements between the dual and the unitary regimes, the Ordinance includes an "opt-in" system, under which parties can elect to apply certain procedural aspects and judicial safeguards to their arbitrations. These provisions, which reflect provisions characteristic of domestic arbitration under the Old Ordinance, are listed in Sch.2 of the Ordinance. They include the following:

(1) sole arbitrator to determine the dispute submitted to arbitration if the parties fail to agree on the number of arbitrators (para.1 of Sch.2);

(2) court power to order consolidation of arbitration proceedings, concurrent hearings, or stay of arbitral proceedings pending determination of related proceedings (para.2 of Sch.2);

(3) court power to determine a preliminary question of law (para.3 of Sch.2);

(4) court power to determine challenges to an arbitral award on the ground of serious irregularity affecting the tribunal, the arbitral proceedings or the award (paras.4 and 7 of Sch.2); and

(5) court power to hear appeals against an arbitral award on a question of law (paras.5, 6 and 7 of Sch.2).

8.005 These "opt-in" provisions apply in two instances:

(1) if an arbitration agreement provides expressly that any or all of the provisions of Sch.2 are to apply (s.99 of the Ordinance);[4] and

(2) if an arbitration agreement entered into before or within the six years following 1 June 2011 provides that the arbitration is "domestic", all of the provisions of Sch.2 of the Ordinance automatically apply (s.100 of the Ordinance)[5].

8.006 However, the Sch.2 provisions will not automatically apply if the parties agree in writing that they shall not, that is, if the arbitration agreement expressly states that:

[4] Note that where parties do not wish to adopt all of the Sch.2 provisions, there are certain combinatorial requirements on those provisions which are opted in. If the parties wish to apply para. 4 of Schedule 2 (challenge on grounds of serious irregularity), they must also apply para. 7 of Sch.2 (supplementary provisions on challenge to or appeal against arbitral award). If the parties wish to apply para.5 of Sch.2 (appeal on a question of law), they must also adopt the complementary paras.6 and 7 of Sch.2; see s.99 of the Ordinance. While it is likely that paras. 6 and 7 would apply automatically where the parties agree to apply para. 4 or 5 of Sch.2 (see Chong & Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations*, 2nd edition, Sweet & Maxwell, at para. 99.07), it is always preferable for the agreement to state expressly that they shall apply, if that is what the parties intend.

[5] This will be the case where the agreement states expressly that the arbitration agreement is domestic. It may also be the case where there is no express statement, but the arbitration agreement applies the HKIAC Domestic Arbitration Rules, or there is another indication that the parties intended the arbitration to be "domestic" (as that term was applied under the Old Ordinance).

(1) s.100 or s.101 does not apply; or

(2) s.2, 3, 4, 5, 6 or 7 applies or does not apply.[6]

(b) The operation of the opt-in system for Hong Kong construction arbitration

8.007 There is also a specific framework for the applicability of the Sch.2 provisions to construction contracts in Hong Kong.[7] This framework was developed to cater for Hong Kong's domestic construction industry which, for many years, has adopted arbitration as its preferred forum for dispute resolution. For decades, most standard form construction contracts in Hong Kong have featured arbitration agreements. This is the case for both the public and private sectors in Hong Kong, as well as Hong Kong contractors operating in other jurisdictions. Under the old Ordinance, the majority of disputes relating to domestic construction projects were resolved according to the "domestic" arbitration regime in Hong Kong, the features of which proved particularly helpful in the context of the construction industry (e.g. court-ordered consolidation of multiple arbitral proceedings where there are chains of contracts involving sub-contractors).

8.008 With this in mind, the Hong Kong legislators drew up various provisions by which the "domestic"-style features of the Ordinance would be deemed to apply automatically in instances involving chains of construction contracts. For example, if all of the provisions of Sch.2 of the Ordinance apply to an arbitration under a "construction contract" pursuant to s.100 of the Ordinance, then any sub-contract (or further sub-contract) to that construction contract *which contains an arbitration agreement* is deemed to have adopted all of the Sch.2 provisions automatically (s.101 of the Ordinance).

8.009 However, there are exceptions to these deeming provisions for construction sub-contracts which essentially limit their effect to domestic Hong Kong-related construction contracts (s.101(2) of the Ordinance). In addition, as with the usual operation of the opt-in system, the Sch.2 provisions will not automatically apply if the parties agree in writing that they shall not, that is, if the arbitration agreement expressly states that:

(1) s.100 or s.101 does not apply; or

(2) s.2, 3, 4, 5, 6 or 7 applies or does not apply[8].

[6] Section 102(1)(b)(ii) originally stated that ss.100 and 101 would not apply where the arbitration agreement stated expressly that: "*any* provision(s) of Sch.2 of the Ordinance applies or does not apply" (emphasis added). This led to a concern that parties who opted for domestic arbitration and specified the number of arbitrators in their arbitration agreements were deemed to have applied (by selecting a sole arbitrator) or chosen not to apply (by selecting three arbitrators) s.1 of Sch.2, which requires the dispute to be referred to a sole arbitrator. The Arbitration (Amendment) Ordinance 2015 amended s.102(2) to allow parties to a "domestic" arbitration to select the number of arbitrators without losing the benefit of the other Sch.2 sections.

[7] See s.101(4) of the Ordinance for the definition of "construction contract" and "construction operations".

[8] S.102(1)(b)(ii) originally stated that ss.100 and 101 would not apply where the arbitration agreement stated expressly that: "*any* provision(s) of Sch.2 of the Ordinance applies or does not apply" (emphasis added). This led to a concern that parties who opted for domestic arbitration and specified the number of arbitrators in their arbitration agreements were deemed to have applied (by selecting a sole arbitrator) or chosen not to apply (by selecting three arbitrators) s.1 of Sch.2, which requires the dispute to be referred to a sole arbitrator. The Arbitration (Amendment) Ordinance 2015 amended s.102(2) to allow parties to a "domestic" arbitration to select the number of arbitrators without losing the benefit of the other Sch. 2 sections.

3. Arbitrations Commenced Before 1 June 2011—The Old Ordinance

8.010 According to the transitional provisions in Sch.3 of the Ordinance, the provisions of the Old Ordinance—including the dual regime for domestic versus international arbitrations—continue to apply to arbitrations and their related proceedings commenced prior to 1 June 2011, and to all proceedings related to those arbitrations.[9] In 2017, there are very few such cases on foot, although one or two may still be in progress.

8.011 Article 1(3) of the 1985 Model Law, which applied pursuant to s.34C of the Old Ordinance, sets out the factors governing whether an arbitration is considered international or domestic under the previous legislative regime. An arbitration is considered international if:

(1) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states;[10] or

(2) one of the following places is situated outside the state in which the parties have their places of business:

(a) the place of arbitration, if determined in, or pursuant to, the arbitration agreement;

(b) any place where a substantial part of the obligations of the commercial relationship are to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(3) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

8.012 Arbitrations arising from agreements which do not satisfy these criteria were regarded as domestic arbitrations.[11] However, despite the distinction, the two regimes were interchangeable at the decision of the parties. That is, pursuant to ss.2L and 34B of the Old Ordinance, the parties to a domestic arbitration agreement could, after a dispute had arisen, agree in writing to have the reference arbitrated as an international arbitration. Similarly, ss.2M and 34A(2) of the Old Ordinance provided that the parties to an international arbitration agreement could agree in writing, regardless of whether a dispute had arisen, to have the arbitration conducted under the domestic regime.

8.013 The distinction between the domestic and international arbitration regimes became less pronounced after the enactment of the Arbitration (Amendment) Ordinance 1996 (the 1996 Amendment Ordinance). Without agreement by the parties to do

[9] Ordinance para.1 of Sch.3.
[10] Pursuant to s.2(4) of the Old Ordinance, Hong Kong is deemed to be a "state" for the purpose of the Model Law.
[11] Old Ordinance s.2(1).

otherwise, arbitrations which fell under the domestic regime were governed by Pt II of the Old Ordinance. International arbitrations, on the other hand, were conducted in accordance with Pt IIA of the Old Ordinance, which applied the 1985 Model Law in full, with the notable exception of Arts.35 and 36, which deal with the recognition and enforcement of overseas awards.[12] However, despite the harmonisation created by the 1996 Amendment Ordinance, there remained some important differences between the two regimes under the Old Ordinance.

(a) Difference between "Domestic" and "International" arbitration under the Old Ordinance

(i) *International regime—1985 Model Law*

8.014 Set out below is a list of provisions included in the international regime for which there was no corresponding provision in Hong Kong domestic arbitration.

	1985 Model Law	General Provisions
1	Article 4	Waiver of right to object to non-compliance with arbitration agreement.
2	Article 11	Appointment of arbitrators by parties, see Chapters 6 and 10.
3	Article 16(1)	Power of arbitral tribunal to rule on its own jurisdiction, see Chapters 8 and 12.
4	Article 17	Power of arbitral tribunal to order interim measures of protection, see Chapter 14.
5	Article 18	Equality of treatment of the parties, see Chapters 6 and 10.
6	Article 20	Power of arbitral tribunal to determine the place of arbitration in absence of agreement between the parties, see Chapters 8 and 12.
7	Article 22	Power of arbitral tribunal to determine the language to be used in arbitration in absence of agreement between the parties.
8	Article 23	Submission of statements of claim and defence, see Chapter 11.
9	Article 24	Hearings and documents only proceedings.
10	Articles 24(3) and 26	Power of arbitral tribunal to appoint experts, see Chapter 13.
11	Article 25	Default of a party.
12	Article 28	Rules applicable to the substance of the dispute.

[12] Old Ordinance s.34C(1).

	1985 Model Law	General Provisions
13	Articles 31(1) and 31(3)	Formalities for awards.
14	Article 31(2)	Requirement of reasons for award, see Chapter 15.
15	Article 32	Termination of proceedings otherwise than by final award.
16	Article 33(1)	Request to arbitral tribunal for an interpretation of award.
17	Article 33(3)	Request to arbitral tribunal to make additional award.

8.015 Although the above provisions were not covered under the domestic regime (i.e. Pt II of the Old Ordinance), it should be noted that they would, in most cases, have been dealt with by either the common law, the applicable institutional rules, or the arbitration agreement.

(ii) *Domestic regime—Old Ordinance*

8.016 The domestic arbitration regime provided the Hong Kong High Court with additional powers to intervene in, and assist with, the arbitration process. These powers were not available in arbitrations conducted under the international provisions of the Old Ordinance. They included:

	Ordinance	Powers of High Court
1	Section 6B(1)	To order two or more arbitration proceedings to be consolidated.
2	Section 6B(2)	To appoint an arbitrator or umpire for the consolidated proceedings in the event that the parties could not reach an agreement on the choice.
3	Section 7	To order interpleader issues to be referred to arbitration for determination.
4	Section 9	To set aside a party's appointment of a sole arbitrator in a "two-arbitrator tribunal" case.
5	Section 21	To order that fees of an arbitrator or umpire be taxed.
6	Section 23A	To determine a preliminary point of law in limited circumstances.
7	Section 23C	To extend the powers of the arbitrator or umpire to deal with party defaults.
8	Section 23(2)	To confirm, vary or set aside an award which arises out of an appeal on a question of law.

	Ordinance	Powers of High Court
9	Section 23(5)	To order the arbitrator or umpire concerned to state the reasons for his award in sufficient detail, so that should the award be appealed, the court could consider any question of law arising out of the award.
10	Section 24	To remit the matter to the arbitrator or umpire for reconsideration.
11	Section 26(2)	To set aside the arbitration agreement or to give leave to revoke the authority of the arbitrator appointed by the agreement, so that the court could deal with a question of fraud.

8.017 At the time of writing, six years have passed since the Ordinance came into force, and it now governs the vast majority of Hong Kong seated arbitrations. However, disputes do still arise under arbitration agreements concluded before 1 June 2011, or under arbitration agreements concluded within six years of 1 June 2011 which provide they are "domestic".

8.018 As a result, Hong Kong practitioners may still be called upon to advise on arbitrations (or related proceedings) to which the Old Ordinance applies. For the time being, therefore, it remains important for them to be versed in the provisions of both Arbitration Ordinances, and to understand when the provisions of Sch.2 may apply. However, as the number of Hong Kong arbitrations under the Old Ordinance decreases over time, so the ambition of the Hong Kong legislators to abolish the sometimes troublesome distinction between domestic and international arbitration shall be realised.

Chapter 13

COMMENCEMENT OF ARBITRATION

*By John Choong and Eric Chan**

* The authors are grateful to Peter Yuen, for his contribution to the original version of this chapter.

1. Introduction

13.001 The commencement of an arbitration is an important procedural step for several reasons. First, it often represents the formal launch of the adversarial dispute resolution process between the parties. Secondly, the date of commencement will be significant in terms of any contractual or statutory time limits applicable to claims. Thirdly, the manner in which the arbitration is commenced must comply with all requirements of law, contract and the chosen arbitration rules. Finally, the notice of arbitration will serve to define the matters being referred to arbitration and thus the jurisdiction of the arbitral tribunal.

13.002 This chapter begins by considering the key issue of whether parties should decide to resolve their disputes by litigation or arbitration. After that, it describes the formal requirements for a notice of arbitration which commences the arbitration, and the applicable time limits. Lastly, it will deal with the important process of selecting and appointing the arbitrator(s) to decide the case.

2. Deciding Whether to Arbitrate or Litigate

13.003 The relative strengths and weaknesses of arbitration compared to litigation have been dealt with in Chapter 4.

13.004 This section focuses on the options a party has after a dispute has arisen. In legal terms, a party's decision on whether to arbitrate is governed by the presence or absence of an arbitration agreement.[1] If the parties have previously agreed to arbitrate future disputes, or if they agree to submit present disputes to arbitration, they must comply with that agreement and refer their disputes to arbitration. Conversely, since arbitration is wholly dependent on the existence of an agreement to arbitrate, if no such agreement exists, litigation before the courts will generally be the only available option, unless there is a mandatory regime of mediation and arbitration, such as under the Financial Dispute Resolution Centre which commenced operations in June 2012[2].

13.005 Despite this position in law, parties retain an element of choice irrespective of the presence or absence of an arbitration agreement. In short, parties must decide whether they wish to observe and implement their agreement to arbitrate. Even if an arbitration agreement has been concluded, the party initiating the claim may nevertheless decide that there are good legal or commercial reasons for preferring to submit the claim to the courts, or for proposing an alternative method of dispute resolution. Conversely, if there is no applicable arbitration agreement, the party initiating the claim may nevertheless decide to propose arbitration to the opposing party. Meanwhile the respondent may decide that it wishes to try to escape any obligation to arbitrate by asserting, for example, that the arbitration agreement is invalid or that the particular dispute falls outside the scope of the relevant arbitration clause, thus depriving the arbitrators of jurisdiction.

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1 See generally the discussion in Chapter 10 concerning arbitration agreements.

2 The Financial Dispute Resolution Centre is an independent, non-profit making organisation set up to assist financial institutions to resolve financial disputes with their individual customers.

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.[3] 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.[4]

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[5]. 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:

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

[4] 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.

[5] See *Kanson Crane Service Co Ltd v Bank of China Group Insurance Co Ltd* [2003] 3 HKC 602.

(1) Actions based on contract must generally be brought within six years from the date on which the cause of action accrued.[6] 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[7] must also be brought within six years from the date on which the cause of action accrued.[8] 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;[9]

(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.[10]

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.[11] 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.[12]

(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

[6] Limitation Ordinance (Cap.347), 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 i.e. a limitation period of 12 years from the date on which the cause of action accrued: s.4(3).

[7] 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.

[8] Limitation Ordinance (Cap.347), s.4(1).

[9] Limitation Ordinance (Cap.347), ss.31–32.

[10] See *Halsbury's Laws of Hong Kong* (LexisNexis), vol. 50 2014 Reissue [400], para.448; *Peconic Industrial Development Ltd v Lau Kwok Fai* [2009] 2 HKLRD 537, CFA; Limitation Ordinance (Cap.347).

[11] Limitation Ordinance (Cap.347), s.4(1).

[12] 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.

to arbitration is received by the respondent.[13] As for the receipt of the request, the Arbitration Ordinance provides that unless otherwise agreed by the parties:

(1) it is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address;

(2) if none of the above can be found after making a "reasonable inquiry", it is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it.[14]

13.013 If the request is sent by any means by which information can be recorded and transmitted to the addressee, the communication is deemed to have been received on the day it is so sent, provided that there is a record of receipt of the communication by the addressee.[15]

13.014 In addition, s.14(3) of the Arbitration Ordinance (Cap.609) deals with "*Scott v Avery*" clauses,[16] which are generally agreements that no action shall be brought upon a contract until an arbitration award has been made. That section provides that notwithstanding such a clause, a cause of action is, for purposes of limitation enactments, deemed to accrue at the time when it would have accrued but for that clause. Section 14(4) further provides that if a court orders an award to be set aside, the period between the commencement of the arbitral proceedings and the date of the order of the court setting aside the award must be excluded in computing the time prescribed by a limitation enactment. The purpose of both provisions is to protect a party in situations where it might otherwise be time barred from commencing proceedings.

(c) Contractual time limits

13.015 It is permissible for contracting parties to agree that any claims arising under their agreement should be subject to shorter time limitation periods than the periods prescribed by general law. Such provisions appear regularly in commercial agreements.[17] In principle, contract terms that abridge, extend or abrogate limitation periods will be construed and enforced like any other term of the agreement.

13.016 It is a question of contractual interpretation whether a clause of this kind serves only to exclude the right to refer disputes to arbitration, or whether it excludes (or extinguishes) the right of action altogether.[18] If the former interpretation applies, a claimant who fails to comply with shortened contractual time limits may still be able to commence litigation in court in respect of the claim, subject to compliance with the general limitation periods

[13] Arbitration Ordinance (Cap.609), s.49(1), giving effect to art.21 of the UNCITRAL Model Law.
[14] Arbitration Ordinance (Cap.609), s.10(1), giving effect to art.3 of the UNCITRAL Model Law.
[15] Arbitration Ordinance (Cap.609), ss.10(2) and 10(3).
[16] *Scott v Avery* (1856) 25 L.J. Ex. 308.
[17] See *Aries Tanker Corporation v Total Transport Ltd* [1977] 1 WLR 185.
[18] See *Tommy CP Sze & Co v Li & Fung (Trading) Ltd* [2003] 1 HKC 418, 426–430.

prescribed by law. If the latter interpretation applies, however, a claimant who fails to comply with contractual time limits will lose any right to claim at all.

13.017 If an arbitration agreement provides that a claim will be barred or extinguished completely upon the expiry of contractual time limits, the arbitral tribunal (or the court, if the tribunal has not yet been constituted) has the power to extend the time for commencing the arbitration in certain limited circumstances. This is to avoid injustice caused by the rigorous application of shortened contractual time limits in circumstances not contemplated by the parties when they made their agreement, or in cases of misconduct by one or another party.

13.018 Section 58 of the Arbitration Ordinance applies to arbitration agreements that provide for a claim to be barred or for a claimant's right to be extinguished unless the claimant, before a certain time or specified period, takes a step to commence arbitration or a pre-arbitration dispute resolution procedure[19].

13.019 In such cases, the tribunal may extend the specified time period, but "only if" it is satisfied that:

(1) the circumstances were such as to be outside the reasonable contemplation of the parties when they entered into the arbitration agreement and it would be just to extend the time or period; or

(2) that the conduct of any party makes it unjust to hold the other party to the strict terms of the agreement.[20]

13.020 Such an application may be made only after a claim has arisen and after exhausting any available arbitral procedures for obtaining an extension of time.[21]

13.021 In granting the extension, the tribunal may do so on terms that it thinks fit, and it may do so even though that time or period has expired.[22] The power to extend time is also exercisable by the Court if there is no tribunal in existence that is "capable of exercising" this power.[23]

13.022 However, this is subject to the overriding condition that nothing in s.58 affects the operation of any other enactment (such as the Limitation Ordinance (Cap.347)) that limits the period for commencing arbitral proceedings.[24]

(d) Conflict of laws

13.023 It is generally thought that Hong Kong adheres to the traditional common law view that limitation periods are procedural in nature. On this basis, limitation is governed by Hong Kong law and any limitation provision of the substantive governing law is

[19] Arbitration Ordinance (Cap.609), s.58(1).
[20] Arbitration Ordinance (Cap.609), s.58(4).
[21] Arbitration Ordinance (Cap.609), s.58(3).
[22] Arbitration Ordinance (Cap.609), s.58(5).
[23] Arbitration Ordinance (Cap.609), s.58(7).
[24] Arbitration Ordinance (Cap.609), s.58(6).

ignored. However, if it is shown that the effect of a foreign limitation is to extinguish the underlying legal right (and not just to bar the remedy), the Hong Kong courts may well look to the foreign substantive limitation and apply it.[25]

13.024 In Hong Kong international arbitrations, it is not uncommon for parties to agree to arbitrate in Hong Kong, but to apply a foreign substantive law. For example, many PRC-related agreements provide for Hong Kong arbitration, but the governing law is PRC law. Arguments over limitation can and do arise in these arbitrations, because of uncertainty over whether specific PRC law provisions act as a procedural bar, or if they extinguish the underlying substantive right altogether. The answer in each case will depend in part on the proper construction of the specific PRC law provision in issue.

4. Commencement—Notice of Arbitration

13.025 Having looked at the time limits applicable to the commencement of arbitration proceedings, it is appropriate next to consider the practical aspects of that step. What formal requirements apply to the commencement of an arbitration? What are the practical considerations?

(a) Compliance with conditions precedent and preliminary procedures

13.026 As a preliminary matter it is necessary to ensure due compliance with any conditions precedent or preliminary procedures required by the terms of the parties' agreement.

13.027 It is quite common for commercial agreements to require that parties should first attempt to resolve their dispute by informal negotiation or by mediation or some other form of alternative dispute resolution.

13.028 Construction and engineering contracts commonly require a dispute to be submitted to an engineer or other professional for a decision prior to any reference to arbitration. In addition, in these contracts, there may be provisions stipulating that the results of the preliminary procedures will be final and binding on the parties unless they serve a notice of arbitration within a fixed (and often very short) period. Multi-tiered dispute resolution procedures are becoming an increasingly common feature of larger commercial agreements.

13.029 All conditions precedent and preliminary procedures must be satisfied and followed in full before the claimant commences arbitration. If the claimant fails to do so, the tribunal may not have jurisdiction to determine the disputes. In such a situation, the notice of arbitration may be invalid and where an award has been made by the arbitrator, it may also be rendered invalid or unenforceable. Such a consequence will be of particular significance where the limitation period for commencing proceedings has been exceeded and the claimant is out of time to do so.[26]

[25] For a discussion of this issue, see Johnston, G., *The Conflict of Laws in Hong Kong* (2012), 30–33.

[26] Although note that under s.14(4) of the Arbitration Ordinance (Cap.609), if the court sets aside an award, the period between the commencement of the arbitration and the date of the court order setting aside the award must be excluded in computing the limitation period.

(b) Requirements for notice of arbitration

13.030 Assuming due compliance with any mandatory preliminary steps, how is an arbitration commenced? There is an obvious practical need to ensure that all parties likely to be involved in the arbitration are made aware as soon as possible that it is starting and what it concerns. This is commonly achieved in practice by the claimant serving a formal written notice to this effect on the other party/parties and (if applicable) on the arbitral institution, but does the law or applicable procedure formally require such a notice or can one commence arbitration by other means? If a notice is required, are there any mandatory rules as to its form and content?

(i) *Hong Kong law*

13.031 Hong Kong law does not contain any express requirement for service of a notice of arbitration in order to commence arbitration proceedings, save for a requirement that the request for arbitration must be made by way of a written communications.[27] Otherwise, the law is entirely silent on how an arbitration should be commenced. This is consistent with the Model Law and most other developed arbitration laws, which typically prefer to leave matters of procedural detail to the chosen rules of arbitration and to the discretion of the tribunal.[28]

13.032 Indirectly, however, Hong Kong law does exert a significant influence on the way in which arbitration proceedings are commenced. It does so by means of the rules on limitation of actions discussed earlier.[29] As has been described, those rules provide that an arbitration is deemed to be commenced when a notice of arbitration is received by the respondent.[30] Whilst this does not amount to a legal requirement for a notice of arbitration, it has the indirect effect of encouraging such notices, by giving claimants who serve timely notices protection from any argument that proceedings were commenced out of time.

(ii) *Arbitration rules*

13.033 In practice, the arbitration rules chosen by the parties will often prescribe the manner in which proceedings should be commenced and the form of any notice. Typically, arbitration rules will require the claimant to serve a notice of arbitration and they will contain detailed requirements regarding the content of that notice.

13.034 Article 4.3 of the HKIAC Administered Arbitration Rules provides a typical example of the requirements, and it states that the notice "shall include the following":

(1) a demand that the dispute be referred to arbitration;

(2) the names and (in so far as known) the addresses, telephone and fax numbers and email addresses of the parties and of their counsel;

[27] Arbitration Ordinance (Cap.609), s.49(2).

[28] The Model Law, the Arbitration Ordinance (Cap.609) and most national arbitration laws prescribe certain minimum procedural standards designed to ensure that basic natural justice is observed in the conduct of the arbitration proceedings—see Chapter 6. But these requirements are very general and do not include details such as the method for commencing proceedings.

[29] See paras.13.007–13.022.

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

(3) a copy of the arbitration agreement(s) invoked;

(4) a reference to the contract(s) or other legal instrument(s) out of or in relation to which the dispute arises;

(5) a description of the general nature of the claim and an indication of the amount involved, if any;

(6) the relief or remedy sought;

(7) a proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon;

(8) the claimant's proposals for (as the case may be) the appointment of a sole arbitrator, or its designation of an arbitrator where there are three arbitrators;

(9) confirmation that copies of the notice and any exhibits included therewith have been or are being served simultaneously on all other parties by one or more means of service to be identified in such confirmation.

13.035 The HKIAC Administered Arbitration Rules further provide that the notice of arbitration "may" also include the Statement of Claim.

13.036 Under art.4.5 of the HKIAC Administered Arbitration Rules, the notice of arbitration shall be submitted in the language of the arbitration as agreed by the parties. If no agreement has been reached between the parties, the notice of arbitration shall be submitted in either English or Chinese.

13.037 Most other institutional arbitration rules contain similar but not identical provisions requiring service of a notice of arbitration in order to initiate the procedure and prescribing certain minimum contents. Plainly, it will be essential to refer to the particular rules governing the arbitration, in order to ensure due compliance with all such requirements. Nonetheless, in practice, it is often relatively easy to comply with the above requirements, and in most cases, a notice of arbitration will not need to be an overly lengthy document.

(iii) *Contract*

13.038 Finally, it is also possible that the parties may have included provisions in their arbitration agreement or associated commercial contract that affect the manner in which arbitration proceedings should be commenced or the content of any notice. Provisions of this kind are not common in practice,[31] but if they do appear, they must be followed in order to avoid any subsequent challenge to the legitimacy of the ensuing arbitration.

(c) Practical considerations

13.039 The law and the arbitration rules only prescribe minimum requirements for the notice of arbitration. The claimant is free to add further relevant information and there may be good reasons for doing so. Three reasons should be mentioned in particular.

[31] More commonly, the parties include provisions regarding the timing and mode of service.

13.040 First, the notice of arbitration serves to define the issues that the claimant wishes to refer to the arbitrators in the current proceedings. Matters raised in the defence or counterclaim may supplement those issues in due course, but with that exception the broad scope of the dispute is defined in the notice of arbitration. It is not generally possible to raise new issues subsequently during the course of the proceedings. Such issues would be outside the jurisdiction of the arbitrators appointed to the particular dispute, so that they would have to be asserted separately in a new arbitration (although this may later be consolidated with the first). Clearly, therefore, it is important to draft a notice of arbitration in sufficient detail and width to ensure that it encompasses all likely disputes being raised in the arbitration.

13.041 Second, experience shows that parties embarking on an arbitration are often unable to reach agreement on the identity of the arbitrators. They may disagree on who should be appointed as a sole arbitrator, or they may disagree on who should serve as chairman of a three-person tribunal. In such cases the applicable law and rules are likely to refer the decision to the administering institution or to some other neutral body. That body will know nothing about the dispute beyond the information provided in the notice of arbitration and in any response. As a result, that information is likely to be very influential when the appointing authority selects the arbitrator whom it considers to have the skills, knowledge and experience appropriate for the particular dispute. The claimant should consider what information might be included in the notice in order to assist or influence the appointing authority's decision.

13.042 Third, the notice of arbitration is likely to be the first document that an arbitrator reads when starting to consider the case. It will therefore be obvious that it is in the claimant's interests to prepare the notice in sufficient detail to introduce the arbitrator(s) to the case from the claimant's perspective.

(d) Service of notice of arbitration

(i) *Hong Kong law*

13.043 As noted previously, Hong Kong law indirectly encourages the service of a written notice of arbitration by providing that this shall be deemed to represent the commencement of the arbitration for limitation purposes. In this context, s.10(1) of the Arbitration Ordinance provides that a written communication may be served in a number of ways:

(1) by delivering it to the respondent personally;

(2) by delivering it to the respondent's place of business, habitual residence or mailing address;

(3) if (1) and (2) above cannot be found after making a reasonable enquiry:

  (i) by sending it to the respondent's last-known place of business, habitual residence or mailing address by registered letter;

  (ii) by delivering it using any other means which provides a record of the attempt to deliver it;

(4) by any other manner provided in the parties' arbitration agreement.

Chapter 21

CONSTRUCTION ARBITRATION

By Paul Starr and James McKenzie

Flowchart — Issues to Consider in Construction Arbitration

Contract → Dispute → Hearing

Contract	Dispute	Hearing
Arbitration clause: Appropriate?	Applicable dispute resolution process where multi-tiered dispute resolution clause.	Interim or partial hearing required?
Standard Form?	Condition precedent?	Level of procedural flexibility appropriate for the case? e.g. discovery requirements, use of chess-clock.
Should other methods of dispute resolution be included? e.g. referral to project directors, mediation, panel of experts, dispute review board, or adjudication.	Issues to include in notice of arbitration?	Appropriate expert?
Number of tiers?	Time for commencement?	
Notice of Dispute requirements.	Is consolidation appropriate?	
Method of selecting arbitrator (appointing body? particular qualifications?).		
Number of arbitrators.		
Technical/legal assessor?		
Name borrowing provisions necessary?		

21.001

1. Introduction

21.002 Hong Kong has developed a reputation as a centre of construction arbitration expertise. By way of illustration, of the disputes involving the Hong Kong International Arbitration Centre (HKIAC) between in 2015, about 22.2 per cent were construction disputes.[1] While commercial disputes outnumbered the number of construction disputes handled by HKIAC in 2015,[2] Hong Kong nevertheless continues to be a key

[1] The number of arbitration cases handled by HKIAC between 2009 and 2015 was 1974, of which about 282 were construction disputes: http://www.hkiac.org/en/hkiac/statistics; HKIAC, 2009-2015 Annual Report (note that the HKIAC Annual Report for 2013 did not provide a statistic for construction disputes).

[2] Of the 271 arbitration cases handled by the HKIAC in 2015, 22.2% involved construction, 50% were commercial, 18% involved maritime disputes, 8.9% involved corporate disputes and 0.9% involved insurance disputes; HKIAC, 2015 Annual Report.

regional construction dispute resolution centre, with referrals from other international jurisdictions both to the HKIAC as well as other leading arbitral institutions in Hong Kong such as the China International Economic and Trade Arbitration Commission (CIETAC HK) and the International Chamber of Commerce (ICC).

21.003 Arbitration is, or course, not unique to construction disputes, although they seem to go hand in hand. There are several reasons for the dominance of arbitration in the resolution of construction disputes in Hong Kong. This includes the arbitrator's express power to open up, review and revise an engineer's/architect's certificate, opinion, decision, requirement or notice, the perceived necessity for expert decision makers in construction disputes, the procedural flexibility available in arbitration which is attractive in document-heavy construction disputes, and the fact that most construction contracts include an arbitration clause. These features are discussed in para. 21.018.

21.004 The importance of arbitration in the context of construction disputes is reflected in the accommodation made in the Arbitration Ordinance (Cap.609) for construction contracts—see the automatic opt-in provisions of Sch.2 in s.101 which is discussed in s.21.064–21.069 in this chapter.

21.005 The frequency with which construction disputes lead to arbitration means certain construction-specific procedures or issues have developed over time. Examples include commencement issues, the method and reasons for choosing an arbitrator, chess-clock procedures, expert witness selection, consolidation and name borrowing provisions. Since these issues arise time and time again in the construction context, it is useful to pull them together in a dedicated "Construction Arbitration" chapter.

2. Arbitration Agreements

(a) Advantages of arbitration in construction disputes

21.006 The advantages and disadvantages of arbitration generally are addressed in Chapter 3. The advantages include freedom to choose the arbitrator, informality, confidentiality, economy, speed and finality (with a legally binding decision), and ease of enforcement across borders. In the construction context, the use of arbitration as a dispute resolution mechanism is almost standard. Some of the key advantages of arbitration driving this are described below.

(i) *Crouch*

21.007 For many years, a perceived advantage of arbitration in the construction context was that an arbitrator has the power to open up, review and revise any engineer's/ architect's certificate, opinion, decision, requirement or notice, which the court did not have. This benefit stemmed from the 1984 decision *Northern Regional Health Authority v Derek Crouch Construction Co Ltd*[3] which found that the courts did not possess such powers

[3] *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] QB 644. For discussion of *Derek Crouch Construction in Hong Kong cases*, see *Hsin Chong Construction Co Ltd v Hong Kong and Kowloon Wharf and Godown Do. Ltd*, [1986] HKLR 987; *Icos Vibro Ltd v SFK Construction Management Ltd* [1992] 1 HKC 296.

in the absence of specific agreement between the parties to that effect. An example of how this case made arbitration attractive is where a contractor sought to vary an architect's decision (for example in respect of an extension of time) which it could not get a court to do.

21.008 This aspect of *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* has now been reversed in the United Kingdom by the 1998 case of *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd*[4] and also by introduction of s.43A of the Senior Courts Act 1981[5] so that there is no bar to the courts opening up, reviewing and revising any certificate, opinion, decision or notice given by an architect or engineer under a contract where such a certificate, opinion, decision or notice is arguably not in accordance with the requirements of the contract. This decision arguably takes away what was for years the main advantage of arbitration in construction disputes.[6]

21.009 At the time of writing, *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd* has not been addressed by the Court of Appeal in Hong Kong. However, it has been addressed by the Court of First Instance, suggesting that the existence of the *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* advantage may no longer apply in Hong Kong.[7] See paras. 21.087 to 21.091 for further discussion.

(ii) *Arbitration provides expert decision makers*

21.010 Most construction disputes involve technical issues which a lawyer or judge may find a challenge to understand, even with the aid of a technical expert witness (although the construction industry is not unique in this regard). By taking a dispute before an arbitrator with relevant and competent technical expertise, the argument can be resolved with greater speed and accuracy than in court. However, this premise is based on the assumption that all arbitrators are technically competent, their technical skills are relevant for all technical aspects of the case, and that they have all other skills required of an arbitrator (such as a certain amount of legal knowledge and an understanding of an arbitrator's duties). Finding a good arbitrator is hard. Experienced

[4] [1999] 1 AC 266.

[5] Section 43A of the Senior Courts Act 1981 provides that "In any cause or matter proceeding in the High Court in connection with any contract incorporating an arbitration agreement which confers specific powers upon the arbitrator, the High Court may, if all parties to the agreement agree, exercise any such powers". There is no similar provision in Hong Kong.

[6] Although it may be argued that the powers of an arbitrator to re-examine certificates are still wider than those of a court, because the arbitrator's power does not depend on any possible breach of contract and may re-examine the certificate as a matter of professional opinion. Powell-Smith, V., Sims, J. and Dancaster, C., *Construction Arbitrations* (Blackwell Science, 2000).

[7] Although *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] QB 644 has not been expressly overruled in Hong Kong, the application of *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd* by the Court of First Instance in Hong Kong suggests that the existence of the *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* advantage may no longer apply in Hong Kong: see *Wide Project Construction (HK) Ltd. v Incorporated Owners of Yen Dack Building* (unrep., HCA 3759/2002, [2005] HKEC 1997) where the court, after considering *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd*, held that the court had the power to open up and revise the payment certificates as part of the court's ordinary power to enforce the contract in accordance with its terms; see also *W Hing Construction Co Ltd v Boost Investments Ltd* [2009] 2 HKLRD 501 where the judge, after considering *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd*, was satisfied that he had similar powers to an arbitrator to open up, review and review the architect's decision regarding the appropriate extension of time (if any) under GCC 23.

ones are usually heavily booked and it is difficult to secure their time. This in itself, often leads to protracted and divided hearings.

21.011 The selection of an arbitrator is an extremely important part of the arbitration process, yet, as explained in para.21.112, the selection process often has its own concerns. It is arguable that the court system, by setting up the "Construction List", with a judge experienced in the construction industry and who deals only with construction disputes on a regular basis, negates the perceived benefit of having a dispute resolved by a technical arbitrator. This is particularly true where the parties involve technical experts with relevant specialisations.

21.012 It is further argued by some, that the technical content of construction arbitrations is unnecessarily exacerbated by a self-serving industry in technical expertise. The drafting style of standard forms of contract are said to be a major culprit, leaving matters of uncertainty under the contract to the discretion and judgmental evaluation of an architect or engineer.[8] This in turn involves technical evaluation by all manner of "technical experts", such as contract administrators, parties and specialist advisors.

21.013 In conclusion, with careful selection, parties to a dispute may benefit from having a technically skilled arbitrator decide a construction dispute. However, the advantage of such an arbitrator is not uncontested.

(iii) *Procedural flexibility*

21.014 Given that construction disputes are inherently document intensive, a definite advantage of construction arbitration is the potential flexibility it gives to the discovery process. As has been said in Chapter 15 in respect of discovery, the arbitral tribunal has a wide discretion to tailor the discovery process to suit the circumstances of the case. Given the masses of records and other documents which are produced, even on relatively small construction projects, there is a need in construction disputes to streamline and narrow down the obligations on parties to disclose documents. However, the mere fact that parties are empowered by the arbitration process to agree streamlined discovery tailored to the demands of the case, does not guarantee they will do so. The tendency to engage in "litigation style" discovery in the 1980s gave arbitration a bad name. Parties and indeed arbitral tribunals are less tolerant of abuse of the discovery process now. Nevertheless, parties should be reminded to participate in arbitration discovery in good faith by agreeing to simplified, less onerous and wasteful obligations and avoiding vexatious specific discovery applications.

(iv) *The consolidation clause in Hong Kong's Arbitration Ordinance*

21.015 Construction disputes are often multi-party (e.g. where employers claim defects against a contractor, and responsibility is attributed to designers, suppliers and subcontractors or where subcontractors' claims against the main contract are "back to back" with the main contractor's claims against the employer) such that consolidation of proceedings is desirable. Where more than one arbitral tribunal decides on matters

[8] Bernstein, R., Tackaberry, J., Marriott, A.L. and Wood, D., *Handbook of Arbitration Practice*, 3rd edn (Sweet & Maxwell, 1998) 337. See also para.18.076.

arising out of the same set of facts, it is possible for each tribunal to arrive at a different conclusion—one of the advantages of consolidation is the avoidance of inconsistent decisions.[9] Under s.6B of the repealed Arbitration Ordinance, a court had the power to consolidate arbitrations without the agreement of the parties in certain circumstances.

21.016 In order to alleviate concerns raised by the construction industry, the Arbitration Ordinance has preserved a number of key provisions in the repealed Arbitration Ordinance. Under the Ordinance, the court's power to consolidate is available to parties who want to adopt it as an opt-in provision.[10] It also applies automatically to certain types of contracts (see below). The power of the court to consolidate proceedings under the Arbitration Ordinance is provided in s.2 of Schedule 2. The Arbitration Ordinance also contains provisions (including the consolidation of arbitrations) that may be expressly opted for or automatically apply:

(1) Opt-in: an arbitration agreement may provide expressly that any or all of the provisions in Sch.2 are to apply: s.99.

(2) Automatic opt-in: subject to s.102[11] all the provisions in Sch.2 apply to:

(a) an arbitration agreement entered into before the commencement of the Arbitration Ordinance which has provided that arbitration under the agreement is a domestic arbitration; or

(b) an arbitration agreement entered into at any time within a period of six years after the commencement of the new Arbitration Ordinance which provides that arbitration under the agreement is a domestic arbitration: s.100(a) and (b).

21.017 Since a number of construction contracts and subcontracts in Hong Kong which were entered into before the Arbitration Ordinance refer to "domestic arbitration" in their arbitration clauses, the automatic opt-in provisions, including the consolidation provision, will apply to those contracts: s.100(a). However, the Hong Kong construction industry will not be able to rely on these automatic opt-in provisions indefinitely as there is in effect a "sunset" provision. For arbitration agreements entered into after the commencement of the Arbitration Ordinance which provides that arbitration under the agreement is a domestic arbitration, the opt-in provisions will only apply automatically to agreements entered into within a period of six years from the commencement of the Arbitration Ordinance: s.100(b); i.e. before 1 June 2017.

[9] See Hong Kong Institute of Arbitrators "Report of Committee on Hong Kong Arbitration Law", 30 Apr 2003, para.23.1.

[10] See Hong Kong Institute of Arbitrators "Report of Committee on Hong Kong Arbitration Law", 30 Apr 2003, paras.23.1–23.7 for discussion on the background to the recommendation to include s.6B of the repealed Arbitration Ordinance as an opt-in provision (since the Model Law does not provide for the consolidation of arbitral proceedings) and also the opposing views to such inclusion. See also Department of Justice, "Consultation Paper–Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill–December 2007", 80–81.

[11] Section 102 of the Arbitration Ordinance provides that ss.100 and 101 do not apply if (a) the parties to the arbitration agreement so agree in writing; or (b) the arbitration agreement concerned has provided expressly that (i) s.100 or 101 does not apply; or (ii) any of the provisions in Sch.2 applies or does not apply.

21.018 At the time of publication, this sunset provision has expired. Parties therefore will have to make decisions consciously as to whether to include the opt-in provisions of Sch.2 in their construction contracts, including the provision for consolidation. A failure to include such a provision will expose parties to the risk of having different tribunals deciding on matters arising out of the same set of facts, with the possibility of different, potentially inconsistent decisions.

21.019 Section 101(1) deals specifically with the circumstances under which the provisions of Sch.2 will automatically apply to construction subcontracts. Where:

(1) all the provisions in Sch.2 apply (under the automatic opt-in provisions in s.100(a) or (b)) to an arbitration agreement[12] in a construction contract;

(2) the whole or any part of the construction operations to be carried out under the construction contract is subcontracted to any person under a subcontract;

(3) that subcontract also includes an arbitration agreement;

then all the provisions of Sch.2 also apply to the subcontract arbitration agreement. Section 101(3) extends the automatic opt-in provisions to further subcontracts that also includes an arbitration agreement. However, s.101(1) does not apply to the persons or circumstances as set out in s.101(2)[13].

21.020 It should be noted that sections 101(1) and 102 of the Arbitration Ordinance create an important exception to the six year sunset detailed in para.21.019 above. As a result, where a construction contract containing an arbitration agreement is entered into before 1 June 2017 and the Schedule 2 Provisions automatically apply and the whole or any part of the construction operations is subcontracted, the Schedule 2 Provisions will continue to automatically apply to that subcontract. This will be the case even if the subcontract is entered into post 1 June 2017.

21.021 Subcontracting parties who do not wish for the Schedule 2 provisions to apply in such circumstances should therefore expressly agree to exclude them in their subcontract.

21.022 Where s.2 of Sch.2 applies, then the court may, on application of any party to the arbitral proceedings, make certain orders (see below) if, in relation to two or more arbitral proceedings, it appears to the court that:

(1) a common question of law or fact arises in both or all of them;

(2) the rights to relief claimed in those arbitral proceedings are in respect of or arise out of the same transaction or series of transactions; or

[12] See s.19(1) of the Arbitration Ordinance which gives effect to Option 1 of art.7 of the Model Law on the definition and form of arbitration agreement, and s.19(2) and (3).

[13] Section 101(2) of the Arbitration Ordinance provides that s.101(1) does not apply if the subcontractor is a person ordinarily resident outside Hong Kong or has no place of business in Hong Kong; a body corporate incorporated outside Hong Kong or the central management and control of the body corporate is exercised outside Hong Kong; or an association formed under the law of a place outside of Hong Kong or the central management and control of which is exercised outside Hong Kong; or if a substantial part of the relevant operation which is subcontracted is to be performed outside Hong Kong.

(3) for any other reason it is desirable to make an order under s.2: s.2(1) of Sch.2.

21.023 Where the above grounds exist, the court may:

(1) order those arbitral proceedings:

(a) to be consolidated on such terms as it thinks just; or

(b) to be heard at the same time or one immediately after another; or

(2) order any of those arbitral proceedings to be stayed until after the determination of any other of them: s.2(1) of Sch.2.

21.024 If the court orders arbitral proceedings to be consolidated or heard at the same time immediately after another, the court is empowered to make certain directions on costs and the appointment of an arbitrator. In particular, the court has the power to:

(1) make consequential directions as to the payment of costs in those arbitral proceedings; and

(2) appoint the parties' choice of arbitrator where all the parties are in agreement as to the arbitrator for those arbitral proceedings. If the parties cannot agree as to the choice of arbitrator, the court has power to appoint an arbitrator for those arbitral proceedings. Further, in the case of arbitral proceedings to be heard at the same time or one immediately after another, the court has the power to appoint the same arbitrator for those arbitral proceedings: s.2(2)(a) and (b) of Sch.2.[14]

21.025 The power of the arbitral tribunal to make cost orders differs depending on whether arbitration proceedings are consolidated or heard concurrently or one immediately after the other:

(1) Where arbitral proceedings are consolidated under s.2(1)(d)(i) of Sch.2 of the Arbitration Ordinance, the arbitral tribunal has the power under ss.74 and 75[15] in relation to the costs of those arbitral proceedings: s.2(4) of Sch.2;

[14] See discussion on background to this provision: Department of Justice, "Consultation Paper–Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill–December 2007", 80–81; Department of Justice, "Summary of submissions and comments on the Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill", LC Paper no. CB(2)2469/08-09(03)—Sept 2009, 28–31.

[15] Section 74 (adapted from s.2GJ(1) of the repealed Arbitration Ordinance deals with the arbitral tribunal awarding costs of arbitral proceedings. Section 75 (adapted from s.2GJ(1)(c) and (2) of the repealed Arbitration Ordinance deals with taxation of costs of arbitral proceedings (other than fees and expenses of arbitral tribunal). See also Department of Justice, "Consultation Paper–Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill–December 2007", 54–56.

(2) Where two or more arbitral proceedings are heard at the same time or one immediately after another under s.2(1)(d)(ii) of Sch.2 of the Arbitration Ordinance, the arbitral tribunal:

(a) has the power under ss.74 and 75 only in relation to the costs of those arbitral proceedings that are heard by it: s.2(5)(a) of Sch.2; and

(b) does not have the power to order a party to any of those arbitral proceedings that are heard at the same time or one immediately after another to pay the costs of a party to any other of those proceedings unless the arbitral tribunal is the same tribunal hearing all of those arbitral proceedings: s.2(5)(b) of Sch.2.[16]

21.026 An order, direction or decision of the court under s.2 of Sch.2 is not subject to appeal: s.2(6) of Sch.2.

(v) *Concluding remarks*

21.027 Arbitration definitely has its advantages over litigation for the reasons outlined in Chapter 4. A particular advantage is the flexibility the arbitration process provides to litigation style procedures such as discovery. The beauty of arbitration's flexibility is furthered by the increased powers provided to the arbitrator, in preference to the court, under the Arbitration Ordinance which is consistent with the underlying principles of freedom of parties to agree on how disputes should be resolved and minimum court intervention.[17]

21.028 However, these advantages are not necessarily unique to construction arbitration. What has for years been a unique advantage of arbitration in the construction context (the *Northern Regional Health Authority v Derek Crouch Construction Co Ltd*[18] advantage) appear to no longer apply in Hong Kong[19]. So, why then does arbitration continue to be so prevalent in the construction industry?

21.029 One major reason is that standard forms of construction contracts ordinarily include an arbitration clause. As mentioned in para.21.012 it is arguable that there is a self-serving industry in technical experts which nurture the use of arbitration. The cycle starts with standard forms of contract, drafted or contributed to by technical expert interest groups, which vest discretion in engineers and architects, which leads to technical disputes, which in turn are evaluated by armies of technical advisers, which make an understanding of the dispute so technical, that resolution by a technically competent and relevant arbitrator is required, and so the cycle continues.[20] There is some truth in this view. However, it is not advocated that litigation should be preferred

[16] See discussion on this provision: Hong Kong Institute of Arbitrators "Report of Committee on Hong Kong Arbitration Law", 30 Apr 2003, paras.43.31–43.32.

[17] See s.3 of the Arbitration Ordinance.

[18] [1984] Q.B. 644; [1984] 2 W.L.R. 676.

[19] See paras. 21.007 to 21.009.

[20] See Phillip Capper and Anthony Bunch's chapter in Bernstein, R., Tackaberry, J., Marriott, A.L. and Wood, D., *Handbook of Arbitration Practice*, 3rd edn (Sweet & Maxwell, 1998) 337–338 and Wallace QC, I.N.D., "Construction Contracts: The Architect, the Arbitrator and the Courts" (1986) 2(1) *Const* LJ 14, 52.

over arbitration in the construction context. Instead, it is suggested that arbitration continues to be used to resolve disputes in the construction context but that certain areas of the process be watched carefully. Examples include the potential for abuse of the discovery process and appointment of arbitrators by appointing bodies (see paras.21.109 to 21.111). The authors also advocate the combination of arbitration with other considered and appropriate alternative dispute resolution techniques as part of a multi-tiered dispute resolution process.

(b) Arbitration clauses in standard forms

21.030 The elements of an arbitration agreement have been discussed in detail in Chapter 10.[21] The present section of this chapter seeks to familiarise the reader with some examples of arbitration clauses in Hong Kong construction contracts. As discussed in para.21.023, in respect of construction contracts entered into after the commencement of the Arbitration Ordinance, these arbitration clauses will need to be reviewed and revised to take into account the new provisions.

(i) *Hong Kong Institute of Architects/Hong Kong Institute of Surveyors Contracts*

21.031 A common form of construction contract is the Agreement and Schedule of Conditions of Building Contract (Standard Form of Building Contract) for use in Hong Kong (private edition) issued under the sanction of the Hong Kong Institute of Architects (HKIA), the Hong Kong branch of the former Royal Institution of Chartered Surveyors (RICS), which dissolved in 1997[22] and the Society of Builders, Hong Kong (HKIA Form). It was based on the English Joint Contracts Tribunal (JCT) 1963 form of contract, which itself originates from a form prepared by the Royal Institute of British Architects (RIBA) with the Institute of Builders and the National Federation of Building Trades Employers (now the Building Employers Confederation).

21.032 The RICS 1986 Form (RICS Form) largely follows the HKIA Form. It was drawn up by the HKIA, RICS (Hong Kong Branch) and the Society of Builders, Hong Kong.

21.033 The 1986 edition dispute resolution clause (cl.35) in the HKIA and RICS Form is traditional and less sophisticated than some of the multi-tiered dispute resolution procedures appearing in many contracts being made today. It provides that a dispute between the employer or architect and the main contractor, either during the progress of the works or after their completion or abandonment of the works, as to the construction of the contract or any matter arising under or in connection with it, shall be referred to arbitration. The parties can agree on the arbitrator, or, their failing agreement, the HKIA co-jointly with the RICS may appoint one. Except in certain circumstances, the reference to arbitration shall not be opened up until after practical completion or termination of the contract, thus preserving the progress of the works.

[21] See s.19(1) which gives effect to Option 1 of art.7 of the Model Law on the definition and form of arbitration agreement, and s.19(2) and (3).

[22] After the return of Hong Kong to China's sovereignty in 1997, the RICS (Hong Kong Branch) was dissolved on 31 Aug 1997, and the Hong Kong Institute of Surveyors (HKIAS) became the only professional body representing the surveying profession in Hong Kong: http://www.hkis.org.hk/hkis/html/about_history.jsp.

21.034 In the 1999 edition of the Agreement and Schedule of Conditions of Building Contract (Standard Form of Building Contract) for use in the Hong Kong Special Administrative Region (private edition), the dispute resolution clause (cl.35) remained the same except for the substitution of the RICS[23] with the Hong Kong Institute of Surveyors (HKIS) who would co-jointly with the HKIA appoint an arbitrator where the parties fail to agree an arbitrator.

21.035 A potential issue arises under the Arbitration Ordinance as to whether the opt-in provisions in Sch.2 will automatically apply to construction contracts that use or have used either the 1986 or the 1999 editions. As discussed above, the automatic opt-in provisions under Sch.2 apply to:

(1) an arbitration agreement entered into before the commencement of the Arbitration Ordinance which has provided that arbitration under the agreement is a domestic arbitration: s.100(a); or

(2) an arbitration agreement entered into at any time within a period of six years after the commencement of the Arbitration Ordinance which provides that arbitration under the agreement is a domestic arbitration: s.100(b).

21.036 Since neither the 1986 nor the 1999 editions provide that the arbitration is a domestic arbitration, it is unlikely that the opt-in provisions in Sch.2 will automatically apply to these construction contracts.[24]

(ii) *Joint Contracts Working Committee*

21.037 The Joint Contracts Working Committee (JCWC) launched the Standard Form of Building Contract Private Edition—With Quantities in 2005.[25] This contract was drafted by the Hong Kong Construction Association (HKCA) in conjunction with the HKIA, HKIS and the Hong Kong Institute of Construction Managers (HKICM). The dispute resolution clause (cl.41) replaced the one-tier dispute resolution mechanism described in respect of the HKIA and RICS Form above, with a three-tier procedure, similar to the Government General Conditions of Contract described below (i.e. reference to the parties' designated representatives who are obliged to resolve the dispute, mediation and arbitration). Both the mediation and the arbitration would be conducted in accordance with the HKIAC rules.

21.038 The dispute resolution clause (cl.41) in the 2006 edition of the Standard Form of Building Contract Private Edition—Without Quantities is the same as that in the 2005 edition (With Quantities).

[23] After the return of Hong Kong to China's sovereignty in 1997, the RICS (Hong Kong Branch) was dissolved on 31 Aug 1997, and the Hong Kong Institute of Surveyors became the only professional body representing the surveying profession in Hong Kong: http://www.hkis.org.hk/hkis/html/about_history.jsp.

[24] It may be is arguable that as a matter of interpretation, that since s.100 does not use the word "expressly" (as it does in s.99), the provision that the arbitration is a domestic arbitration can be implied. However, to clarify the ambiguity, the parties should expressly agree that the provisions of Sch.2 apply to the contract.

[25] The full title is "Agreement & Schedule of Conditions of Building Contract for use in the Hong Kong Special Administrative Region–Standard Form of Building Contract Private Edition–With Quantities 2005 Edition".

21.039 Since both the 2005 and 2006 editions provide in cl.41.4(5) that the arbitration "shall be a domestic arbitration",[26] the opt-in provisions in Sch.2 of the new Arbitration Ordinance will automatically apply to construction contracts using these editions: s.100(a) and (b) where entered into before 1 July 2017 or a subcontract in the circumstances described in para.21.018 above.[27]

(iii) *Government of Hong Kong SAR contracts*

21.040 The Government of Hong Kong SAR (the Government) has produced a large number of standard forms in two general categories: civil engineering and architectural (building). Until recently, the most widely used forms of contract for public works were the Hong Kong Government's standard form Building Works and Civil Engineering Works, 1999 edition.

21.041 However, the Government has now committed to using New Engineering Contracts for all government projects tendered in 2015 and 2016, following successes on an initial tranche of 30 of the June 2005 edition of the New Engineering Contract pilot projects. NEC3 contract forms are discussed further at paras. 21.059–21.061.

21.042 The Government General Conditions of Contract for Building Works, 1999 edition, dispute resolution clause (cl.86) provides for a three-tier dispute resolution mechanism: decision of architect, mediation and arbitration. It provides that any dispute between the employer and the contractor in connection with or arising out of the contract or the carrying out of the works shall be referred to and settled by the architect who shall state his decision in writing. Unless the contract has already been terminated or abandoned, the contractor shall continue to proceed with the works with all due diligence and give effect to every decision unless and until the decision is revised in mediation or arbitration. If the employer or contractor is dissatisfied with the decision of the architect, that party may within 28 days of receiving notice of the decision, request that the matter be referred to mediation in accordance with the Government Construction Mediation Rules.

21.043 If the matter cannot be resolved by mediation, it shall be referred to arbitration in accordance with the Arbitration Ordinance. The referral must occur within 90 days of the abandonment of the mediation (or other circumstances specified in cl.86(2)). No steps shall be taken in the reference to arbitration until after the completion or alleged completion of the works, unless the parties agree otherwise in writing.

21.044 Virtually identical clauses are found in cl.86 of the General Conditions of Contract for Electrical and Mechanical Engineering Works and General Conditions of Contract for Civil Engineering Works.

[26] This is in contrast to the 1986 and 1999 editions discussed above which do not have such an express provision–see paragraphs 17-31–17-32.

[27] Applying s.100(a) and (b) of the Arbitration Ordinance, the automatic opt-in provisions will only apply to construction contracts using the 2005 or 2006 editions that were entered into (a) before the commencement of the Arbitration Ordinance or (b) within a period of six years after the commencement of the Arbitration Ordinance.

21.045 The same arbitration clause is found in cl. 92 of the General Conditions of Contract for Term Contract for Building Works (2004 Edition), and cl. 86 of the General Conditions of Contract for Term Contracts for Electrical And Mechanical Engineering Works (2007 Edition).

21.046 Since the arbitration clause in these contracts provide that the reference to arbitration "shall be a domestic arbitration" (cl.86(6)), the opt-in provisions in Sch.2 of the Arbitration Ordinance will automatically apply to these construction contracts: s.100(a) and (b).[28]

21.047 A similar dispute resolution clause is found in cl.33 of the Government Sub-Contract for Building Works 2000 edition. Clause 33(6) provide that the reference to arbitration "shall be a domestic arbitration". The opt-in provisions in Sch.2 of the new Arbitration Ordinance will also apply to subcontracts using this form in the circumstances set out in s.101(1).[29]

21.048 The Government contracts described above, by deferring arbitration to the end of the job, attempt to preserve the progress of the contract without the disruption created by concurrent arbitration, and to promote settlement by alternative means. Unlike the more traditional HKIA and RICS Form, alternative dispute resolution techniques are imposed as precursors to arbitration. The success of mediation and adjudication as a form of dispute resolution is discussed in Chapter 4.

(iv) *International Federation of Consulting Engineers contracts*

21.049 The International Federation of Consulting Engineers (FIDIC) "*Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer*" 1999 (the "the 1999 Red Book")[30] issued by FIDIC has a three-tiered dispute resolution process (cl.20): engineer's decision, dispute adjudication board and arbitration (preceded by an attempt at "amicable settlement").

21.050 The first tier involving an engineer's decision only relates to claims for extension of time for completion and/or additional payment. The engineer has 42 days to approve or disapprove (with reason) any such claims. The second tier (which may be the first tier if the dispute does not involve a claim as described above) is dispute resolution by the

[28] Applying s.100(a) and (b) of the Arbitration Ordinance, the automatic opt-in provisions will only apply to construction contracts using these standard forms that were entered into (a) before the commencement of the Arbitration Ordinance or (b) within a period of six years after the commencement of the Arbitration Ordinance.

[29] Section 101(1) provides that where: (a) all the provisions in Sch.2 apply (under the automatic opt-in provisions in s.100(a) or (b)) to an arbitration agreement in a construction contract; (b) the whole or any part of the construction operations to be carried out under the construction contract is subcontracted to any person under a subcontract; and (c) that subcontract also includes an arbitration agreement; then all the provisions of Sch.2 also apply to the subcontract arbitration agreement.

[30] A variant of the *1999 Red Book* is the *MDB Harmonised Edition,* the latest revised edition of which is the 2010 edition. This is a collaboration between FIDIC and the International Bank for Reconstruction and Development, part of the World Bank, and other Multilateral Development Banks (MDBs). Since the MDBs had adopted the Red Book for use on the projects they funded but had required extensive amendments, a version of the Red Book was produced which incorporated the MDBs' standard amendments. Although there are some differences between the dispute resolution clause in the *1999 Red Book* and the *2010 MDB Harmonised Edition*, both adopt a multi-tiered dispute resolution process: see also Baker E., Mellors B., Chalmers S. and Lavers A., *FIDIC Contracts: Law and Practice* (Informa, 2009).

dispute adjudication board (DAB). If a dispute of any kind whatsoever arises between the parties in connection with or arising out of the contract or the works, including any certificate, determination, instruction, opinion or valuation of the engineer, either party may refer the dispute in writing to the DAB for its decision.

21.051 The parties will have appointed a DAB by a date in the tender. Other matters may be referred to the DAB at any time where the parties agree. The DAB shall give its decision within 84 days which shall become binding on the parties until and unless it is revised by arbitration. If any party is dissatisfied with the decision, either party may within 28 days notify the other party of its dissatisfaction. This notice is essential if the dispute is to progress to arbitration. Where such notice of dissatisfaction has been given, both parties shall attempt to settle the dispute amicably before commencement of arbitration. This "obligation" is a toothless tiger since the clause goes on to say that arbitration may be commenced 56 days after such notice, even if no attempt at settlement has been made.[31] It is difficult to imagine that this clause has much success in resolving disputes prior to arbitration, other than the fact that it provides for a 56-day "cooling off" period.

21.052 Unlike the other contracts described above, arbitration may be commenced prior to or after completion of the works. The contract provides protection by stating that, if the works are still in progress during arbitration, the obligations of the parties, the engineer and the DAB do not change. Nevertheless, it is foreseeable that this clause may create problems with the conduct of the contract, where an acrimonious arbitration is on foot. Another interesting feature of this dispute resolution clause is the involvement of a DAB. These are very effective as early, relatively inexpensive, amicable dispute resolution mechanisms as described at Chapter 4.

21.053 Given the international nature of the FIDIC contracts, there is no provision in the 1999 Red Book that arbitration under the agreement is a domestic arbitration. The opt-in provisions in Sch.2 of the Arbitration Ordinance will not automatically apply to construction contracts based on the 1999 Red Book: s.100(a) and (b).

(v) *ICE and ICC contracts*

21.054 The Institution of Civil Engineers (ICE) Conditions of Contract (7th edition)[32] (ICE Conditions of Contract) is produced by the Conditions of Contract Standing Joint Committee (CCSJC). The ICE Conditions of Contract are jointly sponsored by the ICE, the Civil Engineering Contractors Association (CECA) and the Association of Consulting Engineers (ACE).[33] In 2011, pursuant to the consequent agreement in July

[31] See discussion in Baker E., Mellors B., Chalmers S. and Lavers A., *FIDIC Contracts: Law and Practice* (Informa, 2009) 542, citing the *FIDIC Guide* which maintains that "This apparent contradiction is unavoidable, because of the impossibility of providing any meaningful method of imposing a requirement for the Parties to reach a consensual agreement of their differences". Baker *et al.* state that depending on the governing law, the mandatory language of the first sentence "shall attempt to settle the dispute" may mean there is a legal obligation to "attempt" to achieve settlement before the commencement of the arbitration. Despite the contradictory provisions, Baker *et al.* express the view that arbitration may be validly commenced on the 56th day even if no attempt has been made for amicable settlement.

[32] Measurement Version 7th edition Jan 2003.

[33] See https://www.ice.org.uk/disciplines-and-resources/professional-practice/nec-contracts-and-ice-conditions-of-contract.

2010, ICE withdrew from ICE Conditions of Contract and now solely endorses the NEC3 Suite of Contracts. ICE's part ownership of the ICE Conditions of Contract has now been transferred to ACE and CECA. The ICE Conditions of Contract has, since 2011, been rebranded as the Infrastructure Conditions of Contract (ICC) and the suite is managed entirely by ACE and CECA, and will feature a new design and incorporation of all relevant amendments.[34] The ICE contracts remain in use and the authors detail their provisions below.

21.055 In 2004, amendments were made to the dispute resolution clause (cl.66) of the ICE Conditions of Contract, with the objective of improving flexibility and user-friendliness of the clause. Two major changes were introduced:

(1) the deletion of the reference back to the engineer for a formal decision;[35] and

(2) the introduction of a new dispute-avoidance provision. The focus has now been transferred to pre-dispute problem-solving measures.[36]

21.056 The previous cl.66 has been replaced with new clauses: 66, 66A, 66B, 66C and 66D. The "step-by-step" approach to dispute resolution has been abandoned and the parties may now use one or more of the procedures set out in clauses 66A, 66B, 66C or 66D at will and in any order which the parties find convenient.[37]

21.057 As soon as the employer or contractor becomes aware of any matter which might become a dispute, they shall advise the other party in writing with a copy to the engineer. The employer and the contractor shall meet at the earliest opportunity but no later than seven days after such notification to try to resolve the matter. Either party may invite the engineer and any other relevant person to participate. If the matter is not resolved within a reasonable period of time, the parties shall define in writing those parts of the matter that remain unresolved.[38]

21.058 Clause 66A provides a mechanism for the employer or the contractor to serve on the other at any time (after exhausting any means of recourse available elsewhere in the contract),[39] a notice in writing with a copy provided to the engineer, stating clearly the nature of any dispute or difference. It sets out a range of consensual options (including negotiation, conciliation or mediation) to resolve the dispute.

21.059 Notwithstanding cll.66 or 66A, the employer and the contractor each has the right to refer any matter in dispute arising under or in connection with the contract or the carrying out of the works to adjudication, and either party may give a notice of adjudication to the other of his intention to do so (cl.66B).

[34] https://www.ice.org.uk/disciplines-and-resources/professional-practice/nec-contracts-and-ice-conditions-of-contract.

[35] The engineer's decision, although historically very effective in resolving disputes without recourse to arbitration, has been perceived to have lost credibility as a belief in the engineer's independence has dwindled in the face of modern commercial and litigation pressures: see Reference: ICE/Clause-66/July 2004.

[36] Reference: ICE/Clause-66/July 2004.

[37] See cl.66(1) ICE Conditions of Contract; Reference: ICE/Clause-66/July 2004.

[38] Section 66(2) ICE Conditions of Contract.

[39] Other than cll.66, 66A, 66B or 66C: cl.66A ICE Conditions of Contract.

21.060 All disputes arising under or in connection with the contract or the carrying out of the works, other than failure to give effect to a decision of an adjudicator, shall be finally determined by reference to arbitration (cl.66C). The party seeking arbitration shall serve a notice in writing to refer the dispute to arbitration.[40] Unless the parties otherwise agree in writing, any reference to arbitration may proceed notwithstanding that the works are not complete or alleged to be complete (cl.66C(2)(d)).

21.061 Clause 66D (Appointments) relates to the appointment of arbitrator, adjudicator, conciliator or mediator. Where the parties fail to agree on the appointment of an arbitrator, conciliator or mediator, the appointment shall be by the President of the ICE. Appointment of the adjudicator in default of agreement is by the ICE and not its President.

21.062 The beauty of the ICE dispute resolution procedure is that the parties can use any one or more of the procedures provided. The unnecessary expense and delay of forcing the parties to do something they do not want to do (and which is unlikely to result in a resolution) is avoided. This is particularly true of conciliation which relies, to some extent, on the cooperation of the parties for its success.

21.063 As with the FIDIC contracts, the ICE Conditions of Contract do not provide that arbitration under the agreement is a domestic arbitration. The opt-in provisions in Sch.2 of the new Arbitration Ordinance will therefore not automatically apply to construction contracts based on the ICE Conditions of Contract: s.100(a) and (b).

(vi) *New Engineering Contract*

21.064 The New Engineering Contract (NEC) Form has been produced by the ICE through its NEC Working Group. There have been three editions to date: 1st edition (1993), 2nd edition (1995) and the 3rd edition (2005). A fourth edition, NEC4, was announced in March 2017 and is expected to be available at date of publication (NEC currently intends to release the new edition in June 2017).

21.065 This new edition has been updated to reflect procurement and project management developments and emerging best practice, with partciular improvements to the flexibility, clarity and the ease of contract administration. The fourth edition also introduces two new contracts: NEC4 Design, Build and Operate and NEC4 Alliance Contract. Although the text of NEC4 is not yet available, NEC has promulgated a guide setting out some of the key features.[41]

21.066 As discussed at para.21.036, the Government has committed to using New Engineering Contracts for all government projects tendered in 2015 and 2016.

21.067 The June 2005 edition of the NEC3 was amended in June 2006, and again in April 2013. The 3rd edition (NEC3) contains two alternative sets of clauses to govern dispute resolution: Options W1 and W2. Option W2 is intended for use with contracts in the

[40] Since the "step-by-step" approach has been abandoned, there is no reason why a notice to refer needs to await the completion of any antecedent step—it is valid to issue a notice to refer at the same time as the notice of dispute to which it relates—but not before, since there would not be any dispute yet in existence at that stage: Reference: ICE/Clause-66/July 2004.

[41] The NEC guide to NEC4, "NEC4: The next generation An explanation of changes and benefits" is available at https://www.neccontract.com/NEC4-Products/NEC4-Contracts/NEC4-Free-resources.

United Kingdom where the Housing Grants, Construction and Regeneration Act 1996 applies. Option W1 is intended for use with all other contracts. Option W1 involves a two-tier procedure: adjudication followed by reference to a tribunal as identified in the contract data. For Option W2, a referral to adjudication may be made by any party at any time. This is the principal difference from Option W1, which includes a table setting out who may refer disputes, within certain time periods (W1.3). A dispute arising or in connection with that contract is referred to and decided by the adjudicator. Disputes are notified and referred to the adjudicator in accordance with the adjudication table. Unless the dispute is referred to the adjudicator within the times set out in the contract or within any extended time agreed between the project manager and the contractor, neither party may subsequently refer it to the adjudicator or the tribunal. The adjudicator's decision is binding on the parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation between the parties. A party who is dissatisfied with the adjudicator's decision must notify the other party that he intends to refer it to the tribunal. A party may not refer a dispute to a tribunal until this notification is given within four weeks of notification of the adjudicator's decision. A dispute cannot be referred to a tribunal unless it has first been referred to an adjudicator in accordance with the contract. The tribunal must be identified in the contract data. Accordingly, if the parties want disputes to be resolved by arbitration, the contract data must state that the tribunal is to be arbitration otherwise litigation will apply by default in the absence of an arbitration agreement.

21.068 This dispute clause is a simple, no fuss clause which eliminates the preliminary decision by the engineer or architect and launches straight into adjudication.

21.069 Since there are no provisions in NEC3 (Option W1) for a domestic arbitration, the opt-in provisions in Sch.2 of the new Arbitration Ordinance will not automatically apply to construction contracts based on the NEC3 Contract: s.100(a) and (b).

(vii) *MTR Corporation Limited*

21.070 The MTR Corporation Limited[42] (MTR) Conditions of Contract[43] have a multi-tiered dispute resolution system, with variations in time periods. The engineer has 30 days within which to either make a decision or serve a notice on the contractor[44] following a notice of dispute. The parties may within 90 days of receipt of the engineer's decision or notice or at the expiry of the 30 day period refer the dispute to arbitration. No steps can be taken in any reference to an arbitrator (with the exception of the formal appointment of the arbitrator) unless and until either party has first referred the dispute to mediation and the party serving the request for mediation has made a bona fide

[42] The authors are most grateful to Ms Gillian Meller, Legal and European Business Director of MTR Corporation Limited, and to the Corporation itself, for making available the MTR Corporation Limited Conditions of Contract (2009) for (i) Civil Engineering and Building Works, (ii) Civil Engineering and Building Works Design and Construction and (iii) Electrical and Mechanical Engineering Works.

[43] Reference is made to the Resolution of Disputes clause (cl.103) in the above three MTR Conditions of Contract which are identical.

[44] Clause 103.3 provides that within 30 days of receipt of a Notice of Dispute, "either (a) the Engineer shall state his decision in writing and give notice of the same to the Employer and the Contractor; or (b) if the dispute arises from a decision of the Engineer made under a direction of the Employer pursuant to cl.2.1(c), the Engineer shall notify the Contractor in writing of the fact."

attempt to resolve the dispute by mediation. A "*bona fide*" attempt is deemed to have been made where a mediator has been appointed pursuant to the MTRCL Mediation Rules and the party serving the request for mediation has attended at least one meeting with the mediator, whether with or without the presence of the other party.[45] A request for mediation may be served at any time after the expiry of the 90 or 30 day period if both parties consent in writing. In the absence of such written consent, no request for mediation can be served prior to the issue of the certificate of completion for the whole of the works or the determination or abandonment of the contract or the determination of the contractor's employment under the contract.[46]

21.071 Since the MTR arbitration clause (like the JCWC and Government contracts), provides that the reference to arbitration "shall be arbitrated as a domestic arbitration" (cl.103.13), the opt-in provisions in Sch.2 of the Arbitration Ordinance will automatically apply to the MTR contracts: s.100(a) and (b).

21.072 The interesting feature of the MTR, Government and JCWC dispute resolution clauses is the requirement for compulsory mediation. The features of mediation are discussed in Chapter 5. In contrast, the ICE Form (cl.66A) provides for optional negotiation, conciliation or mediation governed by the ICE's own procedure. The increasing use of mediation is significant and important in the construction industry where ongoing relationships and early resolution of disputes are essential for projects to be commercially viable. Although compulsory mediation can be viewed by sceptics as inappropriate given the inherently consensual nature of the process there are proven results that by forcing parties to enter the mediation process, the consensus can naturally follow.

(c) Other contractual methods of dispute resolution

21.073 As is evident from the preceding paragraphs, construction contracts increasingly contain provision for a number of different methods of dispute resolution on the same issues but at different stages. The stages may start by referring the dispute to a contract administrator such as the engineer/architect (see para.18.076) or to a designated representative (see JCWC 2005 Building Contract). Subsequent stages include mediation (see Government, JCWC and the MTR contracts referred to above), reference to a dispute review board (see the FIDIC 1999 Red Book above), adjudication (see the NEC above) and, if all else fails, arbitration. Another approach is to abandon the "step-by-step" or multi-tiered approach and let the parties choose the most appropriate method that suits them (see the ICE Conditions of Contract).

21.074 Adjudication is becoming prevalent in Hong Kong construction contracts, following the developments in the United Kingdom where there is a statutory right to adjudication under the Housing Grants, Construction and Regeneration Act 1996. Adjudication is a contractual procedure. It involves a summary interim decision being made in respect of a dispute by a third party individual (the adjudicator) who is an expert in a field, is usually not involved in the day-to-day performance or administration of the

[45] Clause 103.6 of the (2009) MTR Conditions of Contract.

[46] Clause 103.7 of the (2009) MTR Conditions of Contract.