Principles of Arbitration in Hong Kong

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1. INTRODUCTION

[2-1] At its most basic form, arbitration is a method of alternative dispute resolution ('ADR') whereby the parties to a dispute consent to entrust a third-party adjudicator(s) to decide their case. The power of the arbitrator(s) is derived from the agreement between the parties. While it is unique in formation, it is certainly not the only form of ADR to gain credence over recent time. Indeed, mediation has gained popularity in the last 20 years in Hong Kong and has become almost fixture in most of the Hong Kong litigation process ever since the Civil Justice Reform was introduced in 2009.[1] Separately, Med-Arb, Arb-Med, Arb-Med-Arb, and other permutations of these two processes — the amalgamation of mediation and arbitration — have been making waves in the civil law world for some time and has made their inroads into the common law world at varying degrees. The unique features of Med-Arb were closely analysed in the recent case of *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor*[2] where the Court of Appeal found itself at odds[3] with the Court of First Instance's suspicion of the Med-Arb process[4] and allowed enforcement of the award. The main features of arbitration, as well as a comparison of it with different forms of ADR are discussed below.

1 Whilst mediation has largely remained a voluntary and consensual process in Hong Kong, in practice, the parties may find it difficult to proceed to the next stage of the legal process if they failed to reasonably explain why they have not attempted mediation.

2 *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor* [2011] 3 HKC 157 (CFI) and *Gao Haiyan v Keeneye Holdings Ltd* [2012] 1 HKC 335, [2012] 1 HKLRD 627 (CA).

3 Tang VP held that whether the Med-Arb was conducted might give rise to an apprehension of apparent bias depended on the understanding of how it was normally conducted in China. Due weight should be given to the decision of the supervisory Court. It was also noted that no complaint about the venue had been made to the supervisory Court, at paras 99–102. Enforcement should only be refused if to enforce the award would be contrary to the fundamental conceptions of morality and justice of Hong Kong. The fact that holding a Med-Arb over dinner at a Chinese hotel might give rise to an appearance of bias in Hong Kong would not justify refusal of enforcement in Hong Kong, at paras 104–106.

4 Although the Court of First Instance's finding on apparent bias was based on the facts of the particular case, the Court made various observations on the inherent difficulties of the Med-Arb process. Whilst Reyes J accepted that there was nothing wrong in principle with Med-Arb, the Court observed that: '[f]rom the point-of-view of impartiality, the med-arb process runs into self-evident difficulties. The risk of a mediator turned arbitrator appearing to be biased will always be great', at para 72. The Court further observed that the: 'problems inherent in med-arb are such that many arbitrators decline to engage in it. They view the risk of apparent bias arising from their participation in med-arb as an insurmountable difficulty', at para 77.

2. ARBITRATION

2.1 Principle: At its heart, arbitration is a flexible, private and voluntary form of dispute resolution featuring an adversarial process

[2-2] Arbitration is a flexible, private and voluntary means of achieving a final resolution to a dispute without having to refer the same to courts and tribunals. Owing to its confidential nature, arbitration has been frequently adopted in commercial disputes as the primary alternative to litigation. While it is also a binding adjudicative process, there are a number of key differences which set arbitration apart from litigation. Due to its adaptable and flexile nature, no single definition of arbitration will suffice to encompassed its many varied forms. The Arbitration Ordinance (Cap 609), for instance, provides that: '"arbitration" means any arbitration, whether or not administered by a permanent arbitral institution.' However, other than sub-dividing arbitration into its administered and ad hoc forms, this definition seems largely circular.

[2-3] It is suggested that the core elements of arbitration are:

(1) that the parties have certain control and freedom over the manner in which their dispute is resolved;
(2) that the dispute resolution process remains confidential as between the parties only; and
(3) that the parties have voluntarily decided refer their disputes to arbitration.

2.2 Principle: Parties may elect for institutional arbitration or ad hoc arbitration. Both forms are recognised in Hong Kong as valid arbitrations

[2-4] There are two basic forms of arbitration — ad hoc and institutional — from which parties agreeing to arbitration are free to choose. Where no choice of an institutional arbitration has been explicitly made by the parties, the arbitration will be presumed to be ad hoc.

[2-5] Ad hoc arbitration refers to an arbitration whereby the parties have agreed that the arbitration is supervised and administered by an institution arbitral body. For ad hoc arbitrations, the rules of arbitration may be specifically designed by the parties or laid down by the tribunal. Parties may specifically tailor rules of the arbitration. In cases where the parties' foresight has not catered for a specific situation, gaps will be left for the appointed arbitrators to fill. More often than not, parties will take a 'made to measure' approach and will rely on a set of pre-determined rules which is tailored for their specific needs. It will only be the most ambitious of parties that seeks to set out rules of their own from scratch. Parties may also adopt a pre-existing set of rules designed for ad hoc arbitrations, for instance, the UNCITRAL Arbitration Rules. Some commentators have

advised against the adoption of the institutional rules in ad hoc arbitrations, citing the rules' repeated reference to the relevant institutions as a concern.[5] However, as long as the parties can agree on a mechanism to deal with issues which have been prescribed to be handled by the institutions, there is no obvious reason why institutional rules should not be adopted in ad hoc arbitration. Generally speaking, ad hoc arbitration is more flexible than institutional arbitration as the parties will be free to decide on the best way for them to proceed in the case. In terms of cost, ad hoc arbitration will often be cheaper than institutional arbitration as the parties will be able to avoid paying fees to an institution whilst also being able to negotiate with each arbitrator for his individual costs. However, if the parties have difficulties in agreeing to the rules of arbitration and rely on arbitral hearings to resolve their differences, the added legal costs and the additional cost of the tribunal may make ad hoc arbitration a more expensive option.

[2-6] Conversely, institutional arbitration refers to arbitrations which are run under the guidance of an institution and generally in accordance with their pre-set procedural rules.[6] While there is the added fee charged by the institution, institutional arbitration provides parties with the security of a comprehensive set of rules to govern the arbitral proceedings. When issues arise, each arbitration institution will also be readily able to provide assistance to ensure that disputes are resolved in an efficient and procedurally correct manner. Of importance is the appointment of a sole arbitrator, or the appointment of the chairperson of the tribunal when the parties fail to reach an agreement. Furthermore, the 'brand name' effect of institutional arbitration also allows for parties from all over the world to readily agree to submit their disputes to arbitration institutions which they will have already heard of, or might even be familiar with. Some even believe that the brand name of arbitral institutions will allow for an easier enforceability of an arbitration award. While this is not necessarily true, it is clear that institutional arbitration is most likely to appeal to those disputes involving parties from a variety of jurisdictions where legal cultures and matters of procedure may be in stark contrast to one another.

2.3 Principle: Arbitration is privately conducted and the parties are generally obliged to confidentiality in regards to both the substance of the arbitration, and the very fact of arbitration

[2-7] One of the main strengths of arbitration lies in its private and confidential nature. By privacy, it refers to the exclusion of strangers from attending any of the

5 *Law and Practice of International Arbitration* (4th edn, Redfern & Hunter 2004) at pp 1–104.

6 The parties may agree to refer their dispute to an institutional arbitration but to adopt a set of procedural rules other than the one of the particular institutions. For instance, the parties may agree to refer their dispute to an arbitration at the HKIAC, however decide to adopt the UNCITRAL Arbitration Rules.

arbitration hearings and proceedings. By confidentiality, it refers to the restriction imposed on the parties from disclosing information and documents in relation to the arbitration. For many countries, privacy and confidentiality of arbitration are protected by the inclusion of contractual terms, by the finding of implied terms or by common law duty of confidentiality. For some institutional arbitral rules, their adoption may offer an extra layer of protection. For the position of Hong Kong, the protection of confidentiality has been strengthened through the Arbitration Ordinance. Therein, in section 18, express provisions have been included to protect not only information relating to the arbitral proceedings, but also to the eventual arbitral award. The result of an express recognition of confidentiality in arbitration is that even where parties have failed to come to an agreement themselves, the fallback provisions in the Arbitration Ordinance will continue to uphold the parties' duties of confidentiality for arbitration proceedings held in Hong Kong.

[2-8] As is always the case, there are provisions which outline the exceptions to the general rules above. Parties may, for instances, breach the general vow of silence[7] where a party challenges an arbitral award, where a party wishes to disclose an award so as to be able to rely on *res judicata*,[8] or when the vow of silence comes into conflict with other areas of the law.[9]

[2-9] It should be noted that the Arbitration Ordinance has taken steps to promote harmonisation between confidentiality and other legal rights as far as possible. For instance, section 16(1) stresses that the default position regarding arbitration matters being challenged in court is that proceedings are not held in open court. Further, if the Courts are of the opinion that a significant decision relating to arbitration proceedings should be published, section 17(5) directs that the Court must pay heed to a party's reasonable requests for sensitive matters to be concealed, or alternatively wait for a period not exceeding ten years before the dispute is published.

[2-10] It is the view of these authors that the sanctity of confidentiality in arbitration in Hong Kong is stronger compared to most other jurisdictions around the world. Indeed, it is one of few countries with express statutory provisions on confidentiality in arbitration in the first place. Other jurisdictions, such as the UK, have traditionally relied upon an implied duty of confidentiality which has been shaped by common law over time. Others, such as China, have relied upon institutional rules to protect confidentiality, instead. While these forms of protection are not necessarily less effective, it is suggested that the codification of the duty of confidentiality in arbitration instills parties with more confidence. Hong Kong's position is to be commended.

7 For exceptions to the general rules, see generally, s 18(2) of the Arbitration Ordinance (Cap 609).

8 As was the case in *Parakou Shipping Pte Ltd v Jinhui Shipping and Transportation Ltd* [2011] 2 HKLRD 1, [2010] HKCU 2096 (CFI).

9 Consider, for instance, the requirement of s 3 of the Securities and Futures (Stock Market Listing) Rules (Cap 571V), which may require the candidate company to reveal an ongoing arbitration and may have a material effect on the listing.

2.4 Principle: Subject to mutually agreed upon criteria and processes, parties are generally free to appoint any third parties as the adjudicators of their dispute

[2-11] Another strong attraction of arbitration is the parties' autonomy in selecting the adjudicators for their dispute. While subject to basic notions such as impartiality, parties are generally free to elect for arbitrators of their choosing.

[2-12] Selecting a proper arbitrator is one of the parties' most important decisions to make in the course of arbitration, particularly given that parties wishing to challenge the enforcement of arbitral awards are finding it increasingly hard to do so. The selected arbitrator must also ensure that he has control of the proceedings so that the arbitration achieves its aims of being quick and cost-effective.

[2-13] One of the traditional trends of arbitration is that an arbitrator may be selected from either the legal field, or a field closely related to the dispute at hand. In some cases, the parties may be able to select an arbitrator who has both the necessary legal and industry background. While knowledge of the law is undoubtedly important, it is readily apparent that there are very strong advantages in retaining those arbitrators with specialist knowledge — particularly when the dispute involves dispute of facts arising from niche industries and/or businesses, or relating to the practice and custom of a particular trade. Apart from the pure saving of time and costs, an industry-specific arbitrator may be able to appreciate the finer points relating to the culture or the practices of the industry that would otherwise be hard to appreciate for those on the outside. For the same reason, it has been argued that appointing arbitrators of the same nationality to the parties in dispute is of great benefit to arbitration. Cultural, language and customary nuances are far better appreciated by those who share in the identity of the parties before him.

2.5 Principle: Arbitral awards benefit from the ease of enforceability due to the near-global adoption of the New York Convention

[2-14] While this proposition may seem paradoxical to start, it is almost certain that awards arising out of arbitration are more easily enforceable in foreign countries than litigation judgments. Indeed, while the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (hereinafter referred to as the 'New York Convention') has been signed by over 150,[10] there is no international convention that covers the same for the enforcement of judgments arising out of litigation.

[2-15] In signing up to the New York Convention, a signatory state agrees to give effect to private agreements to arbitration, as well as to recognise and enforce arbitral awards made in other contracting states. Generally speaking, an arbitration

10 The total list of countries can be found at www.newyorkconvention.org/countries, and is frequently updated to reflect the growing number of ratifying parties.

a narrower route of permitting certain forms of litigation funding instead. Changes to the Arbitration Ordinance were brought about by the passage and enactment of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017, introducing both statutory provisions and a code of practice.

[3-27] In terms of statutory provisions, Part 10A, comprising of sections 98E–98X, have been added to the Arbitration Ordinance. In addition, The Code of Practice for Third Party Funding of Arbitration ('the Code') was issued on 7 December 2018 to further enhance the legislative framework. The Code applies not only to Hong Kong seated arbitration, but also to costs and expenses incurred in Hong Kong in relation to arbitrations seated elsewhere and sets out a number of obligations for third party funders to concern themselves with.

[3-28] This multi-faceted legal framework follows the example of the English and Welsh experience on third party funding, particularly in the adoption of 'light touch' regulation. Third party funders will only find themselves bound by the Code, but the failure to comply with it, of itself, does not render any person liable to judicial or other proceedings.[28] Instead, a breach of the code is admissible as evidence before any court or arbitral tribunal.

7.1 Principle: The obligation of confidentiality is waived insofar as it is for the purpose of obtaining third party funding

[3-29] As explained above, Hong Kong is unique in that it has a codified obligation of confidentiality. However, it was clearly recognised by the Law Reform Commission at an early stage that an exception would have to be carved out for parties seeking third party funding, as well as potential arbitration funders.[29] Section 98T thus contains an exception to this rule by setting out that the disclosure of information is permissible in the event that this is made for the purpose of '*having or seeking*' third party funding. This exception envisages that funded parties may communicate information relating to either the arbitral proceedings or any proceedings relating to an arbitral award insofar as they are for the purpose of having or seeking funding. A similar provision exists within the HKIAC Rules in very similarly worded language.[30]

[3-30] In turn, it should be noted that the obligation of confidentiality extends to those in receipt of confidential information as a third party funding. This is reaffirmed by provisions in the Code.[31]

28 Section 98S(1) of the Arbitration Ordinance.
29 The Law Reform Commission of Hong Kong, 'Third Party Funding for Arbitration' (October 2016) at para 3.46.
30 Article 45.3(e) of the 2018 HKIAC Administrated Arbitration Rules.
31 The Code at paras. 2.10–2.11.

7.2 Principle: The funding arrangement between a third party funder and the funded party must be disclosed to every other party to the arbitration

[3-31] The Arbitration Ordinance has made it an obligation for parties to disclose the funding arrangement through the introduction of section 98U. A funded party is now required to give notice of a funding arrangement at the commencement of arbitration proceedings, or, in the case of a funding arrangement agreed to after the commence of arbitration proceedings, within 15 days after the funding agreement is made.[32] This position is reflected in the Code whereby Third Party Funders are obliged to remind the funded party of its obligations to disclose information about the funding arrangement.

[3-32] This is a sound departure from the stance taken in England and Wales where no obligation of disclosure exists. Indeed, the position in England and Wales has caused considerable difficulty as it stops parties from spotting conflicts of interest — whether between a funder and a party or a funder and the arbitral tribunal. Furthermore, the lack of disclosure has meant that many respondents are left in the dark when assessing whether there is a need to apply for security for costs. It has been suggested that this approach has meant that applications for disclosures of funding have been become a matter of habit, further adding to unnecessary costs of the proceedings. The lack of disclosure is also particularly alarming when considered in conjunction with the potential draconian nature of the recoverability of third party funding costs.

7.3 Principle: Third party funders shall not seek to influence the funded party or its representatives to take control or conduct of the funded proceedings

[3-33] This issue of the control of proceedings is one which has been treated with a great amount of variety across common law jurisdictions. While the legal framework in Australia allows third party funders to exercise quite a high degree of control of the funded proceedings, the English legal landscape has made a deliberate decision to leave control of the funded proceedings in the hands of the funded party.

[3-34] Traditionally, Hong Kong has aligned itself with the view that is it undesirable for third party funders to exert too much control over the funded proceedings. For instance, in *Akai Holdings Ltd (in compulsory liq) v Ho Wing On Christopher & Anor*,[33] Stone J criticised what he saw to be excessive control over proceedings by the litigation funders in that case. Furthermore in

32 Section 98U(2) of the Arbitration Ordinance.
33 *Akai Holdings Ltd (in compulsory liq) v Ho Wing On Christopher & Anor* [2009] 51 HKLRD K1 and K2, [2009] HKCU 789 (CFI).

Re Company A,[34] Harris J expressed similar sentiments and suggested that third party funders should be limited in the control they can exercise in any intended litigation.

[3-35] It is thus not surprising that it is now enshrined in the Code that third party funders should not seek to take control or conduct of the funded proceedings.[35] This is a duty that also protects the funded party's legal representatives.

7.4 Principle: A funded party's third party funding costs may be recoverable from the losing party

[3-36] In Hong Kong, the subject of costs and the recoverability of the same are left to the wide discretion enjoyed by the arbitral tribunal as set out the in the Arbitration Ordinance. While third party funding costs have not been explicitly mentioned as recoverable in the Arbitration Ordinance, section 74 allows for an arbitral tribunal to allow costs that are 'reasonable having regard to all the circumstances'.[36] It is thus of note that other jurisdictions have held that third-party funding costs fall under the general umbrella of recoverable costs of proceedings.

[3-37] In the case of *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd*,[37] the High Court of England and Wales refused to set aside an arbitral award which entitled the winning party to recover its third party funding costs on the basis that an arbitral tribunal's power under the Arbitration Act 1996 (UK) to award 'legal and other' costs included the costs of litigation funding. In *Essar*, the claimant had obtained third-party funding of £647,000 GBP from a third party funder in exchange for either 35% of its recovered proceeds, or a 300% uplift, whichever was greater. After succeeding in their claim, the claimant sought to recover £1,940,000 from the respondent and was awarded these costs by the sole arbitrator. It should be noted that both the sole arbitrator and the High Court were seemingly motivated by the conduct of the respondent in coming to their decision — the respondent was seen to be deliberately withholding payments due under the agreement, and moreover, had knowingly tried to force the claimant into a set of proceedings they knew the claimant could not afford. The sole arbitrator went further to note that it was 'blindingly obvious' to the respondent that the claimant was at a distinct financial disadvantage and would have to resort to third-party funding to pursue its claims.[38] Evidence was also adduced by the claimant to show that the terms of its funding was in line with the market standard.

34 *Re Company A* [2015] HKCU 2345 (unreported, HCCW 384/2006, 8 October 2015) (CFI).

35 The Code at para. 2.9.

36 Section 74(7)(a) of the Arbitration Ordinance.

37 *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm) (QBD).

38 *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm) (QBD) at para 23.

[3-38] It must be noted that the Court did not appear to view the recoverability of third party funding costs as routine. It noted that the case was 'unusual' and that the respondent had acted ' … *(reprehensively) … going far beyond technical breaches of contract, in order to vindicate its rights*.'[39] It thus remains to be seen how the considerations in *Essar* would apply to parties who are less oppressive than the respondent in this case. Third party funding is often treated as a form of insurance for parties who wish to pursue a claim without being forced to face the full consequences of the costs of arbitration.

[3-39] While the decision of *Essar* should be seen to have been decided on its particular facts, it does open up the discussion for the recoverability of third party funding costs. Conceptually, it seems that these costs may fall under an arbitral tribunal's wide discretion. While no test or bar has been set and it is unclear how reprehensible a respondent has to act before tribunals and courts will see that third party costs are recoverable, it is clear that this decision will encourage more robust applications. As third party funding is not a procedural cost germane to an arbitration, it is suggested that practitioners may be well advised to plead these costs as part of their pleadings. Parties in Hong Kong will already have to disclose funding arrangements as a result of the law, and pleading third party funding costs will not come to the disadvantage of a claimant in any way.

8. The Interim Measures Arrangement

[3-40] The Interim Measures Arrangement is a unique reciprocal agreement between the Courts of the Mainland and of the HKSAR which will greatly assist parties to arbitrations seated in Hong Kong relating to the Mainland Chinese parties or assets and has come into force since 1 October 2019. It should be noted that while the Interim Measures Arrangement is titled as one of mutual assistance, the Hong Kong Courts were already equipped with the power to grant interim relief in support of arbitrations seated outside of Hong Kong (and thus including Mainland China).[40] The powers of the Hong Kong Courts are not modified by the Interim Measures Arrangement. Conversely, the effect of the Interim Measures Arrangement is that Hong Kong is so far the one and only seat of arbitration outside of Mainland Chinese where the parties can access the PRC Courts in pursuit of interim measures in aid of offshore arbitration. This will undoubtedly ensure that Hong Kong is placed in a unique position of privilege as a seat of arbitration. It has been widely reported that the first application of the Interim Measures Arrangement came a mere seven days after it came into effect.[41]

39 *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm) (QBD) at para 69.

40 For instance, see ss 21L and 21M of the High Court Ordinance (Cap 4) or ss 45(2) and 60(1) which, inter alia, allow for interim relief and aid in the case of foreign proceedings, including arbitration.

41 HKIAC, 'HKIAC Receives Five Applications under Hong Kong–Mainland Arrangement on Interim Measures' (11 October 2019). Perhaps more surprising than the speed of which the Interim Measures Arrangement was put into use was the speed and success by which the PRC Courts have resolved applications — the

8.1 Principle: To benefit from the Interim Measures Arrangement, an arbitration must be seated in Hong Kong and administered by one of the six named arbitration institutions

[3-41] As set out in article 2 of the Interim Measures Arrangement, only Hong Kong seated arbitration will benefit from it. In addition, the arbitration must also be administered by certain (currently six) institutions or permanent offices: the Hong Kong International Arbitration Centre ('HKIAC'), China International Economic and Trade Commission ('CIETAC') Hong Kong Arbitration Center, International Court of Arbitration of the International Chamber of Commerce ('ICC'), the Hong Kong Maritime Arbitration Group, the South China International Arbitration Center (Hong Kong); and the eBRAM International Online Dispute Resolution Centre.[42] This list may be updated from time to time. However, for now it is clear that parties which either choose to commence *ad hoc* arbitration or submit their dispute to an unnamed administrative body will not benefit from the Interim Measures Arrangement.

8.2 Principle: Under the Interim Measures Arrangement, the PRC Courts may grant three types of interim measures, only

[3-42] Parties can currently apply for three types of interim measures from the PRC Courts: an asset preservation order, an evidence preservation order, and a conduct preservation order.[43] The three are self-describing in nature. An asset preservation order prohibits counterparties from dealing with specified assets as is similar, in application, to a Mareva injunction. An evidence preservation order is sought when one wishes to pursue a counterparty to produce evidence that is at risk of being destroyed and handled or may otherwise be difficult to obtain at a later date. Finally a conduct preservation order either prohibits or compels a counterparty from acting in a manner inconsistent with the status quo. The PRC Courts powers are broad, even if only limited to these three general heads of orders.

very first application through the Interim Measures Arrangement was submitted on the day it came into effect, was forwarded on by the HKIAC and was subsequently granted on 8 October 2019, a mere week after the submission was handed in. A great majority, if not all applications submitted under the HKIAC's guidelines have also been successful.

42 eBRAM is a relatively new arbitration administration institution formed with the support of inter alia the Hong Kong Bar Association and the Law Society of Hong Kong, and seeks to bring about an online dispute resolution platform. The HKSAR Government has allocated HK$ 150 million for the development of the platform, which hopes to cut down on the expenses and travel involved in face-to-face litigation.

43 The choice in language can be traced to China's civil law system. In essence, a 'preservation' in civil law jurisdictions is akin to 'interim measures' in common law jurisdictions.

8.3 Principle: Applications for interim relief under the Interim Measures Arrangement can be sought before or after the commencement of proceedings under the relevant arbitration administrative body

[3-43] Article 3 of the Interim Measures Arrangement envisages and stipulates the procedure for applying for interim measures for cases either during the arbitral proceedings or even before the acceptance of request for arbitration by the arbitration institutions. In the case where arbitral proceedings are already underway, article 3 of the Interim Measures Arrangement provides that a party's application should be made through an arbitral institution and transferred by it to the PRC Courts. In practice however, it has emerged that the transfer letter and the party's application papers are submitted together at once to the PRC Courts by the parties themselves.[44] This is in the interests of time owing to the time-sensitive nature of these applications in the first place. In the case where arbitral proceedings have not yet commenced, applications can again be made directly to the relevant PRC Court. In those circumstances, the arbitral institution administering the dispute must issue a letter of proof to the PRC Court after it accepts the request for arbitration within 30 days of the interim relief being handed down by the PRC Court.

8.4 Principle: In the time since the introduction of the Interim Measures Arrangement both foreign and Mainland parties have sought its use, leading to billions of RMB worth of interim measures

[3-44] In the two to three years since the implementation of the Interim Measures Arrangement, it is clear that parties have taken strongly to the benefits the legislation provides.

[3-45] As of 20 September 2022, the HKIAC had issued letters of acceptance in respect of 82 applications, including 77 asset preservation orders concerning a total amount of RMB 20.5 billion.[45] Of these letters of acceptance, the HKIAC

44 Jiang, Qibo, Zhou, Jiahai, Si, Yanli & Liu Kun, 'The Understanding and Application of the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region'. The PRC Court may, in accordance with the contact information provided by the Department of Justice of Hong Kong, verify the information with the relevant arbitration institution.

45 HKIAC, 'PRC-HK Interim Measures Arrangement: Frequently Asked Questions', as of 31 March 2022 (accessible at www.hkiac.org/Arbitration/interim-measures-arrangement-faqs#5.%20How%20many%20successful%20applications%20have%20been%20made%20under%20the%20Arrangement?).

but commenced proceedings it the Singapore Courts. On both of these issues, the Singapore Court of Appeal upheld the validity of the arbitration agreement, affirming the parties' freedom to agree to terms of an arbitration clause including one that effectively requires one of the parties to give up its right to refer their dispute to arbitration.

[4-17] This position rings true in England and Wales as well. For instance, in the case of *NB Three Shipping Ltd v Harebell Shipping Ltd*,[13] the dispute resolution clause gave the shipowner the power to bring the dispute to arbitration but the charterer's right was limited to the commencement of court proceedings. While noting that the clause gave 'better' rights to the shipowner, the dispute resolution clause was nonetheless upheld.

3.2 Principle: While the Court is not required to allow the matter to be resolved by an arbitral tribunal first, the arbitral tribunal will generally have the first opportunity to decide on jurisdictional issues in Hong Kong

[4-18] The doctrine of *kompetenz-kompetenz* is one of the underpinning principles in arbitration. It refers to the fact that arbitral tribunals may rule on their own jurisdiction. This is an important practical consideration as it allows for tribunals to rule that they do not have jurisdiction over a dispute while ensuring that this finding is not itself invalidated. In Hong Kong, the doctrine of *kompetenz-kompetenz* is recognised in section 34 of the Arbitration Ordinance.[14] At the same time, however, it cannot be denied that both the Model Law and the Arbitration Ordinance envisage that Courts may also consider the validity and status of an arbitral clause.[15] In these circumstances, the Court is asked to consider whether the arbitral agreement is valid, whether it relates to a dispute within the boundaries of the arbitral agreement, or whether the arbitral agreement is one that is capable of being performed (in terms of the subject matter or owing to some fault in the legal construction). What is less certain, is the way Courts and arbitral tribunals should interact with each other. While the Model Law enables

13 *NB Three Shipping Ltd v Harebell Shipping Ltd* [2004] EWHC 2001 (Comm), [2004] All ER (D) 152 (Oct).

14 Section 34(1) of the Arbitration Ordinance (Cap 609) adopts art 16(1) of the Model Law in full. The pertinent provisions read: 'The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause.'

15 Section 20(1) of the Arbitration Ordinance adopts art 8(1) of the Model Law in full. The pertinent provisions read: 'A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void.'

both venues to make decisions on the issue of jurisdiction, there are no express provisions regarding the standard of proof and no definitive order of preference is established in allowing one forum to claim priority over the other. Recently, other commonwealth jurisdictions such as Australia have considered that the Court does not have a duty to consider the validity or invalidity of the arbitral tribunal and that it is merely a discretion to be exercised in the appropriate circumstances.[16] In short, the Court may defer its ability to make such decision to the arbitral tribunal. Indeed, it is commonly opined that *kompetenz-kompetenz* has the positive effect that the arbitral tribunal has the power to consider and decide jurisdictional challenges, and the negative effect that restricts supervisory courts from determining jurisdictional challenges at least until the arbitral tribunal renders an award. It is thus suggested that *kompetenz-kompetenz* demands that the arbitral tribunal, and not the court, should in the first instance decide on the tribunal's competence.

[4-19] In Hong Kong, this is not an absolute rule that is followed. In *Kenon Engineering Ltd v Nippon Kokan Koji Kabushiki Kaishia*,[17] the Court of Appeal rejected the argument that courts were required by section 34 to allow the matter of jurisdiction to be decided by an arbitral tribunal first. Instead, it found that the Court was empowered to come to this decision themselves in cases where it would be just and convenient to do so. In that particular case, the arbitral tribunal had stayed arbitral proceedings pending the court's decision and as such, it was an appropriate situation for the Court to decide on the issue of jurisdiction.

3.3 Principle: To determine whether to grant a stay to arbitration under section 20, the Court will consider four main questions

[4-20] It should be noted that section 20 of the Arbitration Ordinance gives legal effect to article 8 of the Model Law and it sets out the basic principle that the court before which an action is brought in a matter which is the subject of an arbitration agreement must refer the parties to an arbitration unless it is established that the arbitration is null and void, inoperative or incapable of being formed. Once these conditions are satisfied, a stay of the legal action is mandatory.[18] In turn, the Court's approach in an application for a stay in favor of arbitration is set out by Ma J, as the Chief Justice was then known, in *Tommy CP Sze & Li & Fung (Trading) Ltd & Ors*,[19] whereby four main questions will have to be decided to reach a conclusive answer. While the order of these four questions has been adopted from the decision, it is noted that Ma CJ has suggested in his decision that it is open to the Court to deal with these issues in any order which they deem efficient and

16 Consider, for instance, *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170 at paras 337–394.

17 *Kenon Engineering Ltd v Nippon Kokan Koji Kabushiki Kaishia* [2004] HKCU 512 (unreported, CACV 215/2003, 7 May 2014) (CA).

18 *Lin Ming & Anor v Chen Shu Quan & Ors* [2012] 2 HKLRD 547 at 556, [2012] HKCU 557 (CFI).

19 *Tommy CP Sze & Li & Fung (Trading) Ltd & Ors* [2003] 1 HKC 418 (CFI).

indeed, not all of the four questions will be controversial in every application. Nonetheless, the order the questions are placed in set out the cognitive flow that one should apply in considering these applications.

[4-21] The logical starting point must be whether the clause in question is an arbitral clause. Indeed, given that this is the basis of any stay application, the failure to answer this question in the affirmative must mean that a stay will not be granted.

[4-22] Next, the Court will consider if the arbitration agreement is 'null and void, inoperative or incapable of being performed', as set out in the text of article 8 itself. It is clear that arbitral clauses will not be upheld if they breach public policy — say, if the subject of the arbitral clause is a dispute which is not capable of being arbitrated. While arbitral clauses may be void for uncertainty, the Courts have liberally interpreted arbitral clauses to give vague language effect. For instances, clauses containing phrases such as 'the parties *may* resort to arbitration', instead of the imperative use of '*shall*' has been held to clear enough to give effect to the clause.[20] Arbitral clauses have been given effect even where parties' names have been misspelt, or reference is made to arbitral institutions that no longer exist by the time the dispute is referred to arbitration.[21] In short, the Court has taken an approach to give effect to arbitral agreements, particularly in cases where there is a clear intention to do so. It is held that the doctrine of separability applies — the fact that the main contract has been terminated or is impugned with allegations of fraud does not render the arbitral clause 'null and void'. The integrity of the arbitral clause is separate from that of the integrity of the main contract it is contained in.

[4-23] After establishing the existence of a valid, certain and operative arbitral clause, the Court will then look to the nature of the dispute itself, asking the question: '*is there in reality a dispute or difference between the parties?*'. This is perhaps a rare point of contention between the parties and naturally, if there is no dispute, no stay will be ordered. In fact, it is difficult to see how the dispute would continue at all, in litigation or arbitration if no dispute is deemed to exist at all.

[4-24] Instead, it has been the case that parties are more likely to raise issues in the fourth question: '*does the arbitration agreement cover the dispute or difference in question*'. This requires the Court to first analyse the nature of the dispute between the parties to see whether it can be construed to fall within the ambit of the arbitration agreement. If the answer is in the negative, a stay will not be ordered. Here too, the Court can be said to have adopted a reasonably broad intention of the specific words used in an arbitral agreement to give effect to arbitral clauses. In the recent case of *Cheung Shing Hong Ltd v China Ping An Insurance (Hong Kong) Co Ltd*,[22] the Court was asked to consider an arbitral

20 *Tianjin Medicine & Health Products Import & Export Corp v JA Moeller (Hong Kong) Ltd* [1994] 1 HKC 545 (HC).

21 *Lucky-Goldstar International (HK) Ltd v Ng Moo Kee Engineering Ltd* [1993] 1 HKC 404, [1993] 2 HKLR 73 (HC).

22 *Cheung Shing Hong Ltd v China Ping An Insurance (Hong Kong) Co Ltd* [2020] HKCU 3051, [2020] HKCFI 2269 (CFI).

clause which provided that: ' ... if any difference shall arise as to the amount to be paid under this Policy, such difference shall be determined by arbitration in accordance with the prevailing Arbitration Ordinance.' On the one hand, the applicant for stay argued that such a clause was broad enough to cover disputes as to both liability and quantum, whilst on the other, the respondent sought to rely on the plain meaning of the words to suggest that only disputes as to quantum were to be referred to arbitration. It is highlighted that while it is important to consider the precise wording of each and every arbitral clause, it should be expected that where the wording of the clause and type of agreement in question has been previously analysed by the Court, one would normally expect the Court to follow the construction and analysis of these earlier court decisions. It is suggested by these authors that it would also be important to give weight to the context of the agreements. Where a particular wording or a particular type of agreement has not been put to the test, the Court will generally apply good commercial sense to the interpretation of arbitration agreements. To that effect, the Court in *Cheung Shing Hong Ltd* was of the opinion that it would surprising for parties to insurance contracts to intend to decide issues of liability and quantum in different forums as it would be unusual for commercial parties to establish separate and distinct procedures merely for resolving different stages of the same dispute.[23] Accordingly, litigation was stayed in favor of arbitration, despite the plain language of the arbitral clause indicated that only issues of quantum would be referred.

3.4 Principle: In proceedings to stay court proceedings in favor of arbitration, the applicant for stay bears the burden to demonstrate that there is a clear prima facie case that the parties are bound to arbitrate

[4-25] The authorities have made it clear that in an application under section 20 of the Arbitration Ordinance, the onus is on the applicant for stay to demonstrate that there is a clear prima facie case that the parties are bound by an arbitration clause.[24] This is not a high hurdle to cross. Indeed in *PCCW Global*

23 Consider, for instance, *Sul America Cia Nacional De Seguros SA & Ors v Enesa Engelharia SA & Ors* [2012] EWCA Civ 638, [2012] All ER (D) 145 (May), [2013] 1 WLR 102 (CA, Eng). While *Sul America* dealt with an arbitral clause which was arguable wider and broader than that in *Cheung Shing Hong Ltd*, the commercial considerations still apply. In *Sul America* it was held by the Court of Appeal of England and Wales that barring very unusual reasons, it would be odd for disputes about liability and quantum to be decided in separate forums, and that if this was the intention, this would have been easily and specifically provided for without creating a conflict between the two conditions. Instead, it was more likely that the parties intended to refer all their disputes to the same forum.

24 *Chee Cheung Hing & Co Ltd v Zhong Rong International (Group) Ltd* [2016] HKCU 657 (unreported, HCA 1454/2015, 9 March 2016) (CFI).

is the challenge that the tribunal does not have the jurisdiction to hear the claim. The consequence of this is important: issues of admissibility are not considered to provide a challenge to the general authority of the parties' agreement to arbitration and an arbitral tribunal should be considered to have the exclusive authority to consider question of admissibility.[34] An interesting way of drawing the line between jurisdiction or admissibility is proffered as such:

> To understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds:
>
> - If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse.
>
> - If the reason would be that the claim should not be heard at all (or at least not yet) the issue is ordinarily one of admissibility and the tribunal's decision is final.[35]

[4-39] It was also opined on by G Lam J that the distinction between jurisdiction and admissibility was not only to be drawn on the specific wording of the written law of a particular jurisdiction, but rather it is a concept which is rooted in the nature of arbitration itself. This is to be kept in mind when considering section 81 of the Arbitration Ordinance in application for setting aside: in approaching applications to set aside arbitral awards, the Court must confine itself to *true* question of jurisdiction, and thus, not ones that merely touch upon admissibility. While there may be genuine questions surrounding the parties' consent and the importance of fulfilling conditions that are offered as a pre-requisite to arbitration, the categorisation of these issues as questions to admissibility rather than jurisdiction mean that these questions should be left to be decided by the arbitral tribunal, and not by the national courts in subsequent enforcement proceedings.

[4-40] A brief point also addressed by the Court related to whether or not the characterisation of escalation mechanisms as mere admissibility considerations for the arbitral tribunal meant that the plaintiff's fundamental right of access to the courts under article 35 of the Basic Law were curtailed. The Court dealt with this allegation in the usual manner — to stress that the right is not

34 Mills, *Arbitral Jurisdiction* in *The Oxford Handbook on International Arbitration* (Oxford University Press, 2018). In *C v D* [2021] 5 HKC 65, [2021] 3 HKLRD 1, [2021] HKCFI 1474 (CFI), G Lam J cited from both this authority as well as Born, *International Commercial Arbitration* (3rd edn, WoltersKluwer 2021), where it is stated in Born that: 'In interpreting the parties' arbitration agreement, the better approach is to presume, absent contrary evidence, that pre-arbitrational procedural requirements are not 'jurisdictional'. As a consequence, in most legal systems, these requirements would presumptively be both capable of resolution by the arbitrators and required to be submitted to the arbitrators (as opposed to a national court) for their initial decision. Similarly, the arbitral tribunal's resolution of such issues would generally be subject to only minimal judicial review in subsequent annulment or recognition proceedings.'

35 Paulsson, *Jurisdiction and Admissibility* in *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC Publishing, 2005) at p 617.

absolute, and that the law and restrictions in this area are proportional. The question of compatibility with the Basic Law is to be adjudged on the entire scheme of the judicial scrutiny of arbitration awards, and that the underlying principle of the Arbitration Ordinance is to restrict the Court's interference in order to ensure the fair and speedy resolution of disputes by arbitration without unnecessary expense.

[4-41] The important lesson to draw from *C v D* above is that absent an explicit intention, the satisfaction of pre-arbitration perquisites is to be seen as relating to questions of admissibility, rather than jurisdiction. While it is still important for parties to ensure that they meet the ends of their contractual bargain, these are issues that will only be brought up before arbitral tribunals in their consideration of whether a dispute is admissible before them. Parties should no longer view the failure to adhere to these conditions as legitimate reasons in their applications to set-aside arbitral awards or to resist enforcement of the same.

3.9 Principle: In considering arbitration clauses involving the CIETAC Shenzhen or Shanghai Sub-committees, due regard must be paid to the PRC Supreme Court's 'Golden Rule'

[4-42] For a period of just over three years in the mid-2010s, great uncertainty arose over the jurisdiction of arbitral tribunals and the interpretation of arbitral clauses naming either 'CIETAC Shenzhen' or 'CIETAC Shanghai' as the arbitral institution of choice. While this issue has been settled by the Supreme People's Court's 'Golden Rule', it is still relevant for us to consider the history and the application of this rule as contracts containing these arbitral clauses are likely to still be in effect today.

[4-43] CIETAC (China International Economic and Trade Arbitration Commission), established in 1956 has risen to the top of many international parties' choice for arbitration in China. As an independent and impartial organisation, many disputes involving state-owned enterprises and international-Chinese joint ventures have been submitted to CIETAC for arbitration in recent years. To better service the wide range of disputes it began to receive, CIETAC set up a number of regional sub-commissions across China.[36]

[4-44] The saga surrounding CIETAC arbitration clauses began with both the Shanghai and the South China sub-commissions announcing on 2 May 2012

36 In particular, CIETAC opened its Hong Kong sub-commission in September 2012 which to date, is the only sub-commission outside of Mainland China. At the date of publication, CIETAC had established the following other sub-commissions: South China (Shenzhen), Shanghai, Tianjin, Southwest (Chongqing), Zhejiang, Hubei, Fujian, Silk Road (Xi'an), Jiangsu, Sichuan, Shandong, Hainan and Xiong'an.

[6-5] As to impartiality, the case of *Hebei Import & Export v Polytek Engineering Co Ltd*,[7] Bokhary PJ referred to the learned authors of Mustill & Boyd in noting that duty encompassed both the need to avoid: '… bias in the strict sense, namely a predisposition to decide a dispute in a particular way' and '… the situation in which the arbitrator conducts the reference in a way which is said to be unduly favourable to one party …', in other words: actual bias and apparent bias. Lord Hewart has famously referred to the importance of these two forms of bias as the need for: '… justice should not only be done, but should manifestly and undoubtedly be seen to be done.'[8] These are discussed below.

2.2 Principle: The burden of proving actual bias or apparent bias is on the challenging party

[6-6] Those who wish to make challenge the appointment of an arbitrator on the basis of actual or apparent bias must keep in mind that the burden is upon them to prove that the situation gives rise to the same.[9] Guidance can also be sought from cases where judges, not arbitrators, are subject to actual or apparent bias allegations. Indeed, as already mentioned, arbitrators are to be held against a stronger standard of independence than judges (if such a difference exists at all) to sanctify the arbitrator's unique position as a party-appointed adjudicator.[10] It has been held in Hong Kong that the standard applied to arbitrators and judges are the same.[11]

[6-7] Any party wishing to challenge the appointment of an arbitrator should keep in mind that the Hong Kong courts have generally been reluctant to intervene save for the most obvious cases and that much cost and time will have been expended by the end of the challenge procedure. Indeed, Lam J had noted in *Brunswick Bowling & Billiard Corp* that an arbitrator challenge is a serious matter than goes to the very integrity of the arbitrator concerned.[12] Parties should therefore be sure that the case is built on a solid foundation before proceeding with any challenge. Indeed, section 26(2) of the Arbitration Ordinance provides that if an award is being challenged for, inter

7 *Hebei Import & Export v Polytek Engineering Co Ltd* [1999] 2 HKC 205, (1999) 2 HKCFAR 111, [1999] 1 HKLRD 665 (CFA).

8 *R v Sussex Justices ex p McCarthy* [1924] 1 KB 256, [1923] All ER Rep 233.

9 *Logy Enterprises Ltd v Haikou City Bonded Area Wansen Products Trading Co* [1997] 2 HKC 481 (CA).

10 *AT&T Corp v Saudi Cable Co* [2000] 2 All ER (Comm) 625, [2000] 2 Lloyd's Rep 127 (CA, Eng), per Lord Woolf MR.

11 *Jung Science Information Technology Co Ltd v ZTE Corp* [2008] 4 HKLRD 776, [2008] HKCU 1127 (CFI).

12 *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Corp Ltd* [2009] 5 HKC 1, [2011] 1 HKLRD 707 (CFI).

alia, the independence of an arbitrator, the court may refuse to grant leave for enforcement of the award.[13]

2.3 Principle: An actual bias is an unequivocal basis for removal

[6-8] Actual bias refers to the situation where it an arbitrator has: 'acted in a way where (his or her) impartiality has been compromised'.[14] It is thus a necessary requirement for the reliant party to show that the arbitrator not only had a partial or prejudiced state of mind, but that he had applied the same in rendering his verdict and making decisions in the course of the arbitration. It is for this reason that actual bias has been said to be an elusive proposition,[15] and cases where actual bias can be proven are far and few in between.

2.4 Principle: Where a reasonable apprehension of bias exists, an arbitrator will also be removed from the tribunal for apparent bias

[6-9] It is important to understand the differentiation between actual bias and apparent bias. While actual bias refers to the situation where real, proven bias exists and has been acted on, apparent bias describes the situation where bias will be *imputed* from the very nature of an arbitrator himself, or his relationship to parties involved in the arbitration. If sufficient facts and factors arise to suggest that bias *may* be present, this will be enough for an arbitrator to be removed.

[6-10] The recognised standard for apparent bias is whether or not a fair-minded and informed observer would conclude that the arbitrator was biased, being in full knowledge of the circumstances which would have a bearing on that suggestion.[16] With this in mind, it is clear that each potential challenge must be decided on its own particular facts.

[6-11] It is important to appreciate that the 'reasonable apprehension of bias' test involves an assessment of the critical facts and circumstances through the eyes of an objective, fair minded and informed observer. In *Pacific China*

13 Section 26(2) of the Arbitration Ordinance (Cap 609) reads: 'During the period that a request for the Court to decide on a challenge is pending, the Court may refuse to grant leave under section 84 for the enforcement of any award made during that period by the arbitral tribunal that includes the challenged arbitrator.'

14 Tweedale, A and Tweedale, K, '*Arbitration of Commercial Disputes: International and English Law and Practice*' (2007) at para 13.55, as cited by Tang VP (as he then was) in *Gao Haiyan v Keeneye Holdings Ltd* [2012] 1 HKC 335, [2012] 1 HKLRD 627 (CA).

15 Okpaluba, C & Juma L 'The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa' (2011) PER 38.

16 *Jung Science Information Technology Co Ltd v ZTE Corp* [2008] 4 HKLRD 776, [2008] HKCU 1127 (CFI).

Ltd of England,[24] it was said that the guidelines were to be applied with common sense, and not rigidly or in a formulaic manner.[25] At the time of publication, few Hong Kong cases have overtly considered the IBA Guidelines.[26] Indeed, while the IBA Guidelines have the potential to come into conflict with legal authorities, it is suggested that reliance on the former will at least serve to demonstrate that the arbitrator in question was not unreasonably withholding information that he is later deemed to have wrongly withheld.[27]

[6-17] Over the course of the next few principles, the IBA Guidelines will be referred to, in an attempt to be supplemental to that which has been settled by the courts.

2.6 Principle: Where an arbitrator has pecuniary interest in the outcome of proceedings, he will be automatically disqualified from serving on the Tribunal

[6-18] The IBA Guidelines have sought to set out a 'non-waivable red list' of circumstances whereby justifiable doubts as to an arbitrator's independence or impartiality will necessary exist due to the nature of the relationship, and an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances. These circumstances are non-waivable in the sense that even the parties expressly state their willingness to have such a person act as arbitrator, it would be insufficient to allow an arbitrator to continue in the proceedings. Needless to say, an arbitrator who holds a significant financial interest in a company should not be involved in an arbitration the company is a party to. This includes financial relationships[28] such as being a shareholder, an employee, a creditor of or a debtor to any party.

[6-19] Under the IBA Guidelines, an exception has been expressly recognised in the case that an arbitrator holds an insignificant amount of shares in a publicly-listed company which is one of the parties or an affiliates of one of the parties.[29]

24 *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm), [2006] 2 All ER (Comm) 122 (QB).

25 See also, para 6 of the Introduction of the Guidelines, which reads, '[t]he IBA Arbitration Committee trusts that the Guidelines will be applied with robust common sense and without unduly formalistic interpretation.'

26 They were considered, for instance, in *W v AW* [2021] 5 HKC 476, [2021] HKCFI 1707 (CFI), by Mimmie Chan J, in passing.

27 Support may be found in *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528, [2002] 3 WLR 640 where it was held that '[i]f the position is borderline, disclosure should be made because then the judge can consider, having heard the submissions of the parties, whether or not he should withdraw.'

28 Paragraphs 1.2–1.3 under the Non-Waivable Red List of the Guidelines.

29 Paragraph 4.4.2 under the Green List of the Guidelines.

[6-20] Significant difficulty has arisen in regards to the application of automatic disqualification upon personal relationship, particularly in the aftermath of *Re Pinochet (No 2)*[30] whereby the rule of automatic disqualification was extended to personal interests. In *Re Pinochet (No 2)* it was said that Lord Hoffmann's position as an unpaid director and chairman of Amnesty International placed him in a position of automatic disqualification *vis-a-vis* the hearings over the Chilean ruler's extradition to Spain. Amnesty International had intervened in proceedings against Pinochet's application to resist extradition. Ultimately the House of Lords came do the decision that Lord Hoffmann should have been automatically disqualified from taking his seat in *Re Pinochet* due to his personal relationship with Amnesty International. It is important to note that the IBA Guidelines suggest that where the arbitrator has a 'significant' personal interest in one of the parties or the outcome of the case, he should automatically withdraw from proceedings.[31]

[6-21] Legal observers have been critical of this decision, noting that no previous decision had sought to extend automatic disqualification to personal interests, a position recognised by Lord Hope in *Re Pinochet (No 2)*. However, it was held that in order to maintain the absolute impartiality of the judiciary, there had to be a rule which automatically disqualified a judge based on personal interests, such as the promotion of a cause in which he was involved together with one of the parties. Lord Browne-Wilkinson held that there was no room for fine distinctions in this area of law if the absolute impartiality of the judiciary was to be maintained. Indeed, in the later decision of *Meerabux v A-G of Belize*[32] it was expressed by Lord Hope that:

> If the House of Lords had felt able to apply [the apparent bias test] in the Pinochet (No 2) case, it is unlikely that it would have found it necessary to find a solution to the problem that it was presented with by applying the automatic disqualification rule.

[6-22] This admission speaks volumes.

[6-23] As such, while the decision in *Re Pinochet (No 2)* remains highly influential and was said to have been adopted by the Court of Appeal of Hong Kong in *Cheung v Insider Dealing Tribunal*,[33] its application is highly doubted. Indeed, a close

30 *Re Pinochet (No 2)* [2000] 1 AC 119, [1999] 1 All ER 577, [1999] 2 WLR 272 (HL).

31 The following descending order of potential conflicts of interest arisen from one's personal interest should be noted. When a close family member of the arbitrator has a significant personal interest in one of the parties or an affiliate of one of the parties, it is put under the Waivable Red List para [2.3.9]. When a close personal friendship exists between an arbitrator and a counsel of a party, it is put under the Orange List para [3.3.6]. When a close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board of a party, or an entity that has a direct economic interest in the award, or any person having a controlling influence on one of the parties or an affiliate of one of the parties or a witness or expert, it is put under the Orange List para [3.4.3]. When the arbitrator has a relationship with one of the parties or its affiliates through a social media network, it is put under the Green List para [4.4.4].

32 *Meerabux v A-G of Belize* [2005] 2 AC 513, [2005] All ER (D) 419 (Mar), [2005] 2 WLR 1307 (PC).

33 *Cheung v Insider Dealing Tribunal* [2000] 1 HKC 437, [2000] 1 HKLRD 807 (CA).

bias. As it transpired, the sole arbitrator, a barrister, had represented the expert witness in a number of litigation hearings, had known each other for over 25 years, and had taken lunch together on a very regular basis.

[6-32] On the other hand, the case of *Jung Science Information Technology Co Ltd* above shows the fact sensitive-nature of not only the circumstances surrounding the arbitrator and the parties involved, but also the greater legal community at large. In *Jung* the Court of First Instance dismissed a challenge brought against the-then HKIAC Chairman, who had been appointed by the HKIAC to serve as chairman of the tribunal. Therein, it was argued by the applicant, inter alia, that the arbitrator held a social and professional relationship with one of the defendant's lawyers by being personal friends, sitting together on the HKIAC council and often delivering speeches at seminars and meetings together. This application was ultimately rejected by the Court of First Instance, paying heed to the fact that two highly regarded practitioners would often be in ordinary contact with one another, particularly given that the international arbitration circle in Hong Kong was rather small.

[6-33] Courts have also been slow to recognise any reasonable apprehension of bias in the case where arbitrators hold directorships or non-executive directorships with parties affiliated to those involved in the proceedings. In *AT & T Corp v Saudi Cable Co* above, the English Court of Appeal rejected an arbitrator challenge on the basis that the arbitrator held a non-executive directorship with one of the parties' main competitors. In arriving at this decision, the English Court of Appeal carefully assessed the arbitrator's role as a non-executive director by recognising that that office was an incidental rather than vital part of his personal life, and that he was in function and fact, independent of management of the company. For instance, he took no part in the Executive Committee of the company he was a non-executive director in.[37] The reluctance of the court in Hong Kong is better demonstrated in a similar but different situation in the case of *Logy Enterprises Ltd*.[38] This case related to a complaint of apparent bias on the part of an arbitrator who also held office as a 'high official' of the entity whose branch had issued an inspection certificate which was heavily relied upon by a party to the arbitration. In spite of this, the Court of Appeal found that there was no 'real danger' of bias.[39]

37 An interesting side-note to the decision at first instance is the learned Judge's recognition that the challenged arbitrator's role as Queen's Counsel meant that he must also be well aware of his obligations of impartiality. The Court of Appeal neither confirmed nor denied the applicability of this reasoning in their decision. Similar interesting reasoning can be found in the case of *Jung* where the Court reasoned that as both the challenged arbitrator and a law firm partner of an international firm were senior, highly experienced and well-respected practitioners (as shown on their internet profile), they can be expected to observe high standards of integrity.

38 *Logy Enterprises Ltd v Haikou City Bonded Area Wansen Products Trading Co* [1997] 2 HKC 481 (CA).

39 *Logy* was a case that pre-dated the modern approach of 'real apprehension'. It should also be noted that the challenge was launched at the stage of enforcement of award, but the potential conflicts of interest were discovered after the making of the award.

[6-34] Another unsuccessful challenge arising from a judge's private life can be demonstrated in the case of *Taylor*[40] where it was held that a judge was not barred from continuing to serve as the presiding judge in a case where one party was represented by a firm of solicitors who were simultaneously advising the judge on matters relating to a will. The Court of Appeal went as far as saying that inference of apparent bias in this situation was 'unthinkable'.

2.9 Principle: An apprehension of bias may arise in circumstances where an arbitrator accepts multiple appointments in different arbitrations from the same party, where the arbitrations concern the same or overlapping subject matters

[6-35] The recent judgment of the UK Supreme Court in *Halliburton Co v Chubb Bermuda Insurance Ltd*[41] contains important implications for the common law in both the matter of how apparent bias will be assessed by the English courts (and theoretically the Hong Kong courts), and manner in which this test will be applied to the specific context of arbitration, particularly where a more limited number of practitioners may exist.

[6-36] *Halliburton* related to disputes arising out of the 'Deepwater Horizon' incident (often referred to as the largest marine oil spill in the history of the petroleum industry) where a drilling rig exploded in the Indian Ocean, causing oil to spill into the waters of the Gulf of Mexico. The oil rig was owned by Transocean Holding LLC, Halliburton provided cementing and monitoring services to the operation, and Chubb were both Transocean and Halliburton's insurers for the operation. Both Transocean and Halliburton had purchased insurance on the 'Bermuda Form', a standard insurance contract which provided for high excess commercial general liability insurance. After a number of years of disputes with various departments of the US Government, both Halliburton and Transocean had settled many of their claims or had pled guilty to regulatory offences, necessitating the payment of large fines. Both Halliburton and Transocean then sought to claim these amounts on the basis of the insurance policies they had taken out with Chubb. Chubb refused to pay the various settlement sums, in both cases, on the grounds that neither settlement was a reasonable settlement.

[6-37] Stemming from these incidents, Halliburton commenced ad hoc arbitration proceedings against Chubb in January 2015 pursuant to an arbitral clause in the insurance agreements which were seated in London. The governing law was New York law. After both parties had nominated their respective arbitrators, a chairman could not be decided upon. Owing to these difficulties, the High Court of England and Wales ultimately appointed Mr. Rokison QC as the

40 *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528, [2002] 3 WLR 640.

41 *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [2021] AC 1083, [2021] 2 All ER 1175 (SC, UK).