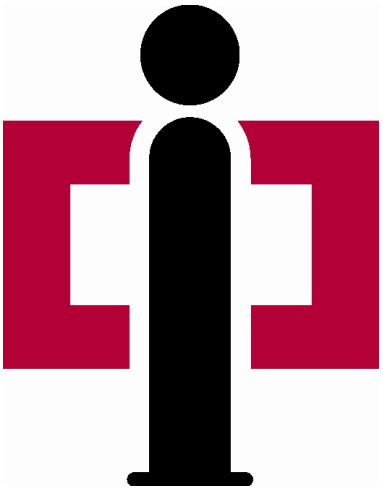
The Hong Kong Institute of Arbitrators



Matching Grant Scheme:

International Commercial Arbitration and PRC

Arbitration Training Programme

Course Manual

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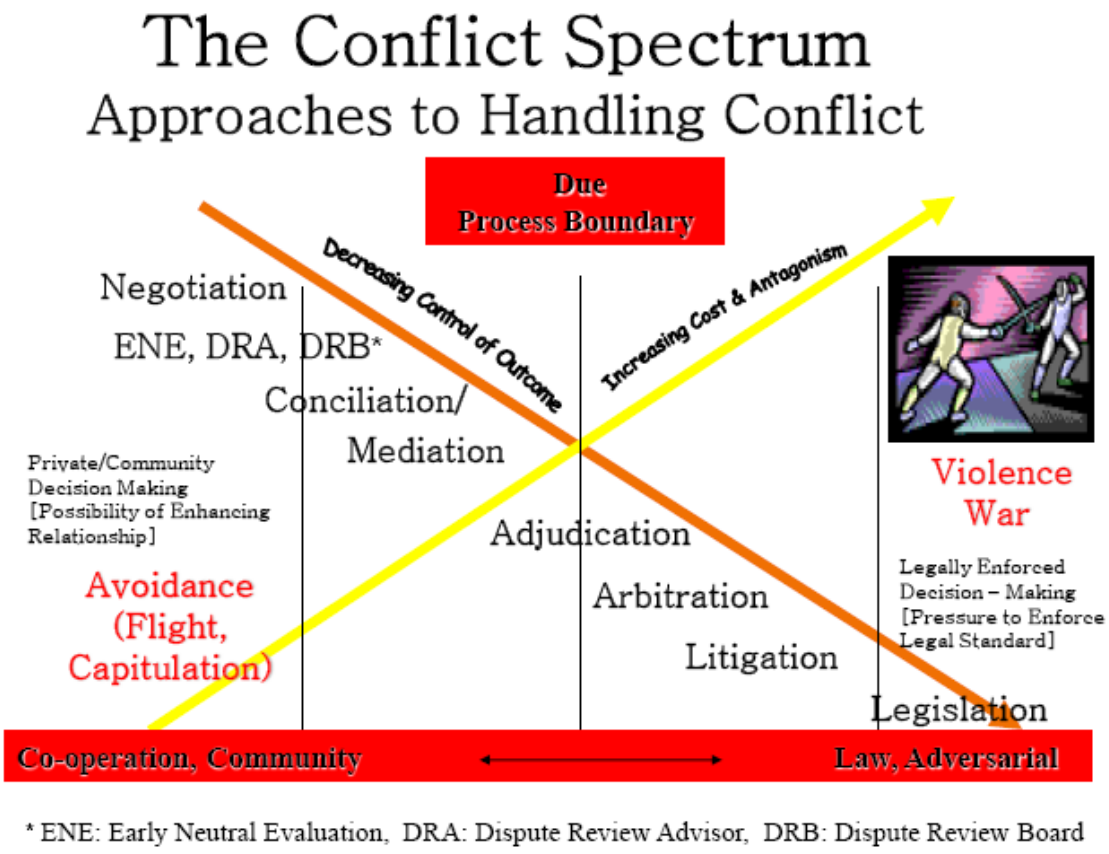
CHAPTER 1: ARBITRATION IN THE SPECTRUM OF DISPUTE RESOLUTION

Arbitration has in the past half-century become the method of choice for resolving international commercial disputes. It is, however, one technique in the spectrum of dispute resolution methods. This chapter distinguishes arbitration from other methods, pointing out its characteristics, as well as the advantages and disadvantages of arbitration as compared with other techniques available to disputing parties.

I. The Dispute Resolution Spectrum



* ENE: Early Neutral Evaluation, DRA: Dispute Review Advisor, DRB: Dispute Review Board

1. The many ways of resolving a dispute depend on the circumstances and the type of resolution that is sought. These methods of dispute resolution include negotiation, expert determination, “med-arb”, dispute review boards, adjudication and others. The three techniques most commonly used in Hong Kong are mediation, litigation and arbitration.

2. Mediation is a private, informal dispute resolution process in which a neutral third person, the mediator, acts as a facilitator to help disputing parties reach an agreement. The mediator is not acting as a judge or counsel, and has no power to impose a decision on the parties[1]. The resulting settlement agreement is contractually binding on the parties, but not enforceable as a judgment.

3. Litigation is a legal action in a state court of law for the purpose of enforcing a right or seeking a remedy to resolve a dispute. Litigation results in a binding judgment that may be enforced using the state’s powers. Litigation in a state court is the “default”, or usual method of resolving disputes. Once in the state court system, parties have little control over the procedures and are bound by a set of fairly rigid court rules.

4. The Hong Kong Arbitration Ordinance states its objective as the *fair, speedy and cost-effective resolution of disputes without unnecessary expense*.[2] Arbitration is a private method of dispute resolution in which the parties agree that a neutral third party (arbitrator or arbitral tribunal) will render a legally based decision after the parties have an opportunity to present their case[3]. Arbitration is an alternative to litigation, but like litigation, it produces a decision (award) that is binding upon the parties as if made by a state court judge. Because arbitration is a departure from the customary public system, the parties must clearly choose it.

5. The methods of dispute resolution can be seen as a continuum, each offering its own advantages and disadvantages, which parties can choose according to what suits their own specific circumstances. For example, mediation may precede arbitration, or the parties may engage in mediation after the arbitration has begun.

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1 *Black’s Law Dictionary*, Sixth Edition (1991).

2 S.3(1) HKAO. Unless otherwise specified, reference to the Arbitration Ordinance means the new Ordinance (Cap. 609).

3 *Black’s Law Dictionary.*

6. **Mediators** help parties to reach a new agreement once a dispute has arisen. Through techniques aimed at facilitating negotiation, the neutral third party assists the parties in reaching a compromise which will be acceptable to both. As a completely voluntary, interest-based rather than rights-based technique, mediation can produce a creative result which is not limited to traditional legal remedies like damage and specific performance. This method is especially popular for those who wish to maintain a business relationship and where there is hope for a conciliatory outcome. Even when it is not completely successful in ending the dispute, mediation may help the parties to define the issues and to resolve some of them, thus reducing the length and cost of later litigation or arbitration. In Hong Kong, most litigants are now expected to attempt to mediate their disputes before they go before the judge. Parties who refuse to mediate may be denied costs if they win, and may even end up paying the court costs of the opponent.

7. **Court litigation** sits on the opposite end of the spectrum. Parties submit their dispute to the court system, and therefore have little to no control over the proceedings. A judge renders a legally-based decision that binds both parties, and is usually opposable against third parties as well. Because the judgment is legally enforceable, parties must have the protection of a set of procedural rules which ensure that each has an equal opportunity to present its case and to be heard by the court. The rules of natural justice must be observed. A party dissatisfied with the resulting judgment may appeal to a superior court for a review of the decision. In international disputes where the parties come from differing legal cultures, it is inevitable that one will feel disadvantaged by having to appear in a foreign court, often in a foreign language, and with procedures, customs and judges that it may not know or trust. On the other hand, a party who wishes to “make an example” or establish a new legal precedent may favour state court proceedings.

8. With **arbitration**, parties submit their dispute to an arbitrator who renders an award that is binding on both parties. The parties are free to choose their arbitrator, or at least the authority who will appoint the arbitrator. They may also agree on venue, language, procedures, and applicable laws.

9. Arbitration stands near litigation in the dispute resolution spectrum. It developed hundreds of years ago as the preferred method for settling trade disputes among merchants trading in Mediterranean countries, and over the past half-century has grown in popularity. Today arbitration is the preferred method of resolving international commercial disputes. It offers the neutrality, flexibility and efficiency of other forms of alternative dispute resolution such as mediation, but also provides the finality and enforceability of a court judgment obtained through litigation.

10. Parties choosing to arbitrate can choose between **institutional** and **ad hoc** arbitration. By agreeing to arbitrate under the auspices of an institution, the parties are effectively choosing the rules of that institution. The institution will administer the arbitration procedure in accordance with those rules (see Chapter 3 of this book). Parties who choose to arbitrate without institutional support (*ad hoc*) will need to create their own rules for the procedure, or they may choose the UNCITRAL Rules designed for ad hoc cases.

II. Characteristics of Arbitration

A. Privacy

11. Arbitration is usually conducted in private, with only the parties, their representatives and the tribunal present. This is a marked difference from open court litigation where details of the parties' dispute, including sensitive or personal information, will normally become public knowledge through open courtrooms and easily accessible court files.

12. The new provisions of Hong Kong's law also recognise the **confidentiality** of the arbitration process[4]. Some institutions also have rules for confidentiality, requiring that parties ensure that documents and other materials that have been disclosed during the arbitration remain secret, in order to, protect business interests and trade secrets relating to the dispute. Parties should be aware however, that not all jurisdictions recognise confidentiality, and even in those (like Hong Kong) which do recognise it, the right to confidentiality will always be subject to exceptions.

B. Consent

13. The primary characteristic of arbitration is that of consent. Party consent is the foundation for the arbitral tribunal's jurisdiction. Consent provides the tribunal's authority to make a final and binding award without resort to state courts.

14. Consent to arbitration is usually expressed by the existence of an **arbitration agreement** between the parties. The parties' agreement is usually contained within the contract between the two parties, though it can sometimes be incorporated by reference to a document such as a bill of lading.[5] Less frequently, the agreement may also take the form of a separate contract by which the parties agree to submit to arbitration a dispute that has already arisen.

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4 S. 17 and 18 HKAO.

5 *Parkson Holdings Ltd. v Vincent Lai & Partners (HK) Ltd.* [2008] HKCA 1985.

C. Finality

15. The tribunal acts **judicially**. The award rendered by the tribunal is final and binding on the parties, who have in most cases renounced their right to appeal by choosing to arbitrate. Without an appeal, a losing party's only recourse is to resist enforcement or attempt to have the award set aside on the basis of a limited list of procedural irregularities. Setting aside procedures in Hong Kong under section 81 of the Arbitration Ordinance track article 34 of the UNCITRAL Model Law, which in turn refers to article V of the New York Convention. (See Chapter 10 of this book).

16. Courts play a limited role in arbitration. The court should interfere in the arbitration of a dispute only as expressly provided for in the Ordinance. If a party institutes court action in a matter which is the subject of arbitration, the Court must recognise the arbitration agreement, stay the court action and refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed[6]. The Hong Kong courts are generally supportive arbitration and will try to ensure that the process moves forward. Once an award is issued by the tribunal, the courts may enforce the award, or in some cases review it for procedural irregularities which may cause the award to be set aside.

III. Advantages of Arbitration

A. Party Autonomy

17. A notable characteristic of arbitration, which distinguishes arbitration from litigation, is the concept of party autonomy - the ability of the parties to control how they want their arbitration to proceed. Section 3 of the Ordinance states clearly that, subject to safeguards of public interest, parties to a dispute are free to agree on how their dispute should be resolved. This means that parties can control various aspects of their arbitration, including:

    a. The **seat of arbitration,** the jurisdiction to which the arbitration is legally connected – usually, but not always, the same as the **venue** – the location where the arbitration is held. Important for establishing the *lex arbitri*, the laws governing the procedure of the arbitration, such as Hong Kong's Arbitration Ordinance

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6 S.20 HKAO, citing Art.8 UNCITRAL Model Law; *See also*: *Xu Yi Hong v Chen Ming Han* [2006] 4 HKC 633, setting the standard of whether *prima facie,* a binding arbitration exists between these parties.

b. The **choice of arbitrators**, either a sole arbitrator or an arbitral panel of three. Parties may wish to choose arbitrators with relevant experience in their specific field

c. The **applicable law** governing the merits of the case: the parties' substantive rights and obligations arising from their relationship (*e.g.* "This contract will be governed by Hong Kong law.")

d. The **rules of procedure** (including usually the procedures at the seat, as well as any institutional rules chosen. For an arbitration conducted in Hong Kong, the Hong Kong Arbitration Ordinance applies, but the parties may choose to arbitrate pursuant to the rules of the Hong Kong International Arbitration Centre.

e. The **language of procedure** including the language that the parties wish to use for written and oral submissions - often, but not always, the language of the contract

f. **Types of procedures** available, perhaps incorporating one or more of the following:
    i. documents-only arbitration
    ii. "look and sniff" arbitration
    iii. fast-track arbitration
    iv. traditional "court" type proceedings including full production of documents, interrogatories, etc.
    v. a simplified European style procedure with mostly documentary evidence and limited oral testimony.

B. Neutrality

18. By choosing to have their dispute arbitrated by a privately appointed neutral, parties can avoid the **judges** of the opposing party's jurisdiction, which they may fear are biased or even corrupt. In arbitrations involving a single arbitrator, that arbitrator is chosen by agreement of the parties or appointed by the parties' agreed arbitral institution or other appointing authority. In arbitral panels of three arbitrators, each party typically has the opportunity to choose one arbitrator, with those arbitrators picking the president or chair of the tribunal. It is usual to choose a sole arbitrator or chair who does not have the same nationality as either of the parties.

19. In international arbitration the parties may also choose a neutral forum or **seat**, without involving the courts of either party's country. Neither party has the "home court" advantage of familiar judges and legal culture, so both enjoy a "level playing field".

C. Flexibility

20. As mentioned above, one of the key characteristics of arbitration is party autonomy. Hong Kong's Ordinance provides default procedures where the parties are unable or unwilling to agree, but these solutions yield to party agreement, provided the rules of natural justice are respected.

21. The parties are free to choose whomever they wish to **represent** them. Some parties consider it useful to engage local counsel in the seat of the arbitration, but they may still bring their own lawyers, who need not be qualified in Hong Kong in order to represent them before the arbitral tribunal.

D. Efficiency

22. One of the key advantages of arbitration over other methods of dispute resolution is efficiency. Costs for arbitration are not necessarily lower, as the parties must pay the tribunal whereas litigation costs are borne by the public. However, by choosing a simplified or shortened procedure parties may be able to save considerably on legal costs. The finality of the award also allows a successful party to avoid multiple levels of appeal typical of court litigation. Parties who choose experienced arbitral institutions, arbitrators who are available to hear their case promptly and a seat with efficient arbitration legislation may also find that they can complete their arbitration more quickly than state court litigation. Generally speaking, the shorter the timeframe, the lower the cost.

E. Enforceability

23. Arbitral awards made in Hong Kong are enforceable as court judgments under section 84 of the Arbitration Ordinance. The successful party can obtain leave for enforcement and enforce the award with the help of state remedies such as seizure and sale of assets, or garnishee.

24. A major advantage of arbitration in an international context is the “portability” of the award. Arbitral awards made in other jurisdictions can be recognized and enforced in Hong Kong under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). A special system is in place to facilitate the enforcement of awards between Hong Kong and Mainland China, since the New York Convention does not include awards made within the same sovereign state (Chapter 10 of this book describes enforcement in detail).

IV. Disadvantages of Arbitration

A. Absence of non-consenting parties

25. The arbitral tribunal derives its jurisdiction (power to decide) from the parties’ consent to submit that dispute to the tribunal. Thus, a party coming to arbitration must first establish that there has indeed been a valid arbitration agreement, either as a dispute resolution clause contained in the body of the contract, or in a subsequent agreement to arbitrate (“*compromis*”) a dispute which has already arisen. This may sometimes pose problems in the case of multi-party contracts, or groups of linked contracts, where the arbitration agreement may not be sufficient to attract all “necessary” parties in order to resolve the dispute. This sometimes necessitates multiple actions, and even may create the risk of competing inconsistent results.

B. Lack of Predictability and Consistency

26. In Hong Kong courts, justice is a public affair, with both files and hearings open to anyone who is interested. The common law concept of *stare decisis* (binding precedent) means that courts must follow judgments from higher level courts. This establishes a known body of law that parties can refer to when they try to predict the outcome of their dispute. The advantage of privacy unfortunately means that very little information is available about arbitrated disputes and how they are decided.

27. Although arbitral awards can have persuasive effect, they are not binding on subsequent arbitral tribunals and in many cases are unknown to anyone but the parties who were involved. It is usually only when an award is challenged in a state court that its details become accessible to the public and therefore to the members of the arbitration community. This gives rise to the possibility of conflicting awards on similar facts.

C. **Arbitrators have no coercive powers**

28. The Hong Kong Arbitration Ordinance, in adopting the 2006 amendments to the UNCITRAL Model Law, grants arbitral tribunals broad powers to order interim or conservatory measures[7]. However, unlike judges, arbitrators are private persons, without the power of the state to compel parties and others to comply with their orders. For certain measures then, parties may have to go outside the normal arbitral process and request the assistance of the state court.

[7] S.35 HKAO.

Comparing Mediation, Litigation and Arbitration

	Mediation	**Litigation**	**Arbitration**
Structure	Flexible – the mediator sets the "ground rules" for the negotiation, and leads the parties through it	A set of Court rules established by the government regulates state court proceedings and parties have little control over the structure of their dispute.	Parties adopt rules for their process, which must respect natural justice and treat both parties fairly and equally.
Conduct	Mediators use various negotiation or coaching methods to assist in resolving a dispute	Parties must conform to the procedural requirements of state law, including language, evidence, and court schedules	Arbitrators guided by arbitral law and any rules of arbitral institution, and can adapt conduct of proceedings to needs of parties
Privacy	Yes	No – open court is the norm	Yes
Consent	Yes	No	Yes
Power of Neutral	No. Neutral assists but has no power to direct or decide	Yes	Tribunal makes judicial decisions, but has no coercive powers
Neutrality	Yes	Possibly not – "home court" for one party	Usually yes – parties can choose neutral seat
Appeal	No judgment. Parties who fail to settle are free to go to court or arbitration	Appeal according to domestic law, usually to a court of appeal and even a supreme court	Very limited appeal, if any, usually only on procedural or jurisdictional grounds
Enforcement	Settlement agreement is contractually binding	Enforceable using the mechanisms of the state: seizure of assets, garnishee, injunction	Award is like a court judgment and enforceable using state mechanisms

QUESTIONS

1. What are some specific situations that may encourage parties to consider arbitration as opposed to mediation or court litigation?

2. Should parties choose to mediate before going to arbitration or vice-versa?

3. What issues should a party keep in mind when drafting an arbitration agreement?

FURTHER READING

Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective*, (Cambridge University Press 2011), Chapter 1.

CHAPTER 2: THE LEGAL STRUCTURE OF INTERNATIONAL ARBITRATION

This chapter introduces key UNCITRAL documents, and covers the interaction of the New York Convention, the Hong Kong Arbitration Ordinance (Cap. 609), and the agreement of the parties, including any institutional or other rules they may have chosen to govern their arbitration. It explains the concept of severability and the doctrine of "*kompetenz-kompetenz*".

I. The Texts

1. The United Nations Commission on International Trade Law (UNCITRAL), is an international group of experts dedicated to the harmonization and facilitation of international business and trade. Among the many conventions produced by UNCITRAL are the key documents that have helped to make arbitration the method of choice for resolving international disputes. The most important of these are the **New York Convention, the UNCITRAL Rules,** and the **UNCITRAL Model Law**. It is important to distinguish these documents, their purposes, and how they interact to provide structure and support for international arbitration.

A. The New York Convention

2. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards[8], usually known as the New York Convention, is one of the key instruments in international arbitration, and one of the most successful multilateral agreements in history. As of 2011, over 150 jurisdictions were signatories (members) of the New York Convention. Since its adoption in 1958, it has facilitated the recognition and enforcement of arbitral awards in member states around the world, providing one of arbitration's main advantages over state litigation: portability.

[8] Adopted by the United Nations on 10.06.1958; entered into force on 07.06.1959.

3. The title of the Convention suggests that it relates only to the recognition and enforcement of foreign arbitral awards. That, indeed, is its essential purpose and the subject of most of its rules (art. III to VI) which were intended to replace those of its predecessor, the 1927 Geneva Convention. However, the New York Convention also provides for the recognition by state courts of **agreements to arbitrate**, with members' state courts declining jurisdiction over disputes where a valid arbitration agreement exists. The underlying theme of the New York Convention as a whole is the autonomy of international arbitration.[9]

4. Under the terms of the New York Convention, "[e]*ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."*[10]

5. Hong Kong became a member of the New York Convention while still a territory of Great Britain, which signed the Convention **without reservations**. In 1997, when Hong Kong returned to Chinese sovereignty, the Chinese and British governments agreed that it would remain a party. Mainland China is also a party to the Convention, but its signature is subject to the **commercial** and **reciprocity** reservations.

6. Under the Convention, an arbitration award issued in another state is enforceable in any other contracting state. However, there are some exceptions: the reciprocity reservation means that a contracting state may elect to enforce only awards from other contracting states. (Article II — Article V). Mainland China will apply the New York Convention only to disputes arising from commercial legal relationship, thus excluding disputes between foreign investors and governments of host countries, not considered by China to be "commercial". On the other hand, Hong Kong's participation in the New York Convention is not limited by these reservations. (Chapter 10 deals more fully with enforcement under the New York Convention.)

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9 Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, (Kluwer Law International 1999), ch.1. See also Lord Mustill's speech in *Coppee-Lavalin v Ken Ren* [1994] 2 Lloyds's Rep 109 at 187: "…*arbitration is a consensual process, and …national courts should, within very broad limits, recognize and give effect to any agreement between the parties, express or tacit, as to the way in which the arbitration should be conducted. It is now widely recognized as a first principle of arbitration law, and the English courts in common with those of other nations with developed systems of arbitration law strive to give effect to it…"*

10 Art.II(1).

B. The UNCITRAL Model Law

7. The UNCITRAL Model Law on International Commercial Arbitration[11] ("the Model Law") codifies internationally agreed principles of best practice in international arbitration. The underlying theme of the Model law is to harmonise arbitration laws, and to promote party autonomy and finality in international arbitration by maximizing the powers of the arbitral tribunal and limiting the intervention of the courts.

8. The Model Law is not in itself legislation, but a model to be copied by states wishing to enact their own modern, accessible arbitration legislation. Some countries enact the Model Law verbatim. Others such as England and Wales, are "inspired" by it, but enact quite different laws. In 1980 Hong Kong became one of the very first jurisdictions to enact the Model Law. The new Hong Kong Arbitration Ordinance[12] maintains the framework of the Model law, subject to some adaptations to suit Hong Kong's unique situation.

C. The UNCITRAL Rules

9. Parties need a set of rules under which they will conduct their arbitration proceedings. If they have not chosen to arbitrate under the auspices of an institution, they may create their own rules. Alternatively, UNCITRAL approved a set of rules for ad hoc arbitration in 1976, and then amended them in 2010. These rules, which incorporate recognised practices of many jurisdictions, set out a basic structure for an arbitration procedure. They are available to anyone. They exist in several languages, and parties can amend them to fit their circumstances. The UNCITRAL Rules have become very popular, with parties around the world using them. Some institutions, including the Hong Kong International Arbitration Centre, will also administer arbitrations using the UNCITRAL Rules. Where the rules are silent the parties will agree or the tribunal will decide upon more detailed rules of procedure. It is important to distinguish the UNCITRAL Rules from the UNCITRAL Model Law.

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11 Adopted by the United Nations Commission on International Trade Law on 21.06.1985.

12 Hong Kong Arbitration Ordinance (Cap. 609), enacted on 11.11.2010, came into force on 01.07.2011.

D. **Hong Kong's Arbitration Ordinance (Cap. 609)**

10. Hong Kong was one of the first jurisdictions to adopt the UNCITRAL Model law, and has thus had an excellent arbitration tradition for 30 years. The new Arbitration Ordinance, which came into effect on 1 July 2011, resulted from years of consultation. It streamlines and improves the readability and accessibility of the law, and mostly abolishes the distinction between domestic and international arbitration procedures. With the entry into force of the new Ordinance, all arbitrations in Hong Kong – both domestic and international – will be governed by a single unified regime based on the UNCITRAL Model Law.[13]

11. Although Hong Kong has used the Model Law extensively in creating its Arbitration Ordinances (initially Cap. 341 and currently Cap. 609), it has departed in a number of areas from the Model Law. The Arbitration Ordinance shows clearly where the Model Law is being incorporated verbatim, and where Hong Kong has enacted its own legislation.[14]

12. The object of Hong Kong's Ordinance is to facilitate the **fair and speedy resolution** of disputes by arbitration **without unnecessary expense**.

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[13] An exception to this principle is the "*opt-in" provisions*. The new Arbitration Ordinance allows the parties to opt into a number of provisions in their arbitration agreement, including consolidation of arbitrations or arranging for proceedings to be heard at the same time or one immediately after another; determination of a preliminary question of law by the Court of First Instance; challenging an arbitral award on the ground of serious irregularity; and appeal against an arbitral award on a question of law. These are set out in *Schedule 2* to the Ordinance. *Schedule 2* will automatically apply, unless parties agree otherwise, to arbitration agreements entered into before or within six years after the commencement of the Ordinance which provide that the arbitration is a "domestic arbitration".

[14] For example, s.23 HKAO says, "article 10(1) of the UNCITRAL Model Law has effect" and then quotes it: *"The parties are free to determine the number of arbitrators."* However, article 10(2) is shown as [*Not applicable.*] This is a case where Hong Kong, instead of using the Model Law's default number of three, makes its own provision: "*…If the parties fail to agree…the number of arbitrators is to be either 1 or 3 as decided by the HKIAC…*"

13. The four "pillars" of Hong Kong's Arbitration regime are enshrined in the Ordinance at section 3:

    a. **Autonomy of the Parties**: Parties to a dispute should be free to agree on how their dispute should be resolved;

    b. **Minimum Court Intervention**: The court should interfere in the arbitration of a dispute only as expressly provided for in the Ordinance;

    c. **Speed**: The object of the Ordinance is to facilitate the speedy resolution of disputes; and

    d. **Reasonable cost**: The Ordinance specifies the goal of resolution without unnecessary cost.

14. The new Ordinance reinforces the theme of minimal court intervention by vesting considerable powers in the arbitral tribunal. With the adoption of the UNCITRAL Model Law's 2006 provisions regarding interim measures,[15] arbitral tribunals seated in Hong Kong are able to grant temporary measures to preserve assets or evidence, or to maintain or restore the status quo, including the granting of injunctions or other preliminary orders preventing parties from frustrating any interim measure. The tribunal's power to make orders is limited however to the kind of order that could be made by a Hong Kong court.[16]

15. A feature of the new legislation is the inclusion of express provisions in relation to confidentiality.[17] Although often perceived as a major advantage of arbitration, confidentiality is not guaranteed in all jurisdictions. Some jurisdictions (for example, England) imply confidentiality into the arbitration agreement between the parties, although the precise boundaries of this obligation are somewhat uncertain. Others do not recognise it unless the parties have specifically agreed to keep their affairs confidential. In Hong Kong, neither the court nor the parties are to disclose information about the arbitration proceedings without the consent of all parties.

16. One notable feature of the Hong Kong Arbitration Ordinance concerns the regime for the enforcement of arbitral awards, which departs from the provisions of the UNCITRAL Model Law in favour of the enforcement procedures established under the previous regime.

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15 S.35 HKAO.

16 S.45 HKAO.

17 Ss.17and18 HKAO.

17. The Arbitration Ordinance also contains provisions specific to the enforcement of awards between Hong Kong and Mainland China, since such awards cannot be enforced under the New York Convention.[18] Chapter 10 of this book will discuss the enforcement of awards.

II. Consent – the Arbitration Agreement

18. The Hong Kong Arbitration Ordinance defines the **arbitration agreement** at Section 19 as:

> "*an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between then in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement."*

19. The arbitral tribunal derives its jurisdiction from the agreement of the parties to submit their dispute to arbitration instead of to the state court system. Thus, the existence of an arbitration agreement is essential for the foundation of the arbitral procedure and for the eventual enforcement of the resulting award.

20. The arbitration agreement may be a **dispute resolution clause** in the main contract to refer future disputes to arbitration, or it may be a separate agreement to refer an existing dispute to arbitration **"*compromis*"**). It defines the scope of dispute that is referred to arbitration and establishes the procedures to be used in arriving at the award, including the choice of rules or of an institution to supervise the arbitration.

21. The arbitration agreement in the contract or *compromis* may set out all aspects of arbitration, including kinds of disputes to be arbitrated, the appointment of the arbitral tribunal, the jurisdiction of the arbitral tribunal, the conduct of the arbitration proceedings, the award and its enforcement. Then again, it may simply provide for "arbitration", leaving the details to be determined later. Institutions have model arbitration agreements which they recommend to parties. There are two such clauses in Annex 1 to this book. It is important that the arbitration clause be well drafted, to avoid disputes about how the main dispute is to be resolved! Under Hong Kong law, the arbitration agreement must be in writing, but this is given a wide meaning.[19] The concept of "writing" is addressed in the next chapter of this book.

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18 S.84 HKAO.

19 S.19(2) - (6) HKAO.

III. Severability of the arbitration clause

22. The principle of **autonomy (or separability or severability) of the arbitration clause** is a doctrine accepted in most modern jurisdictions. Once parties have validly given their consent to arbitration, the obligation to arbitrate survives because it is considered separate from the rest of the contract. Thus, the invalidity of the main contract does not necessarily invalidate the arbitration agreement contained within it.

23. This principle ensures the parties' intent to arbitrate disputes will proceed without undue court interference, notwithstanding a challenge to the validity of the contract containing the arbitration agreement.

24. One consequence of separability is that the arbitration agreement may be submitted to a different law than the main contract. Even in cases where the main contract contains an explicit choice of law clause and the parties have not specified a different law to apply to the arbitration clause, courts have not always extended the effect of the choice of law for the main contract to the arbitration clause.[20]

25. England's House of Lords in *Fiona Trust*[21] dealt with the severability of the arbitration clause. The dispute arose out of eight charter-party contracts entered into between a Russian group of ship owners and eight charter companies. Lord Hoffmann emphasised the doctrine of severability of arbitration agreements enacted in section 7 of the English Arbitration Act 1996, holding that an arbitration agreement could only be invalidated on grounds that related directly to the arbitration agreement, and not as a consequence of the invalidity of the main agreement.

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20 See *XL Insurance Ltd v. Owens Corning*, (2000) 2 Lloyd's Rep. 500 (Q.B.) (U.K.), published in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 2001 – Volume XXVI*, (Kluwer Arbitration 2001) 869, pp. 878 et seq.

21 *Fiona Trust & Holding & Holding Corporation & 20 Ors v. Yuri Privalov & 17 Ors* [2007] UKHL 40, and *Premium Nafta Products Limited and others v Fili Shipping Company Ltd. and others* [2007] UKHL 40.

IV. **Applicable law**

26. Unlike in a state court, which will always apply its own procedural law, even if asked to apply a foreign law to decide the merits of a case, the legal context of arbitral tribunal proceedings is more complex. No matter what law the parties have chosen to govern their relationship, and no matter which procedural law and rules they may have chosen, the tribunal must comply with any mandatory laws of the place (or "seat") of the arbitration. The following chapter of this book has more information on applicable law.

27. The legislature and courts in Hong Kong continue to be very supportive of the arbitration process, upholding agreements by parties to arbitrate and the procedures they have chosen.[22]

QUESTIONS

1. Why do you think the doctrine of severability of the arbitration clause developed?

2. Consider the interaction of the parties' agreement to arbitrate, the rules of the institution they choose, and the governing procedural law (the Arbitration Ordinance) in Hong Kong. How flexible is this system?

3. What are the pros and cons of Hong Kong's very liberal interpretation of "writing" with respect to the arbitration agreement?

4. Explain the difference between "privacy" and "confidentiality" in the context of arbitration.

[22] For example, The Hong Kong Court of Appeal in *Eton Properties Ltd* [2008] 4 HKLRD 972 rejected an attempt to resist enforcement on an alleged ground of public policy.

FURTHER READING

Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, (Kluwer Law International 1999), Chapter 1

Gary B. Born, *International Commercial Arbitration: Commentary and Materials*, 2nd edition (Kluwer Law International 2001), Chapter 1

Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective*, (Cambridge University Press 2011), Chapters 3 and 4.

CHAPTER 3: PRE-ARBITRATION CONSIDERATIONS

Before arbitrating, indeed before even agreeing to arbitrate, parties should consider a number of questions: capacity, the significance of "writing", the location of the seat, the applicable law, the choice of ad hoc or institutional arbitration, and the arbitrability of the subject matter that may be disputed. It also describes the interaction of law and rules in the arbitration process.

I. Capacity to arbitrate

1. Generally any individual who is competent to make a contract can submit to arbitration. For companies, the legally empowered officers of the company can submit a dispute to arbitration on its behalf. This is usually done in the arbitration clause or dispute resolution clause contained in the main contract between the parties. The person with the authority to sign the contract will normally also have the authority to bind the company (and sometimes its successors) to resolve disputes by arbitration.

2. In some jurisdictions, states may not submit to arbitration because of the doctrine of sovereign immunity. Hong Kong's courts have recently recognised the doctrine of absolute sovereign immunity, so parties contracting with state parties should consider this when deciding whether and where to arbitrate.[23]

II. The Significance of 'writing'

3. The significance of 'writing' originated in English law, in which 'writing' has a special quality over other forms of evidence[24]. National laws on arbitration agreements vary, from maintaining a fixed writing requirement for their validity, to requiring them to be verified by a written record, to permitting oral agreements.[25]

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23 *Democratic Republic of the Congo and Ors v FG Hemisphere Associates LLC* [2011] HKEC 747, considered in Chapter 10 of this book.

24 Albert Jan van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions*, ICCA Congress Series No.11 (London 2002), (Kluwer Arbitration 2003), pp. 19 - 81.

25 In 2006, the UNCITRAL Working Group II on Arbitration published an extensive review of state practice in this area: *Settlement of commercial disputes*, U.N. Doc. A/CN.9/WGII/WP.139, available at: http://www.uncitral.org/uncitral/en/commission/workinggroups/2Arbitration.html.

4. According to section 19 of the Hong Kong Arbitration Ordinance, an arbitration agreement must be in writing. However, the Arbitration Ordinance interprets the concept of "writing" very broadly, adopting Option 1 of the 2010 UNCITRAL Model Law. It provides that an arbitration agreement is in writing if its content is recorded in any form, whether the arbitration agreement or contract has been concluded *orally, by conduct, or by other means*. The writing requirement is met by electronic communication, or if contained in an exchange of statements and defence in which the existence of an agreement is alleged by one party and not denied by the other. Also, reference in a contract to a document containing an arbitration clause will suffice. Thus, there is no need for a signed document, as long as it is recorded by a party to the agreement, or by someone with authority of the parties to record it.

III. **The seat of arbitration**

5. The seat of arbitration is the jurisdiction to which the arbitration proceedings are legally attached and where the award is deemed to have been rendered. Usually the seat is the jurisdiction where the arbitration proceedings take place, although it is not uncommon to hold some or all of the proceedings in another physical location, if the circumstances warrant.

6. Parties often choose the seat of arbitration in their arbitration agreement. If they have not agreed to the seat, then the arbitral institution (if there is one) will choose the seat, and more rarely, even the arbitral tribunal may choose the seat. Failing to choose a seat may inhibit the arbitration or even render the arbitration agreement inoperable, leaving the parties with no alternative but to go to a state court.

7. By choosing the seat of the arbitration proceedings, the parties are choosing the legal environment of their proceedings. Usually the choice of the seat is considered also to be an implicit choice of the procedural law of that place. It is possible to choose a procedural law different from the law of the seat, but the arbitration will still be subject to any mandatory laws at the seat. Having two different procedural laws applicable may complicate the procedure, delay it and add expense, and even leave the resulting award vulnerable to attack.

8. The law and judges at the seat are key to the success of the procedure. The choice of the seat involves important legal consequences relating to court intervention or support of the tribunal, the probable success of recourse, and whether the resulting award will be enforceable. Parties should choose an "arbitration friendly" jurisdiction as the seat, to ensure maximum court support and minimum interference with the arbitral procedure. It is the court of the seat which will hear an application to set aside and award or to declare it void.

9. What are the hallmarks of an "arbitration friendly" jurisdiction? In choosing a seat, parties should consider whether the location:

    - is a member of the New York Convention;
    - has a modern arbitration law (often Model Law based);
    - has judges who understand and support the arbitral tribunal rather than seeing it as "competition" for cases; and
    - has a pool of experienced arbitration practitioners, both counsel and arbitrators.

10. Practical features of a good seat include:

    - convenient transportation from major world capitals;
    - stable political system and safe streets;
    - comfortable, reasonable hotels and meeting facilities;
    - good communication facilities (for example videoconferencing);
    - experienced local counsel, expert witnesses;
    - available support staff such as translators, recorders, administrative services; and
    - reasonable immigration, labour and tax requirements for counsel and tribunal.

IV. **Institutional or *ad hoc* arbitration?**

11. A number of organisations around the world provide institutional arbitration services to assist parties in the administration of the arbitration process. Some of the best-known international arbitration institutions are the International Chamber of Commerce ("ICC"), the American Arbitration Association ("AAA") and the London Court of International Arbitration ("LCIA"). In Hong Kong, the Hong Kong International Arbitration Centre ("HKIAC") has an excellent reputation and a busy caseload. The China International Economic and Trade Arbitration Commission ("CIETAC") in Mainland China now has the largest number of cases of any of the institutions.

12. Other major institutions are ICDR (part of the American Arbitration Association), ICSID (for investment disputes), WIPO (for intellectual property) and an increasing number of regional centers in jurisdictions around the world. The institutions offer varying levels of service, and at prices which also vary considerably. Parties should “do their homework” before choosing an arbitral institution, to ensure they are getting the quality, reputation and level of service they need.

13. Each arbitral institution generally has its own procedural rules that apply where parties have agreed to arbitration under the auspices of that institution.[26] The institution’s rules are thus included as an extension of the parties’ contractual terms, so parties should be familiar with the rules they are choosing.

14. Arbitral institutions do not themselves arbitrate the merits of the parties' dispute, nor do they act as a “court of appeal”. The decision on the merits of the case is the responsibility of the arbitrators, who are not typically employed by the institution, but may be engaged through the institution by the parties to the dispute.

15. The services offered by institutions vary, but may include:

    - provision of rules setting out the basic procedural framework and timetable for the arbitration process;
    - designating the seat of the arbitration;
    - providing hearing rooms and facilities for procedural conferences and hearings;
    - appointment of sole arbitrator, chair, or sometimes two or even three arbitrators;
    - deciding challenges to arbitrators (for bias or non-performance);
    - replacement of arbitrators;
    - administering the arbitration file on a continuing basis;
    - acting as stakeholder for the tribunal’s fees and costs;
    - fixing, collecting, and paying fees of the tribunal;
    - providing procedural advice to arbitrators; and
    - review of the award for form, logic, consistency, etc. to ensure it has the best possible chance of being enforced.

[26] Gary B. Born, *International Commercial Arbitration: Commentary and Materials*, 2nd edition (Kluwer Law International 2001) pp. 1 – 52.

16. All arbitrations are administered. Unlike a state court, which has a Registrar, bailiffs, recorders and a host of administrators to deal with court files, arbitrators are private individuals. Still, someone must administer arbitrations. If there is no institution involved, it is the arbitrators and the parties (or their counsel) who must handle the administration. This arrangement is known as *ad hoc* arbitration.

17. *Ad hoc* arbitrations are not conducted under the auspices or supervision of an arbitral institution. *Ad hoc* arbitration agreements will stipulate a particular person or tribunal to resolve their dispute without institutional supervision or assistance. The parties will often select a preexisting set of procedural rules designed to govern *ad hoc* arbitrations, such as the UNCITRAL Rules, but may (less frequently) design their own arbitration rules.

18. When choosing *ad hoc* arbitration, parties should designate an appointing authority to select the arbitrator(s) if the parties cannot agree. If the parties fail to select an appointing authority for an arbitration seated in Hong Kong, then under the Arbitration Ordinance, the HKIAC is the default appointing authority[27].

V. **Arbitrability**

19. Some disputes cannot be settled by arbitration. Whether a dispute is arbitrable is a matter of national law at the seat of the arbitration. Generally speaking, issues of status (marriage, divorce, adoption, etc.) and criminal law are always reserved to state courts. If a dispute can be negotiated to a binding settlement, it is generally capable of being arbitrated. The law in this area is evolving, with areas that were traditionally considered as not being arbitrable (such as intellectual property and insolvency) now being decided by tribunals. Recent developments show a blurring of the line between what is, and is not arbitrable. If a dispute is not arbitrable under the law of the seat, then even with the consent of the parties, the tribunal cannot have jurisdiction to decide it, and any award it makes may be set aside (annulled).

20. Under Hong Kong law, there are relatively few restrictions on arbitrability and even these tend not to encroach on commercial transactions. As mentioned above, divorce and criminal matters cannot be arbitrated. Although employment disputes can be arbitrated, certain claims for compensation under the Employee's Compensation Ordinance cannot be arbitrated as Hong Kong law places these under the exclusive jurisdiction of a specialised government body.

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27 S.23 HKAO.

VI. **Applicable law**

21. In contrast to state court litigation, where the judge will apply either local law or the law designated by local rules of international private law (**conflicts of law rules**), in an international contract the parties may choose the law to govern the merits of their case. This is usually an important negotiating point, as sometimes applying different laws will lead to different results. Parties usually want to apply their own law, although in some instances they will "compromise" by choosing a "neutral" law – of some third jurisdiction, neither claimant's nor respondent's. This is not a choice to make blindly. Negotiating parties should carefully consider the possible consequences of their choice of law before committing to it. If the parties have not chosen the law to apply to their contract, then the tribunal will choose, either by applying appropriate conflict of law rules, or by **directly choosing the most appropriate law** – the law with the closest connection to the dispute.

22. The rules chosen by the parties, whether UNCITRAL or those of an institution, are an **extension of the parties' agreement to arbitrate**. Under the UNCITRAL Rules if the parties do not agree on the *law* to be applied to their dispute, the tribunal will decide after taking into account the provisions of the contract and the relevant trade usages. Whatever the rules may permit, their authority is subject to the **mandatory procedural laws** of the place of the arbitration. It is important to remember that a rule cannot give parties or a tribunal powers which have been reserved exclusively to a state court judge. Hong Kong arbitral tribunals have wide powers under the Arbitration Ordinance.

QUESTIONS

1. Would a supervising court consider the parties' intentions in deciding whether or not a dispute is arbitrable? Explain.

2. What arguments favour institutional rather than *ad hoc* arbitration? Why might some parties prefer *ad hoc* arbitration?

3. How many different laws might apply to an international arbitration?

4. What circumstances might warrant changing the place of meetings or hearings from the agreed seat to another venue? Who decides on whether this should happen?

FURTHER READING

Gary B. Born, *International Commercial Arbitration: Commentary and Materials*, 2nd edition (Kluwer Law International 2001), Chapter 1

Albert Jan van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions*, ICCA Congress Series No.11 (London 2002), (Kluwer Arbitration 2003), Chapter 2

Hong Kong Arbitration Ordinance (Cap. 609), Section 19

CHAPTER 4: THE CONSTITUTION OF ARBITRAL TRIBUNAL

"Arbitration is only as good as the Arbitrator." A recent survey of users of arbitration has found that one of the most prized advantages of arbitration is the ability of the parties to choose at least one member of the tribunal.[28] This chapter considers the choice and appointment of the arbitral tribunal, with reference to the UNCITRAL Rules, institutions (such as ICC and HKIAC) and the Hong Kong Ordinance.

I. What qualities should parties look for in choosing an arbitrator?

1. The parties' freedom to choose their own arbitrators to resolve their dispute is important to their acceptance of the resulting award. In Hong Kong, parties are free to agree on the procedure for appointing the arbitral tribunal.[29] Once a decision to refer a dispute to arbitration has been made, choosing the right arbitral tribunal is critical to the success of the process, since the tribunal leads and manages the arbitration as well as making a legally enforceable decision. The right to choose at least one member is one of the distinguishing factors of arbitration as opposed to national judicial proceedings.[30]

2. Parties sometimes agree in their contract on the arbitrator they want to decide any disputes that might arise between them. While this is useful in theory, problems may arise if the named arbitrator is no longer available when a dispute arises.

3. More usually, the parties choose the tribunal after a dispute has arisen. They may do this directly, with each party choosing one arbitrator and the two thus chosen then choosing the third, presiding arbitrator.

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28 School of International Arbitration at Queen Mary, University of London, 2010 International Arbitration Survey: Choices in International Arbitration,at: http://www.arbitrationonline.org/research/2010/index.html.

29 S.24(1) HKAO, citing Art.11(2) UNCITRAL Model Law.

30 Nigel Blackaby, Constantine Partasides, et al., *Redfern & Hunter on International Arbitration*, 5th edition, (Oxford University Press 2009), pp. 252 – 255.

4. The parties may also ask an **appointing authority** to name a sole or all three arbitrators. The Hong Kong International Arbitration Centre is such an authority. Most arbitration institutions are also willing to appoint the arbitrators on behalf of parties, for a fee. If the parties have chosen an institution, then the constitution of the tribunal usually is included in the services offered by the institution. It is not the practice in Hong Kong, but fairly common in some jurisdictions, to ask a state court to name an arbitrator.

5. Hong Kong law requires that arbitrators be **independent** and **impartial**.[31] Because the tribunal is exercising a judicial function and must ensure that the parties are treated fairly and equally, an arbitrator needs to have judicial temperament and capacity – the ability to observe natural justice.

6. The arbitral tribunal also must be **diligent**, as it must dispose of the dispute efficiently and without undue expense.[32] Thus, an arbitrator who fails to act without undue delay may be removed under the Arbitration Ordinance. The duties and powers of arbitrators are described more fully in Chapter 5 of this book.

7. The parties and their counsel should consider a number of factors when choosing an arbitrator. How much is the claim worth? Is it essentially a legal problem or does it turn mostly on the facts? What cultures, languages and political circumstances are involved? Is a particular expertise required to evaluate the facts quickly and correctly? Having at least one member of the tribunal with knowledge of the specific market (construction, energy, intellectual property, food franchises, for example) can be useful, as counsels will not need to spend time "educating the judge". Parties may look for an arbitrator whose writings, comments or previous decisions seem in sympathy with the way they see their case.

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31 S.25 HKAO. In *Panel On Takeovers And Mergers And Another v William Cheng Kai-Man* [1995] 2 HKLR 302, the court considered whether there was a real danger of bias on the part of the tribunal, in that an arbitrator he might have unfairly regarded the case of a party.
In *Gao Haiyan v Keeneye Holdings Ltd* [2011] HKEC 514, the Court held that the conduct of the arbitrator would cause a fair-minded observer to apprehend a real risk of bias, and as a result, enforcing the award would be contrary to public policy in Hong Kong. A rare example of Hong Kong courts refusing enforcement on public policy grounds where the tribunal had mediated between the parties.

32 S.27 HKAO.

8. Other attributes parties should look for in a potential arbitrator include:

   a. **Experience** in arbitration, particularly for a sole arbitrator or the presiding arbitrator, who must effectively take control of the proceedings.

   b. **Nationality**. Under Hong Kong law, no one is precluded by reason of nationality from acting as an arbitrator.[33] Parties like the comfort of having at least one member of the tribunal who comes from the same country, or at least shares with them a similar legal culture and language. On the other hand, unless both parties consent, it is rare to have a chair who is of the same nationality as one of the parties.

   c. **Adaptability**, since the sole or presiding arbitrator may have to conduct the procedure against a background of conflicting cultures and legal backgrounds, responding to differing expectations of the parties and their counsel.

   d. **Leadership, diplomacy and organizational skills**, because the sole arbitrator or chair will have to "manage" the process, seeking consensus or deciding on many facets of the arbitral process.

   e. **Writing skills**. The end product of the arbitration is a reasoned award, which may need to be enforced by the successful party. A poorly reasoned, incoherent or inconsistent decision is open to attack and may prolong the process, cause enormous extra cost, and even result in an unenforceable award.

   f. **Availability**. Many of the best-known arbitrators have very full calendars and in a tribunal of three, this may translate into delays of many months before the arbitrators and counsel can fix dates for meetings and hearings that are acceptable to all. Parties who want a speedy resolution to their problem should ensure that their chosen arbitrator will be available to give it the attention it requires.

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[33] S.24(1)(1) HKAO.

9. Sometimes, parties to arbitration will restrict or qualify the choice of the tribunal, by choosing rules (for example, of a religious organization) or a seat (such as Saudi Arabia). They also may stipulate expressly in their arbitration clause, that the arbitrator should possess particular professional, language or even religious attributes. The danger of "overqualifying" the tribunal members, especially in a very specialized field, is that there may be no one who meets all the qualifications, or that anyone who does meet them is unavailable or is in a position of conflict.

10. Because of the tribunal's duty to act impartially and to treat the parties fairly, arbitrators should not decide a case in which they have a personal or financial interest. This principle seems obvious, but its effects can be far-reaching, and many arbitrators are "conflicted out" by relationships that may at first seem rather remote. At the end of the proceedings, a party who is unhappy with the award may seek to have it set aside on the grounds that one or more of the arbitrators might have been biased due to such a relationship.

11. A party who doubts the impartiality or independence or who does not consider a potential arbitrator qualified, can challenge the appointment.[34] This is a continuing right, throughout the arbitration proceedings, so arbitrators must be vigilant in avoiding conflicts which may lead to their challenge and removal, thus wasting time and money for all concerned. Challenges are discussed in Chapter 5 of this book.

12. The IBA Rules on Conflicts of Interest set out best practices for arbitrators who may have had some prior connection with one or more of the parties. Although the Rules do not have the force of law, most arbitrators pay attention to them in deciding whether to disclose a prior or existing connection, and indeed whether to accept an appointment. These rules are discussed in more detail in Chapter 5 of this book.

[34] S.25 HKAO, citing Art.12(2) of the UNCITRAL Model Law.

II. How Many Arbitrators?

13. The parties are free to agree on the number of arbitrators.[35] A panel of three will obviously cost more than a sole arbitrator. It is also more difficult for three arbitrators to find a convenient time for the hearing.[36] However, since arbitration is usually not subject to appeal, the parties may want the comfort of "three heads being better than one", especially if their dispute is complex or if a large sum of money is at stake.

14. Rarely, a different number such as two or five may be used. An even number is not usually good practice as it allows for a deadlock. The Ordinance does provide that where only two arbitrators are chosen as the tribunal, those two may at any time appoint an umpire. Unless the parties agree otherwise, the umpire will replace the two arbitrators who may have been unable to agree.[37] More than three becomes prohibitively expensive for most disputing parties.

15. Sometimes the parties fail to agree upon the number of the arbitrators. They may not address the question, they may not want to commit themselves before knowing the nature of the dispute, or they may simply disagree. They also may leave the choice to an institution, or agree in the event of a dispute to proceed under the rules they have chosen.

16. **ICC.** Under the ICC Rules, if the parties do not agree on the number of arbitrators the ICC Court will decide on the number of arbitrators.[38] Unless it is a complex or sensitive dispute, the ICC will generally choose to appoint a single arbitrator in cases of less than about $5 million.

17. **UNCITRAL Rules**. The UNCITRAL Rules provide that if the parties have not agreed on the number of arbitrators within 15 days following the respondent's receipt of the notice of arbitration, three arbitrators will be appointed.

18. **Hong Kong Arbitration Ordinance**. Under the Ordinance, if the parties fail to choose the number of arbitrators, and there is no institution or set of rules agreed, the default solution leaves it up to the HKIAC to determine whether there should be one or three arbitrators.[39]

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35 Arts. 7 - 8 UNCITRAL Rules; Art.12 ICC Rules (2012); Art.6 HKIAC Administrated Arbitration Rules.

36 Art.8 UNCITRAL Rules.

37 Ss. 30 and 31 HKAO.

38 Art.12(2) ICC Rules (2012).

39 S.23 HKAO.

19. **HKIAC** follows a procedure similar to that of ICC. Article 6(1) of HKIAC's Administrated Arbitration rules stipulates that if the parties have not agreed upon the number of arbitrators, the HKIAC Council shall decide whether the case shall be referred to a sole arbitrator or to a three-member arbitral tribunal.

III. Appointing Authority and Procedure

20. Under section 24 of the Arbitration Ordinance the parties are free to agree on a procedure for appointing the tribunal, and this includes the right to delegate this task under the rules they have chosen (*e.g.* UNCITRAL) or to use the procedure of an institution such as ICC or HKIAC.

A. Sole arbitrator:

21. **Hong Kong Arbitration Ordinance**. In case of a sole arbitrator, if the parties are unable to agree on the arbitrator, the Hong Kong International Arbitration Centre is the default appointing authority.[40]

22. **ICC**. Although the parties may jointly nominate an arbitrator for confirmation by the ICC, the usual rule is for the ICC to choose a sole arbitrator. The ICC Court will usually consider the proposal of an ICC national committee or group in appointing the candidate that it considers most suitable.[41]

23. **UNCITRAL Rules**. Where the parties have agreed to a sole arbitrator, they may also agree on the identity of that arbitrator. Otherwise, if there is no institution involved, but the parties have chosen the UNCITRAL Rules, either party can request the Secretary-General of the Permanent Court of Arbitration at The Hague to choose an appointing authority.[42] The fact that the Secretary-General does not appoint the arbitrator(s) but only designates an appointing authority is cumbersome and a source of delay. So, when using the UNCITRAL Rules the parties should attempt at least to agree to an appointing authority.

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40 S.23 HKAO.

41 Art.13(3) - (4) ICC Rules (2012).

42 Art.6 UNCITRAL Rules.

B. **A panel of three arbitrators:**

24. **ICC rules.** In a traditional two-party international arbitration with a tribunal of three, parties commonly select one arbitrator each and the third, presiding arbitrator, is chosen either by the parties' chosen arbitrators or by the institution. If parties fail to choose their arbitrator or the two arbitrators chosen fail to agree on the presiding arbitrator, The ICC Court will usually consider the proposal of a national committee or group of ICC to appoint the candidate that it considers most suitable.[43] In multi-party cases, or if a party fails to nominate an arbitrator, the ICC may appoint one, two or even all the arbitrators.[44]

25. **UNCITRAL Rules.** Where three arbitrators are to be appointed, each party appoints one arbitrator and the two thus appointed choose the third who is usually the presiding arbitrator. Where there are multiple parties, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator, failing which, the appointing authority shall, at the request of any party, constitute the arbitral tribunal.[45]

26. **HKIAC.** Under the Administered Arbitration Rules each party designates an arbitrator and these two choose their presiding arbitrator. If one party fails to designate an arbitrator, then the HKIAC Council will appoint the second arbitrator and the two appointed arbitrators will choose a third as the presiding arbitrator.[46]

27. **Hong Kong Arbitration Ordinance.** Under section 24 of the Hong Kong Arbitration Ordinance, unless the parties have otherwise agreed, each party shall appoint one arbitrator and the two selected arbitrators appoint the third arbitrator of a panel of three. If either of the parties fails to appoint an arbitrator or the two arbitrators fail to agree on the third arbitrator within 30 days, the court or other authority shall make the appointment, as specified in article 6 of the Model Law.[47]

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43 Art.13 (3) - (4) ICC Rules (2012).

44 Art.12 (6) - (8) ICC Rules (2012).

45 Art.10 UNCITRAL Rules.

46 Art.8.1 HKIAC Administrated Arbitration Rules.

47 S.24 HKAO.

IV. Replacement of Arbitrators

28. If a party successfully challenges an arbitrator for alleged lack of independence or impartiality (see Chapter 5 of this book), or if an arbitrator dies or is otherwise unable or unwilling to perform the duties of the tribunal, it may be necessary to appoint a **replacement** or **substitute arbitrator**.[48]

29. Under the Arbitration Ordinance, where an arbitrator's mandate is terminated (through removal, withdrawal or death), a substitute arbitrator is appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.[49]

30. The Institutions and UNCITRAL all provide procedures for replacing an arbitrator who has been removed, or who is unwilling or unable to fulfill the arbitral functions.[50]

V. Ethical considerations

31. Because of the differing legal cultures and procedures in jurisdictions which come together in international arbitrations, the question of ethics is a delicate one. What may be acceptable and even encouraged in one jurisdiction may be forbidden in another. The Code of Ethical Conduct of the Chartered Institute of Arbitrators[51] is an attempt to codify best practices from around the world. The Code is not legally binding on anyone, but serves as a guide to the conduct of arbitrators and as a point of reference for users of the arbitration process. For example, the Code stipulates that the arbitrator shall act fairly and impartially as between the parties, throughout the whole proceedings; the arbitrator shall be free from bias and shall disclose any interest; the arbitrator shall only accept an appointment if he has suitable experience and ability for the case and available time to proceed with the arbitration. The Code itself is not a rigid set of rules, but is a reflection of internationally acceptable norms.

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48 Ss. 26 – 28 HKAO.

49 S.28 HKAO.

50 Art.15(4) ICC Rules (2012), art.15(5) ICC Rules (2012), art.12.1 HKIAC Administrated Arbitration Rules and art.12.3 HKIAC Administrated Arbitration Rules.

51 Chartered Institute of Arbitrators, *Code of Professional and Ethical Conduct for Members* (October 2009), available at: www.ciarb.org/information-and-resources/membership-rules-and-regulations/code-of-conduct/

QUESTIONS

1. Should arbitrators have a recognised diploma or professional title like those of lawyers, engineers, or doctors, in order to decide disputes? Why or why not?

2. Do you think parties should be allowed to choose their arbitrator, or will the party appointed arbitrators just act as advocates within the tribunal for the party that named them, leaving the decision to the chair?

3. What are the arguments in favour of a sole arbitrator and of a panel of three?

FURTHER READING

Gary B. Born, *International Commercial Arbitration: Commentary and Materials*, 2nd edition (Kluwer Law International 2001), Chapter 11

Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective*, (Cambridge University Press 2011), Chapter 3

Nigel Blackaby, Constantine Partasides, et al., *Redfern & Hunter on International Arbitration*, 5th edition, (Oxford University Press 2009), Chapter 4

CHAPTER 5: JURISDICTION OF THE TRIBUNAL

The jurisdiction of the tribunal is the overall authority vested in the tribunal to determine a particular dispute. This chapter deals with the jurisdiction of the tribunal – the sources of a tribunal's jurisdiction, the doctrine of *Kompetenz-Kompetenz*, the powers and duties of arbitrators, and challenges to the jurisdiction of the tribunal as well as challenges of arbitrators for cause.

I. The Sources of Jurisdiction

1. The jurisdiction of the arbitral tribunal is the foundation of its mandate and power. Because arbitration is a departure from the normal forum for resolving legal disputes – the public courts – the parties must agree to submit to it. By their **agreement to arbitrate** instead of going before a state court judge, the parties confer jurisdiction on the tribunal to hear and decide their dispute, and renouncing their right to have a state court decide. This agreement is recognised and enforced by state courts, who will decline to exercise jurisdiction in the face of a valid and operative arbitration clause or submission.[52]

2. The parties' agreement to arbitrate, may be a clause in their contract, or in a specific agreement to submit a dispute that has already arisen to arbitration. The **rules** chosen by the parties outline the general framework within which the arbitrator exercises jurisdiction, often setting out specific actions that the tribunal is authorised to take. This system works within the legislative framework provided by the Hong Kong Arbitration Ordinance, which itself mentions specific actions and decisions that the tribunal may take.

3. The arbitration agreement (previously discussed in Chapter 2 of this book) is the evidence of the will of the parties. Challenges to jurisdiction usually concern the arbitration agreement, its scope, the arbitrability of the issues submitted for decision, and the validity of the parties' consent.

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52 S.20 HKAO.

II. *Kompetenz-Kompetenz*

4. The doctrine of separability was discussed in Chapter 2 of this book. In arbitration, if the validity or existence of the main contract is successfully challenged, the severed arbitration agreement may still remain valid, leaving the tribunal with the jurisdiction to judge the effects of the invalidity of the main contract. However, if the validity or existence of the arbitration agreement itself is challenged, how are arbitrators to know whether or not they have jurisdiction? Bringing this matter before a court might prove to be time-consuming and inefficient, and would ultimately thwart the parties' (presumed) desire to avoid the public court by choosing arbitration.

5. The doctrine of *Kompetenz-Kompetenz* (or Competence-Competence), borrowed from the German courts, provides an answer: the tribunal may (at least in the first instance) determine its own jurisdiction. Section 34 of Hong Kong's Arbitration Ordinance stipulates that "[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

6. Under Hong Kong law, a Hong Kong court may review an arbitral tribunal's decision on its own jurisdiction.[53] However, while the challenge to jurisdiction is before the courts, the arbitral tribunal need not suspend its work, and may continue to hear and adjudicate the case. It is therefore possible that a tribunal will issue its award before the court decides whether the arbitral tribunal had jurisdiction to make it. This is in keeping with the "pro-arbitration" stance of the Hong Kong legislators, who have decided to limit court intervention to a minimum.

7. The doctrine of *Kompetenz-Kompetenz* can only apply when the arbitration law of the jurisdiction allows for arbitrators to determine their own jurisdiction. In China for example, jurisdiction is decided not by the tribunal, but by the arbitral institution, such as CIETAC.

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53 S.34(1) HKAO.

III. Duties and Powers of the Tribunal

A. Duties

8. The arbitral tribunal's duties constitute the mandatory obligations that arbitrators are required to achieve in arriving at a decision to resolve the dispute. These may come from an arbitration clause or a submission of an existing dispute to arbitration, from the arbitration rules adopted by the parties, or from the Arbitration Ordinance.

9. Statutory duties are laid out in section 46 of the Arbitration Ordinance:

    a. The parties must be treated with **equality**.

    b. The tribunal must be **independent**.

    c. The tribunal must act **fairly and impartially** between the parties, and must give them a **reasonable opportunity to present their cases** and to deal with the cases of their opponents.

    d. The tribunal must use **procedures appropriate** to the particular case, **avoiding unnecessary delay or expense**, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate.

10. These duties are mandatory and cannot be excluded by the parties. This is one of the few exceptions to party autonomy in arbitration, and ensures that each party will have a fair chance to present its case. The Arbitration Ordinance (Cap. 609) includes requirements that arbitrators be both independent and impartial, a change from both the old Arbitration Ordinance (Cap. 341) and the UNICITRAL Model Law.[54]

11. In addition to these mandatory provisions, section 27 of the new Arbitration Ordinance also establishes that arbitrators must act without undue delay. If arbitrators are unable to perform their functions without undue delay, parties have the power to go to a court to have that arbitrator removed. Potential arbitrators finding themselves in this situation should not accept appointment, since failure to abide by this obligation may result in a party challenging the appointment of an arbitrator (discussed further below).

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[54] John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations*, (Sweet & Maxwell 2011), p.240.

B. **Powers**

12. Powers are “tools” given to arbitrators for use in exercising their duties. The general powers of an arbitral tribunal are laid out in section 56 of the Arbitration Ordinance, and include:

    a. ordering **security for costs**;

    b. directing **production** of documents or delivery of interrogatories;

    c. directing **inspection** and taking of **samples** from relevant property;

    d. directing that evidence be taken by **affidavit**; and

    e. ordering measures to **inspect**, **preserve**, **sample**, etc. property relevant to the proceedings.

13. Section 33 of the Arbitration Ordinance describes the arbitrator’s power (with consent of both parties) to **act as mediator** even after the arbitration proceedings have commenced. The information obtained from each party by the arbitrator in the course of the mediation is confidential. However, if the mediation fails to produce a settlement, the arbitrator must disclose to the other party the information that the arbitrator considers material to the arbitration, before resuming the proceedings.

14. The Arbitration Ordinance also makes it clear that the fact that the arbitrator has mediated in accordance with section 33 is not grounds for removing that arbitrator if the mediation fails.[55]

15. Other powers attributed to an arbitral tribunal appear in sections 47 (freedom from strict rules of evidence), 57 (limit the amount of recoverable costs), 69 (correction and interpretation of award), 71 (interim or partial awards), 74 (allocation of costs), and 79 (award interest). Additionally, the tribunal has powers to act in case of a party’s failure to appear or to comply with an order of the tribunal.

16. Powers may also come from the **parties’ agreement** or from the **rules** they have chosen. There is now also considerable discussion about whether an arbitral tribunal may possess **inherent powers** arising out of its judicial function.[56]

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55 S.33(5) HKAO.

56 The Arbitration sub-committee of the International Law Association (ILA) is currently preparing a paper on this topic, expected in late 2012 or early 2013.

17. The powers of an arbitral tribunal are subject to the consent of the parties involved, since under section 56(1) of the Arbitration Ordinance the parties may agree to exclude certain powers that are granted to the tribunal. This exclusion may be express, in the arbitration agreement, or it may be implied, by the parties adopting arbitral rules that address these matters.

C. Challenging Jurisdiction

18. A party wishing to challenge the jurisdiction of an arbitral tribunal – its overall authority to decide a particular dispute or part of it - must make its objection promptly, usually at the first possible opportunity. Guidelines for challenges to jurisdiction are established in section 34(2) of the Arbitration Ordinance:

> *"A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence… A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during arbitral proceedings."*

19. The challenge may be regarding the entire dispute, or over one or more issues submitted to the tribunal. A party challenging the tribunal's jurisdiction regarding the entire dispute might allege that there is no agreement to arbitrate between these parties. A party challenging the tribunal's jurisdiction over one or more issues may acknowledge the overall jurisdiction of the tribunal, but allege for example, that a particular issue is not included within the scope of the arbitration agreement.

20. A tribunal that is ruling on its jurisdiction may issue a Partial Award or an Order to rule on the issue as a preliminary question, or include it in the Final Award along with its decision on the merits.[57]

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57 S.34(3) HKAO. In the case of *Incorporated Owners of Tak Tai Building v. Leung Yau Building Ltd.* [2005] 1 HKC 530, an arbitrator decided that the tribunal had jurisdiction, and issued this decision in the form of an interim award. When the matter came to the Court of First Instance, the judge held that the preliminary ruling was on jurisdiction, and was an order and not an award on the merits. This distinction becomes important in the discussion of enforcement, at Chapter 10 of this book.

D. Challenging an arbitrator for cause

21. A party who accepts the tribunal's jurisdiction over the dispute may nevertheless wish to challenge the appointment of an arbitrator on grounds that the arbitrator is unable to participate in the arbitration impartially or independently, or for some other reason.

22. At any time in the proceedings, if a party believes that an arbitrator is conducting the proceedings improperly, is unable or unwilling to carry out its function, or that a conflict of interest has arisen or come to light, that party may challenge the arbitrator and attempt to have that arbitrator removed and replaced.[58] The method for challenge depends on the arbitral rules that have been adopted as well as the arbitral law of the seat.

23. The challenge must be made as soon as the objecting party is aware of the circumstances on which it is basing its challenge. The result of a successful challenge will be that the arbitrator's appointment is either not confirmed in the first place, or the arbitrator is removed and replaced by a substitute.

a. *Procedure*

24. Most institutions have procedures in place for challenges to an arbitrator.[59]

25. In the event that the parties have not chosen a set of arbitral rules (as in *ad hoc* arbitrations), the parties can agree on a procedure for challenging an arbitrator. Alternatively, the *lex arbitri,* the law of the seat can dictate the procedures for arbitrator challenges.

26. In Hong Kong, section 26 of the Arbitration Ordinance stipulates that parties wishing to challenge an arbitrator must submit a written statement of reasons to the arbitral tribunal within fifteen days of the constitution of the tribunal, or after the party becomes aware of the reason for challenge. If the arbitral tribunal rejects the challenge to the arbitrator, the party may request the Court of First Instance to decide on the challenge. This request must be made within 30 days of receiving the decision of the arbitral tribunal. The court's decision will not be subject to appeal.[60] During this period, the arbitral tribunal may continue arbitral proceedings and make an award, although if the challenge is eventually upheld, this award may be set aside.

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58 S.26 HKAO.

59 Art.14(2) ICC Rules (2012) and Art.11.5 HKIAC Administered Arbitration Rules.

60 S.26(1)(3) HKAO.

b. *Grounds*

27. The grounds for which an arbitrator can be challenged can also be found in the *lex arbitri.* In Hong Kong, the grounds for challenging the appointment of an arbitrator are established in section 25 of the Arbitration Ordinance. An arbitrator can only be challenged under the Arbitration Ordinance for exhibiting a lack of impartiality or independence, or if that arbitrator does not possess the qualifications required by the parties. This ties in to the fact that arbitrators are required to avoid unnecessary delay or expense in accordance with section 46(3)(c) of the Arbitration Ordinance. This means that arbitrators who refuse to participate in proceedings or who experience circumstances preventing them from attending the proceedings may be challenged as they do not possess the qualifications required by the parties.

28. **Impartiality** and **independence** are related but different concepts. Independence of an arbitrator is objective, and involves an identifiable relationship with one of the parties involved, which will raise doubts as to the ability of that arbitrator to decide fairly. Impartiality on the other hand is a subjective notion, involving the state of mind of the arbitrator. As this cannot be directly observed, impartiality has to be judged on evidence tending to show that an arbitrator may favor one side over the other.

29. In *Jung Science Information Technology Co. Ltd. v. ZTE Corporation*[61], a challenge was made against an arbitrator because of a friendship between the arbitrator and counsel, and the fact that both persons served on the HKIAC Board. The test used by the Hong Kong court to determine if the arbitrator was biased was that of an objective fair-minded and informed observer, having considered the relevant facts, and whether he would conclude that there is a real possibility that the arbitrator was biased. The challenge was eventually dismissed. This was also the test used by Chief Justice Li in the Court of Final Appeal in the case of *Suen Wah Ling t/a Kong Luen Construction Engineering Co. v China Harbour Engineering Co. (Group).*[62] This test appears to be an evolution from the case law in the UK, in particular, the test developed in the case of *Porter v Magill*.[63]

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

62 [2008] HKCU 570.

63 [2002] 2 AC 357.

30. Arbitrators must thus consider whether they harbour conflicts of interest when deciding to accept a case. Arbitrators need to ensure that there are no existing conflicts that would trigger a challenge of their appointment, and also disclose any potential conflicts of interest. This duty is set out in section 25 of the Arbitration Ordinance and also covered in institutional rules.

c. *The IBA Guidelines*

31. Arbitrators that question whether or not their relationships will create conflicts of interest or that are concerned that these relationships may give rise to potential challenges to their appointment may wish to refer to the **IBA Guidelines on Conflicts of Interest**[64]. As professional guidelines, they have no binding legal authority, but are frequently used as a reference.

32. The IBA Guidelines establish four lists: the Non-Waivable Red List, Waivable Red List, Orange List, and Green List. The Red List provides a list of situations that would give rise to justifiable doubts about the arbitrator's independ*ence. This list is further divided int*o the Waivable List, where arbitrators should be allowed to continue serving if all parties expressly agree to waive objection. The Non-Waivable Red List establishes situations where an arbitrator must withdraw. The Orange List establishes situations where an arbitrator has a duty to disclose their relationships, as it may give rise to justifiable doubts as to the arbitrator's impartiality or independence. The Green List is a list of potential situations where no conflict of interest exists from an objective point of view. In this type of case an arbitrator would not need to disclose the relationship.

QUESTIONS

1. With respect to the constitution of the tribunal, challenges to an arbitrator for cause and interim or conservatory measures, discuss the interaction in Hong Kong among:

    - The New York Convention
    - The arbitration law of Hong Kong as the seat of the arbitration
    - The rules chosen by the parties
    - The terms of the parties' agreement to arbitrate

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64 International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (2004), available at: www.ibanet.org/publications/publications_IBA_guides_and_free_materials.aspx

2. How can parties ensure that arbitral tribunals have jurisdiction to rule on the matters that they want to go to arbitration?

3. Make a list of all the *powers* that an arbitral tribunal is granted by the HKAO.

4. In what situations might a party choose to waive an objection to jurisdiction or to the appointment of an arbitrator?

5. Should arbitrators disclose every past and potential relationship even if they know that that relationship will not give rise to any possible conflict of interest?

FURTHER READING

Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective*, (Cambridge University Press 2011), Chapters 5 and 6

John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Sweet & Maxwell 2011)

International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (22 May 2004)

CHAPTER 6: PROCEDURE AND EVIDENCE

It is the responsibility of the tribunal to act impartially, to ensure that parties are fairly treated and have the opportunity to present their case and to meet the case of the other party. These are the fundamentals of *natural justice* (sometimes called *due process*.) This chapter will cover the flexibility and autonomy of arbitration, with respect to the expectations of different legal traditions, and the use of UNCITRAL Notes and IBA Rules on Evidence.

I. Flexibility and Autonomy of Arbitration

1. The concept of party autonomy is enshrined in the Arbitration Ordinance, specifically in section 47. The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. This article tracks Article 19(1) of the UNCITRAL Model Law, which has been called the "Magna Carta" for party autonomy in all modern laws on international commercial arbitration"[65] and is considered to be one of the most important principles of the UNCITRAL Model Law.[66] If the parties' chosen procedure is not followed, arbitrators risk having their award set aside: see section 81(2)(a)(iv) of the Arbitration Ordinance. To the extent that the parties do not agree, the tribunal may conduct the arbitration in the manner it deems appropriate.

2. Usually the tribunal, very soon after it is constituted, will convene the parties for a preliminary meeting, or **procedural conference**, at which they will discuss and agree the ground rules for the procedure. It is usual for the presiding arbitrator to circulate a proposed procedural order for comments by the parties' counsel, in attempt to dispose of the easily agreed procedural issues ahead of the meeting. Gathering parties and lawyers and arbitrators for a preliminary conference in an international arbitration is expensive, but often is an excellent opportunity for negotiating a settlement. In smaller cases, the meeting can be held by telephone or video conference.

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65 V.V. Veeder, "Whose Arbitration is it Anyway: The Parties' or the Arbitration Tribunal's: An Interesting Question?", *in* Lawrence W. Newman and Richard D. Hill (eds.), *The Leading Arbitrator's Guide to International Arbitration*, 2nd edition, (JurisNet LLC 2008), p.341.

66 UNCITRAL Analytical Commentary (1985), para.17.

3. At the procedural conference, the tribunal will attempt to achieve a consensus, but where there is no agreement the tribunal must use the procedures it deems appropriate. At this conference, typical issues arising include: methods of communication (with no one-sided communications between a party and an arbitrator), types of written submissions as well as the format and dates for delivery, how many witnesses will be needed, whether expert witnesses are necessary and how their evidence is to be presented. The UNCITRAL Notes, another useful document prepared in 1996, provide a comprehensive checklist of issues that might arise and need to be addressed at the procedural hearing.[67]

4. Parties may have decided to select procedures established by an arbitral institution, such as the ICC or the HKIAC. Some institutions have two or more different sets of rules, which can be selected by the parties either in the arbitration agreement, or at the time of arbitration. The HKIAC, for example, has the Short Form Arbitration Rules, Electronic Transaction Arbitration Rules, and Domestic Arbitration Rules, and its Administered Arbitration Rules, in addition to administering under the UNCITRAL Rules. All these rules leave room for the parties to customize the procedure according to their individual needs.

5. In the absence of any agreement between the parties as to how to conduct the procedure, the tribunal may conduct the arbitration in any manner it considers appropriate, as allowed by section 47(2) of the Arbitration Ordinance. However, arbitrators must always keep in mind that their discretion is also governed by mandatory provisions of the Arbitration Ordinance, such as section 46 (equal treatment of the parties), section 52(1) (holding an oral hearing, if a party requests), and section 54 (procedures for tribunal-appointed expert witnesses).

6. If there is to be a hearing, it can take a variety of forms, depending on the wishes of the parties and the needs of the case. Arbitration is sometimes modeled on court proceedings, but this negates one of the most important attributes of arbitration: the flexibility to choose the kind of evidence, the timing, and the approach that suit the parties and their case.

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67 See: www.uncitral.org/pdf/english/texts/arbitration and paragraphs 10 to 13 of this chapter.

7. The tribunal and parties will usually determine the procedure to be followed and the timetable for the arbitration through preliminary correspondence and one or more procedural meetings. For smaller cases, telephone and video conferences are becoming more popular. These preliminary meetings allow the tribunal to determine procedural issues such as modes of communication between the tribunal and the parties, the type of pleadings, and procedures for adducing evidence. Bearing in mind any institutional or other rules chosen by the parties, the tribunal will attempt to obtain party agreement, but failing consensus, will establish the procedures as it sees fit.

8. For example, the ICC Rules establish time limits for certain procedural steps.[68] The tribunal may request that the ICC Court shorten or lengthen these time limits to suit the circumstances.

9. Is the tribunal expected to know the law, or can it do its own research? Can an arbitrator take advantage of its own expert knowledge in a given field? Whatever the source of its information, whether fact or law, the tribunal must not make a decision based on any element which all parties have not had the opportunity to address. For the treatment of expert witnesses and reports, see section 54(1) of the Arbitration Ordinance.

II. **UNCITRAL Notes**

10. Arbitrators looking for guidance on the appropriate procedures to use for international arbitrations frequently refer to the UNCITRAL Notes on Organising Arbitral Proceedings. In all cases, the arbitral tribunal has the responsibility to ensure that each party has adequate notice of all proceedings and hearings, and to conduct the proceedings fairly. If all parties are from common law countries, this may be an easy task as all counsel will be familiar with techniques such as discovery, oral presentation of evidence, preparation of witnesses and cross-examination. This is not necessarily the case where parties and their lawyers come from jurisdictions where these techniques are unknown, or even expressly forbidden.

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68 Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective*, (Cambridge University Press 2011), p.326.

11. Can witnesses read from witness statements filed prior to the hearing? Should a witness be sworn before testifying? Can witnesses be in the hearing room before or after they give their own testimony? Can a party representative testify? Is a tribunal competent to administer an oath? Can a Muslim witness swear on a Koran instead of a Bible in Hong Kong? Can any witness simply promise to tell the truth? All of these issues may arise for decision during the procedural hearing. The decisions taken at that initial hearing, subject to any later amendments, form the roadmap of the arbitration proceedings for a particular case.

12. The UNCITRAL Notes on Organizing Arbitral Proceedings provide tribunals – whether neophytes or seasoned practitioners – with a useful comprehensive checklist of situations and issues that a tribunal may need to consider when determining the appropriate procedures for arbitration.

13. Arbitrators should keep in mind that arbitration proceedings do not follow a universal template. These Notes do not have any binding legal force on anyone, but are a useful checklist for any arbitrator in planning the conduct of the case.

III. **Evidence**

14. Evidence may be in the form of oral evidence, often accompanied by advance witness statements, by documentary evidence, or by physical or real evidence such as models, charts and summaries. The tribunal may want to visit the site to see for itself the subject matter of the dispute.

15. Bearing in mind that parties might come from various linguistic backgrounds and legal cultures, the tribunal needs to consider the potentially differing approaches of the common law, civil law, and Sharia law, often combining elements of each in order to create a procedure that best meets the expectations of all the parties.

16. International tribunals are rarely subject to rules of evidence used by state courts. For example, under section 47(3) of the Arbitration Ordinance, a tribunal is not bound by the rules of evidence of the Hong Kong courts, and may allow any evidence that it considers **relevant** to the arbitral proceedings. Tribunals then give evidence any **weight** that it considers appropriate. For example, **hearsay** evidence is not excluded, but a tribunal would probably tend to give it little weight if it is not corroborated independently.

17. To assist arbitral tribunals in determining the admissibility and weight of evidence in arbitration, the **IBA Rules on the Taking of Evidence in International Arbitration**[69], revised in 2010, are a useful guide. These rules "provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings."[70]

18. For example, Article 9(2) of the IBA Rules on Evidence suggests grounds on which a tribunal may exclude production of documents, statements, oral testimony, or inspection, including:

    a. lack of sufficient relevance or **materiality**;

    b. **legal impediment or privilege** under the legal or ethical rules that the tribunal deems applicable;

    c. unreasonable **burden** on a party;

    d. **loss or destruction** of a document;

    e. **confidentiality**;

    f. political or institutional **sensitivity**; and

    g. considerations of procedural **economy, proportionality, fairness or equality** of the Parties.

19. The IBA Rules on Evidence provide a framework and guidelines for tribunals in determining whether to exclude evidence on one or more of the grounds listed above. Frequently tribunals and parties will agree to be "guided but not bound" by these Rules, leaving any specific difficulties to the discretion of the tribunal.

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69 International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (2010), available at: www.ibanet.org/publications/publications_IBA_guides_and_free_materials.aspx

70 IBA Rules on the Taking of Evidence in International Arbitration, Foreword

IV. The Rights of the Parties

20. When adopting suitable procedures for the arbitration, the tribunal will accord significant weight to the wishes of the parties. However, party autonomy is not absolute. Certain rights of the parties and duties of the arbitrators cannot be subject to party autonomy. These **mandatory provisions** of Hong Kong law include the right to equal treatment, the right of a party to present its case, and the obligation to avoid unnecessary delay and expense.

A. Right to Equal Treatment

21. In Hong Kong, parties cannot renounce the right to equal treatment enshrined in section 46(2) of the Arbitration Ordinance. Moreover, section 46(3) establishes that arbitrators must act "*fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents.*" This principle is also reflected in institutional rules.[71]

22. The need to treat parties equally also means that the tribunal must avoid situations where the tribunal is communicating with one party only ("*ex parte")*. One-sided communications may violate the right to equal treatment, and may lead to an eventual challenge of the award, regardless of whether the meeting was formal or informal in nature.[72] A violation of this principle may also lead to the removal of an arbitrator.[73]

23. An exception to this rule is when one party seeks leave from the tribunal for a protective or conservatory order against the other party **without notice**. Specific grounds for ex parte applications are set out in s.37 of the Arbitration Ordinance and will be covered further in Chapter 7.

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71 Art.14.1 HKIAC Administered Arbitration Rules and Art.22(4) ICC Rules (2012).

72 Decision 10 (13 Feb 2002) *in* Geoff Nicholas and Constantine Partasides, "LCIA Court Decisions on Challenges to Arbitrators: A Proposal to Publish" (2007) 23(1) *Arbitration International*,pp. 16 - 17.

73 *Charteryard Industrial Ltd. v. Incorporated Owners of Bo Fung Gardens* [1998] 4 HKC 171.

B. **Right to Present Their Case**

24. Parties also have the right to present their case. Section 46(3)(b) of the Arbitration Ordinance states that parties must be given a reasonable opportunity to present their cases, which is an element of **natural justice** and the **right to be heard** (*audi alteram partem*). This includes the requirement that parties be notified of the existence of the arbitration, of the dates when hearings have been scheduled, and of all submissions or assertions of the other party.

25. In Hong Kong, one departure from the UNCITRAL Model Law involves the right of parties to present their case. Where the Model Law requires a "**full**" opportunity to present one's case in arbitration, section 46(3)(b) of the Arbitration Ordinance only requires that the parties be given a "**reasonable**" opportunity to present their case. The need to provide an opportunity for parties to argue their cases is reflected in institutional rules as well.[74]

26. The right to present one's case may not necessarily extend to the right to present one's case orally. A tribunal may have the power to decide on an issue without the need for **oral hearings**, and therefore issue an award on the basis of written submissions only. The parties may agree to a documents-only procedure, especially in low value or very simple disputes. They may do this explicitly, or by choosing a set of rules which does not allow oral hearings. Under Hong Kong law, unless the parties have agreed not to have a hearing, if either party requests a hearing, the tribunal must hold one.[75] The length and procedure for the hearing is at the tribunal's discretion, and presumably, a party insisting on an unnecessary or overlong hearing could be sanctioned by an adverse costs order (See Chapter 8 of this book).

27. The tribunal must balance the need to provide a reasonable opportunity for parties to present their cases with the need to avoid unnecessary delay and undue expense, reinforcing the principle that one of the key strengths of arbitration is commercial efficiency.

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74 Art.17.1 UNCITRAL Rules; Art.14.1 HKIAC Administered Arbitration Rules; Art.22(4) ICC Rules (2012).

75 John Choong and Romesh Weeramantry (eds.), *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Sweet & Maxwell 2011), p.266.

C. **Duty to Avoid Delay and Expense**

28. Hong Kong arbitrators have a duty to avoid delay and expense. Under section 46(3)(c), the arbitral tribunal must "*use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate.*" This represents a mandatory obligation for the arbitral tribunal. The need to avoid unnecessary delay or expense is also reflected in modern institutional rules.[76]

29. Section 47 of the Arbitration Ordinance allows parties the freedom to agree on the procedure to be followed by the tribunal, subject to the provisions of the Law. This creates **tension**: if the parties agree to use a procedure that is unsuitable, or would result in unnecessary delay or expense, is the tribunal bound by section 46 of the Arbitration Ordinance to override the parties' agreement on procedure?[77]

QUESTIONS

1. What considerations should the tribunal look at in deciding on the procedures for a particular case?

2. What is the significance of Hong Kong's choice of a "reasonable" opportunity to present one's case, as opposed to the Model Law's "full" opportunity?

3. How should a tribunal accept evidence that has been presented by an expert who is clearly biased towards one party?

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[76] For example, art.14.1 HKIAC Administered Arbitration Rules and art. 22(2) and (3) of the ICC Rules (2012).

[77] John Choong and Romesh Weeramantry*, The Hong Kong Arbitration Ordinance: Commentary and Annotations (Sweet & Maxwell 2011),* p. 244: "Section 46 sets out certain fundamental requirements of equality of treatment, independence and impartiality of the tribunal, fairness and due process. These requirements are mandatory and are therefore not susceptible to any agreement to the contrary by the parties, in contrast to the principle of party autonomy that pervades sections 47 to 57 in general and section 47 in particular".
Commentary on section 47: "The limitations to party autonomy are however represented by the mandatory provisions of the Arbitration Ordinance aimed at ensuring fairness, including the requirements set out at section 46, which cannot be excluded."

FURTHER READING

Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective*, (Cambridge University Press 2011), Chapter 7

John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Sweet & Maxwell 2011)

International Bar Association, *IBA Rules on the Taking of Evidence* (29 May 2010)

CHAPTER 7: INTERIM MEASURES AND PRELIMINARY ORDERS

This chapter deals with interim and conservatory measures available either from the Arbitral Tribunal or from the Hong Kong courts. This chapter will cover the requirements for issuing preliminary orders and interim measures, which can be granted by an arbitral tribunal (ss. 35 - 42), and which require the assistance of the court (s.45).

I. Interim Measures

1. Interim measures (sometimes called provisional or conservatory measures), are orders issued either by the arbitral tribunal or the state court during or prior to the arbitration. Usually they **protect assets** that may be at risk, or **maintain the status quo**. These measures are temporary, and do not survive the issuance of the final arbitral award.[78] They are used to **prevent or minimise harm** to a party before the final award is issued. Such measures may help maintain the **integrity** of the arbitral process by ensuring that the subject matter of the arbitration remains intact. This may involve **preserving evidence**, or ensuring that one party cannot dissipate capital or destroy evidence before a final award is issued.

2. This is one area in which Hong Kong has made some departures from the text of the UNCITRAL Model Law, mainly by legislating its own more extensive provisions to deal with the respective powers of the tribunal and the court.[79]

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78 Simon Greenberg, Christopher Kee and Romesh Weeramantry*, International Commercial Arbitration: An Asia-Pacific Perspective, (Cambridge University Press 2011)*, p.357; *Firm Ashok Traders v. Gurumukh Das Saluja* (2004) 3 SCC 155 (Indian Supreme Court).

79 For example, ss. 57, 59 and 61 HKAO

3. The arbitral tribunal **can bind only parties to the arbitration**. It has no coercive powers, but can issue partial awards and costs sanctions to persuade parties to comply. Other situations, often involving non-parties, will require a court to utilise its power to issue state-backed sanctions, such as contempt proceedings, fines, and even imprisonment. Section 61 of the Arbitration Ordinance allows for interim measures issued by a tribunal to be enforced by a Hong Kong court. In Hong Kong, the Court of First Instance will typically handle these applications.[80]

4. The *lex arbitri*, otherwise known as the **procedural law of the seat**, determines the ability of an arbitral tribunal to issue interim measures. In Hong Kong, interim measures are governed by section 35 of the Arbitration Ordinance, which grants arbitral tribunal the power to order them. This is a new section, following the 2005 amendments to the UNCITRAL Model Law.[81] Section 35(1) of the Arbitration Ordinance states that: "*[U]nless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures*". Note that parties may agree to limit or even eliminate the tribunal's powers to make interim orders. Also, some national laws reserve the power to make interim orders to the state court.[82]

5. To prevent abuse of interim measures, safeguards are included in the Arbitration Ordinance. Under section 39 of the Arbitration Ordinance, the tribunal has the power to modify, suspend, or terminate an interim measure once it has been issued. Section 40 allows the arbitral tribunal to require the requesting party to provide security in connection with an interim measure, while section 41 allows an arbitral tribunal to require any party to disclose a material change in the circumstances on which the interim measure was granted. Section 42 establishes that parties requesting interim measures are also liable for costs and damages caused by the measure, if the tribunal later decides that the interim measure should not have been granted.

II. Common Types of Interim Measures

6. An arbitral tribunal or court may grant a wide variety of interim or conservatory orders. Following are just some examples of the most common interim measures used in commercial arbitration.

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80 John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Sweet & Maxwell 2011), p.232.

81 *Id.*, p.197.

82 For example: Greece, Italy and Mainland China.

A. Freezing Orders

7. A freezing order (otherwise known as a Mareva Injunction) is an order whereby the tribunal or court orders a party to preserve an asset, or prevent that asset from being removed from the jurisdiction to thwart enforcement of an award. The party seeking the freezing order must demonstrate to the tribunal or court that (a) there is a **reasonable possibility** that that party will succeed on the merits, and (b) that there is a **real risk** that the assets in question will be removed or dissipated.

B. Orders for Sequestration or Safe-Keeping

8. The tribunal may order that a party transfer possession of an asset (money or personal property) to a neutral third party for safe-keeping pending the decision of the tribunal as to who the true owner is.

9. The test of whether or not there is a real risk of dissipation is based on several factors, including the nature of the assets, the residence of the party against whom the order is sought, that party's reputation for evasion or how it has behaved during the period of the contract, and that party's financial standing.

10. Essentially, the party requesting the freezing order will be attempting to ensure that there are assets available to satisfy an eventual award. The party requesting the freezing order may be liable for damages if the freezing order is issued wrongfully.

C. Anti-Suit Injunctions

11. An anti-suit injunction is an order by which a tribunal or court orders a party to stay or forego litigation in another jurisdiction while arbitration proceeds in its own jurisdiction.

12. Arbitral tribunals may issue anti-suit injunctions, but these injunctions require the backing and state-sanctioned power of the courts. Violation of such an order may lead to contempt of court proceedings. Typically, these injunctions are issued only where instituting foreign proceedings is "unconscionable" or "vexatious or oppressive".[83] Even if the tribunal grants the injunction, the requesting party may need to apply to the court where the litigation or arbitration is likely to take place to order a party to refrain from beginning (or continuing) an action in that jurisdiction.

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83 *Lucky Sun Development Ltd. v. Gainsmate International Ltd.* [2007] HKEC 801, para.85.

D. Security for Costs

13. Security for costs orders are designed to prevent an impecunious claimant from bringing frivolous or spurious claims (sometimes called “nuisance claims”) against a defendant who will be unable to find any assets from which to recover any cost order awarded in its favour. By ordering a party to furnish security for costs, the tribunal makes the right of a claimant or counter-claimant to proceed on its claim conditional on the raising of a bank guarantee or other form of surety to guarantee any eventual award of legal costs assessed against the claimant by the arbitral tribunal.[84] Because this kind of order may cause hardship to a claimant, or even make it impossible to proceed with the arbitration, tribunals must use care in ordering a party to provide security for costs.

III. Requirements for issuing an interim measure

14. A tribunal should not issue Interim measures lightly, but must bear in mind the needs of both parties, balancing the needs of the party requesting the order against the harm that could be caused to other parties. It is important to avoid even the appearance of pre-judging the case.

15. Section 36 of the Arbitration Ordinance sets out certain requirements for issuing an interim measure. A party requesting an interim measure under section 35 must satisfy a two-pronged test:

    a. First, that **damages alone would be inadequate** to repair the harm which is likely to result if the measure is not ordered. This harm must substantially outweigh the harm that is likely to result if the measure is granted.

    b. Second, that there is a **reasonable possibility** that the party requesting the interim measure will succeed on the merits of the case. When requesting a freezing order, the arbitration must be filed or filed as soon as possible. The party must also show that there is a good arguable case. This does not mean that the party is sure to win, but that the claim is sound if the alleged facts are proven.

16. This test is similar to the test for issuing an injunction in English law as stated in the *American Cyanamid* case.[85]

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84 Gu Wexia, “Security for Costs in International Commercial Arbitration”, (2005) *Journal of International Arbitration* 167, p.167.

85 [1975] AC 396.

17. This test is reduced somewhat for interim measures that deal only with the preservation of evidence. The tribunal is still required to consider the two-pronged test, but only to the extent to which the arbitral tribunal considers it appropriate.

18. Under the Ordinance, the arbitral tribunal may issue only those interim measures a Hong Kong court could issue. This prevents the arbitral tribunal from issuing extraordinary measures that would not be enforceable by a court.

19. In addition to the requirements established by Hong Kong's law, arbitrators must also keep in mind the requirements of any institutional rules that parties may have adopted. The institutions' rules may dictate the arbitral tribunal's powers to issue an interim measure. For example, article 24 of the HKIAC Administered Arbitration Rules grants a broad scope to arbitral tribunals to issue interim measures.[86] It is important to remember that even if institutional rules allow the tribunal to issue a particular interim measure, if the *lex arbitri* does not allow the tribunal this power then the tribunal cannot grant it. In Hong Kong, this problem is unlikely to arise, given the broad powers accorded to tribunals by the Arbitration Ordinance.

IV. **Court Assisted Measures and Court Ordered Measures**

20. Although the Ordinance grants arbitral tribunals specific power to order interim measures, some measures are either not within the tribunal's power, or impractical for an arbitral tribunal to enforce. In these cases, it may be necessary to request that a court issue an interim measure rather than an arbitral tribunal. Section 45 of the Arbitration Ordinance departs from Article 71J of the Model Law in dealing more extensively with the interim measures to be ordered by a Court. The court's powers may be **concurrent** with those of the tribunal in which case the court may decline to exercise its powers.

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86 In contrast, Articles 17 and 18 of the CIETAC Rules (in Mainland China) regarding preservation of property and evidence require the tribunal to forward the request to the competent court of the jurisdiction, leaving the arbitral tribunal without the power to issue interim measures.

21. Consider the following situations where a party might have to go to court:[87]

    a. An arbitral tribunal cannot issue interim measures **before the tribunal has been constituted**. If an interim measure is required before the tribunal is constituted, a Hong Kong court will assist.[88]

    b. Because the powers of an arbitral tribunal extend only to the parties in the arbitration, interim measures affecting **third parties** can only be issued by a court.

    c. Interim orders (as opposed to awards) of an arbitral tribunal **may not be enforceable** in another jurisdiction under the New York Convention, thus a party might have to invoke the assistance of a local court where it intends to enforce the order.

22. Section 60 gives Hong Kong courts special powers relating to arbitration proceedings; these powers may be *concurrent* with those of the tribunal. In addition to the court's power to enforce orders issued by an arbitral tribunal under section 61 of the Arbitration Ordinance, the court has specific powers to grant interim measures, whether the arbitral proceedings take place in or outside of Hong Kong.[89] This means, for example, that courts in Hong Kong could issue an order that a party terminate PRC court proceedings in favor of arbitration in Hong Kong.[90]

23. Section 45 of the Arbitration Ordinance also establishes grounds on which a court can issue, or decline to issue an interim measure, such as when the interim measure is currently the subject of arbitral proceedings or where the court does not wish to interfere with arbitral proceedings.[91]

24. Interim measures made by a court are not subject to appeal: see Section 45(10) of the Arbitration Ordinance.

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87 Nigel Blackaby, Constantine Partasides, et al., *Redfern & Hunter on International Arbitration*, 5th edition, (Oxford University Press 2009), p.445.

88 Some institutions such as ICC (art. 23 of ICC Rules 2002) can appoint an "Emergency Arbitrator" to deal with such cases.

89 *Owners of the Ship or Vessel "Lady Muriel" v Transorient Shipping Ltd.* [1995] 2 HKC 320.

90 *Lucky Sun Development Ltd. v Gainsmate International Ltd.* [2007] HKEC 801.

91 *Leviathan Shipping Co. Ltd. v Sky Sailing Overseas Co. Ltd.* [1998] 4 HKC 347.

QUESTIONS

1. What are the differences between an interim measure issued by an arbitral tribunal and an interim measure issued by a court?

2. How can a party recover an asset that has been subjected to detention or freezing order due to an interim measure?

3. What reasons are there for issuing an interim measure *ex parte*, without notifying the other party of the measure beforehand? What are the dangers of allowing *ex parte* interim orders in an international arbitration?

FURTHER READING

Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective*, (Cambridge University Press 2011), Chapter 7

John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Sweet & Maxwell 2011), pp. 195 - 235

Nigel Blackaby, Constantine Partasides, et al., *Redfern & Hunter on International Arbitration*, 5th edition, (Oxford University Press 2009), Chapter 7

CHAPTER 8: COSTS AND INTEREST

This chapter considers the principles on which the arbitral tribunal may make an order reimbursing a successful party for some or all of the expenses it has incurred in making its claim. It will then deal with interest that the tribunal may order, either as part of a claim for damages, or to encourage prompt payment of any amounts awarded by the tribunal.

I. Introduction

1. In Hong Kong, as in England and many Commonwealth countries, the judge or tribunal will usually order the losing party to pay at least part of the winning party's costs. In other jurisdictions such orders are unknown, or the amount of the costs to be paid is very limited. In making an order for costs, an international arbitration tribunal needs to consider the different legal cultures of the parties, the provisions of the rules they have chosen, as well as the expectations that those parties may bring to the arbitration.

2. The term 'costs' in the context of arbitration may be divided into two broad categories: the costs of the arbitration and the costs of the parties.

II. Costs of the Arbitration

3. Also referred to as the costs of the reference, the costs of the arbitration include the fees, plus hotel, travel and other expenses of the members of the arbitral tribunal, as well as the fees and expenses of any administering institution or appointing authority, and of experts appointed by the arbitral tribunal. Fees and expenses of an administrative secretary, and any other incidental expenses incurred by the arbitral tribunal for the account of the case may also be included in the costs of the arbitration.[92]

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92 Nigel Blackaby, Constantine Partasides, et al., *Redfern & Hunter on International Arbitration*, 5th edition, (Oxford University Press 2009), p.546.

III. Costs of the Parties

4. The costs of the parties include the fees and expenses of the lawyers engaged to represent the parties in the arbitral proceedings, as well as expenses for the preparation and presentation of the case. Depending on the nature of the dispute parties may engage experts such as accountants, claims consultants or specialists in the business involved in the dispute. The hotel and travel expenses of these lawyers, witnesses and parties will be party costs. Also included are disbursements for copying, binding, telephone, fax, document delivery, translations and so on.[93]

5. Rarely, it may be appropriate to claim “hidden” costs, such as the cost of time spent on the case by senior officials, directors, or employees of the parties themselves, and the indirect costs of disruption to their ordinary business.[94] The rules chosen by the parties may furnish guidelines or, at least, give some indication of what a party might claim. The UNCITRAL Rules mention the travel and other expenses of witnesses and the costs for legal representation and assistance.[95] The ICC rules refer simply to ‘the reasonable legal and other costs incurred by the parties' as part of the costs of the arbitration.[96] As businesses become more accustomed to putting a value on time through their internal accounting systems, claims for ‘executive’ or ‘management’ time may occur more often, either as part of the parties' legal costs or as part of a claim for damages.[97]

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93 Nigel Blackaby, Constantine Partasides, et al., *Redfern & Hunter on International Arbitration*, 5th edition, (Oxford University Press 2009), p.546.

94 *Ibid.*

95 Art.40(2) UNCITRAL Rules.

96 Art.37(1) ICC Rules (2012).

97 Nigel Blackaby, Constantine Partasides, et al., *Redfern & Hunter on International Arbitration*, 5th edition, (Oxford University Press 2009), p.546.

IV. Costs under Hong Kong Arbitration Ordinance

6. Section 74 of the Hong Kong Arbitration Ordinance deals with costs. The arbitral tribunal may include in an award directions with respect to the costs of arbitral proceedings (including the fees and expenses of the tribunal). The Arbitration Ordinance specifies that the tribunal may take into account that a written offer of settlement of the dispute concerned has been made, and direct in the award whom and by whom as well as in what manner the costs are to be paid. The tribunal may also order a party to pay the costs of an order or direction, including an interim measure, either immediately, or at a time the tribunal may otherwise specify, usually the end of the proceedings.

7. A provision in an arbitration agreement to the effect that the parties, or any of the parties, must pay their own costs with respect to the arbitral proceedings arising under the agreement is **void**, unless it is part of a "*compromis*" – an agreement to submit to arbitration a dispute that had already arisen before the agreement was made[98].

8. An arbitral tribunal, rendering its award, has a number of choices in dealing with the apportionment of costs.[99] It may explicitly say that it is making no order as to costs. It may award the winning party all or part of its costs or it may deny a successful party its costs because of that party's unacceptable behaviour during the proceedings. It is relatively rare for any successful party to recover 100% of its costs.

9. In Hong Kong courts, costs are usually awarded to the successful party on a party and party basis, on a **common fund** basis or more rarely, on an **indemnity** basis. Party and party costs will cover a substantial portion of the winning party's costs as well as the costs of the arbitration; the common fund basis is more generous; indemnity costs represent 100% of the reasonable costs incurred by the winning party.

98 S. 74(8) and (9) HKAO.

99 S.74 HKAO.

10. In international arbitration it is customary for the parties' counsel to make **submissions on costs**, either at the close of the hearing, or in post-hearing briefs. It is also possible for a tribunal to issue a partial award, except as to costs, requiring the parties' submissions only after they know the contents of the tribunal's decision on the merits. In their submissions, the parties' counsel will set out the fees and expenses expended by or on behalf of their clients, and will make any legal or circumstantial arguments about how much the tribunal should award as costs, and why.

11. Since Hong Kong's Civil Justice Reform in 2009, **cost-effectiveness** plays an important part in Hong Kong's ADR arena. This extends to court actions involving challenges to arbitration awards. In the case of *A v R*[100], Reyes J held that, absent special circumstances, when an award was unsuccessfully challenged the court will normally consider awarding costs against a losing party on an indemnity basis. Reyes J's comments on costs were made in light of the duty of the parties to assist the court in the just, cost-effective and efficient resolution of disputes. Reyes J held that to award costs on the conventional party-and-party basis would encourage parties to bring unmeritorious challenges to an award, which in turn would thwart the objectives underlying the Civil Justice Reform.

V. Assessing the costs

12. When assessing the amount of costs a tribunal is not obliged to follow the scales and practices adopted by the Hong Kong courts. Nevertheless, it should allow only costs that are reasonable having regard to all the circumstances. Unless the parties agree otherwise, the tribunal may allow costs incurred in the preparation of the arbitral proceedings prior to the commencement of the arbitration.[101]

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100 [2010] 3 HKC 67.

101 S.74 HKAO.

13. What are **"reasonable" costs** in an arbitration? In a case before the Iran–US Claims Tribunal, one arbitrator laid down the criteria to be applied in determining the costs of the parties and by whom they should be borne:

> *"The test of reasonableness is not an invitation to mere subjectivity. Objective tests of reasonableness of lawyers' fees are well known…. Just how much time any lawyer reasonably needs to accomplish a task can be measured by the number of issues involved in a case and the amount of evidence requiring analysis and presentation…"*

14. For a number of reasons, an arbitral tribunal in an international commercial arbitration is generally reluctant to order the unsuccessful party to pay the whole of the winning party's legal costs. First, as mentioned at the beginning of this chapter, the practice under which the unsuccessful party is expected to pay or contribute towards the other party's legal costs is not universal. Second, it is rare for the winner to have been wholly successful on all the issues in dispute in the arbitration. If a party obtains an award for only a fraction of an inflated claim, it may not receive all or any of its costs from the losing party. If there has been a successful counterclaim, the tribunal may apportion the costs as it deems fair. Third, having decided that some contribution is appropriate, the tribunal must use its discretion in assessing this contribution. If a party claimed 100 million dollars and gets an award for only 20 million, is that "success" enough to warrant the full payment of its costs? Or should the reimbursement of costs be prorated to the level of success, so that the party might receive only 20 % of its costs? There is no single answer, because practice varies around the world.

15. Another element that tribunals consider in assessing costs is the behaviour of the parties. It is not unusual for a Hong Kong tribunal to **penalise** a party in costs because of its conduct during the arbitration proceedings. For instance, a successful party may be penalised in costs if it has used tactics to derail or delay the arbitration process, or acted unscrupulously, unreasonably or oppressively. A party who has made enormously inflated or spurious claims, unreasonably prolonged the proceedings by presenting repetitious or immaterial evidence, who has lied to the tribunal, or otherwise attempted to pervert the course of justice, if successful, may not receive its costs. If it loses, this party may find itself facing a heavy burden of the costs of the arbitration.

16. While arbitrators usually allow counsel a great deal of flexibility in deciding how to present their case (and thus how much money the client will spend), the tribunal's obligation under Hong Kong law to conduct the process efficiently and without undue expense may serve as a guide in assessing a party's claim for costs. Is it reasonable to spend ten million dollars on a claim for only five million? Was it necessary to employ a barrister[102] as well as a solicitor for the hearing, if the amount is small and the issues straightforward? Should the expenses of duplicative or otherwise unnecessary testimony be reimbursed? What about counsels who prolong the hearing by tedious and repetitive examination, or by failing to appear on time? Was it reasonable to demand a hearing at all?

17. Other thorny questions relating to costs concern **success fees** and **contingency** billing. These arrangements are commonplace in some jurisdictions, but forbidden in others. Is it reasonable to award costs on these terms, or should an hourly rate be the norm? Should fees be awarded on an ***ad valorem*** basis (related to the amount claimed rather than the amount awarded), in the same way as the ICC's own administrative charges are assessed?[103]

18. The courts will generally not intervene where a tribunal has made an order for costs.[104]

VI. Limiting Recoverable Costs

19. The Hong Kong Arbitration Ordinance permits a tribunal to set in advance a **cap on recoverable costs**. With such an order in place, no matter what a successful party has spent on the arbitration, it will only receive reimbursement from the losing party of the maximum agreed in advance by the parties or fixed in advance by the tribunal.

VII. Offers to Settle

20. In their submissions on costs, counsel may refer to a number of forms of offer commonly used in arbitration, which may affect the determination of the arbitral tribunal on the issues of costs. Although familiar in the Hong Kong legal community, these offers may be unknown to parties and counsel from other jurisdictions.

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102 HK courts use the expression "fit for counsel" but this is unknown to practitioners of many other jurisdictions.

103 Art.37 ICC rules (2012).

104 *Tramontana Armadora SA v Atlantic Shipping Co*. *SA* [1978] 1 All ER 870.

21. **Payment into court.** A defendant in litigation can protect itself against the costs of defending its case by making a payment into the court. The amount or even the existence of the payment is not disclosed to the decision-maker until the end of the procedure. If the plaintiff does not accept the payment and continues the action, but eventually gets less than the amount paid into the court, the plaintiff will normally be ordered to pay the wasted costs incurred by the defendant from the date of the payment into the court. In arbitration, a respondent may make a payment into the court as an offer in settlement of the arbitration[105]. This is a cumbersome process, as it involves starting an action in the Hong Kong courts, so it is rarely used. In some cases, the payment may be made to a neutral stakeholder such as the Hong Kong International Arbitration Centre.

22. **Sealed offer.** A party, usually the respondent may offer to settle at any time before or during the hearing, by delivering a sealed envelope to the arbitral tribunal and requesting it not to open the envelope until it has made its decision as to the substantive issues. The arbitrator then opens the envelope only in order to assess the reasonableness of the parties' positions in deciding on costs. In a domestic arbitration case under the old Hong Kong law, the court recognised the use of sealed offers.[106]

23. **Calderbank offer.**[107] This is an offer made "*without prejudice save as to costs*". The existence of the Calderbank offer is drawn to the attention of the arbitral tribunal only at the end of the proceedings when the tribunal is to consider the question of costs. An English case summarised the effect of an offer to settle:

> *"If the Claimant in the end has achieved no more than he would have achieved by accepting the offer, the continuance of the arbitration after that date has been a waste of time and money. Prima facie, the claimant should recover his costs up to the date of the offer, and should be ordered to pay the respondent's costs after that date. If he has achieved more by going on, the respondent should pay the costs throughout.[108]"*

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105 Rr.11 - 18, O.73 RHC.

106 *Chinney Construction Co. Ltd. v Po Kwong Marble Factory Ltd*. [2005] 3 HKEC 1042 concerned an appeal from the award of an arbitral tribunal arising from the tribunal's treatment of a Calderbank offer. The court confirmed that arbitral tribunals could and should consider Calderbank offers in the exercise of their discretion on costs.

107 The name derives from the English case of *Calderbank v Calderbank* [1975] 3 All E.R. 333.

108 *Tramontana Armadora SA v Atlantic Shipping Co. SA* [1978] 1 All ER 870.

VIII. Taxation under Hong Kong Arbitration Ordinance

24. If parties agree that the costs of the arbitral proceedings are to be assessed by the court, then unless the arbitral tribunal directs in an award, the award is deemed to include the costs to be taxed by the court.[109] After the taxation by the court, the arbitral tribunal must make an additional award as a result of such taxation. The taxation by the court is not subject to appeal.[110]

25. In an international arbitration, it is rare for the parties to ask the Hong Kong courts to tax costs. It is customary for the arbitral tribunal to receive submissions at the end of the procedure, often in a post-hearing brief, and then to consider the question of costs once it has made its decisions as to the merits of the dispute.

IX. HKIAC Administered Arbitration Rules

26. Detailed provisions in Article 36 guide the tribunal in determining the costs of the arbitration. In particular, Article 36.1 sets out an exhaustive list of items which constitute as “costs” to be determined by the tribunal in its award. Article 36.4 states that such costs should in principle be borne by the unsuccessful party, although the tribunal may make whatever apportionment it considers reasonable.

27. Articles 36.2 and 36.3 deal with the fees of the arbitral tribunal. The parties can choose whether the arbitrators should be compensated on the basis of agreed rates or in accordance with a fee schedule. If the parties choose the fee schedule, the arbitrators’ fees will be fixed by the HKIAC Council, in accordance with the schedule, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances.

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109 S.75(1)(a) HKAO.

110 S.75(3) HKAO.

X. Interest

28. **Purpose of Interest.** An award of interest is not to penalise the losing party, but to **compensate** the successful party for having lost the use of the money from the time that it ought to have received it until the time that it is actually paid[111]. Different jurisdictions adopt different attitudes toward interest, as well as different rates of interest. In common law jurisdictions, a party must claim interest, based on an express or implied agreement that it will be due in the circumstances of the relationship or contract. In contrast, *Sharia* law, present in a number of Middle Eastern countries, prohibits an award of interest.

29. **Types of interest.** Pre-award interest is interest on a **liquidated** sum (known quantity of money) claimed in arbitration as due from a date before the date of the award.[112] A party must claim this specifically and argue for it as part of the damages to be awarded. More frequently, the tribunal will order only that the sums it has awarded (interest on the award) will bear interest at a given rate either from the date of the Award or from some other date, until paid.[113]

30. **Rate of interest.** The arbitral tribunal has great discretion in awarding interest[114], but must exercise this discretion judicially. Unless the award otherwise provides, the **judgment rate** of interest applies to sums awarded by the tribunal until they are paid in full.[115] However, the tribunal needs to consider relevant circumstances, including fluctuating foreign exchange rates or the fact that foreign currency amounts may bear different rates.

31. **Simple or compound interest.** The calculation may be stated as *simple interest*: "interest on the amount of $xxx, at the rate of y%, from [date] until payment in full." In some cases, it may be appropriate to award *compound interest*, where interest is payable on interest.[116]

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111 *Riches v Westminster Bank Ltd.* [1947] AC 390.

112 S.79 HKAO.

113 S.80(2) HKAO.

114 S.79 HKAO.

115 S.80 HKAO.

116 An example of compound interest: On an Award dated March 10, 2011 for $100,000 at 4% per annum, paid on March 10, 2014, as of March 10, 2012, the amount owed is (100,000 x 104%=) $104,000, again at 4% per annum. As of March 10, 2013 the amount owed is (104,000 x 104% =) $108,160, again at 4% per annum. As of March 10, 2014 the amount owed is (108,160 x 104% =) $112,486.40. Simple interest for the same period: $100,000 x 104% x 3 years = $112,000.

32. In international arbitration, where a party has claimed interest but the tribunal fails to award interest, the party may request the arbitral tribunal to make an **additional award** to deal with interest.[117]

QUESTIONS

1. Discuss the advantages and disadvantages of requiring the parties' counsel to make submissions on costs (a) at the end of the hearing and (b) in post hearing submissions, once the decision of the tribunal is known.

2. Under what circumstance will the Hong Kong courts, instead of the arbitral tribunal, assess the costs of the arbitration?

3. In a section 75 situation where the Hong Court is to tax costs, when does the tribunal make its Final Award?

4. Discuss the differing purposes of pre-award interest and interest on the award.

FURTHER READING

Nigel Blackaby, Constantine Partasides, et al., *Redfern & Hunter on International Arbitration*, 5th edition, (Oxford University Press 2009), Chapter 9

Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective*, (Cambridge University Press 2011), Chapter 8

[117] S.69(1)(3) HKAO.

CHAPTER 9: DECIDING AND DRAFTING THE AWARD

This chapter will discuss purpose of the award, and the manner in which an arbitral tribunal drafts an award, as well as the requirements as to the form and content of the award, most of which are mandatory under the Arbitration Ordinance, unless the parties have agreed that no reasons are to be given.[118]

I. Definition and purpose of Award

1. The award is the determination and order of an arbitral tribunal, deciding all disputes which the parties have referred to the arbitration. An award must be in writing and signed by the members of the arbitral tribunal.[119] Parties expect an arbitration to result in an award that will be final and binding. It has the effect of "***res judicata***" on the issues decided. This contrasts with an **order** of the tribunal which does not decide the substantive rights and obligations in dispute between the parties, but usually deals with procedural questions relating to the conduct of the arbitration.

2. By agreeing to arbitration parties usually renounce their right to an appeal, or at least restrict the grounds for appeal.[120]

3. The award results from the consideration by the arbitral tribunal of all the facts and law relating to the issues before it, as presented by the parties. In the case of a tribunal of three, it will usually be a **collegial** decision, produced unanimously from discussions among all members of the tribunal. If there is no consensus, a **majority decision**[121] may result, on one or all of the issues. If there is no majority decision, the **presiding member** of the tribunal may decide.[122]

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118 S.67 HKAO, citing Art. 30 and 31(2) UNCITRAL Model Law.

119 S.67 HKAO.

120 S.81 HKAO, citing Art.34 UNCITRAL Model Law.

121 S.65 HKAO, citing Art.29 UNCITRAL Model Law.

122 *Ibid.*

4. The purpose of the award is to **determine the dispute** submitted by parties, to **inform** the parties about the decision of the arbitral tribunal, and to provide the evidential base for the successful party to seek **enforcement** of the award.

II. Types of awards

5. Arbitration awards may be:

   a. **Final** - dealing with all issues referred to the tribunal, including costs;

   b. **Partial** - dealing in a final and binding manner with an issue or set of issues referred to the tribunal, leaving other issues and the question of costs for later consideration; or

   c. **Interim** - dealing on a temporary basis with one or more issues, which may be altered or subsumed in the Final Award.[123]

   d. **Consen**t - recording agreed terms of settlement;[124] or

   e. **Default** - made despite the failure of a party, after notice, to participate in the proceedings.

III. Reasoned Award

6. The Arbitration Ordinance requires that reasons be given, even if not requested by the parties, unless the parties have **agreed** that no reasons are to be given.[125]

IV. Remedies

7. In Hong Kong, the arbitral tribunal may award any remedy or relief that may be ordered by the Court, including a determination of which party is liable for costs.[126]

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123 Ss. 35 and 67 HKAO; Arts. 17 and 31 UNCITRAL Model Law.

124 S.66 HKAO, citing Art.30 UNCITRAL Model Law.

125 S.67 HKAO, citing Art.31(2) UNCITRAL Model Law.

126 S.70(1) HKAO and paragraph 21 of this chapter.

8. Unless agreed otherwise by the parties, an arbitral tribunal may award the remedy of specific performance, with the exception of cases involving contracts relating to **land** or an interest in land.[127]

V. Formal Validity of the Award

9. It is the obligation of an arbitral tribunal to make its best efforts to produce a valid and enforceable award. There is no single acceptable form for Awards, and every arbitrator develops his or her own style. A reasoned award may be only a few dozen pages in length, or in a complex case may extend to several hundred pages.

10. In order to be valid, an award must conform to the parties' agreement, the chosen rules, and the applicable law. Under section 67 of Arbitration Ordinance and article 31 of the UNCITRAL Model Law, an award must be:

    a. in **writing**;

    b. **final and binding**;

    c. supported by **reasons**;

    d. **signed** by the majority of all members of the arbitral tribunal;

    e. **dated**;

    f. **place of arbitration** named; and

    g. **delivered** to all parties.

11. As to substance, the award must comply with five basic legal requirements[128] in order to ensure its enforceability:

    a. **Compliance with submission** - it must determine all issues submitted for decision (save in the case of an interim award), and deal only with those disputes submitted;

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127 S.70(2), HKAO: *Tilia Sonera Ab v Hilcourt (Dockland) Ltd* [2003] EWHC 3540 (Ch.) Unreported 4 July 2003; *Xiamen Xinjingdi Group Ltd v Eton Properties Ltd* [2008] 4 HKLRD 972, [2009] 4 HKLRD 353 (CA).

128 These also apply in respect of the orders of the arbitral tribunal as to costs and interest.

b. **Cogency** - it must contain an unambiguous adjudication and dispositive order by the arbitral tribunal;

c. **Certain** - without contradictions, logical inconsistencies or ambiguities, it should contain all elements of calculation and be clear and consistent in its finding of facts, holding of law, its reasoning and its dispositions;

d. **Final** - without reservation or delegation of decisions for later determination, save in the case of an interim award; and

e. **Operative** - capable of being performed, that is, containing only those types of remedy that can be awarded, it should set out the specific obligations (to pay a sum, to deliver goods etc.) to be fulfilled by the losing party and the timeframe for doing so.

12. If an Award fails to comply with the substantive requirements,

a. the award may be **set aside** in Hong Kong under section 81 of the Arbitration Ordinance and article 34 of the UNCITRAL Model Law;

b. **enforcement may be refused in Hong Kong** under section 84 of the Arbitration Ordinance or on an action suing on the award; or

c. **enforcement of the award may be refused outside Hong Kong** under the New York Convention.

VI. Content of Award

13. **Front Page.** The front page of the award sets out the legislation and rules under which the arbitration is conducted, relevant file number, **identifies** the parties to the dispute and their representatives, if any, and makes clear the nature of the award, *e.g.* "Final Award", or "Interim Award No.9".

14. **Recitals.** These set out the background leading to the award. The Recitals include:

a. reference to the underlying **contract**;

b. the **arbitration agreement**, preferably quoted verbatim;

c. reference to the provisions for **appointing** the arbitral tribunal;

d. statement that a **dispute has arisen**;

e. statement that the **dispute was submitted** to arbitration by one or both parties;

f. statement as to how the arbitral tribunal was **appointed** and recording its **acceptance** of the appointment;

g. statement as to **preliminary meetings** held and brief details of all important **interlocutory matters** decided; and

h. statement as to how the **procedure** has been conducted (documents only, or hearing, dates, etc.).

15. **Preamble.** Sets out the background of the dispute and the parties' cases, including (if not already covered in recitals):

    a. the origin or "**trigger**" of the dispute(s);

    b. **common ground**, that is agreed points of fact and law, if any;

    c. summary of each party's **contentions and claims**;

    d. list of **issues** to be decided;

    e. statement and particulars of **submissions and evidence received**, goods or samples inspected or land, buildings or plant and machinery inspected.

16. **Reasoning.** There are different styles of structuring a reasoned award. The reasons may be set out in the Recitals, after the findings of facts and holding of law, in a separate section within the award, or attached at the end of the award and stated to form part of the award.

17. In its reasons, the tribunal will set out each issue to which it must respond in order to decide the dispute. It will then set out its decision on questions of fact, usually on the basis of "the balance of probabilities", and on questions of law by applying the appropriate rule. For each issue, a factual and legal analysis should produce a logically reasoned decision.

18. The arbitrators must also calculate the **amount to be awarded** on each issue of the claim and any counterclaim, and including interest if requested.

19. The tribunal must take care to decide **all questions, but only those questions, submitted** to it by the arbitration agreement.

20. **Operative Directions.** Also called the **Dispositive Section**, these usually begin in a standard form: *"Now, I [name] hereby make and [issue/publish] my [Interim/Partial /Final Award]"*, with specific instructions about **who** is to pay **how much**, **to whom**, and **when**. They deal with the remedies being awarded under each claim and counterclaim, including costs.

21. Common **remedies** awarded by arbitral tribunals include:

    a. **damages**;

    b. **specific performance**;

    c. **declaration**;

    d. **indemnity**;

    e. **set-off**;

    f. **interest**; and

    g. **costs**.

22. In Hong Kong courts, costs usually **follow the event**, that is, the losing party pays most of the costs of the arbitration. (See Chapter 8 of this book)

23. In arbitration, it is up to the arbitral tribunal to determine which party shall pay the costs and in what proportion.[129] The tribunal then orders that party (or parties) to pay the costs as ordered, including reimbursement by one party to another of any overpayment.

24. **Signature**, etc. The arbitral tribunal must sign the award.[130] It is good practice, but not legally required, to have the signature(s) of the tribunal witnessed. The award must also be **dated**, and the **seat** of the arbitration mentioned.

25. If a member of a three-person tribunal fails to sign the award, there must be an **explanation for the absent signature**, but the award is not invalid.[131]

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129 S.74 HKAO.

130 S.67 HKAO.

131 S.67(1) HKAO, citing Article 31(1) UNCITRAL Model Law.

26. **Dissent Awards**. Because of the collegial nature of the deliberations of the arbitral tribunal, and the fact that arbitration awards do not produce binding precedent, it is rare for an arbitrator to render a dissenting award.

QUESTIONS

1. For whom is the arbitral tribunal writing its award? Who is the "audience", and why is it important to consider the audience?

2. Give some examples of the types of award referred to in this chapter.

3. Why is the FORM of the award so important, especially in international arbitration?

FURTHER READING:

Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective*, (Cambridge University Press 2011), Chapter 8

John Choong and J. Romesh Weeramantry (eds.), *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Sweet & Maxwell 2011), Chapter 10

Nigel Blackaby, Constantine Partasides, et al., *Redfern & Hunter on International Arbitration*, 5th edition, (Oxford University Press 2009), Chapter 10

CHAPTER 10: CHALLENGING AND ENFORCING THE AWARD

One of the greatest advantages of international arbitration is the "portability" of the award. To enforce a foreign court judgment, a successful litigant must usually start a new court action on the judgment in the court of the target jurisdiction. In contrast, arbitration awards are recognised and enforced summarily, without the necessity for this intermediate step. This chapter will deal with enforcement of awards, and with recourse against awards, including grounds for setting aside or refusal to recognise and enforce an award under the Arbitration Ordinance.

I. Methods of challenge

1. In most cases, a losing party will voluntarily comply with an arbitration award, so that challenging and enforcement proceedings will not be necessary.

2. The Arbitration Ordinance limits court interference in the arbitration of a dispute,[132] setting out an exhaustive list of instances in which a court can intervene in the arbitral process. Usually by choosing arbitration, parties renounce the right to appeal the resulting award; the award is final and binding without further review on the merits of the dispute. However, the award may subject to setting aside or challenge.[133] Under the Arbitration Ordinance, when dealing with an award, the Hong Kong courts may be involved in:

    a. an application for **setting aside** the award; as the exclusive recourse against arbitral awards;[134]

    b. **enforcement of non-convention and non-Mainland awards**;[135]

    c. **enforcement of New York Convention awards**;[136] or

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132 S.12 HKAO, citing Art.5 of UNCITRAL Model Law.

133 See Parts 9 and 10 HKAO.

134 S.81 HKAO, citing Art.34 of UNCITRAL Model Law.

135 Ss. 82 to 86 HKAO.

136 Ss. 87 to 91 HKAO.

d. **enforcement of Mainland awards**.[137]

3. In the 2011 case of *Pacific China Holdings*, the Hong Kong Court held that, to set aside an award, the attacking party must first establish one or more of the grounds provided for in the Arbitration Ordinance, but then must also establish that without the violation, the result might have been different. The grounds set out in the Arbitration Ordinance for challenging an award are narrow and limited, tracking those set out in the New York Convention.

II. Setting aside of arbitral award

4. Under section 81(2) of the Arbitration Ordinance[138], there are six grounds on which the losing party can base a challenge, all of which relate to some aspect of due process:

   a. a party to the arbitration agreement referred to in article 7 was under some **incapacity**; or the agreement is **not valid** under the law to which the parties have subjected it or, failing any indication thereon, under the law of Hong Kong; or

   b. the party making the application was not given proper **notice** of the appointment of an arbitrator or of the arbitral proceedings or was otherwise **unable to present its case**; or

   c. the award deals with a **dispute not contemplated** by or not falling within the terms of the submission to arbitration (***infra petita***), or contains decisions on matters **beyond the scope** of the submission to arbitration (**ultra petita**), provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

   d. the **composition of the arbitral tribunal or the arbitral procedure** was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

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137 Ss. 92 to 98 HKAO.

138 The same grounds as those found in Art.34 UNCITRAL Model Law.

e. the court finds that the subject-matter of the dispute is **not capable of settlement by arbitration** under the law of Hong Kong; or

f. the court finds that the award is in conflict with the **public policy** of Hong Kong.

5. For an award made in an arbitration with a Hong Kong seat, the challenging party must apply to set aside within **three months** from the date of receiving the award.[139] In the case of a request for a correction, interpretation or an additional award, the time period runs from the date the tribunal makes its decision on that request.[140]

6. The court's ruling on the challenge to an award is subject to appeal provided **leave** is granted.[141]

7. If the challenging party successfully vacates the arbitral award, the award is **null and void** without further legal effect.

III. Recognition and Enforcement of Arbitral Awards

8. If the challenging party fails to have the award set aside, a second recourse is available in the court where the prevailing party will attempt to enforce the award against the assets of the losing party. The losing party may try to resist enforcement on the same grounds as those available for setting aside[142]. However, the likelihood of enforcement is high because so many countries have adopted the "pro-enforcement" view, and interpret very narrowly the limited grounds listed under the New York Convention for refusing to enforce. Hong Kong **departs somewhat from the Model Law** in its provisions on recognition and enforcement of awards.

9. The procedure for enforcement is the same for all awards. Leave of the court is required. Section 26(2) of the Ordinance provides that while a challenge to an arbitrator is pending, the Hong Kong court may (but is not obliged to) **refuse to grant leave to enforce** any award made during that period by the tribunal.

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139 S.81(3) HKAO, citing Art.34 UNCITRAL Model Law.

140 *Ibid.*

141 Ss. 81(4) and 107 HKAO; Orders 59 and 73, rule 2A and 2B, Rules of the High Court (Cap 4A).

142 Ss. 86, 89 and 95 HKAO.

10. The party requesting enforcement must produce to the Hong Kong court:

    a. the original authenticated **award** or a certified copy;

    b. the original **arbitration agreement** or certified copy; and

    c. a **translation into Chinese or English** if the award is in some other language.

IV. Non-Convention and non-Mainland awards

11. Under section 84 of the Arbitration Ordinance, the successful party will enforce a non convention, non Mainland award made in Hong Kong by an *ex parte* application to High Court for enforcement.

12. A new provision in the Arbitration Ordinance states expressly that **leave** of the Court is required **to appeal from its decision to grant or refuse leave** to enforce an award.[143]

13. Sections 86(1) and (2) of Arbitration Ordinance provide the statutory basis upon which a court **may** (but is not obliged to) refuse to enforce non-convention and non-mainland awards:

    a. that a party to the arbitration agreement was (under the law applicable to that party) under some **incapacity**; or

    b. that the **arbitration agreement was not valid**
        i. under the law to which the parties subjected it; or
        ii. if there was no indication of the law to which the arbitration agreement was subjected under the law of the country where the award was made; or

    c. that the person
        i. was not given proper **notice** of the appointment of the arbitrator or of the arbitral proceedings; or
        ii. was otherwise **unable to present his or her case**; or

143 Ss. 84(3) and 107 HKAO; Rules 2A and 2B, Orders 59 and 73, Rules of High Court (Cap 4A).

d. subject to subsection (3), that the award
    i. deals with a **difference not contemplated** by or not falling within the terms of the submission to arbitration; or
    ii. contains decisions on matters **beyond the scope** of the submission to arbitration; or

e. that the **composition of the arbitral authority or the arbitral procedure** was not in accordance with
    i. the **agreement** of the parties; or
    ii. (if there was no agreement) the **law of the country where the arbitration took place**; or

f. that the award
    i. has **not yet become binding** on the parties; or
    ii. has been **set aside or suspended** by a competent authority of the country in which, or under the law of which it was made.

14. Enforcement of an award referred to in section 85 may also be refused on grounds raised either by a party or by the court itself:
    i. the award is in respect of a **matter which is not capable of settlement by arbitration** under the law of Hong Kong; or
    ii. it would be contrary to **public policy** to enforce the award; or
    iii. for **any other reason** the court considers it just to do so.

    This last-mentioned ground is the one difference between the grounds for refusing enforcement of non-convention and non-mainland awards and the grounds on which a Convention award may be refused.

15. This additional ground suggests that Hong Kong Courts have a greater scope to consider challenges to non-convention and non-mainland awards. As this is a new provision, it remains to be seen how Hong Kong judges will apply their discretion.

V. Convention awards

16. While under the governance of the United Kingdom, Hong Kong became a party to the New York Convention in 1977. This enabled Hong Kong awards to be enforced in other Convention states and vice versa. Since the transfer of sovereignty over Hong Kong from Britain to China in **1997**, by agreement between the United Kingdom and China, Hong Kong remains a party to the New York Convention through the People's Republic of China. Because Hong Kong became a member of the Convention through the UK, which had signed the Convention **without reservations**, its position is slightly different from that of Mainland China, which signed the Convention subject to both the **commercial** and **reciprocity** reservations.[144]

17. A Convention award means an award made in a State or territory other than any part of China, which is a party to the New York Convention.[145] The grounds for refusal of enforcement of Convention awards are governed by sections 89(2) and (3) of the Arbitration Ordinance.[146] These are the same as those of sections 86(1) and (2) of Arbitration Ordinance mentioned above.

18. The Convention's language is **permissive rather than obligatory**, so the court has discretion to enforce an award even if it finds that one or more grounds for challenge exist.

19. The courts construe the grounds narrowly and the losing party must establish complaints of substance for a successful challenge.

20. A new provision in the Arbitration Ordinance expressly states that a decision or order of the court for the enforcement of a Convention award is not subject to appeal.[147]

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144 *See* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

145 S.2(1) HKAO.

146 S. 89(2) and (3) HKAO.

147 S.89(6) HKAO.

VI. **Mainland awards**

21. With the repatriation of Hong Kong to China on 1 July 1997, the enforcement of awards between Hong Kong and Mainland China became controversial. Prior to the "handover", the New York Convention was the vehicle for enforcement. However, once Hong Kong was internationally recognized as part of China, the New York Convention became inappropriate to enforce awards between the two territories of the same sovereign nation. This necessitated the negotiation between the PRC Supreme People's Court and the Hong Kong Department of Justice, of the **Arrangement** Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region.[148] The Arrangement has been implemented in both the Mainland and Hong Kong, and came into force on 1 February 2000.[149]

22. Under the Arrangement, enforcement mechanisms and exclusive grounds for refusing enforcement are similar to those of the New York Convention for 'Mainland awards' made by recognized arbitration commissions in Mainland China under Chinese law.[150]

23. Up until now, only two applications for enforcement have been refused by the Mainland Courts.[151] In the case of *Hong Kong Heung Chun Cereal & Oil Food Co Ltd v Anhui Cereal & Il Food Import & Export Co*[152], enforcement was refused on the ground that the arbitration agreement was void. In another case of *Tung Fung Hong Kong Shipping Co., Ltd v SINOTRANS Shenyang Group Co*[153], the application was refused because of failure to give proper notice of the reappointment of the arbitrator and of a hearing.

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148 Wang Lipeng, "Problems of recognition and enforcement of Hong Kong arbitral awards in mainland China: with specific reference to grounds of refusing enforcement" (Master thesis, City University of Hong Kong 2009).

149 Arbitration (Amendment) Ordinance 2000 (Ordinance No. 2 of 2000).

150 Wang Lipeng, "Problems of recognition and enforcement of Hong Kong arbitral awards in mainland China: with specific reference to grounds of refusing enforcement" (Master thesis, City University of Hong Kong 2009).

151 *Ibid.*

152 [2003] Min Si Ta Zi No.9, 14 November 2003.

153 [2006] Min SI Ta Zi No.12, 2 June 2006.

VII. **Hong Kong's unique political situation**

24. Under the "One Country, Two Systems" principle, the Central People's Government of P.R.C has responsibility for foreign affairs relating to the Hong Kong Special Administrative Region.[154] Prior to the case of *FG Hemisphere Associates v. Democratic Republic of Congo*[155], it was unclear whether the doctrine of sovereign immunity should be interpreted as absolute by Hong Kong's courts, in accordance with the position of the Mainland, or whether Hong Kong retained a concept of limited sovereignty inherited prior to 1997 from Britain. The decision of the Court of Final Appeal in *FG Hemisphere*, approved by the National Peoples' Council in Beijing, held that Hong Kong must follow Mainland China to adopt the broader, **absolute theory of sovereign immunity**.[156]

25. In another case, *The Hua Tian Long (No 3)*[157], the court ruled that sovereign immunity is not reciprocal between China and Hong Kong. The Chinese Central People's Government, enjoys absolute "Crown" immunity in Hong Kong. The Hong Kong government, by contrast, does not enjoy absolute immunity and proceedings can be brought against it in accordance with the provisions of the Crown Proceedings Ordinance.[158]

QUESTIONS

1. What do you understand by "public policy"?

2. Will the "Congo" decision referred to above have any effect on Hong Kong's place as an arbitration hub in Asia? How?

3. At what point should parties to a contract first consider the issues of challenge and enforcement?

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154 Arts. 13 and 19 Basic Law of Hong Kong SAR.

155 FACV Nos. 5, 6 & 7 of 2010 CFA.

156 Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress; *FG Hemisphere Associates v. Democratic Republic of Congo* (FACV Nos 5, 6 & 7 of 2010 CFA).

157 [2010] 3 HKC 557.

158 Cap 300.

FURTHER READING

Simon Greenberg, Christopher Kee and Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective*, (Cambridge University Press 2011), Chapter 9

John Choong and J. Romesh Weeramantry (eds.), *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Sweet & Maxwell 2011), Chapters 11 and 12

Nigel Blackaby, Constantine Partasides, et al., *Redfern & Hunter on International Arbitration*, 5th edition, (Oxford University Press 2009), Chapters 10 and 11