

## HONG KONG

### DELOS GUIDE TO ARBITRATION PLACES (GAP)

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#### JURISDICTION INDICATIVE TRAFFIC LIGHTS

1. Law ●
  - a. Framework ●
  - b. Adherence to international treaties ●
  - c. Limited court intervention ●
  - d. Arbitrator immunity from civil liability ●
2. Judiciary ●
3. Legal expertise ●
4. Rights of representation ●
5. Accessibility and safety ●
6. Ethics ●

VERSION: 28 OCTOBER 2019 (v01.000)

There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

## IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Hong Kong is ranked as the 4<sup>th</sup> most preferred arbitral seat globally and the 2<sup>nd</sup> in Asia.<sup>1</sup> Although Hong Kong is part of China (the “**PRC**”), it has its own mini constitution (known as the Basic Law) under which Hong Kong operates as an autonomous jurisdiction with its own common law legal system.

Hong Kong’s Arbitration Ordinance adopts almost entirely the provisions of the UNCITRAL Model Law, which the Hong Kong judiciary applies with a pro-arbitration stance. Hong Kong is also home to the Hong Kong International Arbitration Centre (“**HKIAC**”), the Asia office of the ICC, and was CIETAC’s first outpost outside of the Chinese mainland. Hong Kong is an extremely convenient city with modern accessible transport infrastructure, and is home to a vibrant and sophisticated arbitration community.

Hong Kong’s relationship with China in some instances provides a significant benefit to a Hong Kong seated arbitration. For example, China and Hong Kong executed a landmark bilateral arrangement under which Chinese courts will recognise and enforce interim measures (such as asset freezing orders) in support of institutional arbitration seated in Hong Kong; such treatment does not extend to any other jurisdiction outside of Mainland China. Hong Kong maintains a bilateral arrangement with China on mutual enforcement of arbitral awards, under which Hong Kong awards are directly enforceable in China (on terms broadly similar to the New York Convention). The arrangement, as well as the latest agreement on enforcement of interim measures in support of arbitration between Hong Kong and China, place Hong Kong at the forefront of China-related arbitration.

Key places of arbitration in the jurisdiction?	Hong Kong.
Civil law / Common law environment?	Common law.
Confidentiality of arbitrations?	Yes – by statute (section 18 Arbitration Ordinance (Cap 609)).
Requirement to retain (local) counsel?	Common but no legal requirement.
Ability to present party employee witness testimony?	Yes, although the tribunal have discretion to weigh such evidence.
Ability to hold meetings and/or hearings outside of the seat?	Yes, by party consent and/or tribunal’s direction.
Availability of interest as a remedy?	Interest is a matter of the applicable substantive law.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	Third party funding is available from 1 February 2019. Contingency fee arrangement remains prohibited.

<sup>1</sup> See the 2018 International Arbitration Survey conducted by the Queen Mary University of London, available at <http://www.arbitration.qmul.ac.uk/research/2018/> [last accessed at 19 August 2019].

Party to the New York Convention?	Yes, as a part of the PRC (note Hong Kong has a separate bilateral arrangement with the PRC putting in place a similar mechanism to that under the convention).
Other key points to note?	Φ
<a href="#">WJP Civil Justice score (2019)</a>	Ranked 12 out of 126 with an overall score of 0.77.

## ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	The existing arbitration regime in Hong Kong unifies the regimes for domestic and international arbitrations; it came into effect on 1 July 2011 through the enactment of the Hong Kong Arbitration Ordinance; the latest amendment to the Hong Kong Arbitration Ordinance was published in the Gazette on 23 June 2017; the 2017 amendments clarified that disputes over intellectual property rights may be resolved by arbitration and that it is not contrary to the public policy of Hong Kong to enforce arbitral awards involving intellectual property rights.
UNCITRAL Model Law? If so, any key changes thereto?	The Hong Kong arbitration law is based in large parts on an adoption of the 1985 UNCITRAL Model Law with only few minor adjustments.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	Ordinary courts (the Hong Kong Court of First Instance) handle jurisdictional challenges and the annulment and enforcement of awards. Within these courts, arbitration-related cases are regularly assigned to one specific judge ensuring a certain level of knowledge and experience.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Hong Kong courts have jurisdiction to grant <i>ex parte</i> interim measures in support of arbitration, whether seated within or outside Hong Kong.
Courts' attitude towards the competence-competence principle?	Courts generally respect a tribunal's ruling on its own jurisdiction. If the tribunal finds that it has jurisdiction, any party may request the Court to decide the matter (only after the tribunal has made its ruling, as envisaged by Art 16 of the UNCITRAL Model Law).
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	Only the grounds set out in the New York Convention. In addition to that, Schedule 2 to the Hong Kong Arbitration Ordinance contains provisions that may be expressly opted for by the parties. Section 5 and 6 of Schedule 2 allow a party to appeal on a question of law, with the agreement of all the other parties to the arbitral proceedings or with the permission of the Court.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Hong Kong courts uphold the discretionary wording of Article V of the New York Convention that provides that " <i>recognition and enforcement of the award may be refused ...</i> ". Hong Kong courts may refuse enforcement of an award that has been set aside or suspended at the seat. Further, Hong Kong Courts may look into the reasons why the award was set aside or annulled. For example, a finding by the seat's supervisory court that the arbitration agreement was invalid is a very strong policy consideration for the Hong Kong court in deciding whether or not enforcing the award would be contrary to Hong Kong public policy.

Other key points to note?

Hong Kong courts are generally pro-enforcement and pro-arbitration, and will likely hold the parties to their contractual bargain to arbitrate. Hong Kong courts have a high enforcement track record. Only very few arbitral awards have been set aside or refused enforcement in Hong Kong since the new Arbitration Ordinance came into force in 2011.

## JURISDICTION DETAILED ANALYSIS

### 1. The legal framework of the jurisdiction

#### 1.1 Is the arbitration law based on the UNCITRAL Model Law?

Yes, the Arbitration Ordinance (Cap 609) is primarily based on the UNCITRAL Model Law. It further provides “opt-in” provisions under Schedule 2 which include provisions such as challenging the award for serious irregularity, appeal on the point of law, provisions relating to appointing a sole arbitrator, consolidation of arbitrations by Hong Kong courts, decision of preliminary question of law by Hong Kong courts, etc.

Schedule 2 can be applied either expressly by parties’ agreement (in both international and domestic arbitrations) or automatically if the arbitration agreement expressly provides for “domestic arbitration” and was entered before the commencement of the Arbitration Ordinance (*i.e.*, 1 June 2011) or within 6 years after the commencement.<sup>2</sup>

#### 1.2 When was the arbitration law last revised?

The latest revision to the Hong Kong Arbitration Ordinance came into effect in June 2017, clarifying that disputes over intellectual property rights may be resolved by arbitration and that it is not contrary to the public policy of Hong Kong to enforce arbitral awards involving intellectual property rights.

### 2. The arbitration agreement

#### 2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Hong Kong courts typically apply the standard common law test to determine the law applicable to an arbitration agreement.<sup>3</sup> They will first look into whether there is an express choice of the governing law by the parties; they will then look into whether there is an implied choice by the parties, and then, in the absence of an express or implied choice, the courts will look at the system of law with which the arbitration agreement has the closest and the most real connection. In other words, where there is no express or implied law governing the arbitration agreement, the court determines the law governing the arbitration agreement by considering the law which has the closest and most real connection with the arbitration agreement. The candidates for this law (*i.e.*, the law governing the arbitration agreement) are usually the law of the underlying contract, or the law of the seat. Hong Kong courts will take under advisement the landmark case law on the choice of law point, such as *Sulamérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A* [2012] EWCA Civ 638, *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 2 All ER 1, *Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS and VSC Steel Company Ltd* [2013] EWHC 4071 (Comm), as well as the recent *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12.

#### 2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Yes, under Section 34 of the Arbitration Ordinance which adopts Article 16 of the UNCITRAL Model Law. Accordingly, a tribunal’s decision that the contract is void does not invalidate the arbitration clause. In *Fung Sang Trading Limited v Kai Sun Sea Products & Food Company Ltd* [1992] 1 HKLR 40 at 50, Kaplan J observed that Art 16(1) of the Model Law enshrined the doctrine of separability which English law had partially recognised since *Heyman v Darwins* [1942] AC 356. Thus the arbitration clause is separable from the

<sup>2</sup> Sections 99-100, Arbitration Ordinance.

<sup>3</sup> Neil Kaplan and Olga Boltenko, “The Dangers of Neglect Governing Law of Arbitration Agreement” in Julio César Betancourt (ed), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitration* (OUP 2016).

contract containing it so that even if the contract is repudiated and the repudiation is accepted, the arbitration clause survives the repudiation.

### **2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?**

Hong Kong is one of the few jurisdictions that approaches requirements of form in a very flexible manner. Section 19 of the Arbitration Ordinance adopts Option I of Article 7 of the UNCITRAL Model Law, essentially removing all requirements of form to the arbitration agreement. It provides that an arbitration agreement must be in writing, whether in the form of a clause in a contract or a separate agreement. However, “writing” is broadly construed, and agreements can be “recorded in any form”, whether it has been concluded orally, by conduct or by other means.<sup>4</sup> The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (“EDI”), electronic mail, telegram, telex or telecopy.

### **2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?**

Generally under Hong Kong law, a third party (non-signatory) is not bound by an arbitration agreement that the third party is not party to. However, Hong Kong courts have applied a number of legal theories to bind entities that have not executed an arbitration agreement. These legal theories are often based on generally applicable rules of contract and commercial law, including agency (actual and apparent), *alter ego*, implied consent, “group of companies,” estoppel, third party beneficiary, guarantor, subrogation, legal succession and ratification or assumption theories. In each of these instances, non-signatories of a contract may be found to be bound by, and may invoke, the arbitration clause.

Hong Kong courts may construe arbitration agreements broadly, and any claim by a third party (non-signatory) to enforce a contractual right arising out of or relating to a contract with an arbitration agreement may need to be brought in arbitration.<sup>5</sup> This is because where the obligation being enforced arises under a contract with an arbitration clause, the defendant is entitled to have any claim under that contract be pursued in arbitration. Accordingly, a defendant has the right to prevent a claim against them based on their contractual obligations be pursued otherwise than by the contractually agreed mode.<sup>6</sup>

This reasoning is unlikely to apply conversely (*i.e.*, a party to a contract cannot extend the arbitration clause to claim against a non-party in arbitration).

### **2.5 Are there restrictions to arbitrability?**

#### **2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?**

Not all disputes are arbitrable under Hong Kong law. Certain disputes are not subject to resolution through arbitration, including the following: actions in rem against ships; criminal cases; competition and antitrust disputes; divorce proceedings; guardianship applications; and matters reserved for resolution by state agencies and tribunals (*e.g.*, taxation, immigration and national welfare entitlements)

In 2017, the Hong Kong Arbitration Ordinance was amended to clarify that disputes relating to intellectual property rights are arbitrable in Hong Kong. Other domains are subject to standard arbitrability restrictions, such as actions in rem against ships; criminal cases; competition and antitrust disputes;

<sup>4</sup> Section 19, Arbitration Ordinance.

<sup>5</sup> Third parties may enforce contractual rights under the Contract (Rights of Third Parties) Ordinance (Cap 623).

<sup>6</sup> See, for example, *Dickson Valora Group (Holdings) Co Ltd and another v Fan Ji Qian* [2019] CFI 482, where a claimant seeking to enforce a contract that he was not party to was required to comply with the agreed enforcement mechanism, *i.e.*, arbitration.

divorce proceedings; guardianship applications; and matters reserved for resolution by state agencies and tribunals (e.g., taxation, immigration and national welfare entitlements).

There are areas where restrictions on arbitrability depend on the grounds on which a particular action is sought. For example, the question of whether or not a winding up order should be made may not be arbitrable.<sup>7</sup> This depends on the grounds on which the winding up is sought. The Hong Kong courts will identify the substance of the dispute between the parties, and ask whether or not that dispute is covered by the arbitration agreement. Hence, a dispute between a petitioner and a company over a debt relied on to establish locus to present a winding up petition may be arbitrable.

Where Hong Kong law is the law of the place of incorporation and hence applicable to the dispute, Hong Kong is one of the few common law jurisdictions that does not prohibit a party from bringing a common law-based derivative claim through arbitration.<sup>8</sup> This sets Hong Kong apart as a jurisdiction with the state-of-the-art corporate legislation. The benefit of being able to bring a derivative claim in the arbitration context is that the tribunal's ruling on that claim would be enforceable through the global framework of the New York Convention, as opposed to typical statutory derivative claims that would run into a number of cross-border enforceability issues as court judgments.

One of the key features of Hong Kong company law is that the will of the majority ought to prevail in respect of how a company is managed. However, it is recognised that, at times, the will of the majority may wrongly infringe upon the rights of the minority.<sup>9</sup> Derivative action is a cause of action which allows an oppressed minority shareholder to challenge the rule of the majority shareholders by allowing the minority shareholder to sue in the name of the company. Section 732(6) of the Hong Kong Company Ordinance specifically provides that "*this Division does not affect any common law right of a member of a company, or a member of an associated company of a company, to bring proceedings on behalf of the company...*". This section therefore expressly preserves the common law derivative action.<sup>10</sup>

The Court of Final Appeal in *Waddington Ltd v Chan Chun Hoo*<sup>11</sup> conclusively held that a common law multiple derivative action is maintainable in Hong Kong. This means that, where a subsidiary company has suffered loss, a shareholder of a parent/holding company of that subsidiary company is entitled to sue on behalf of that subsidiary company.

Arbitration agreements can be enforced against a consumer under Hong Kong law, provided that the consumer provides their written consent after the differences have arisen, or has themselves had recourse to arbitration to enforce the agreement.<sup>12</sup> The court will also scrutinise the substance of the agreement to determine if the consumer is in fact dealing as a consumer. For example, an experienced businessman who instructs solicitors frequently in the course of their business was not treated as a consumer for the purposes of an arbitration agreement contained in a solicitors' retainer.<sup>13</sup>

## 2.5.2 Do these restrictions relate to specific persons (i.e., State entities, consumers etc.)?

Generally speaking, no. However, a defence of immunity from suit (or execution) may be invoked by a State or a State-owned enterprise in Hong Kong on the basis of the absolute sovereign immunity doctrine.<sup>14</sup>

<sup>7</sup> *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449 at §12.

<sup>8</sup> *Chu Kong v Lau Wing Yan & Ors* [2018] HKCA 1010 at §18.

<sup>9</sup> This is commonly referred to as a "fraud on the minority", which means an improper exercise of voting power by the majority shareholders in which the benefit of the company as a whole has not been considered.

<sup>10</sup> See, for instance, the commentary contained in §732.08 in the Annotated Ordinance for the CO.

<sup>11</sup> (2008) 11 HFKCAR 370.

<sup>12</sup> Section 15, Control of Exemptions Clauses Ordinance (Cap 71).

<sup>13</sup> *Grandom Asia Holding Ltd v. Henry Wai & Co (A Firm)* [2018] HKCFI 31;

<sup>14</sup> Note that in Hong Kong, the doctrine of sovereign immunity only applies to foreign States. It does not apply to China, because China is not a foreign State vis-à-vis Hong Kong (Hong Kong being a part of China). Instead, in Hong Kong, the

The absolute sovereign immunity doctrine applies in Hong Kong since 2011, as opposed to restrictive sovereign immunity that applied in Hong Kong prior to 2011, when the Court of Final Appeal handed down its decision in *Democratic Republic of the Congo and others v. FG Hemisphere Associates LLC* [2011] HKCFA 43; (2011) 14 HKCFAR 95; [2011] 4 HKC 151; FACV 7/2010 (8 June 2011).

The doctrine of absolute sovereign immunity is based on the principle of territorial sovereignty, equality and independence of sovereign States, which dictates that a sovereign State may not exercise its jurisdiction over another sovereign State in its courts. A specific waiver of sovereign immunity in writing is required in order for Hong Kong courts to accept jurisdiction over a State or its organs. The enforcement of an arbitral award in Hong Kong against a State or its organs also requires a separate, distinct waiver. There is no exception in Hong Kong for commercial transactions between the state and private parties.

Typically a waiver of sovereign immunity from suit and execution would be included in the contractual arrangements between the parties. In theory, there exists no bar to waiving sovereign immunity after the dispute has arisen. On the authority of *Democratic Republic of the Congo and others v. FG Hemisphere Associates LLC*, immunity may be waived by 'an unequivocal submission to the jurisdiction of the forum State at the time when the forum State's jurisdiction is invoked against the impleaded State'. In *Hua Tian Long (No. 2)* [2010] 3 HKC 557, the Court of First Instance found that the Guangzhou Salvage Bureau was entitled to crown immunity, but had waived that entitlement by (among others) filing a counterclaim in the Hong Kong court proceedings. Although in the context of crown immunity, this reasoning is likely to also apply to waiver of sovereign immunity.

It is important to note that the Hong Kong courts will not equate an arbitration agreement to a waiver of sovereign immunity. An arbitration agreement is regarded as a contractual submission to the jurisdiction of the arbitral tribunal, as opposed to a submission to the jurisdiction of any enforcing court, which would require its own specific waiver.

Importantly, Hong Kong courts will be reluctant to extend sovereign immunity to State-owned enterprises (or in the context of PRC state-owned enterprises, crown immunity). In 2017, in *TNB Fuel Services SDN BHD v. China National Coal Group Corporation*, the Hong Kong Court of First Instance rejected a claim of crown immunity by a State-owned enterprise of the PRC and upheld an order for execution against assets located in Hong Kong.

The enforcement action in *TNB Fuel Services SDN BHD v. China National Coal Group Corporation* arose out of an arbitration between TNB Fuel Services SDN BHD ("**TNB**"), a Malaysian privately owned company, and China National Coal Group Corporation ("**CNCGC**"), a PRC coal conglomerate owned by the State Asset Supervision and Administration Commission. TNB obtained a USD 5.2 million award against CNCGC, and attempted enforcement against the shares held by CNCGC in a Hong Kong company. CNCGC resisted enforcement by invoking crown immunity, claiming that it is wholly owned by the PRC, and therefore the Hong Kong courts have no jurisdiction to order execution against its assets.

Mimmie Chan J rejected the crown immunity argument and granted enforcement against CNCGC's assets in Hong Kong. Of interest is that in her analysis, Mimmie Chan J referred to a letter from China's Central People's Government which affirmed the legal status of CNCGC, as a State-owned enterprise:

*"...a state-owned enterprise is an independent legal entity, which carries out activities of production and operation on its own, independently assumes legal liabilities, and there is no special legal person status or legal interests superior to other enterprises."*

For that reason, the letter concluded, CNCGC should not be covered by China's sovereign immunity save for "*extremely extraordinary circumstances*" where CNCGC might act on behalf of the PRC via appropriate authorization. Mimmie Chan J also applied a "control and functions" test to determine that CNCGC under its

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common law doctrine of crown immunity applies to China and its State organs. After the hand-over of sovereignty over Hong Kong to China, the crown immunity previously enjoyed by the British Crown in Hong Kong was transferred to China.

laws of incorporation was an independent legal entity and did not serve as an instrumentality of China as a state.

### 3. Intervention of domestic courts

#### 3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

Yes, Hong Kong courts stay domestic litigation if there is a valid arbitration agreement, irrespective of where the seat of the arbitration is located. Hong Kong courts also grant interim measures in support of arbitration (whether in or outside of Hong Kong), including anti-suit injunctions.<sup>15</sup>

#### 3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, suspending or withdrawing litigation proceedings?

There is a dearth of Hong Kong case law on this as parties usually go directly to the Hong Kong courts to seek a stay of litigation or an anti-suit injunction. This is because a Hong Kong court order may be enforced directly by way of contempt proceedings (as opposed to a tribunal's order, which needs to be enforced before the Courts first).

Hong Kong courts have been willing to grant anti-suit injunctions to restrain foreign proceedings, even against non-Hong Kong parties where the parties have agreed to Hong Kong seated arbitration agreement.<sup>16</sup>

#### 3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

Hong Kong courts have broad jurisdiction to grant orders in support of arbitration in and outside of Hong Kong. These may include:

- i) Asset freezing injunctions. Hong Kong courts can grant asset-freezing orders in support of foreign seated arbitrations, so long as the arbitration is capable of giving rise to a judgment which may be enforced against assets situated in Hong Kong.<sup>17</sup>
- ii) Anti-suit injunctions. Hong Kong Courts may grant anti-suit injunctions (even against parties outside of Hong Kong) where proceedings are brought in breach of a contractually agreed forum, unless there are strong reasons to the contrary.
- iii) Orders to secure evidence. The Court may order a person to attend proceedings before a tribunal in a Hong Kong seated arbitration to give evidence or produce documents, provided that there is approval from the tribunal.<sup>18</sup>

### 4. The conduct of proceeding

#### 4.1 Can parties retain outside counsel or be self-represented?

Either is fine.

<sup>15</sup> For example, in *Dickson Valora Group (Holdings) Co Ltd and another v Fan Ji Qian* [2019] CFI 482, the court granted an anti-suit injunction restraining a non-party to a contract from enforcing the contract through PRC litigation brought contrary to the contractual arbitration agreement.

<sup>16</sup> For example, in *In Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi* [2015] 2 HKLRD 866, the court issued an anti-suit injunction refraining the Turkish defendant from continuing the proceedings in Turkey, in light of a Hong Kong seated arbitration agreement.

<sup>17</sup> Section 21M High Court Ordinance.

<sup>18</sup> Section 55 of the Arbitration Ordinance (Art 27 of the UNCITRAL Model Law).

**4.2 How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?**

The Hong Kong Arbitration Ordinance upholds the party autonomy principle and thus allows the parties to agree on their own arbitrator challenge procedure (Section 26 of the Arbitration Ordinance). Where the parties fail to agree on the challenge procedure, the Hong Kong courts will entertain challenge applications in accordance with the procedure set out in Section 26 of the Arbitration Ordinance. First, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance that may give rise to a challenge, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If this procedure fails, then within thirty days after having received notice of the decision rejecting the challenge, the challenging party may request the court to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Under the opt-in provisions at Schedule 2 to the Arbitration Ordinance, an award may be challenged for serious irregularity if the arbitral tribunal failed to comply with its duties of independence and impartiality. However, where these provisions do not apply, challenges as to an arbitrator's failure to disclose would have to be brought under one of the established New York Convention grounds for challenging an award.

If a related challenge is brought against the award under the "public policy" ground, the Hong Kong courts may require more than apparent bias or apparent lack of impartiality (which might be sufficient to challenge domestic court decisions or even domestic awards<sup>19</sup>) before the Court would refuse enforcement of an award.<sup>20</sup> The Court requires a grave departure from basic concepts of justice as applied by the enforcement court (*i.e.*, Hong Kong) because the object of the New York Convention is to encourage the recognition and enforcement of commercial arbitration agreements, and unify the standards by which agreements to arbitrate are observed and awards are enforced. The Hong Kong courts construe the "public policy" defence under Art V2(b) of the New York Convention narrowly in order to attain that objective without excessive intervention on the part of the enforcement courts.<sup>21</sup>

**4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?**

Where the parties do not agree on a procedure for appointing an arbitrator, and are not able to agree on the arbitrator, the Court may appoint an arbitrator upon request of a party.<sup>22</sup>

**4.4 Do courts have the power to issue interim measures in connection with arbitrations?**

Yes. (See question 3.1) However, parties applying to the court after the tribunal has been constituted (or will imminently be constituted) should be mindful of whether they need to explain why they are not seeking relief from the tribunal at the first instance. In this regard, see question 3.2 on availability of contempt proceedings for breach of court orders.

<sup>19</sup> While the statutory regime applies to both domestic and international arbitration, some case law suggests that Courts are more pro-enforcement when considering international awards because the court recognises the object of the New York Convention, which is to encourage the recognition and enforcement of commercial arbitration agreements and unify the standards by which agreements to arbitrate are observed and awards are enforced.

<sup>20</sup> *Hebei Import & Export Corp v Polytek Engineering* [1999] 2 HKCFAR 111 at 123H-I; recently applied in *Paloma Co v Capxon Electronic* [2018] HKCFI 1147.

<sup>21</sup> *Hebei Import & Export Corp v Polytek Engineering* [1999] 2 HKCFAR 111 at 123H-I.

<sup>22</sup> Section 24, Arbitration Ordinance (adopting Article 11 of the UNCITRAL Model Law).

#### 4.4.1 If so, are they willing to consider *ex parte* requests?

Yes, as with all *ex parte* applications in Hong Kong, there is a duty of full and frank disclosure and factors associated with *ex parte* applications (such as a demonstrating the need for secrecy).

#### 4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

Section 46 of the Arbitration Ordinance requires that parties be treated with equality, and that, when conducting arbitral proceedings, the tribunal is independent, acts 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, and uses 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 is an adjustment as compared to the UNCITRAL Model Law Article 18 requirement of equal treatment of parties, which provides that "*The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.*"

##### 4.5.1 Does it provide for the confidentiality of arbitration proceedings?

This is a statutory requirement. Section 18 of the Arbitration Ordinance provides that no party may publish, disclose or communicate any information relating to the arbitral proceedings and/or the award, unless otherwise agreed by the parties.

##### 4.5.2 Does it regulate the length of arbitration proceedings?

There is neither an express provision on the duration of arbitration proceedings nor a remedy against excessively lengthy proceedings. However, there is a general obligation on Hong Kong seated tribunals to avoid unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate (Section 46 of the Arbitration Ordinance).

##### 4.5.3 Does it regulate the place where hearings and/or meetings may be held?

No.

##### 4.5.4 Does it allow for arbitrators to issue interim measures?

Arbitrators are empowered to order interim measures under Section 35 of the Arbitration Ordinance. Such measures may include ordering parties to:

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

Section 46 of the Arbitration Ordinance sets out the conditions for granting interim measures, as follows:

- harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination of this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

#### 4.5.5 Does it regulate the arbitrators' right to admit/exclude evidence?

The tribunal is not bound by the rules of evidence and may receive any evidence that it considers relevant to the arbitral proceedings. It must give weight that it considers appropriate to the evidence adduced in the arbitral proceedings.<sup>23</sup>

That said, in Hong Kong arbitration, parties are at liberty to agree on the rules of evidence, such as the IBA Rules on the Taking of Evidence in International Arbitration 2010.

##### 4.5.5.1 For example, are there any restrictions to the presentation of testimony by a party employee?

No, but the tribunal has discretion to weigh the evidence as it sees fit.<sup>24</sup>

#### 4.5.6 Does it make it mandatory to hold a hearing?

Not mandatory. The starting position is that an arbitral tribunal has a discretion to decide whether to hold oral hearings. Nonetheless, if requested by a party, it shall hold such hearings at an appropriate stage of the proceedings, unless the parties have agreed that no hearings shall be held.<sup>25</sup>

#### 4.5.7 Does it prescribe principles governing the awarding of interest?

The arbitral tribunal has discretion to award interest generally. Interest may be simple or compound and at rates that the tribunal considers appropriate. Interest may be awarded on money claimed in and outstanding at the commencement of the proceedings or on costs awarded by the tribunal.<sup>26</sup>

For interest on money or costs awarded in the arbitral proceedings, the default will be the judgment rate determined by the Chief Justice under Section 49(1)(b) (Interest on judgments) of the High Court Ordinance (Cap 4), from the date of the award.<sup>27</sup> The current judgment rate is at 8.125% per annum.

#### 4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

Tribunals have broad discretion to allocate costs, but agreements that the parties must pay their own costs in respect of arbitral proceedings are void (unless made post-dispute).<sup>28</sup>

In unsuccessful setting aside proceedings or proceedings to resist enforcement, Hong Kong courts will award costs on an indemnity basis (*i.e.*, where a higher percentage of a party's incurred costs may be recovered) as a general rule.

### 4.6 Liability

#### 4.6.1 Do arbitrators benefit from immunity to civil liability?

Yes, arbitrators are generally immune to civil liability. However, arbitrators are liable if it is proved that the act or omission in question was done dishonestly.<sup>29</sup> The same applies to employees and agents of an arbitral tribunal.

<sup>23</sup> Section 47(3), Arbitration Ordinance (Article 19 of the UNCITRAL Model Law).

<sup>24</sup> Section 47(3), Arbitration Ordinance (Article 19 of the UNCITRAL Model Law).

<sup>25</sup> Section 52, Arbitration Ordinance.

<sup>26</sup> Section 79, Arbitration Ordinance.

<sup>27</sup> Section 80(1), Arbitration Ordinance.

<sup>28</sup> Section 74(9) Arbitration Ordinance.

<sup>29</sup> Section 104, Arbitration Ordinance

#### **4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?**

No, although if the participants in an arbitration proceeding commit criminal offences (e.g., assaulting a witness, creating fraudulent documents, or any other offence), that may give rise to criminal liability.

### **5. The award**

#### **5.1 Can parties waive the requirement for an award to provide reasons?**

Yes, parties can agree that no reasons are to be given.<sup>30</sup>

#### **5.2 Can parties waive the right to seek the annulment of the award?**

No.

#### **5.3 What typical mandatory requirements apply to an award rendered at a seat in the jurisdiction?**

An award:<sup>31</sup>

- (1) must be in writing and signed by the arbitrator(s);
- (2) shall also state the reasons upon which it is based (unless the parties have agreed that no reasons are required);
- (3) shall state the date and place of the arbitration; and
- (4) must be delivered to each party.

#### **5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?**

Unless otherwise agreed, an award made by an arbitral tribunal is final and binding.<sup>32</sup> It follows that – unless otherwise agreed – an arbitral award is not open to appeal save for applying to the Hong Kong courts for setting aside pursuant to the narrow New York Convention grounds (e.g., incapacity, invalid arbitration agreement, procedural irregularities, etc.).<sup>33</sup>

Where Schedule 2 of the Arbitration Ordinance applies (e.g., where the parties have agreed that the provisions of Schedule 2 apply, or the arbitration agreement is agreed at the relevant time and is expressly stated to be a “domestic arbitration”<sup>34</sup>), a party may appeal to the Court on questions of law arising out of an award with leave of Court or with the agreement of all the other parties to the arbitral proceedings.

#### **5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?**

Awards are recognised and enforced by way of an *ex parte* application to the Hong Kong Court under the Arbitration Ordinance, which applies to both international and domestic arbitral awards. If the application is successful, the respondent usually has 14 days (after being served with the order) to apply to set aside the order and the award may not be enforced until the expiry of that time.

If a party is considering enforcing an award in Hong Kong and the Chinese Mainland, the *Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* may prohibit simultaneous applications for enforcement in the Mainland and in Hong Kong.

<sup>30</sup> Section 67(1)(2) Arbitration Ordinance.

<sup>31</sup> Section 67, Arbitration Ordinance.

<sup>32</sup> Section 73, Arbitration Ordinance.

<sup>33</sup> Section 81, Arbitration Ordinance

<sup>34</sup> See section 1.1 above.

Under the Limitation Ordinance (Cap 347), any action to enforce an award shall not be brought after the expiration of 6 years from the date on which the cause of action accrued (in most cases, this is from the date of the award).<sup>35</sup>

**5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?**

Where proceedings are commenced in Hong Kong to set aside leave to enforce an award in Hong Kong, enforcement will be stayed until those proceedings are determined.

Similarly, annulment or appeal proceedings at the seat may be a ground to stay enforcement proceedings as a matter of case management. The Court has broad discretion in deciding whether or not to stay enforcement, and may even stay enforcement where there are separate cross claims between the same parties in other proceedings. In *Baosteel Engineering & Technology Group Co Ltd v China Zenith Chemical Group Ltd [2018] HKCFI 1678*, the Hong Kong court granted a 6 month stay of enforcement (conditional on the defendant paying the awarded amounts into Court) because there were separate proceedings on the Mainland which could give rise to a cross-claim against the party enforcing the award.

**5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?**

In most cases yes, but Hong Kong courts may consider the reasons behind that annulment. For example, a finding by the seat's supervisory court that the arbitration agreement was invalid is a very strong policy consideration for the Hong Kong court in deciding whether or not enforcing the award would be contrary to Hong Kong public policy.

**5.8 Are foreign awards readily enforceable in practice?**

New York Convention awards are readily enforceable in Hong Kong.

**6. Funding arrangements**

**6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?**

Third-party funding became available when the amendments to sections 90K-90O of the Arbitration Ordinance came into force on 1 February 2019. Contingency fee arrangements are prohibited in Hong Kong.

**6.1.1 If so, what is the practical and/or legal impact of such restrictions?**

The practical impact of the prohibition of contingency fee arrangements is that an impecunious claimant may be deprived of the claim unless the claimant can obtain third-party funding.

**7. Is there likely to be any significant reform of the arbitration law in the near future?**

Not at the time of writing. However, to further promote Hong Kong as a leading centre for international arbitration services in the Asia-Pacific region, the Secretary for Justice has set up an Advisory Committee on Promotion of Arbitration, comprising representatives from the Department of Justice and the legal, arbitration and relevant sectors in Hong Kong. Overseas arbitration experts may also be appointed from time to time to assist in the work of the Advisory Committee either generally or on specific issues.

<sup>35</sup> Section 4(1)(c), Limitation Ordinance.