

HONG KONG

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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 any and all responsibility.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Hong Kong is ranked as the third most preferred arbitral seat globally and second after Singapore in Asia.¹ Hong Kong is a Special Administrative Region of the People's Republic of China (the "PRC"). It operates within the confines of the Basic Law on the basis of the "one country, two systems" principle. In practice, Hong Kong exercises a high degree of autonomy and enjoys broad executive, legislative and judicial powers, including that of final adjudication by an independent judiciary.

At the apex of Hong Kong's judicial system is the Court of Final Appeal, which features prominent justices from other common law jurisdictions, such as Australia, Canada, and England and Wales, who sit as Non-Permanent Judges. Currently there are 14 Non-Permanent Judges on the Court of Final Appeal, including The Right Honourable the Lord Hoffmann GBS, The Right Honourable Lord Sumption, The Honourable Mr Justice Anthony Murray Gleeson GBS, The Right Honourable the Lord Neuberger of Abbotsbury GBS and The Right Honourable Madam Justice Beverly McLachlin.

Hong Kong's Arbitration Ordinance (the "Arbitration Ordinance") adopts the provisions of the UNCITRAL Model Law with limited amendments, and the Hong Kong judiciary adopts a pro-arbitration stance in applying the Ordinance. Hong Kong is also home to the Hong Kong International Arbitration Centre ("HKIAC"), an Asia office of the ICC, the China Maritime Arbitration Commission, the Hong Kong Maritime Arbitration Group, eBRAM International Online Dispute Resolution Centre Limited, and it is CIETAC's first outpost outside of the Chinese mainland. Hong Kong also enjoys various advantages as geographical proximity with multiple Asian countries, modern infrastructure, transport links and hearing venues. It is also home to a vibrant and sophisticated arbitration community.

A number of bilateral arrangements with Mainland China and local Hong Kong legislations provide significant benefits for China-related arbitrations seated in Hong Kong. In 2019, China and Hong Kong executed² a bilateral arrangement under which Chinese courts 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 arrangement³ 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). This arrangement was supplemented in November 2020 to further align with the spirit of the New York Convention. These developments place Hong Kong firmly at the forefront of China-related international arbitration. In December 2022, Hong Kong enacted supplementary legislation that legalises Outcome-Related Fee Structure in international arbitration, enabling Hong Kong and the mainland Chinese based legal teams to offer tailored fee arrangements to their clients.

Key places of arbitration in the jurisdiction	Hong Kong.
Civil law / Common law environment? (if mixed or other, specify)	Common law.
Confidentiality of arbitrations?	Yes – by statute (section 18 Arbitration Ordinance (Cap 609)).

¹ See the 2021 International Arbitration Survey conducted by the Queen Mary University of London, available at <https://www.whitecase.com/publications/insight/2021-international-arbitration-survey> last accessed in March 2023.

² Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the "Interim Measures Arrangement") was signed on 2 April 2019 and came into effect on 1 October 2019.

³ Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (signed on 21 June 1999 and in force since 1 February 2000).

Requirement to retain (local) counsel?	Common but no legal requirement for parties in Hong Kong seated arbitrations to be represented by Hong Kong qualified counsel.
Ability to present party employee witness testimony?	Yes, although the tribunal has discretion to weigh such evidence.
Ability to hold meetings and/or hearings outside of the seat and/or remotely?	Yes, by party consent and/or tribunal's direction.
Availability of interest as a remedy?	Under section 79 of the Arbitration Ordinance, tribunals may, unless otherwise agreed by the parties, award simple or compound interest from the date of award and at the rates the tribunal considers appropriate for any period ending not later than the date of payment. Section 80 of the Arbitration Ordinance also provides for post-award interest at the judgment rate (currently 8.169% per annum), unless otherwise ordered by the tribunal.
Ability to claim for reasonable costs incurred for the arbitration?	Yes.
Restrictions regarding contingency fee arrangements and/or third-party funding?	<p>Third party funding has been expressly permitted from 1 February 2019.</p> <p>Outcome-Related Fee Structures (ORFS) have been available in Hong Kong since 16 December 2022 for arbitration and arbitration-related proceedings, allowing for not only Conditional Fee Arrangements (CFAs), but also for Damages Based Arrangements (DBAs) and for hybrid DBAs.</p> <p>The ORFS limits include (1) no more than 100% of uplift off the benchmark fee for CFAs, (2) the DBA payment must not exceed 50% of the financial benefit obtained by the client, (3) the cap on what the client is to pay in the event of no financial benefit is received, for hybrid DBAs, is 50% of the irrevocable costs.</p>
Party to the New York Convention?	The PRC has been party to the New York Convention. Hong Kong is a Special Administrative Region (SAR) of the PRC. As such, Hong Kong is not a separate party to the New York Convention (note Hong Kong has a separate bilateral arrangement with the PRC putting in place a similar mechanism to that under the convention).
Party to the ICSID Convention?	The PRC has been party to the ICSID Convention since 6 February 1993. Hong Kong is a Special Administrative Region (SAR) of the PRC. As such, Hong Kong is not a separate party to the ICSID Convention.
Compatibility with the Delos Rules?	Yes.
Default time-limitation period for civil actions (including contractual)?	<p>Generally, 6 years for contractual and tort actions.</p> <p>12 years from the date of the breach for action based on a deed and to recover land.</p>

<p>Other key points to note?</p>	<p>Under Section 22B of the Arbitration Ordinance, emergency arbitrator relief and relief granted by arbitral tribunals, whether seated in Hong Kong or overseas, are enforceable as if an order or direction of the Hong Kong High Court with the leave of the court.</p> <p>Tribunal-ordered interim measures are enforceable under section 61 of the Arbitration Ordinance in the same manner as an order or direction of the court that has the same effect, with the leave of the court.</p> <p>Under section 21 of the Arbitration Ordinance, it is not incompatible with an arbitration agreement to request interim measures of protection from a court.</p>
<p>World Bank, Enforcing Contracts: <i>Doing Business</i> score for 2020, if available?</p>	<p>Ranked 31 out of 190 with an overall score of 69.1.</p>
<p>World Justice Project, Rule of Law Index: <i>Civil Justice</i> score for 2022, if available?</p>	<p>Ranked 19 out of 140 with an overall score of 0.72.</p>

ARBITRATION PRACTITIONER SUMMARY

Date of arbitration law?	The current 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 Arbitration Ordinance. The latest revision to the Arbitration Ordinance came into effect on 16 December 2022, giving effect to the ORFS for arbitration regime in Hong Kong.
UNCITRAL Model Law? If so, any key changes thereto? 2006 version?	The Arbitration Ordinance is based in large part on the 2006 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?	<p>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 who is knowledgeable and experienced in arbitration matters. There are also many judges of appeal, including Non-Permanent Judges, who are knowledgeable and experienced in arbitration matters.</p> <p>The Hong Kong judiciary maintains a Construction and Arbitration List of judges that comprises experienced judiciary that are frequently assigned on arbitration-related matters. Hon Mimmie Chan J has been assigned to the majority of arbitration-related matters in the last decade.</p>
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, including before arbitration proceedings are commenced, provided the applicant gives an undertaking to commence arbitration shortly after, with a strict duty to make full and frank disclosure of all material facts to the court.
Courts' attitude towards the competence-competence principle?	<p>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 of First Instance to decide the matter (only after the tribunal has made its ruling, as envisaged by Art 16 of the UNCITRAL Model Law (Section 34 of the Arbitration Ordinance).</p> <p>If the tribunal finds that it does not have jurisdiction, this decision is not appealable in court. The final (jurisdictional) award may be set aside by the Court of First Instance on the limited grounds set out in Section 81 Arbitration Ordinance (which mirror New York Convention grounds), and leave of the Court of First Instance is required for any appeal from its decision under Article 34 of the UNCITRAL Model Law (Section 81 Arbitration Ordinance, Recourse Against Award).</p>
May an arbitral tribunal render a ruling on jurisdiction (or other issues) with reasons to follow in a subsequent award?	Generally, section 67 of the Arbitration Ordinance requires that the award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given, or the award is an award on agreed terms.

<p>Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?</p>	<p>The mandatory grounds are only those set out in the New York Convention. In addition, Schedule 2 to the Arbitration Ordinance contains optional provisions that only apply where expressly opted for by all the parties. These provisions include Section 5 and 6 of Schedule 2, which 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. Section 4 of Schedule 2, if opted in, allows a party to challenge an award on the ground of serious irregularity affecting the tribunal, the arbitral proceedings, or the award.</p>
<p>Do annulment proceedings typically suspend enforcement proceedings?</p>	<p>It lies within the court's discretion to determine whether it will adjourn an application to enforce an arbitral award if an action to remit or set aside the award is pending. The court will consider factors such as the merits and prospects of success of the set-aside application (Sections 86(4)(a), 89(5)(a) and 98D(5)(a) Arbitration Ordinance).</p>
<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>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 recognition and enforcement of an award that has been set aside or is challenged at the seat. Further, Hong Kong courts may look into the reasons why the award was set aside. 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.</p>
<p>If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of an ensuing award in the jurisdiction?</p>	<p>The Hong Kong courts and leading arbitral institutions like HKIAC have embraced and endorsed virtual hearing and more so after the in-person hearings disruption caused by the COVID-19 pandemic.</p> <p>A tribunal's order to conduct remote hearings is unlikely to prevent enforcement of the award. Section 46(3)(c) of the Arbitration Ordinance provides that the arbitral tribunal has the discretion (and in fact, is required) to use "<i>procedures that are appropriate to the particular case</i>" and to "[avoid] <i>unnecessary delay or expense</i>". One may therefore understand that arbitrators are therefore empowered to resort to virtual hearings. More significantly, virtual hearings do not appear to be in breach of any rule or law which concerns the seat of the arbitration. Recently, in <u>CSFK v HWH [2020] HKCA 207</u> the court underscored that as long as the key requirements of "fairness and openness" are satisfied, there is "<i>no rule prohibiting other modes of hearings</i>". However, on 20 May 2020, Anthony Chan J in <u>Re Nobility School Ltd [2020] HKCFI 891</u>, found that the giving of evidence by video conferencing facilities is an exception, and rejected an application for key witnesses in a shareholders dispute to give evidence by a video link where the witness credibility is contested. For more details, please refer to paragraph 4.5.3 below.</p>

	<p>Anthony Chan J also finds that allowing an application for a virtual trial where witness credibility is contested will leave the parties with a “justified sense of grievance”, as the court will be “deprived of the opportunity to observe them [witnesses] giving evidence in person under a solemn atmosphere. In addition, there will likely be interruptions of the evidence due to, eg, quality of the audio, and such interruptions will normally be to the disadvantage of the cross-examiner.”</p> <p>This said, it is unlikely that an order for a virtual hearing in itself will serve as a bar to recognition and enforcement. It is the burden of the resisting party or a party applying to set aside an award to make out the grounds on which an award may be set aside, or its recognition and enforcement refused.</p>
<p>Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?</p>	<p>To the extent that “public bodies” in this context mean States or instrumentalities of the States (State organs and agencies), 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 <i>Democratic Republic of the Congo and others v. FG Hemisphere Associates LLC</i> [2011] HKCFA 43; (2011) 14 HKCFAR 95; [2011] 4 HKC 151; FACV 7/2010 (8 June 2011) (see more below at 2.6.2).</p>
<p>Is the validity of blockchain-based evidence recognised?</p>	<p>The courts and arbitral tribunals have broad discretion to admit and give weight to evidence ⁴ and it will depend on judges/arbitrators and the facts of the case.</p> <p>There is currently no specific regulation on blockchain in Hong Kong, but Mainland authorities have established a regulatory regime to foster the healthy development of blockchain technology. The “Internet courts”, which handle a range of civil disputes such as lending, defamation and domain names, will accept digital data as admissible evidence if the data has been verified by methods including blockchains and digital signatures.</p> <p>In Hong Kong in 2020, the High Court granted a Mareva injunction to freeze the assets of a digital currency trader in a case concerning disputed ownership of Bitcoins (see <i>Nico Constantijn Antonius Samara v Stive Jean Paul Dan</i> [2019] HKCFI 2718). The injunction restrained the defendant from disposing of assets valued at over US\$2.6 million. This case dealt with, <i>inter alia</i>, the difficulty in proving ownership and tracing transactions involving blockchain or Bitcoins, particularly where the plaintiff in this case chose to protect his privacy right by conducting transactions anonymously.⁵</p>

⁴ Section 47 Arbitration Ordinance (incorporating Article 19 of UNCITRAL Model law)

⁵ See, <https://www.hk-lawyer.org/content/application-blockchain> (Stephen KY Wong, Privacy Commissioner for Personal Data, Hong Kong).

<p>Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?</p>	<p>We are not aware of Hong Kong court or tribunal decisions expressly deciding this. However, Hong Kong law defines an “arbitration agreement in writing” very broadly.⁶ If the electronic communication that concludes the arbitration agreement meets the requirements under the Arbitration Ordinance, and can be retrieved from the blockchain, that is likely sufficient to meet the formal requirements.</p>
<p>Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?</p>	<p>Unlikely, please see the explanation in 7.3 below.</p>
<p>Other key points to note?</p>	<p>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.</p>

⁶ Section 19 of the Arbitration Ordinance.

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

1.1 Is the arbitration law based on the UNCITRAL Model Law? 1985 or 2006 version?

Yes, the Arbitration Ordinance is primarily based on the 2006 UNCITRAL Model Law. It further contains “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 used to be applicable either by parties’ express 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, (i.e., until 31 May 2017).⁷ For arbitration agreements entered into from 1 June 2017 onwards, parties have to expressly “opt in” Schedule 2 for it to be applicable.

1.2 When was the arbitration law last revised?

The latest revision to the Arbitration Ordinance was introduced in 2022 with respect to Outcome Related Fee Structure Agreement for Arbitration (Part 10B). The purpose of the amendment is to establish that an OFRS agreement for arbitration is not prohibited by the common law doctrines of maintenance, champerty and barratry, to provide for the validity and enforceability of ORFS agreements for arbitration that meet certain general and specific conditions, and to provide for measures and safeguards in relation to ORFS agreements for arbitration.

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.⁸ In a recent case *China Railway (Hong Kong) Holdings Ltd v Chung Kin Holdings Co Ltd* [2023] HKEC 187, the Court of First Instance adopted the four-stage enquiry set out in the decision of the UK Supreme Court in *Enka Insaat Ve Sanayi AS v OOO Insurance Co Chubb* [2020] UKSC 38. Following that four-stage enquiry, the Hong Kong courts will first consider whether there is an express or implied choice of the governing law by the parties; 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. The candidates for this law (i.e., the law governing the arbitration agreement) are usually the law governing the underlying contract, or the law of the seat. Hong Kong courts have taken into consideration the landmark case law from other common law jurisdictions (*which is persuasive*) on the issue of choice of law, 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), the decisions of the UK Supreme Court in *Enka* (referred to above), as well as *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48.

2.2 In the absence of an express designation of a ‘seat’ in the arbitration agreement, how do the courts deal with references therein to a ‘venue’ or ‘place’ of arbitration?

There is no Hong Kong case law on the interpretation of ‘venue’ or ‘place’ of arbitration in the absence of an express designation of a ‘seat’. However, the Hong Kong courts would likely find persuasive the recent U.K.

⁷ Sections 99-100, Arbitration Ordinance.

⁸ 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).

decision in *Process & Industrial Developments Ltd v Nigeria* [2019] EWHC 2241 (Comm) where the court found⁹ that a reference to 'venue' in an arbitration agreement was a reference to the legal seat. Further, consistent with general international arbitration practice, reference to the place of arbitration (absent exceptional circumstances or evidence to the contrary) would generally be a reference to the legal seat. For instance, the HKIAC 2018 Administered Rules¹⁰ clarify that references to the "seat" of arbitration mean the place of arbitration as defined in Article 20.1 of the UNCITRAL Model Law.¹¹

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

2.4 What are the formal requirements (if any) for an enforceable arbitration agreement?

Hong Kong approaches requirements of form in a 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.¹² 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.

2.5 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 – albeit infrequently – have applied a number of legal theories to bind entities that have not executed an arbitration agreement (typically in situations where a non-party tries to claim under an agreement subject to an arbitration clause). These legal theories are often based on generally applicable rules of contract and commercial law, and include, for example, agency, estoppel, and third-party beneficiary doctrines.

⁹ In para. 85, the court took into account that the clause referred to venue "of the arbitration", implying that it would apply to the whole proceeding; whether interpreting the venue as the place where the hearing takes place is convenient to the parties; and whether interpreting venue as the seat of the arbitration was inconsistent with the relevant arbitration legislation and rules.

¹⁰ Rule 2.14.

¹¹ UNCITRAL Model Law, Article 20. Place of arbitration (1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. (2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

¹² Section 19, Arbitration Ordinance.

Hong Kong courts 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.¹³ 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 to be pursued in arbitration. Accordingly, a defendant has the right to prevent a claim against them based on their contractual obligations from being pursued otherwise than by the contractually agreed mode. (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 dispute resolution mechanism, i.e., arbitration).

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

2.6 Are there restrictions to arbitrability?

2.6.1 Do these restrictions relate to specific domains?

Not all disputes are arbitrable under Hong Kong law. Certain disputes are not subject to resolution through arbitration, including: 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 Arbitration Ordinance was amended to clarify that disputes relating to intellectual property rights are arbitrable in Hong Kong.

There are areas where restrictions on arbitrability depend on the grounds on which an action is sought. For example, the question of whether or not a winding up order should be made may not be arbitrable,¹⁴ but this will depend in each case 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.

With respect to winding up procedures, a 2018 Court of First Instance judgement *Re Southwest Pacific Bauxite (HK) Ltd (Lasmos)* suggests that if there is an arbitration clause, a winding-up petition will generally be dismissed, save in exceptional circumstances, if: i) the company disputes the debt relied on by the petitioner; ii) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and iii) and the company takes the steps to commence the contractually mandated dispute resolution process.¹⁵ The correctness of the *Lasmos* approach has been contested in Hong Kong courts. In subsequent Court of First Instance cases, the court held that to dismiss the winding-up petition, it would be incumbent upon the debtor to demonstrate that there is a genuine dispute on the debt which required the determination of an arbitral tribunal.¹⁶ The higher courts in Hong Kong have not opined definitively which approach is preferable, although in a recent Court of Appeal leading judgement, the court's reasoning on the effects of an exclusive jurisdiction clause on the winding-up petition appeared to be in line with *Lasmos*.¹⁷ The law in this area continues to be "in a state of flux".

Where Hong Kong law is the law of the place of incorporation and hence applicable, Hong Kong is one of the few common law jurisdictions that does not prohibit a party from bringing a common law-based derivative

¹³ Third parties may enforce contractual rights under the Contract (Rights of Third Parties) Ordinance (Cap 623).

¹⁴ *Re Southwest Pacific Bauxite (HK) Ltd (Lasmos)* [2018] 2 HKLRD 449 at §12.

¹⁵ *Re Southwest Pacific Bauxite (HK) Limited (Lasmos)* [2018] HKCFI 426.

¹⁶ See, e.g., *But Ka Chon v Interactive Brokers LLC* [2019] HKCA 873; *Re Hong Kong Bai Yuan International Business Co., Ltd* [2022] HKCFI 960 ;

¹⁷ *Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP* [2022] HKCA 1297

claim (i.e. a derivative action on the company's behalf) through arbitration.¹⁸ This sets Hong Kong apart as a jurisdiction. 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 framework of the New York Convention, as opposed to typical statutory derivative claims that would be enforceable only as court judgments, which can encounter multiple enforceability issues in the cross-border context.

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

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.¹⁹ 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.²⁰

With respect to state entities, there are, generally speaking, no restrictions on arbitrability.

However, a defence of immunity from suit (or execution) may be invoked by a State in Hong Kong on the basis of the absolute sovereign immunity doctrine.²¹ It is unlikely that the sovereign immunity defence will be successful in Hong Kong if invoked by a State-owned enterprise, as explained below. The absolute sovereign immunity doctrine applies in Hong Kong since 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.

¹⁸ *Chu Kong v Lau Wing Yan & Ors* [2018] HKCA 1010 at §18.

¹⁹ Section 15, Control of Exemptions Clauses Ordinance (Cap 71).

²⁰ *Grandom Asia Holding Ltd v. Henry Wai & Co (A Firm)* [2018] HKCFI 31;

²¹ 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 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.

Importantly, Hong Kong courts will be reluctant to extend sovereign immunity to State-owned enterprises (or in the context of PRC stated-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 USD5.2 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 or order execution against its assets.

Justice Mimmie Chan rejected the crown immunity argument and granted enforcement against CNCGC’s assets in Hong Kong. In her analysis, Justice Mimmie Chan referred to a letter from PRC’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 (crown) immunity save for “extremely extraordinary circumstances” where CNCGC might act on behalf of the PRC via appropriate authorization. Justice Mimmie Chan also applied a “control and functions” test to determine that CNCGC under its 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. Hong Kong courts also grant interim measures in support of arbitration (whether in or outside of Hong Kong), including anti-suit injunctions. A party to an arbitration agreement will be held to the agreement. This applies to a remote party to the agreement such as an insurer seeking to exercise the rights of the insured by way of subrogation and a third party seeking to exercise the rights under the contract.²²

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

There is a wealth 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 orders, which need 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. 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.

²² See, e.g., *Dickson Valora Group (Holdings) Co Ltd and another v Fan Ji Qian* [2019] CFI 482

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunctions/anti-arbitration injunctions or orders, 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 an award which may be enforced against assets situated in Hong Kong.²³
- 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.²⁴

4. The conduct of proceeding

4.1 Can parties retain foreign counsel or be self-represented?

Either is fine in arbitration proceedings. However, in arbitration-related litigation foreign counsel need to seek *ad hoc* admission to be able to appear before Hong Kong courts. In arbitration-related litigation, Hong Kong adopts a flexible approach in determining whether to admit overseas counsel, and considers such factors as the public interest in the case, the level of court in which the advocate intends to appear, the importance of the legal issues to Hong Kong's jurisprudence and the complexity of the case.

In particular, Hong Kong courts consider that the 'arbitration factor' - that is, court proceedings that arise from arbitration proceedings in which the relevant counsel has appeared in the substantive hearing or has had substantive involvement - is a powerful factor in favour of admission. The usual obligation on solicitors to provide details of local counsel who have been approached and their availability is also reduced where the arbitration factor is in play. This is because where the arbitration factor exists, other leading counsel would not have represented the party in the underlying arbitration proceedings and therefore would not have had the arbitration counsel's advantages. However, there are limits on the arbitration factor. For example, it only applies to leading counsel because counsel must be of sufficiently high quality and standing (such as a King's Counsel or equivalent) to be admitted, and the matter must be a substantial one (e.g., *ad hoc* admission for a directions hearing is unlikely to be granted).

Additionally, the burden of showing that the case is one of unusual difficulty and complexity is not a high one. In *Re Alistair John McGregor QC*, the Court of Appeal had "no doubt that many Senior Counsel in Hong Kong will be able, competently and skilfully, to conduct the case", but still allowed the admission of overseas counsel because (*inter alia*) it appreciated that the action required specialist and experienced counsel and that the counsel seeking admission had been consulted at a relatively early stage.

The usual practice in Hong Kong is for overseas leading counsel to appear alongside local barristers. In *Re Mark Taylor Simpson QC*, the Court of First Instance rejected a proposal for overseas leading counsel to appear alongside local solicitor advocates instead of a local barrister. The court reasoned that solicitor advocates played a less significant role in enhancing access to justice (by comparison with the local Bar), and that the public interest in having a strong and independent local Bar outweighed the public interest in the development and growth of a body of solicitor advocates.

²³ Section 21M High Court Ordinance.

²⁴ 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 be of a gravity such as to justify this outcome?

The Arbitration Ordinance upholds the principle of party autonomy 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, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, 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 decisions or even domestic awards)²⁵ before refusing enforcement of an award.²⁶ The Hong Kong courts' require a grave departure from basic concepts of justice to justify a challenge on the "public policy" ground because the object of the New York Convention is to encourage the recognition and enforcement of commercial arbitration agreements, and to 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.²⁷

A recent example of the Hong Kong court refusing enforcement on grounds of public policy and serious irregularity of the tribunal is the decision in *Z v Y* [2018] HKCFI 2342. The court refused enforcement under Section 95(3)(b) of the Arbitration Ordinance.²⁸

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.²⁹

²⁵ 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 to unify the standards by which agreements to arbitrate are observed and awards are enforced.

²⁶ *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.

²⁷ *Hebei Import & Export Corp v Polytek Engineering* [1999] 2 HKCFAR 111 at 123H-I.

²⁸ *Z v Y* [2018] HKCFI 2342, available at:

[https://www.hkllii.org/cgi-](https://www.hkllii.org/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2018/2342.html?stem=&synonyms=&query=title(%25222018%2520HKCFI%25202342%2522))

[bin/sinodisp/eng/hk/cases/hkcfi/2018/2342.html?stem=&synonyms=&query=title\(%25222018%2520HKCFI%25202342%2522\)](https://www.hkllii.org/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2018/2342.html?stem=&synonyms=&query=title(%25222018%2520HKCFI%25202342%2522))

²⁹ Section 24, Arbitration Ordinance (adopting Article 11 of the UNCITRAL Model Law).

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 that they may 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.

As noted above, the Interim Measures Arrangement that came into effect on 1 October 2019 allows parties to Hong Kong seated arbitrations (administered under certain institutions)³⁰ to apply directly to an Intermediate People's Court in the PRC for property, asset or conduct preservation orders. Parties to PRC arbitrations can apply directly to the Hong Kong High Court for injunctions or other interim measures. Before the Interim Measures Arrangement, except for maritime disputes, PRC courts would not provide any assistance or grant any interim measures to parties to arbitral proceedings in Hong Kong.

In practice, since the coming into effect of the Interim Measures Arrangement on 1 October 2019, PRC courts have been efficient at processing applications under the Arrangement. The average time taken by the PRC courts to issue a decision was 14 days from its receipt of the complete application, although applications that are made during the COVID-19 pandemic may take longer. The interim measures applications made to the PRC courts concern mainly preservation of assets, whereas applications for preservation of evidence and actions are much rarer. PRC courts largely impose a higher standard for conduct and evidence preservation applications than asset preservation ones. As at the end of 2022, the PRC courts published 58 decisions concerning the Interim Measures Arrangement. Of these 58 decisions, 54 granted the applications for preservation of assets upon the applicant's provision of security and four rejected such an application.³¹

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

Yes, although the applicant needs to satisfy a list of considerations associated with *ex parte* applications (such as extreme urgency and the need for secrecy). As with all *ex parte* applications in Hong Kong, there is a duty of full and frank disclosure on the part of the applicant.

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 a modification to UNCITRAL Model Law Article 18, 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.

³⁰ The list of institutions are: Hong Kong International Arbitration Centre, China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center, International Court of Arbitration of the International Chamber of Commerce - Asia Office, Hong Kong Maritime Arbitration Group, South China International Arbitration Center (HK), and eBRAM International Online Dispute Resolution Centre.

³¹ See, <https://www.hkiac.org/about-us/statistics>

Further, HKIAC Administered Arbitration Rules (2018) provide for similar confidentiality requirements applicable to the arbitral tribunal, any emergency arbitrator, experts, witnesses, tribunal secretaries and HKIAC.³²

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).

Under the HKIAC Administered Arbitration Rules 2018, Article 42, if parties opt into or apply the HKIAC expedited procedure, (which generally adopts the same procedural steps in HKIAC arbitrations, except for joinder or consolidation proceedings) the HKIAC requires that “the award shall be communicated to the parties within six months from the date when HKAIC transmitted the case file to the arbitral tribunal”. The HKIAC may extend this time limit in exceptional circumstances.

4.5.3 Does it regulate the place where hearings and/or meetings may be held and can hearings and/or meetings be held remotely, even if a party objects?

Section 48 of the Ordinance provides that the hearing of witnesses, experts and parties can be held “*at any place*” and the “*parties are free to agree on the place of arbitration*”. If no consensus is reached the arbitral tribunal will determine the place and procedure by examining the relevant circumstances. Section 46(3)(c) of the Arbitration Ordinance provides that the arbitral tribunal has the discretion to use “*procedures that are appropriate to the particular case*” and to “[avoid] *unnecessary delay or expense*” and is therefore permitted to resort to virtual hearings. More significantly, virtual hearings do not appear to be in breach of any rule or law which concerns the seat of the arbitration.

See, however, *Re Nobility School Ltd* [2020] HKCFI 891, where Chan J found that the giving of evidence by video conferencing facilities is an exception, and rejected an application for key witnesses in a shareholders dispute to give evidence by a video link, in particular where the witness credibility is contested. There, Chan J found that “*it would be inappropriate for witnesses to give evidence in their office, and “neutral” venues are essential for the purpose. The latter is of great importance to ensure that there will be no foul play, e.g., the trial bundles to be shown to the witnesses are unmarked and there will be no prompting of the witnesses.*”

Anthony Chan J also found that allowing an application for a virtual trial where witness credibility is contested would leave the parties with a “*justified sense of grievance*”, as the court will be “*deprived of the opportunity to observe them [witnesses] giving evidence in person under a solemn atmosphere. In addition, there will likely be interruptions of the evidence due to, e.g., quality of the audio, and such interruptions will normally be to the disadvantage of the cross-examiner.*”

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 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.

³² Article 45, HKIAC Administered Arbitration Rules 2018.

4.5.4.1 In the affirmative, under what conditions?

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 Hong Kong 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.³³

That said, in Hong Kong arbitration, parties are at liberty to agree on the rules of evidence, and tribunals frequently take guidance from soft law instruments such as the IBA Rules on the Taking of Evidence in International Arbitration 2020.

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.³⁴

4.5.6 Does it make it mandatory to hold a hearing?

A hearing is 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, the tribunal shall hold such hearings at an appropriate stage of the proceedings, unless the parties have agreed that no hearings shall be held.³⁵

4.5.7 Does it prescribe principles governing the awarding of interest?

Generally, the arbitral tribunal has discretion to award interest. This may include simple or compound and at rates that the tribunal considers appropriate. Interest may be awarded on money claimed and outstanding at the commencement of the proceedings or on costs awarded by the tribunal.³⁶

For post-award interest on money or costs awarded in the arbitral proceedings, the default will be 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.³⁷ The current judgment rate is at 8.169% per annum.³⁸

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

Tribunals have broad discretion to allocate costs, and agreements that the parties must pay their own costs in respect of arbitral proceedings are void (unless they are made post-dispute).³⁹

³³ Section 47(3), Arbitration Ordinance (Article 19 of the UNCITRAL Model Law).

³⁴ Section 47(3), Arbitration Ordinance (Article 19 of the UNCITRAL Model Law).

³⁵ Section 52, Arbitration Ordinance.

³⁶ Section 79, Arbitration Ordinance.

³⁷ Section 80(1), Arbitration Ordinance.

³⁸ See, https://www.judiciary.hk/en/court_services_facilities/interest_rate.html

³⁹ Section 74(9) Arbitration Ordinance.

As a general rule, 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).

4.6 Liability

4.6.1 Do arbitrators benefit from immunity from 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.⁴⁰ The same applies to employees and agents of an arbitral tribunal.

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

No. However, if the participants in arbitration proceedings commit any criminal offences (e.g., assaulting a witness, creating fraudulent documents, or any other offence) in arbitration proceedings, this 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.⁴¹

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

The law of the seat where recourse against the award is sought will determine the validity of the parties' contractual waivers.

In line with the arbitration rules of many arbitral institutions around the world, the HKIAC Arbitration Rules build in a general waiver of any form of recourse against an award in respect of setting aside, enforcement and execution, to the extent that such waivers can be validly made (Article 35.2 of the HKIAC Arbitration Rules).

Equally, Article 49.9 of the CIETAC Arbitration Rules provides that "Neither party may bring a lawsuit before a court or make a request to any other organization for revision of the award", although Chapter VI of the CIETAC Arbitration Rules that applies to Hong Kong-seated arbitrations does not contain such general waiver of recourse.

The Hong Kong courts have not tested the validity of such contractual waivers, either through incorporating the applicable arbitration rules or through express wording in the arbitration clause. A commonly expressed view of the commentators in Hong Kong is that the contractual waiver of rights of recourse against an award would not be enforceable in Hong Kong.⁴² Although the Hong Kong courts generally uphold the parties' autonomy and freedom to contract, there are public policy reasons to maintain a degree of judicial oversight at least over the fundamental issues pertaining to Hong Kong-seated arbitrations such as validity of the arbitration agreement, jurisdiction of the tribunal, and prohibition of corruption and fraud.

⁴⁰ Section 104, Arbitration Ordinance

⁴¹ Section 67(1)(2) Arbitration Ordinance.

⁴² Annotated Arbitration Ordinances, section 81; A Guide to the HKIAC Arbitration Rules, 11.33.

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

There are no atypical mandatory requirements. An award:⁴³

- (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) a signed copy of the award 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.⁴⁴ It follows that – unless otherwise agreed – an arbitral award is not open to appeal save for an application 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.).⁴⁵

5.4.1 If yes, what are the grounds for appeal?

Where Schedule 2 of the Arbitration Ordinance applies by parties' express agreement⁴⁶, a party may appeal to the Court of First Instance on questions of law arising out of an award with leave of the arbitral tribunal or with the agreement of all the other parties to the arbitral proceedings. The decision of the Court of First Instance may be appealed at Court of Appeal, with the leave of the Court of First Instance or Court of Appeal.

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. 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 (in most cases, this is from the date of the award) accrued.⁴⁷ 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* (the "**Arrangement**") may prohibit simultaneous applications for enforcement in the Chinese Mainland and in Hong Kong.

This Arrangement was supplemented on 27 November 2020 to further align with the spirit of the New York Convention. The Supplemental Arrangement sought to amend the Arrangement by:

- a) expressly including the term "recognition" when referring to enforcement of arbitral awards in the Arrangement for greater certainty (using the word "recognition" for the first time in acknowledgment that enforcement is a two-stage process, as under the New York Convention);
- b) adding an express provision to the existing Arrangement to confirm that courts considering the enforcement of an award may impose post-award interim measures;

⁴³ Section 67, Arbitration Ordinance.

⁴⁴ Section 73, Arbitration Ordinance.

⁴⁵ Section 81, Arbitration Ordinance

⁴⁶ See section 1.1 above.

⁴⁷ Section 4(1)(c), Limitation Ordinance.

- c) aligning the definition of the scope of arbitral awards with the prevalent international approach of “seat of arbitration” under the New York Convention; and
- d) removing the current restriction of the Arrangement to allow parties to make simultaneous application to both the courts of the Mainland and the HKSAR for enforcement of an arbitral award.

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 pay the awarded amount into court) because there were separate proceedings on the Chinese 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 annulment. For example, where the seat’s supervisory court finds that the arbitration agreement was invalid, there may be strong policy considerations for the Hong Kong court not to enforce the award.

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 laws or regulations relating to, or restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction? If so, what is the practical and/or legal impact of such laws, regulations or restrictions?

Third party funding became expressly permitted for arbitration, including proceedings before emergency arbitrators and ancillary court proceedings in Hong Kong, when the amendments to sections 90K-90O of the Arbitration Ordinance came into force on 1 February 2019. To accommodate the legalisation of third-party funding for arbitration, the HKIAC introduced the amendments to the HKIAC Rules on 1 November 2018. The revised HKIAC Rules expressly recognise third party funders and, require a funded party to disclose promptly the existence of a funding agreement, the identity of the funder and any subsequent changes to this information.⁴⁸

Outcome Related Fee Structure (ORFS) for arbitration came into force on 16 December 2022. The reform was introduced by Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Ordinance, which contains amendments to the Arbitration Ordinance (Cap. 609) and Legal Practitioners Ordinance (Cap. 159). Secondary legislation encapsulating more detailed guidance came in the form of Arbitration (Outcome Related Fee Structures for Arbitration) Rules. The Hong Kong Solicitors Guide to Professional Conduct and the Hong Kong Bar Association’s Code of Conduct were also amended to accommodate the ORFS for arbitration regime. The ORFS for arbitration regime in Hong Kong permits conditional fee agreements, damages-based agreements and hybrid damages based agreements.

⁴⁸ HKIAC Rules, Article 44.

Under the Hong Kong regime, ORFS can only be used for arbitrations seated in or outside Hong Kong, and the following proceedings under the Arbitration Ordinance: court proceedings, proceedings before an emergency arbitrator, as well as mediation proceedings. Hong Kong lawyers are still prohibited from entering into ORFS arrangements for other contentious matters.

7. Arbitration and technology

7.1 Is the validity of blockchain-based evidence recognised?

Hong Kong arbitration law affords tribunals and courts broad discretion to admit and give weight to evidence.⁴⁹ It is therefore open to the court and tribunal to give appropriate weight to blockchain-based evidence as it sees fit. Given the relatively new technology, a party seeking to persuade a tribunal or court on the validity of blockchain-based evidence may need to do so with expert evidence.

In a recent case in front of the Hong Kong Court of First Instance, a public bitcoin ledger, an open distributed ledger using blockchain technology, which showed bitcoin transaction records, was admissible at trial and accepted by the High Court as evidence.⁵⁰ In another recent case, the High Court lent help from expert evidence to understand the features of Bitcoin, digital keys, their storage in wallets and how wallets are initialised.⁵¹

7.2 Where an arbitration agreement and/or award is recorded on a blockchain, is it recognised as valid?

We are not aware of Hong Kong court or tribunal decisions expressly deciding this. However, Hong Kong law defines an “arbitration agreement in writing” very broadly.⁵² This requirement 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.

So long as the arbitration agreement is in writing and can be retrieved from the blockchain, that is likely sufficient to meet the formal requirements. For example, in the context of blockchain based credit delegation agreements involving both off-chain legal agreements and on-chain smart contracts,⁵³ it is certainly conceivable that an agreement to arbitrate recorded on-chain can meet the formal requirements under Hong Kong law.

However, where an award is recorded on a blockchain, that position is less clear. This is because an arbitral award must be in writing and signed by the arbitrators and delivered to the parties.⁵⁴ It is unclear whether the fact that an arbitral award recorded on the blockchain and signed by the arbitrators’ private keys are sufficient to meet these formal requirements.

⁴⁹ Section 47 Arbitration Ordinance (incorporating Article 19 of UNCITRAL Model law)

⁵⁰ *Nico Constantijn Antonius Samara v Stive Jean Paul Dan* [2022] HKCFI 1254

⁵¹ *Yan Yu Ying v Leung Wing Hei* [2022] HKCFI 1660

⁵² See paragraph 2.4 above, and section 19 of the Arbitration Ordinance.

⁵³ See, for example, AAVE’s Credit Delegation Agreement which allows for on-chain credit delegation with off-chain recourse <http://lib.openlaw.io/web/aave/template/Master%20Facility%20Agreement%20-%20Credit%20Delegation>

⁵⁴ See paragraph 5.3 above.

7.3 Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?

Where an arbitration agreement only exists on-chain, and the parties' signatures to the arbitration agreement only exist in the form of signed, on-chain, transactions, it is arguable that the blockchain arbitration agreement is the "original" arbitration agreement. However, where there is, in fact, a physical copy of an agreement that was signed, it is unlikely that saving a copy of that agreement on the blockchain would render that the "original".

The same reasoning applies to an award.

7.4 Would a court consider an award that has been electronically signed (by inserting the image of a signature) or more securely digitally signed (by using encrypted electronic keys authenticated by a third-party certificate) as an original for the purposes of recognition and enforcement?

Hong Kong law recognises electronic signatures⁵⁵ so long as the method used to attach the electronic signature is reliable and appropriate for the purpose for which the information contained in the document is communicated. A digital signature supported by a "recognised certificate"⁵⁶ is expressly recognised under the Electronic Transactions Ordinance.⁵⁷

However, for purposes of determining whether an award is an "original",⁵⁸ it remains unclear under Hong Kong law whether a digitally signed award meets the formal requirements. Accordingly, parties and arbitrators should exercise extreme caution when pushing technological boundaries (especially if not necessary, such as where the arbitration is not blockchain-based).

8. 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.⁵⁹

9. Compatibility of the Delos Rules with local arbitration law

The Delos Rules are generally compatible with the Arbitration Ordinance and rules of arbitral institutions in Hong Kong. The Delos Rules provide for additional measures to proactively manage the procedure and control costs that local arbitration law and rules do not (e.g. time-limit set for arbitrators to submit their awards, which neither the HKIAC nor the Arbitration Ordinance does; recommend that disputes under a certain value be settled by a sole arbitrator and setting specific time limits for designation of co-arbitrators from the beginning of the arbitration). Parties in a Hong Kong-seated arbitration are therefore able to agree to the Delos Rules as the procedural rules governing their arbitration.

10. Further reading

- P. Yuen & M. Townsend, Hong Kong Government Reaches Bilateral Arrangement with the Chinese Supreme People's Court Regarding Interim Measures for Arbitration, Hong Kong Lawyer, 5 April

⁵⁵ Section 6 of the Electronic Transactions Ordinance.

⁵⁶ One issued by a certification authority, as described under section 22 of the Electronic Transactions Ordinance.

⁵⁷ Section 6(1A) Electronic Transactions Ordinance.

⁵⁸ Under Section 85 of the Arbitration Ordinance ("Evidence to be produced for enforcement of arbitral awards")

⁵⁹ See, https://www.doj.gov.hk/en/legal_dispute/arbitration.html

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 - P. Yuen, M. Townsend & F. Roday, Mainland Interim Relief In Support Of Hong Kong Arbitration: 5 Practical Points To Note, Hong Kong Lawyer, 31 March 2021, <https://www.hk-lawyer.org/content/mainland-interim-relief-support-hong-kong-arbitration-5-practical-points-note> (last accessed 1 March 2023)
 - John Choong & Romesh J. Weeramantry, The Hong Kong Arbitration Ordinance: Commentary and Annotations (Sweet & Maxwell/Thomson Reuters 2nd ed. 2015).
 - Michael Moser & Chiann Bao, A Guide to the HKIAC Arbitration Rules (Oxford University Press 2nd ed 2021)
 - Johnston, Graeme. The conflict of laws in Hong Kong (Sweet & Maxwell Asia Hong Kong 2005)

ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

Leading national, regional and international arbitral institutions based out of the jurisdiction, <i>i.e.</i> with offices and a case team?	Hong Kong International Arbitration Centre CIETAC Hong Kong Arbitration Centre eBRAM
Main arbitration hearing facilities for in-person hearings?	HKIAC hearing rooms CIETAC Hong Kong hearing rooms eBRAM virtual platform
Main reprographics facilities in reasonable proximity to the above main arbitration hearing facilities?	Small scale printing can be done at the institutions, while larger-scale printing maybe easily outsourced.
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	Local transcription and reporting services include: EPIQ Global
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	Local translation service providers include: EPIQ Global
Other leading arbitral bodies with offices in the jurisdiction?	International Chamber of Commerce Hong Kong Maritime Arbitration Group CIETAC Hong Kong Arbitration Centre