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International Arbitration 2024

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Hong Kong Sar, China: Law and Practice

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HONG KONG SAR, CHINA

Law and Practice

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Latham & Watkins LLP advises global companies, investors, state-owned enterprises, and states facing increasingly complex international disputes. Its International Arbitration Practice excels in resolving high-stakes issues and enforcement actions across borders, corporate structures, commercial contracts, jurisdictions, and treaties. Latham brings deep experience in international commercial arbitration, investment treaty arbitration, multi-jurisdictional disputes, and public international law. Its team has represented clients before all major arbitral institutions, including AAA, HKIAC, ICC, ICSID, LCIA, SIAC and under UNCITRAL rules, as well as in numerous ad hoc proceedings. With a global presence and deep experience, Latham delivers innovative strategies and seamless service, ensuring its clients maximise their chances of success in arbitration and enforcement actions.

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1. General

1.1 Prevalence of Arbitration

Arbitration is a popular mode of alternative dispute resolution in Hong Kong, used increasingly in cross-border commercial disputes and among international parties. In 2023, the Hong Kong International Arbitration Centre (HKIAC) recorded 281 new arbitration cases with a total amount of HKD92.8 billion (approximately USD12.5 billion) in dispute. Hong Kong was ranked as the third most popular arbitral seat worldwide in a 2021 survey by Queen Mary University of London. As one of the top international arbitration hubs, over 80% of administered arbitration submitted to HKIAC in the past three years was international in nature.

Notwithstanding the increasing prevalence of arbitration, litigation remains an important method of resolving commercial disputes. In the commercial context, it is often used in debt recovery, loan and security enforcement, fraud and asset-tracing, and restructuring and insolvency matters. With the increasing popularity of arbitration came a substantial increase in arbitration-related litigation, including applications to enforce and set aside arbitral awards.

1.2 Key Industries

According to the HKIAC's 2023 statistics, HKIAC's caseload comprises of disputes arising from a variety of sectors. The top five sectors include corporate, construction, commercial, maritime and banking and financial services, which together constituted 81.5% of the HKIAC's registered cases in 2023. Arbitration continues to be the most commonly used method of dispute resolution in the construction and shipping industries in Hong Kong, as an arbitration clause is a common feature of contracts in these industries. Commercial parties and private equity firms have also become more inclined to use international arbitration to resolve disputes, given various factors including the confidential nature and efficiency of the proceedings, as well as the growing incidence of cross-border M&A and other transactions, which increasingly tend to favour arbitration over domestic litigation. This accounts for the sustained uptick in international arbitration activity in Hong Kong, being one of Asia's leading international business and capital-raising centres.

1.3 Arbitration Institutions

The most commonly used institution for international arbitration in Hong Kong is the HKIAC. Other arbitral institutions which routinely administer Hong Kong-seated arbitrations include the International Chamber of Commerce (ICC), China International Economic and Trade Arbitration Commission (CIETAC), China Maritime Arbitration Commission (CMAC), South China International Arbitration Centre (SCIAHK) and AALCO Hong Kong Regional Arbitration Centre (AALCO-HKRAC).

1.4 National Courts

While Hong Kong does not have a standalone arbitration court per se, the Court of First Instance of the High Court (CFI) maintains a specialist list, the Construction and Arbitration List, which handles applications relating to arbitration made under the Arbitration Ordinance (Cap. 609) (AO) and Order 73 of the Rules of the High Court (Cap. 4A) (RHC). Arbitration-related claims are heard by a group of specialist judges presiding over the Construction and Arbitration List. Standard directions and practices set out in Practice Direction 6.1 are adopted in these proceedings.

2. Governing Legislation

2.1 Governing Law

International arbitrations in Hong Kong are governed by the AO, which largely applies the UNCITRAL Model Law (the "Model Law"), save for certain modifications and additions set out in the AO.

Some of the more significant differences from the Model Law include:

- Provisions relating to confidentiality and emergency arbitrators in Schedule 2 of the AO, which are not found in the Model Law.
- Provisions for promoting efficiency of arbitral proceedings: under Section 46 of the AO, parties are given a reasonable opportunity to be heard, as opposed to a full opportunity under the Model Law. Section 46 of the AO further empowers arbitrators to "use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate".
- Availability of peremptory orders: if a party fails to comply with any order or direction without sufficient cause, Section 53 of the AO vests tribunals with the power to issue peremptory orders in addition to the default provisions in Article 25 of the Model Law.
- Default number of arbitrators: the AO does not provide for a default number of arbitrators, unlike Article 10(2) of the Model Law. Instead, the parties are at liberty to determine the number of arbitrators. If no prior agreement as to the number of arbitrators exists, this issue would be determined by the HKIAC.
- Enforcement of awards: Sections 84–98D of the AO set out more prescriptive enforcement provisions as compared to Articles 35 and 36 of the Model Law, which address awards from the People's Republic of China (PRC), Macau, countries which are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"), as well as awards that do not fall into these categories.
- Limitation of arbitrator liability: the AO contains provisions that limit the liability of arbitral tribunals and related parties, which is not dealt with in the Model Law.

2.2 Changes to National Law

The arbitration law in Hong Kong has not changed significantly in the past year.

The most recent key development in Hong Kong is the introduction of a new regime permitting outcome-related fee structures (ORFS) in arbitration and arbitration-related court proceedings, which came into force on 16 December 2022.

Under the new regime, legal practitioners are allowed to enter into ORFSs (including conditional fee agreements, damages-based agreements and hybrid damages-based agreements) with clients in arbitration and arbitration-related court proceedings.

3. The Arbitration Agreement

3.1 Enforceability

Consistent with the definition of an arbitration agreement in the Model Law, Section 19 of the AO defines an arbitration agreement as "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".

An arbitration agreement can take the form of an arbitration clause in a contract or as a separate agreement, and must be in writing. Where an arbitration clause is used, it must be drafted using sufficiently clear, certain and identifiable terms, avoiding any internal inconsistencies (for example, also stating that the parties agree to submit to the exclusive jurisdiction of a domestic court) or to a non-existent arbitral institution. The requirement that an arbitration be in writing is satisfied if it is recorded in any form, communicated electronically, contained in exchange of statements of claim and defence in which its existence is not denied, or by reference to a written form of arbitration clause.

Other than that, there are no further requirements under Hong Kong law as to the contents of the arbitration agreement.

3.2 Arbitrability

In general, certain matters involving public interest elements or which affect the rights of third parties are not arbitrable. Examples of subject matters which are non-arbitrable include: personal bankruptcy or corporate insolvency, marriage and divorce, competition and antitrust, criminal charges and matters reserved for resolution by government agencies such as taxation, immigration and social welfare entitlements.

On the other hand, as clarified in an amendment to the Arbitration Ordinance in 2017, the arbitration of disputes relating to intellectual property rights will not be contrary to the public policy of Hong Kong.

Whether a dispute is arbitrable is a different question to whether an arbitral tribunal may award a relief that is sought. Thus, in Quiksilver Greater China Ltd v Quiksilver Glorious Sun Jv Ltd & Another [2014] HKCU 1750, while it was held that the tribunal could not order a winding-up of the company, it could decide the underlying basis on which a joint venture was to end and the decision could be used as the basis for a winding-up petition on just and equitable grounds in court. The same approach was adopted in a more recent case, Falcon Insurance Company (Hong Kong) Limited v Bing Lee Crane-Lorry Transportation Co, Limited And Another [2023] HKCU 1899.

3.3 National Courts' Approach

The relevant principles for determining the law governing the arbitration agreement were set out by the CFI in Klöckner Pentaplast Gmbh & Co Kg v Advance Technology (HK) Company Limited [2011] HKCU 1340 ("Klöckner"): if there is an express choice of law to govern the arbitration agreement, that choice will be effective, irrespective of the law applicable to the contract as a whole. If there is an express choice of law to govern the contract as a whole, the arbitration agreement will also normally be governed by that law (regardless of whether or not the seat of the arbitration is stipulated, and irrespective of the place of the seat).

The same approach has been adopted in the context of dispute resolution clauses more generally in China Railway (Hong Kong) Holdings Limited v Chung Kin Holdings Company Limited [2023] HKCFI 132, in which the Hong Kong court endorsed the approach by the English Supreme Court (Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb (2020) UKSC 38), and held that "generally an express choice of law clause applicable to the main contract will also apply to the [dispute resolution] clause".

The Hong Kong court adopts a pro-arbitration approach towards the enforcement of arbitration agreements, which is also underscored by

the decision in Klöckner. In Klöckner, the court held that "an arbitration clause should be construed in accordance with the presumption that the parties intended any dispute arising out of the relationship into which they had entered or purported to enter to be decided by the same tribunal, unless the language made it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction".

3.4 Validity

Section 34 of the AO (which incorporates Article 16 of the Model Law) recognises the principle of separability, which means that the arbitration agreement is considered to be separate from the underlying or substantive agreement between the parties in which it is found. Relevantly, it states that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract".

4. The Arbitral Tribunal

4.1 Limits on Selection

Sections 23 and 24 of the AO (which incorporate Article 10 and 11 of the Model Law) provide that parties have the freedom to determine the number of arbitrators, which includes "the right of the parties to authorise a third party, including an institution, to make that determination". The parties are also free to agree on a procedure of appointing the arbitrator or arbitrators.

With regards to who can be appointed as an arbitrator, the law does not impose eligibility requirements on behalf of the parties. The only requirements are those specified in the arbitration agreement as decided by the parties, if any. If, however, existing circumstances give rise to justifiable doubts as to an arbitrator's impartiality or independence, or if they do not possess the qualifications agreed to by the parties, the arbitrator may be challenged under Section 25 of the AO (which incorporates Article 12 of the Model Law).

4.2 Default Procedures

In the absence of the parties' agreement on the procedure for appointing arbitrator(s), Section 24 of the AO (which incorporates Article 11 of the Model Law) contains a default appointment procedure.

- In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two party-appointed arbitrators shall appoint the third arbitrator.
- In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, upon the request of a party, the arbitrator shall be appointed by the HKIAC.

Consistent with the above:

- for arbitrations with an even number of arbitrators, where the parties have not agreed on an appointment procedure, each party is to appoint the same number of arbitrators; and
- for arbitrations with an odd number of arbitrators greater than three, where the parties have not agreed on an appointment procedure, each party shall appoint the same number of arbitrators and the HKIAC must appoint the remaining arbitrators.

In any case, where a party fails to perform as agreed under an appointment procedure or within 30 days of receipt of a request from the other party to appoint an arbitrator or arbitrators, then the HKIAC must make the necessary appointment upon a request to do so from any party.

Similarly, where the parties' agreed appointment procedure fails, the HKIAC has the authority under the AO to appoint arbitrators as needed.

4.3 Court Intervention

Section 12 of the AO (which incorporates Article 5 of the Model Law) provides that the court's role in the arbitration process shall be limited, though there are exceptions to this approach. Such exceptions include rulings on challenges in the appointment process and extensions of time to commence arbitration in cases where an arbitral tribunal has yet to be appointed, which is elaborated upon in Sections 26 and 58 of the AO, respectively.

4.4 Challenge and Removal of Arbitrators

Section 25(2) of the AO (which incorporates Article 12 of the Model Law) states that an arbitrator may only be challenged in one of two scenarios: (i) if existing circumstances give rise to justifiable doubts as to his impartiality or independence; or (ii) if he does not possess qualifications agreed to by the parties. An arbitrator may only be challenged for reasons of which the challenging party becomes aware after the appointment has been made.

According to the challenge procedure in Article 13 of the Model Law, incorporated in Section 26 of the AO, the parties are free to agree on a procedure for challenging an arbitrator. If there is no such agreement, then:

- a party intending to challenge shall send a written statement of the reasons for the challenge to the arbitral tribunal within 15 days of becoming aware of the circumstances which led to the challenge;
- the arbitral tribunal would then decide on the challenge, except where the challenged arbitrator withdraws from their office or the other party to the arbitration also agrees to the challenge; and
- in case the challenge is unsuccessful, the challenging party may request the court to decide on the challenge. The party would have to issue such a request within 30 days of receiving notice of the decision to reject the challenge, and the court's decision would not be subject to appeal.

It is important to note that, while awaiting the court's decision, the challenged arbitrator may continue with arbitral proceedings and make an award.

4.5 Arbitrator Requirements

Section 25 of the AO (which incorporates Article 12 of the Model Law) provides that an arbitrator shall disclose, without delay, "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence" not only when they are approached in connection with their possible appointment as an arbitrator, but also throughout the arbitral proceedings. The arbitrator may be challenged if such circumstances arise and there are justifiable doubts to their impartiality (or if they do not possess the qualifications agreed upon by the parties).

5. Jurisdiction

5.1 Matters Excluded From Arbitration

There are some matters that cannot be arbitrated, even if the parties agree to arbitrate the issue. The New York Convention provides for this, noting that the matter to be arbitrated must be capable of settlement by arbitration (Article 11(1)). Accordingly, Section 81 of the AO states that an award may be set aside if "the subject-matter of the dispute is not capable of settlement by arbitration".

With regards to which matters cannot be arbitrated, arbitration is considered to be widely available in Hong Kong, especially in the context of commercial disputes.

That said, Section 3 of the AO states that the parties' freedom to arbitrate certain issues is "subject to the observance of the safeguards that are necessary in the public interest". This brings about a degree of uncertainty associated to the arbitrability of certain issues. See **3.2 Arbitrability**. Some cases have provided persuasive authority on this point. For example, in Fulham Football Club (1987) Ltd v Richards [2012] EWCA Civ 855, the English Court of Appeal underscored the importance of considering whether the dispute engages third-party rights or involves public interest matters that cannot be settled within the bounds of a private contractual process. Generally speaking, criminal law, family law and certain administrative law matters are considered among those that are non-arbitrable.

5.2 Challenges to Jurisdiction

The principle of competence-competence is applicable in Hong Kong. The arbitral tribunal can rule on its own jurisdiction, including any challenges regarding the existence or validity of an arbitration agreement and decisions as to whether the tribunal is properly constituted or what matters have been submitted to arbitration in accordance with the agreement, as stated in Section 34 of the AO (which incorporates Article 16 of the Model Law).

5.3 Circumstances for Court Intervention

Hong Kong has long upheld its policy of supporting arbitration agreements and awards. As such, the courts tend to exercise judicial restraint and minimise their intervention, setting aside awards only on rare occasions.

As a starting point, therefore, under Section 34(4) of the AO (incorporating Article 16 of the Model Law), a ruling of the arbitral tribunal that it does not have jurisdiction to decide a dispute is not subject to appeal. If such negative ruling is rendered by the arbitral tribunal, the court must, if it has jurisdiction, decide on that dispute (Section 34(5) of the AO).

Subject to the above, under Section 81 of the AO (incorporating Article 34 of the Model Law), the court may set aside an arbitral award if:

- the party making the application provides evidence that:
  - (a) a party to the arbitration agreement was under some incapacity or said the agreement is not valid under the law to which the parties have subjected it;
  - (b) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or is otherwise unable to present their case;
  - (c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or
  - (d) the composition of the arbitral tribunal or procedure was not in accordance with the agreement of the parties; or
- the court finds that:
  - (a) the subject matter is not capable of settlement by arbitration under the law of Hong Kong; or
  - (b) the award is in conflict with the public policy of Hong Kong.

In any case, the limitations in Section 81 of the AO do not affect:

- the power of the court to set aside an arbitral award under Section 26;
- the right to challenge an arbitral award under Section 4 of Schedule 2 (if applicable); or
- the right to appeal against an arbitral award on a question of law under Section 5 of Schedule 2 (if applicable).

In the case of Pacific China Holdings Ltd (in liquidation) v Grand Pacific Holdings Ltd [2012] 4 HKLRD 576, the Hong Kong Court of Appeal held that, in an application to set aside an arbitral award, the court is concerned with the procedural fairness of the arbitration. For an arbitral award to be set aside, it must be shown that the arbitral tribunal's conduct was of a "serious, even egregious" nature, such that it could be said that a party has been denied due process. The court will not review the substantive merits of the dispute or the correctness of the arbitral award, whether concerning errors of fact or law. (In this case, leave to appeal to the Court of Final Appeal in an attempt to re-instate the arbitral award was refused.)

Even if procedural irregularities are identified, the court retains a residual discretion to refuse to set aside the award based on the circumstances of the case, such as where the procedural irregularity does not affect the "structural integrity" of the arbitration proceedings (China Property Development (Holdings) Ltd v Mandecly Ltd [2016] HKEC 1151).

5.4 Timing of Challenge

Section 34 of the AO (which incorporates Article 16 of the Model Law) states that challenges against the jurisdiction of the arbitral tribunal "shall be raised not later than the submission of the statement of defence", though late challenge may be admitted if the delay is considered justifiable. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, a party may request a court to decide the matter within 30 days after having received notice of that ruling.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

Questions of jurisdiction are subject to review by the court on a de novo basis. As in S Co v B Co [2014] HKCFI 1436, the court should therefore be satisfied that the arbitral tribunal indeed had jurisdiction. In R v A, B and C [2023] HKCFI 2034, it was affirmed that the court is entitled take into consideration any new evidence and arguments from the parties – even if these could have been introduced before the tribunal and had not been – while conducting a de novo review.

5.6 Breach of Arbitration Agreement

Under an arbitration agreement, a breach of contract would occur if a party were to commence litigation or bring proceedings in a forum other than the contractually agreed arbitral forum. A party alleging such breach is entitled to have the arbitration agreement enforced, and the court would ordinarily grant an injunction to restrain the pursuit of foreign proceedings brought in breach of an agreement for Hong Kong arbitration, unless there are strong reasons to the contrary (such as the party applying for the injunction failing to "come with clean hands" – eg, dishonest conduct). Applying this principle, in Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi [2015] 3 HKC 246, the Court of First Instance granted an anti-suit injunction against a party seeking to commence court proceedings in Turkey in breach of an arbitration clause under which the parties agreed to refer their disputes to "arbitration in Hong Kong in accordance with the Hong Kong Arbitration Ordinance".

Furthermore, if the subject matter of proceedings brought before the Hong Kong court falls within the scope of a valid arbitration agreement (providing for Hong Kong as the seat of arbitration), the Hong Kong courts are obliged to stay their proceedings under Section 20 of the AO (which incorporates Article 8 of the Model Law). More specifically, in determining whether a stay should be granted under Section 20 in favour of arbitration, the court will consider four questions.

- Is the clause in question an arbitration agreement?
- Is the arbitration agreement null and void, inoperative or incapable of being performed?
- Is there dispute or difference between the parties in reality?
- Does the dispute or difference between the parties fall within the ambit of the arbitration agreement?

In LS v FL [2022] HKCFI 1050, the court noted that, in applying the four-step test above, the applicant will need to prove a "prima facie or plainly arguable case" that the parties are bound by an arbitration clause which extends to the dispute in the subject matter of the action sought to be stayed. Unless the point is clear otherwise, the action will be stayed for the arbitral tribunal to decide whether it has jurisdiction over the dispute. In this case, the court found that the relevant agreement did not contain an arbitration clause as it was an oral agreement. Under Section 19 of the AO, an arbitration agreement must be made in writing. As the emails evidencing the oral agreement did not contain an arbitration agreement nor refer to any other written document containing an arbitration clause, the court found that there was no arbitration clause incorporated in the agreement between the parties.

Nevertheless, the case must still be supported by cogent and not dubious or fanciful evidence. In the case of A v C [2023] HKCFI 804, the reference to conditions in the main contract contained in documents identified in the sub-contract was sufficiently cogent evidence in favour of incorporating the arbitration clause contained in the main contract to the sub-contract. As such, the court proceedings were stayed in favour of arbitration.

Where the arbitration agreement mandates the parties to refer "any dispute" to arbitration, until all disputed matters under the underlying agreement are duly resolved, the arbitration agreement will remain operative even if the relationship that gave rise to the underlying agreement has discontinued. The fact that one dispute has already been referred to arbitration does not "discharge" the parties from their duty to resolve any other dispute falling within the ambit of the arbitration agreement by way of arbitration (T v TS [2014] 4 HKLRD 722).

5.7 Jurisdiction Over Third Parties

Hong Kong law recognises arbitration as a private, consensual process. The result is the inability to compel joinder of parties or consolidation of proceedings, other than by consent (Parakou Shipping Pte Limited v Jinhui Shipping And Transportation Limited & Ors [2010] HKCU 2096).

That said, under Section 12 of the Contracts (Rights of Third Parties) Ordinance (Cap. 623), a third party may be treated as a party to the arbitration agreement for the enforcement of an award, though this may be contracted out of when the parties enter an agreement. This would apply to foreign and domestic third parties if the agreement is governed by Hong Kong law.

6. Preliminary and Interim Relief

6.1 Types of Relief

Under Section 35 of the AO (which gives effect to Article 17 of the Model Law), an arbitral tribunal may grant interim measures at the request of a party. Generally, the party requesting an interim measure must satisfy the tribunal that (i) harm which cannot be adequately reparable by an award of damages would likely result if the measure is not ordered, and such harm outweighs the harm that is likely to result to the party against who the measure is directed (if granted); and (ii) there is a reasonable possibility that the requesting party will succeed on the merits of the case. Interim orders and directions made under Section 35 of the AO may be enforced in the same manner as an order or direction of the court, but only with leave of the court.

Interim measures include any temporary measure in the form of an award or another for the purposes of, inter alia, maintaining or restoring the status quo, taking actions to prevent current or imminent harm, preserving assets for the execution of the arbitral award and preserving dispute-related evidence (Section 35 of the AO).

6.2 Role of Courts

Pursuant to Section 21 of the AO, which incorporates Article 9 of the Model Law, the court has the power to grant interim measures, and the court will usually do so in emergency situations such as to restrain the destruction of documents or dissipation of assets. Meanwhile, the requirements concerning court-ordered interim measures are specifically illustrated in Section 45 of the AO, although Article 17J of the Model Law (empowering the courts to issue interim measures in relation to arbitration proceedings) is not directly applicable in Hong Kong. The court is empowered to grant interim measures, irrespective of whether the arbitral tribunal has exercised similar powers regarding the same dispute (Sections 45(2) and 45(3) of the AO).

Under Section 45(5) of the AO, with respect to the arbitral proceedings commenced in foreign jurisdictions, the court may grant an interim measure only if the following two conditions are satisfied: (i) the arbitral proceedings are capable of giving rise to an arbitral award (whether interim or final) that may be enforced in Hong Kong; and (ii) the interim measure falls under a type or description of interim measure that may be granted in Hong Kong in relation to arbitral proceedings by the court.

An emergency arbitrator mechanism is available in Hong Kong. Section 22A of the AO defines “emergency arbitrator” as an individual who deals with the parties’ applications regarding emergency relief (eg, interim measures) prior to the formation of an arbitral tribunal. Specifically, a detailed Emergency Arbitrator Procedure is set out in Schedule 4 of the 2024 HKIAC Administered Arbitration Rules (the “2024 HKIAC Rules”).

Decisions rendered by emergency arbitrators are binding on the parties (subject to the circumstances laid out in Section 18 of Schedule 4 of the 2024 HKIAC Rules) and shall have the same effect as an interim measure granted under Article 23 of the 2024 HKIAC Rules (Section 17, Schedule 4 of the 2024 HKIAC Rules). Emergency arbitrators generally have a wider discretion than the courts in respect of the type of relief they may order, although courts may be the more appropriate forum than an emergency arbitrator (and arbitration generally) when seeking relief against a third party or on an ex parte basis (eg, Mareva injunctions). Moreover, the emergency arbitrator’s award, by its very nature,

is temporary pending the final award from the tribunal.

With regards to the enforcement of the emergency relief granted by the emergency arbitrator, Section 22B of the AO provides that only upon leave of the court can the emergency relief granted become enforceable in the same manner as an order of the court to the same effect, regardless of whether the emergency relief is granted by an emergency arbitrator within Hong Kong or overseas.

6.3 Security for Costs

Section 56(1) of the AO provides that an arbitral tribunal may order a claimant to give security for costs of the arbitration. Such an order can be enforced with the leave of the court.

Contrastingly, the power of the court to order security for costs is limited to applications or appeals against arbitral awards (where the opt-in provisions of Section 7 of Schedule 2 to the AO apply).

7. Procedure

7.1 Governing Rules

Arbitrations seated in Hong Kong are governed by the AO, which provides the fundamental legal framework for arbitration in Hong Kong. The detailed arbitration procedure is governed by the arbitration rules chosen by the parties (if any).

Please refer to the Hong Kong Arbitration FAQs, section on Procedural Laws and Rules (ie, 25–30) at this website.

7.2 Procedural Steps

There are no fixed procedures for arbitration proceedings required by law. The parties are free to choose their preferred arbitration rules to govern the arbitration procedure, which are usually stated in the arbitration agreement. If or to the extent that the parties have made no such agreement, the arbitral tribunal may, subject to the provisions of the AO, conduct the arbitration in the manner that it considers appropriate (Section 47 of the AO).

7.3 Powers and Duties of Arbitrators

When conducting arbitration proceedings or exercising any of the powers conferred on an arbitral tribunal by the AO, the tribunal must (i) treat parties with equality; (ii) act fairly and impartially and give them a reasonable opportunity to present their cases and deal with the cases of their opponent; and (iii) use procedures that are appropriate to the particular case and 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 AO).

7.4 Legal Representatives

Legal representatives appearing in Hong Kong-seated arbitrations do not need to meet any particular qualifications or requirements. Typically, advocates in Hong Kong-seated arbitrations will be qualified to practise in a jurisdiction which is the governing law of the underlying dispute, but this is not a requirement nor a certainty in all cases.

8. Evidence

8.1 Collection and Submission of Evidence

As part of the general powers exercisable by an arbitral tribunal under Section 56 of the AO, a tribunal can direct the discovery of documents or the delivery of interrogatories or evidence to

be given by affidavit. Unless otherwise agreed by the parties, the tribunal may examine witnesses and parties on oath or affirmation, or direct the attendance before the tribunal of witnesses in order to give evidence or produce other evidence. No rules or requirements under the AO pertain to the approach to how evidence is collected, submitted and/or tested.

8.2 Rules of Evidence

As specified in Section 47(3) of the AO (which incorporates Article 19 of the Model Law), an arbitral tribunal is not bound by the rules of evidence in arbitration proceedings in Hong Kong. The arbitral tribunal may receive any evidence it considers relevant to the proceedings and give proper weight to it.

8.3 Powers of Compulsion

Under Section 55(1) of the AO (which incorporates Article 27 of the Model Law), the court may assist in taking evidence in arbitral proceedings within its competence and in accordance with the relevant rules. Specifically, Section 55(2) of the AO empowers the court to order a person to attend proceedings before an arbitral tribunal to give evidence or to produce documents or other evidence. The court may exercise such power, irrespective of whether the arbitral tribunal has exercised similar powers (Section 55(3) of the AO).

9. Confidentiality

9.1 Extent of Confidentiality

In Hong Kong, a statutory obligation of confidentiality applies under the AO. Sections 16 and 17 of the AO mandate the confidentiality of both arbitral proceedings in Hong Kong and arbitration-related court proceedings. Section 18 further states that "unless otherwise agreed by the parties", the publication, disclosure or communication of any information relating to arbitration proceedings and awards made in the proceedings is strictly prohibited.

Nonetheless, certain exceptions may apply. In addition to the agreements of both parties, Section 18(2) of the AO permits the disclosure of confidential arbitration-related information under the following circumstances: (i) in legal proceedings before a court for the protection of the disclosing party's legal right or interest, or the enforcement of the award; (ii) under the legal obligation to publish, disclose or communicate to a government body, regulatory body, court or tribunal; and (iii) made to a professional or any other adviser of either party.

Specifically, listed companies on the Hong Kong Stock Exchange (HKSE) are required to disclose "inside information" to the public as soon as reasonably practicable, in accordance with Part XIVA of the Securities and Futures Ordinance (Cap. 571) and Rule 13.09 of the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited (the "Listing Rules"). This would include the commencement or existence of arbitration proceedings involving the relevant listed company, as an exception to Section 18(2) of the AO.

Some of the useful resources include the following.

- Arbitration in Hong Kong A Practical Guide, Fifth Edition, 2022, Chapter 1–7. Confidentiality.
- HKIAC Administered Arbitration 50 Questions & Answers.
- Kluwer Arbitration Blog.
- Are Arbitrations Private & Confidential in Hong Kong?

- How Confidential Are Arbitration Proceedings?

10. The Award

10.1 Legal Requirements

The required form and content for an arbitral award is set out in Section 67 of the AO (giving effect to Article 31 of the Model Law). The award shall:

- be made in writing;
- be signed by the arbitrator(s);
- state the reason upon which it is based (unless parties have agreed otherwise); and
- state the date and place of arbitration as determined in accordance with Article 20(1) of the Model Law.

In cases with more than one arbitrator, the signature of the majority of the arbitral tribunal is sufficient so long as the reason for any omitted signature is stated (Section 65 of the AO, giving effect to Article 29 of the Model Law).

Regarding time limits on delivery of the award, the tribunal is not subject to a time limit unless otherwise agreed upon by the parties. Nevertheless, even where the arbitration agreement imposes a time limit, the tribunal may extend the time limit. This extension of time limit can be granted regardless of whether the time has elapsed (Section 72 of the AO).

10.2 Types of Remedies

An arbitral tribunal is able to award any remedy or relief that could have been ordered by the court as if the dispute had been "the subject of civil proceedings in the Court" (Section 70(1) of the AO), and includes an order for specific performance (Section 70(2) of the AO). A tribunal is also able to grant interim measures (including injunctions) in the form of an award (Section 35 of the AO).

However, an arbitral tribunal's power as to relief is limited where the underlying contract relates to land or any interests in land (Section 70(2) of the AO) or when the types of remedies and relief are prescribed through agreement between the parties.

10.3 Recovering Interest and Legal Costs

Parties seeking to recover legal costs will typically see Hong Kong tribunals follow a "costs follow the event" approach, though there is no universal practice. Tribunals reserve the discretion to allocate the costs of arbitration as they see fit and may direct their award "to whom and by whom and in what manner the costs [of the arbitration proceedings] are to be paid" (Section 74(2) of the AO). The costs, however, must be "reasonable in all the circumstances" (Section 74(7)(a) of the AO).

Tribunal discretion is limited where the arbitration agreement provides that parties must pay their own legal costs. This limitation, however, does not apply where the dispute arose prior to the creation of the arbitration agreement (Sections 64(8) and 74(9) of the AO). A tribunal also has the power to require a claimant to give security for the cost of the arbitration, though this order cannot be made on the sole basis that the claimant is a foreign national or entity (Section 56(1) of the AO).

The details of remuneration and other associated costs are not regulated under Hong Kong law. For institutional arbitration, the institutional rules or fee schedule will be used to calculate or apportion the costs of the arbitration. The 2024

HKIAC Rules, for example, contain references to factors such as the relative success of the parties, the scale and complexity of the dispute, the conduct of the parties and any third-party arrangements when apportioning costs.

Tribunal discretion is also limited in cases where a party has entered into an outcome-based fee structure with its lawyers, as the tribunal cannot award costs to that party in excess of the amount that would have been awarded if no such agreement had been made (Section 98ZU of the AO). This applies unless there are exceptional circumstances.

An arbitral tribunal may "award simple or compound interest from the dates, at the rates, and with the rests that the tribunal considers appropriate" unless otherwise agreed by the parties (Section 79(1) of the AO). The interest is payable on money awarded by an arbitral tribunal from the date of the judgment rate, except when the award provides otherwise (Section 80 of the AO).

11. Review of an Award

11.1 Grounds for Appeal

Parties are not ordinarily entitled to "appeal" an arbitral award. Instead, the typical mode of challenge would be an application to set aside the award, with the permitted grounds for setting aside an arbitral award set out in Section 81 of the AO (please refer to **5.3 Circumstances for Court Intervention**).

An application to set aside an arbitral award must be made to the High Court within three months of receipt of the award through originating summons with a supporting affidavit (Section 81(3) of the AO and Order 73 of the RHC).

Though an award rendered in Hong Kong cannot ordinarily be appealed on the grounds of errors of fact of law (Section 81(3) of the AO), if parties would like to challenge an award on a question of law arising out of an award or on the ground of serious irregularity affecting the tribunal, they must expressly opt into the relevant provisions within Section 99 and Schedule 2 of the AO. These provisions enable, and set out the procedure for, a party to appeal on a question of fact or law either with the agreement of all the other parties to the arbitral proceedings, or with the leave of the court. Such an appeal cannot be brought unless the party seeking to appeal has first exhausted all means of challenge, including recourse under Section 69 of the AO (incorporating Article 33 of the UNCITRAL Model Law) and any available arbitral process of appeal or review.

Parties seeking to appeal an arbitral award on a question of law must first exhaust the recourse available under Sections 6 and 7 of Schedule 2 of the AO within the relevant time limit and obtain leave from the court within 30 days of the award being delivered (Order 73, Rule 5 of the RHC).

Subject to the above, recourse may generally be sought only by applying to the CFI for an order setting aside the award under one of the grounds set out in Section 81(1) of the AO. This provision incorporates Article 34 of the Model Law, which permits the court to set aside an award if a party was "unable to present" its case.

However, the exception in Section 81(1) of the AO only applies to awards that finally dispose of substantive issues, and not to interim orders made pursuant to the procedural discretion of the arbitral tribunal, which the court generally cannot and will not interfere with (G v N [2024] HKCFI 721). This is due to the interim order not

being a final award but an anti-suit injunction granted as an interim measure to Section 35 (giving effect to Article 17 of the Model Law).

Apart from Section 81(1) of the AO, an award may also be set aside where there has been a successful challenge to the validity of the arbitration agreement, the terms or scope of the submissions to arbitration, the application of the arbitral procedures to the parties' agreement or Hong Kong law or where the award conflicts with Hong Kong's public policy.

11.2 Excluding/Expanding the Scope of Appeal

Parties can agree to exclude certain grounds for setting aside an arbitral award as permitted by the AO. Parties, however, cannot exclude all grounds for challenge, especially those related to fundamental principles such as public policy.

Regarding the expansion of appeal of challenges, per Section 5 of Schedule 2 of the AO, parties can agree to allow an appeal to the court on questions of law arising out of an arbitral award. This, however, is an opt-in provision that parties need to expressly agree to in order to give effect to it. Opting into this provision allows for a limited expansion of the scope of judicial review, though the review remains limited to the questions of law rather than factual findings or merits of the case.

11.3 Standard of Judicial Review

In Hong Kong, the standard of judicial review of the merits of an international arbitration award is generally deferential. The courts in Hong Kong adopt a pro-arbitration stance, meaning they are reluctant to interfere with the decisions of arbitral tribunals.

The courts do not review the merits of the case de novo – they do not re-evaluate the evidence or re-assess the factual findings or legal conclusions of the arbitral tribunal. Instead, the review is deferential, focusing on whether the arbitration process was conducted fairly and in accordance with the agreed-upon rules and applicable laws.

12. Enforcement of an Award

12.1 New York Convention

While Hong Kong itself is not a signatory to the New York Convention, it enjoys New York Convention status as a Special Administrative Region of the PRC.

As such, Hong Kong is a New York Convention territory which bases its framework on the recognition and enforcement of arbitral awards (Part 10 of the AO) on the New York Convention. Generally, the courts are required to apply the standards under the New York Convention when it comes to the enforcement or the setting aside of an award (Sections 84, 87, 92 and 98A of the AO).

However, post-resumption of PRC sovereignty in 1997, Hong Kong is subject to the same reservations to the New York Convention as applied to the PRC – reciprocity and commercial reservations. As such, Hong Kong will only recognise and enforce arbitral awards arising from commercial disputes seated in member states which are signatories to the New York Convention.

The enforcement of PRC awards in Hong Kong and Hong Kong awards in the PRC is not governed by the New York Convention, as such awards are not considered to be "made in the territory of a State other than the State where the recognition and enforcement of such awards

are sought". Instead, the enforcement of PRC awards in Hong Kong and Hong Kong awards in the PRC are governed by the Arrangement Concerning Mutual Enforcements of Arbitral Awards between mainland China and Hong Kong SAR.

12.2 Enforcement Procedure

Enforcement of an award must be brought within six years from the date on which the cause of action accrued (Section 4(1)(c) of the Limitation Ordinance (Cap. 347)).

To enforce an award, the successful party must make an application supported by an affidavit which includes (Order 73, Rule 10(1) and (3) of the RHC):

- the name and usual/last known location of abode or business of the debtor and the applicant, respectively; and
- the fact that the award has not been complied with or the extent to which it has not been complied with as at the date of the application.

An affidavit filed by the enforcing party must exhibit the following:

- a duly authenticated original award (or a "duly certified copy", per the definition held in New Technology Import and Export Corp Jiangmen Branch v Chiu Shing [1991] 2 HKC 460);
- the original arbitration agreement (or a duly certified copy); and
- a translation of the documents certified by an official or sworn translator or by a diplomatic or consular agent if the award or agreement is not in either or both traditional Chinese and English.

Subject to compliance with the procedural requirements detailed in the AO and the RHC, the courts will grant an application to enforce an award unless there are grounds for doubting the validity of the award (Standard Civil Engineering Co v Attorney General [1986] HKLR 1142). The court may alternatively direct that an inter partes summons be issued after considering the ex parte application (Order 73, Rule 10(1) of the RHC).

Once the order for leave has been granted and served on the unsuccessful party, they have the standard 14 days (or longer, per the discretion of the CFI) to apply to set aside the order.

The award cannot be enforced until the stipulated period for the unsuccessful party to apply to set aside the enforcement order expires. Where the unsuccessful party applies within the period allocated to set aside the order, the award is unable to be enforced until after the application in question has been finally determined (Order 73, Rule 10(6) of the RHC).

Therefore, if a party fails to obtain leave to enforce an award (whether rendered in or outside Hong Kong) under Section 84 of the AO, a party can still enforce the award under common law by bringing an action on the award (Sections 87(1)(a), 92(1)(a) and 98A(1)(a) of the AO). In a common law enforcement action on a arbitral award, the enforcing court has the power to grant relief that is wider than that found within the original award.

In regard to foreign state immunity and PRC crown immunity, states/state entities (such as government departments) may be entitled to immunity from both the jurisdiction of Hong Kong courts and the enforcement and execution against their assets located in Hong Kong. However, state-owned enterprises that carry out commercial rather than sovereign activities will

generally be unable to claim immunity (foreign state and PRC crown).

Arbitrations seated in Hong Kong are typically unaffected by foreign state or PRC crown immunity because it does not involve the exercise of sovereign jurisdiction by a national court over a sovereign state. This is not to say that foreign state or PRC crown immunity is irrelevant to arbitrations seated in Hong Kong as it remains directly relevant to the enforcement and execution in Hong Kong of awards against states, regardless of whether it is rendered in Hong Kong or elsewhere.

12.3 Approach of the Courts

Hong Kong courts typically seek to uphold a party's right to prompt recognition and enforcement of arbitral awards, understanding that delay can prejudice a successful party's interest (Baosteel Engineering & Technology Group Co Ltd v China Zenith Chemical Group Ltd [2019] HKCFI 68).

Section 81 of the AO (incorporating Article 34 of the Model Law subject to Section 13(5) of the AO) lists several scenarios where an arbitral award may be set aside by the court, including where the court finds that the award is in conflict with Hong Kong public policy. This could include cases where the relevant agreement was "tainted by illegality" and was a sham arrangement to disguise what were in fact loans (Z v Y [2018] HKCFI 2342) or where the arbitrator failed to give adequate reasons for the award (A v B and others [2024] HKCFI 751). This appears to apply to foreign arbitral awards as well.

For arbitral awards which are either a Convention award, Mainland award or Macao award (as each defined under the AO), enforcement may not be refused except as provided under Division 2-4 of Part 10 of the AO.

For arbitral awards which are not a Convention award, Mainland award or Macao award, under Section 86 of the AO, the Hong Kong courts may refuse to enforce the award if:

- a party to the arbitration agreement was under some incapacity;
- the said agreement is not valid under the law to which the parties have subjected it or (if no indication of such law) under the law of the country where the award was made;
- the party making the application to deny enforcement was not given proper notice either of the appointment of the arbitrators or of the arbitral proceedings, or was otherwise unable to present their case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or on matters going beyond the scope of application;
- the composition of the arbitral tribunal or arbitral procedure is not in accordance with the agreement of the parties or (if no such agreement) the law of the country where the arbitration took place;
- the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made; and
- the award is in respect of a non-arbitrable matter under Hong Kong law or it is contrary to public policy to enforce the award.

The court may also refuse to enforce an award "for any other reason the court considers just to do so".

13. Miscellaneous

13.1 Class Action or Group Arbitration

Hong Kong's arbitration framework does not explicitly provide for class action arbitration.

Group arbitration is permitted under Section 2 of Schedule 2 of the AO, which allows for the consolidation of arbitrations and the joinders of additional parties if all parties involved agree to such.

13.2 Ethical Codes

Arbitrators and the employees or agents of the appointing body are granted immunity from suit for failing to take reasonable care or to proceed with due diligence (Section 105 of the AO). Arbitrators are also entitled to the same immunity available to judges in respect of their decision-making in the process of arbitration, absent fraud or bad faith (Song Lihua v Lee Chee Hong [2023] HKCFI 1954).

Although immunity is provided for in relation to the acts listed above, arbitrators are expected to comply with the following duties under the AO which are mandatory and cannot be varied by the parties:

- treat all parties equally (Section 46(2) of the AO);
- be independent and not be swayed by profession or personal interests (Section 46(3)(a) of the AO);
- act fairly and impartially (Section 46(3)(b) of the AO); and
- adopt procedures that would avoid unnecessary delay or expenses (Section 46(3)(c) of the AO).

13.3 Third-Party Funding

Third-party funding of arbitration is now permissible in Hong Kong, following the Arbitration and Mediation Legislation (Third Party Funding) Amendment Ordinance 2017. The standards and practices with which a third-party funder is expected to comply are detailed in the Code of Practice for Third Party Funding of Arbitration.

Under Section 98U of the AO and Article 44 of the 2024 HKIAC Rules, a funded party is required to disclose to the arbitration body (including the arbitral tribunal, emergency arbitrator and HKIAC) and to all other parties that it has obtained such third-party funding. There is no obligation to disclose further details regarding the funding arrangements.

13.4 Consolidation

Under Section 2 of Schedule 2 of the AO (if applicable), the court may consolidate two or more arbitral proceedings on terms it thinks just if it appears to the court:

- that a common question of law or fact arises in both or all of them;
- that the rights to relief claimed in those arbitral proceedings are in respect of or arise out of the same transaction or series of transactions; or
- that for any other reason it is desirable to make such an order.

Where the HKIAC Rules apply under Article 28.1 of the 2024 HKIAC Rules, the HKIAC may consolidate two or more arbitrations pending under the 2024 HKIAC Rules where:

- the parties agree to consolidate;
- all claims in the arbitrations are made under the same arbitration agreement; or

- the claims are made under more than one arbitration agreement; a common question of law or fact arises in all of the arbitrations; the rights to relief claimed are in respect of, or arise out of, the same transaction or a series of related transactions; and the arbitration agreements are compatible.

13.5 Binding of Third Parties

Where a claimant has become entitled to enforce an obligation under a contract (containing an arbitration clause) but is not a party to it, the court is still able to intervene by granting an anti-suit injunction for the purpose of restraining such claimant from enforcing the obligation by way of court proceedings abroad instead of by arbitration.

In particular, the court may bind affiliates and associates of the contracting parties even if they were not a party to the contract containing the arbitration clause, as long as the language of the arbitration clause can be construed to cover claims against such third-party affiliates and associates. This is based on the presumption that, as rational businessmen, the contracting parties would have likely intended any dispute arising out of the contractual relationship to be resolved by the same tribunal, unless the language makes it clear that certain issues were intended to be excluded from the arbitrator's jurisdiction (GM1 and GM2 v KC [2019] HKCFI 2793). Moreover, the court may bind a third-party non-signatory that is seeking to enforce a contractual right conferred to it under the contract, on the basis that the arbitration agreement in the contract is a condition integral to such right (see Dickson Valora Group (Holdings) Company Ltd v Fan Ji Qian [2019] HKCFI 482).

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