Arbitration Guide
IBA Arbitration Committee

HONG KONG

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I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

In Hong Kong, arbitration is a commonly accepted dispute resolution process. It is administered by the Hong Kong Arbitration Ordinance (the 'Arbitration Ordinance' or the 'Ordinance').

Advantages of using arbitration in Hong Kong include:

- Flexibility for parties to choose who will resolve their dispute. This is particularly advantageous where the relevant dispute is technical in nature as the parties can select an arbitrator with appropriate qualifications;
- Arbitration is generally a faster and more flexible resolution process than litigation;
- Parties can manage the costs of the dispute with more flexibility than is possible with litigation;
- Arbitration can be conducted in whichever language the parties select;
- Enforcement of an arbitral award is simpler than the comparative procedure for enforcing a judgment of a Hong Kong court.

A disadvantage of using arbitration is that the parties will have limited avenues to appeal any arbitral award, although some businesses regard this as an advantage.

(ii) Is most arbitration institutional or *ad hoc*? Domestic or international? Which institutions and/or rules are most commonly used?

The Hong Kong International Arbitration Centre ("HKIAC"), Hong Kong's leading arbitration organisation, provides the rules most commonly used for arbitrations in Hong Kong.

The majority of arbitrations occurring in Hong Kong are *ad hoc* arbitrations. HKIAC reports that of 262 arbitrations it handled in Hong Kong in 2016, 94 were administered under the HKIAC Administered Arbitration Rules or the UNCITRAL Rules.

Additionally, HKIAC reports that 87.2% of the 262 arbitration matters handled by HKIAC in 2016 were international arbitrations.

(iii) What types of disputes are typically arbitrated?

HKIAC reports that of the arbitrations that it handled in 2016, 19.2% concerned construction disputes, 29.3% were corporate and finance disputes, 21.6% were maritime disputes, 10.8% were international trade disputes, 5.4% were intellectual property disputes, 2.4% were energy disputes and 2.4% were insurance disputes.

(iv) How long do arbitral proceedings usually last in your country?

The length of time for arbitral proceedings can and does range from months to years depending on the arbitral rules adopted by the parties.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

No, there are no restrictions preventing foreign nationals from acting as counsel or arbitrators in arbitrations in Hong Kong.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

Arbitration in Hong Kong is governed by the Arbitration Ordinance. This Ordinance is based on the UNCITRAL Model Law (the "Model Law"). The Ordinance is largely consistent with the Model Law. Section 4 of the Ordinance provides that those provisions of the Model Law which have been explicitly incorporated into the Ordinance have the force of law in Hong Kong. Under the Ordinance there are no significant distinctions between international and domestic arbitrations conducted in Hong Kong.

Section 99 of the Ordinance provides that parties may specify whether they want to opt in to all or some of the provisions listed in Schedule 2 to the Ordinance (the 'Opt-In Provisions'). In addition, the Opt-In Provisions will automatically apply to:

- Arbitration agreements entered into before the commencement of the Ordinance (which occurred on 1 June 2011), or arbitration agreements entered into within six years of the commencement of the Ordinance (that is, before 31 May 2017) that explicitly provide that any arbitration conducted pursuant to the agreement is to be a domestic arbitration (See Section 100 of the Ordinance); and

- Any domestic construction sub-contracts which provide for arbitration that have been entered into under a construction contract which has

automatically opted-in under Section 100 of the Ordinance (See Section 101 of the Ordinance).

The Opt-In Provisions provide for the following requirements:

(i) The relevant arbitration must be before a sole arbitrator;

(ii) The Court may order that multiple proceedings to which the Opt-In Provisions apply be consolidated. Such consolidation usually is ordered if there is a common question of fact or law between the proceedings;

(iii) If one of the parties makes an application with the consent of all parties to the proceedings, or alternatively with the leave of the arbitral tribunal, the Court may decide a preliminary question of law; and/or

(iv) Arbitral awards may be challenged on the grounds of serious procedural irregularities or appealed on the basis of a question of law. The procedural irregularities usually refer to the improper constitution of the arbitral tribunal or an inappropriate exercise of the power of that tribunal.

(ii) If there is a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

While there is no distinction between domestic and international arbitrations under the Ordinance, a practical distinction is detailed in the answer to II(i), above. This distinction will be of increasingly less importance as time goes on.

(iii) What international treaties relating to arbitration have been adopted (*eg*, New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

China, and therefore Hong Kong, has adopted the New York Convention and the Geneva Conventions, subject to the following reservations:

- China will apply the Convention only to the recognition and enforcement of awards made in the territory of another contracting state;

- China will apply the Convention only to differences arising out of legal relationships that are considered to be commercial under the national law.

China, and therefore Hong Kong, has adopted the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

No. Parties may choose the applicable substantive law by expressly stating it in the agreement that gave rise to the dispute or by otherwise agreeing it. If the parties do not stipulate or cannot agree on the substantive law, the arbitral tribunal will normally apply the closest connection test to determine the body of substantive law that the tribunal will apply.

However, Hong Kong law will apply in place of the law stipulated by the parties if applying the chosen law would violate Hong Kong public policy.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

Section 19 of the Ordinance (which incorporates option I of Article 7 of the Model Law) provides that an arbitration agreement must be in writing.

The Ordinance does not require that any particular provisions be included in an arbitration agreement in order for that agreement to be enforceable, provided that the parties have made it clear that they have agreed to use arbitration to resolve their dispute.

However, it is good practice to ensure that the following matters are adequately covered in any arbitration agreement:

- The applicable substantive law;
- The number of arbitrators;
- The applicable procedural rules;
- Any limitations under which certain disputes cannot be referred to arbitration; and
- The language to be used in the arbitration.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an award will not be enforced?

Hong Kong is a pro-arbitration and pro-enforcement jurisdiction.

The Hong Kong court that is the first point of contact for parties seeking judicial involvement in the arbitral process is the Court of First Instance of the Hong Kong High Court (the "Court").

Where there is an agreement to arbitrate, unless the Court finds that the arbitration agreement is null and void, the Court will normally refer a dispute to arbitration upon request of a party to the arbitration agreement. The Court will order a mandatory stay of any Court proceedings, which are commenced in contravention of that agreement (see section 20 of the Ordinance, which incorporates Article 8 of the Model Law).

If the parties dispute the existence or validity of an arbitration agreement, the Court will normally refer that question to the arbitral tribunal to decide, provided that the parties are bound by the arbitration agreement. (See *Pacific Crown Engineering Ltd v Hyundai Engineering & Construction Co Ltd* [2003] 3 HKC 659).

It is very rare for the Hong Kong courts to refuse to enforce a written arbitration agreement that is valid on its face.

An agreement to submit future differences to arbitration entered into with a person dealing as a consumer is unenforceable with limited exceptions. (Section 15 of the Control of Exemption Clauses Ordinance, which is explicitly referred to in section 20(3) of the Arbitration Ordinance).

(iii) Are multi-tier clauses (*eg*, arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

Multi-tier clauses are common and generally enforceable. The Court takes the approach that the parties should be free to determine the process by which they wish to resolve their dispute.

The Ordinance itself makes no statement as to the effect of commencing arbitration without following the process provided for in a multi-tier clause. However, if the parties are unable to demonstrate that they have attempted to resolve the dispute by the process provided for in the relevant multi-tier clauses, the Courts (or an arbitral tribunal if in arbitration) will often order that such attempt be made before the arbitration continues.

(iv) What are the requirements for a valid multi-party arbitration agreement?

There are no requirements for a valid multi-party arbitration agreement that are in addition to or different from those for a valid two-party arbitration agreement.

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

Yes. The parties to any agreement may resolve their disputes in the manner to which they have agreed, provided that the agreement is in writing.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

No. Arbitration agreements in Hong Kong may not bind non signatories.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

Family law matters (including child custody, marriage, and divorce), criminal matters, actions in rem against vessels, fraud, and matters reserved to the state (such as taxation and immigration) may not be arbitrated in Hong Kong .

The question of whether a certain category of matter can be properly referred to arbitration is a decision of the Court. However, each individual arbitral tribunal can decide whether or not it has jurisdiction to hear the matter referred to it. Any lack of arbitrability is a matter of jurisdiction.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

If court proceedings are begun in contravention of a valid arbitration agreement, the Court will usually stay those proceedings, unless it finds that the arbitration is null and void, inoperative, or incapable of being performed.

The party seeking the stay has to establish that the parties are bound by the arbitration agreement (*Pacific Crown Engineering Ltd v Hyundai Engineering & Construction Co Ltd* [2003] 3 HKC 659).

Article 8 of the Model Law, as incorporated by section 20 of the Ordinance, provides that the party seeking to establish that the court proceedings are in breach of a valid arbitration agreement must make that objection no later than when submitting his first statement on the substance of the dispute. If the party remains silent until after that point, they will most likely be deemed to have waived the right to insist that the matter be referred to arbitration.

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of *competence-competence* applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

Section 34 of the Ordinance which incorporates Article 16 of the Model Law provides that the arbitral tribunal may rule on its own jurisdiction. Accordingly, the *competence-competence* doctrine applies in Hong Kong.

Section 12 of the Ordinance, which incorporates Article 5 of the Model Law, provides that the courts shall not intervene in matters governed by the Model Law, except as provided by the Model Law.

If the arbitral tribunal rules that it does not have jurisdiction with regard to any preliminary question to the arbitration, any party may request that the Court determine the question of jurisdiction within 30 days of the arbitral tribunal's ruling.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do Courts play a role?

Parties are free to determine the number and identity of their arbitrators – except in circumstances where the Opt-In Provisions apply, in which case the parties will be required to arbitrate before a single arbitrator.

If the parties do not agree on the method for choosing an arbitrator, the Ordinance provides for the default procedures detailed below:

- If the parties have not agreed the number of arbitrators, the number will be one or three as determined by HKIAC (see Section 23 of the Ordinance incorporating Article 10 of the Model Law);

- In an arbitration with three arbitrators, if the parties fail to agree how to appoint those arbitrators, each party will appoint one arbitrator and the selected arbitrators will appoint the third arbitrator (see Section 24 of the Ordinance, incorporating article 11 of the Model Law);

- If the parties fail to appoint a single arbitrator by the agreed manner, the parties fail to appoint an arbitrator in accordance with Section 24 of the Ordinance, or the two appointed arbitrators cannot agree on a third arbitrator within 30 days, the appointment will be made by HKIAC;

- In an arbitration with an even number of arbitrators, if the parties fail to agree how to appoint the arbitrators, each party will appoint the same number of

arbitrators (see Section 24 of the Ordinance);

- In an arbitration with an odd number of arbitrators that is more than three, if the parties fail to agree on how to appoint the arbitrators, each party will appoint the same number of arbitrators, and the remaining arbitrator will be appointed by HKIAC (see Section 24 of the Ordinance).

If the parties have agreed to a mechanism for the appointment of the arbitrator(s), but that mechanism fails, then any party may request that the HKIAC appoint the arbitrator(s) (See section 24 of the Ordinance).

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do Courts play a role in challenges and what is the procedure?

Each arbitrator is required to disclose any circumstances which are likely to give rise to justifiable doubts as to his or her impartiality or independence (See Section 25 of the Ordinance which incorporates Article 12 of the Model Law). In such circumstances, the parties may challenge the arbitrator, through such procedure as may be agreed by the parties. If the parties have not agreed upon a procedure, they may submit the matter to the arbitral tribunal to determine. If the challenge is not successful, the parties can refer the challenge to the Court to decide (See Section 26 of the Ordinance incorporating Article 13 of the Model Law).

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

There are generally no provisions that limit the persons that may serve as an arbitrator.

If the Court or HKIAC is required to appoint an arbitrator because the parties have failed to agree on the applicable procedure, they shall consider any qualifications specifically required by the parties under the arbitration agreement.

Section 25 of the Ordinance which incorporates Article 12 of the Model Law provides that an arbitrator appointed by the Court or HKIAC may be challenged if he or she does not possess the qualifications that the parties have required under the arbitration agreement provided that the party challenging only became aware of the matter provoking the challenge after the appointment had been made.

Under Section 46 of the Ordinance (incorporating Article 18 of the Model Law) arbitrators must treat the parties equally, be independent, act fairly and impartially; and give the parties a reasonable opportunity to present their case.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

As noted in part V(ii), the Ordinance requires that the arbitrator(s) disclose any circumstances which are likely to give rise to justifiable doubts as to his or her impartiality or independence. The Ordinance also provides a procedure by which the parties can challenge the arbitrator if the parties have justifiable doubts as to the arbitrator(s)' impartiality or independence.

There is no explicit requirement that the IBA Guidelines on Conflicts of Interest in International Arbitration be followed in any arbitration taking place in Hong Kong, but the parties may agree to follow these guidelines.

VI. Interim Measures

(i) **Can arbitrators enter interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

Section 35 of the Ordinance which incorporates Article 17 of the Model Law provides that, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures. Such measures may be granted in the form of an award or in any other form and may be granted: to maintain or restore the status quo pending determination of the dispute, to take any action which would prevent or to refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process, to preserve assets out of which a subsequent award may be satisfied, or to preserve evidence that may be relevant and material to the resolution of the dispute.

Section 36 of the Ordinance which incorporates Article 17A of the Model Law provides that the arbitrator may grant an interim measure if the party can satisfy the arbitral tribunal that: (i) harm which is 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 who the order is made; and (ii) there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

Section 37 of the Ordinance incorporating article 17B of the Model Law provides that a party may make an ex parte application requesting an interim measure together with an application for a preliminary order that the parties not frustrate the purpose for which the interim measure was requested.

Section 40 of the Ordinance replicates Article 17E of the Model Law, which provides that the arbitral tribunal may require the party requesting the interim measure to provide appropriate security in connection with the measure.

Section 56 of the Ordinance empowers the arbitral tribunal to make orders requiring a claimant to give security for costs, and to direct the parties to deal with property in a specified manner.

Section 61 of the Ordinance provides that an order or direction made by an arbitral tribunal, including an interim measure, is enforceable in the same manner as an order or direction of the Court with the same effect, but only with leave of the Court. Such leave is generally granted, provided that the measure is not against Hong Kong public policy.

Part 3A of the Ordinance provides that an order or direction made by an emergency arbitrator under the relevant arbitration rules and which consists only of one or more specific temporary measures is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with leave of the Court.

(i) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following constitution of the arbitral tribunal?

Yes. The Court may grant provisional relief in the form of interim measures in support of arbitration, pursuant to Section 45 of the Ordinance. Interim measures here refer to interim measures under Section 35 of the Ordinance incorporating Article 17 of the Model Law. In addition, the Court may exercise powers under Section 45 of the Ordinance irrespective of whether or not similar powers may be exercised by an arbitral tribunal under Section 35 of the Ordinance in relation to the same dispute.

In addition to Section 45 of the Ordinance, the Court also has power to grant provisional relief in the form of an order under Section 60 of the Ordinance.

A party may request an interim measure of protection at any time before the commencement of an arbitration or during an arbitration. This is provided for in Section 21 of the Ordinance, which incorporates Article 9 of the Model Law.

(ii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

Section 55 of the Ordinance incorporating Article 27 of the Model Law provides that an arbitral tribunal or a party with the approval of the arbitral tribunal may

request the Court for assistance in taking evidence. The Court may order a person to attend arbitral proceedings to give evidence or to produce documents.

VII. Disclosure/Discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

The parties have broad discretion to adopt such disclosure and discovery procedures as they deem appropriate.

Under Section 56(1)(b) of the Ordinance, unless otherwise agreed by the parties, an arbitral tribunal may make an order directing the discovery of documents or the delivery of interrogatories, or as to the inspection of, and dealings with, the parties' property.

The scope of discovery will either be agreed by the parties or determined by the arbitrator. Generally, practices similar to those applicable under the common law are adopted; where all relevant documents will be required to be disclosed.

The tribunal may also direct witnesses to produce documents or other evidence (See Section 56(8)(c) of the Ordinance).

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

There are no limits on the permissible scope of disclosure or discovery.

(iii) Are there special rules for handling electronically stored information?

No.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

Section 18 of the Ordinance provides that no party may publicise, disclose or communicate any information about the arbitral proceedings or any award made in those proceedings unless otherwise agreed upon by the parties.

The duty of confidentiality imposed by Section 18 does not apply where the communication is made to protect a legal right or interest of the party, to enforce or challenge the award, where the disclosure is required by law, or where the disclosure is made to a party's professional advisor.

Hong Kong law also recognizes a common law duty of confidentiality in respect of arbitral proceedings.

Trade secrets would most likely be treated as confidential information.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

See the answer to VIII(i) above.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

The common law rules of privilege apply to arbitral proceeding. This includes legal professional privilege (both advice and litigation privilege) and 'without prejudice' privilege (being privilege attaching to communications made for the purpose of seeking settlement of a dispute).

IX. Evidence and hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

The parties to any arbitration may agree to adopt the IBA Rules on the Taking of Evidence in International Arbitration. The parties may also agree as to whether or not the tribunal has discretion to depart from the rules.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

The arbitral tribunal's discretion to govern the hearing will be subject to the terms of the arbitration agreement and any set of rules adopted by the parties and will also be limited by the Court's powers to make orders or give directions.

There are a very few requirements as to how any hearing should be conducted, and the parties are normally free to conduct the hearing as agreed.

The overriding principles set out in Section 3 of the Ordinance which require a fair and speedy resolution of the dispute without unnecessary expense are relevant considerations. Similarly, under Section 46 of the Ordinance, the arbitral tribunal is required to act fairly and impartially, to give the parties a reasonable opportunity to present their case, and to avoid unnecessary delay and expense. Notably, this obligation differs from Article 18 of the Model Law, which requires that the parties be given a 'full opportunity' to present their case.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

The parties are free to agree on how witness testimony is presented. However, standard procedures provided for in the Ordinance apply, unless the parties agree otherwise, including:

- Section 56(1)(c) which provides that an arbitral tribunal may make an order directing evidence to be given by affidavit;
- Section 56(8) which provides that the arbitral tribunal may administer oaths or take affirmations and may examine witness and parties on oath or affirmation;
- Section 52 (which incorporates Article 24 of the Model law) which provides that the arbitral tribunal may decide whether evidence will be produced on paper only or whether there will be oral testimony.

Generally, arbitrations taking place in Hong Kong will adopt the general practices of common law, including the use of witness statements and cross examination. Direct oral examinations by the arbitral tribunal are uncommon. The arbitral tribunal is free to ask, and usually does ask, questions to clarify the evidence.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

There are no rules in the Ordinance as to who can and cannot appear as witnesses. The parties are free to determine the method by which their dispute is to be resolved. It is not mandatory for evidence to be given on oath or affirmation, but it is common to do so.

The arbitral tribunal may, in the taking of evidence, administer oaths and affirmations (Section 56 of the Ordinance). The Hong Kong Oaths and Declarations Ordinance provides for the form and manner upon which oaths and affirmations must be administered by the arbitral tribunal, if an oath or affirmation is to be administered.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (*eg*, legal representative) and the testimony of unrelated witnesses?

No such distinction is provided for under the Ordinance. However, the parties are free to agree such distinctions if they so wish.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

The ability of the parties to present, and the arbitrator to hear, expert testimony is consistent with the procedures for expert evidence provided in common law litigation.

Section 54 of the Ordinance incorporates Article 26 of the Model Law, which provides that, unless the parties have agreed otherwise, the arbitral tribunal may appoint one or more experts to report to it on specific issues. The tribunal may also require a party to provide the expert with any relevant information, documents, or property for his inspection.

If a party makes a request, or if the arbitral tribunal considers it necessary, the expert shall participate in a hearing after delivery of his written or oral report. In any such hearing, the parties will be entitled to question the expert and to present expert witnesses in order to testify on the points at issue.

There are no formal requirements under the Ordinance regarding the independence and/or impartiality of expert witnesses. However, the parties are free to agree on requirements as they see fit.

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

It is not common for arbitral tribunals to appoint experts beside those that have been appointed by the parties. However, the arbitral tribunal has that power under Section 54 of the Ordinance, which incorporates Article 26 of the Model Law.

There is no provision in the Ordinance that provides that expert evidence provided by an expert appointed by the arbitral tribunal should be considered in a different manner than expert evidence provided by an expert appointed by the parties.

There is no requirement that experts be selected from a particular list, although the parties are free to agree to such a requirement.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

Hot-tubbing, although not specifically provided for by the Ordinance, is sometimes used in arbitrations in Hong Kong.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

There are no rules or requirements for the use of arbitral secretaries in arbitrations in Hong Kong. The use of arbitral secretaries is uncommon.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

The requirements of a valid arbitral award are set out in Section 67 of the Ordinance, which incorporates Article 31 of the Model Law. An arbitral award is required to be in writing and signed by the arbitrator(s). If there is more than one arbitrator, the signature of the majority of arbitrators will suffice as long as the reason for any omitted signature is stated. The award must state the reasons on which it is based, unless the parties have agreed that no reasons are to be given or the award is given on terms agreed by the parties under Article 30 of the Model Law (which is incorporated by Section 66 of the Ordinance). The award shall also state the date and the place of the arbitration as determined in accordance with Article 20(1) of the Model Law. Section 48 of the Ordinance allows the parties to determine the place of the arbitration, or failing that, for the arbitral tribunal to determine the place of the arbitration.

If the arbitral tribunal is composed of more than one arbitrator, the decision of the arbitral tribunal shall be made by a majority of all its members, unless otherwise agreed by the parties (Section 65 of the Ordinance, which incorporates Article 29 of the Model Law).

Unless otherwise agreed by the parties, an arbitral tribunal may award any remedy or relief that could have been ordered by the Court if the dispute had been the subject of civil proceedings. Moreover, the arbitral tribunal may order specific performance of any contract, other than a contract relating to land or any interest in land (Section 70 of the Ordinance).

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

The arbitral tribunal is theoretically empowered to award exemplary or punitive damages (unless the parties have expressly provided otherwise). However, this does not occur very often in practice in Hong Kong.

The arbitral tribunal is entitled to award simple or compound interest on any award from such date and at such rates as it considers to be appropriate (Section 79 of the Ordinance).

(iii) Are interim or partial awards enforceable?

Yes, any interim measure made under Section 35 of the Ordinance (which incorporates Article 17 of the Model Law) can be made an enforceable award on the application of any party.

Similarly, Sections 69 (incorporating Article 33 of the Model Law) and 71 of the Ordinance provide that unless otherwise agreed by the parties the arbitral tribunal may make more than one award at different times on different aspects of the matters to be determined. Interim or partial awards will be enforceable if it is a final determination of the matters concerned.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

Dissenting opinions are very rare in Hong Kong.

There are no provisions in the Ordinance as to whether an arbitrator may issue a dissenting opinion.

As such, the matter is left in the hands of the parties. If the parties have not agreed previously as to whether or not a dissenting opinion should be allowed, the arbitrator will determine whether or not to issue a dissenting opinion.

The form and content of any such dissenting opinion will be likewise subject to the agreement of the parties, or failing such agreement, subject to the discretion of the arbitrators.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Section 66 of the Ordinance incorporating Article 30 of the Model Law provides that if the parties settle the dispute during an arbitration, the arbitral tribunal shall terminate the arbitration. If the parties request, and if the arbitral tribunal does not object, the tribunal shall record the settlement in the form of an award on the agreed terms.

Any such award shall have the same status and effect as any other award on the merits of the case.

Section 66 of the Ordinance provides that if the parties to an arbitration agreement settle their dispute and enter into a written settlement agreement, the settlement agreement will be deemed to be an arbitral award for the purposes of enforcement.

According to Section 68 of the Ordinance incorporating Article 32 of the Model Law proceedings can be terminated by a final award, by an order of the arbitral tribunal or by:

- The claimant withdrawing its claim (and the respondent not objecting to such withdrawal);
- The parties agreeing to terminate the proceedings; or
- The tribunal finding that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

Section 69 of the Ordinance which incorporates Article 33 of the Model Law provides that a party may, with notice to the other party, request that the arbitral tribunal correct any errors in computation in the award, any clerical or typographical errors or any errors of a similar nature. Such a request has to be made within 30 days of the award being received, unless otherwise agreed between the parties.

In addition, with notice to the other parties and within 30 days of the award being received (unless otherwise agreed between the parties), a party may request that the arbitral tribunal give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation that is requested within 30 days of the request.

In addition, the arbitral tribunal may correct any errors in computation, any clerical or typographical errors or any errors of similar nature on its own initiative within 30 days of the date on which it gave the award.

A party may also request (unless expressly provided otherwise by the agreement of the parties) that the arbitral tribunal provide an additional award on matters presented in the arbitral proceedings but omitted from the earlier award. This request has to be made with notice to the other party and within 30 days of the date on which the party requesting the further award received the earlier award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days of the request.

The arbitral tribunal also has the power to make other changes to arbitral awards which are consequential to the correction of any error, or the interpretation of any point contained in the award.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

In Hong Kong, the common law approach to the determination of costs is usually adopted. The general rule is that the losing party to an arbitration will pay the costs of the prevailing party. However, this is subject to exceptions, and the parties can agree a different approach.

Under Section 74 of the Ordinance, the arbitral tribunal may make an order with respect to the costs of the arbitration. The arbitral tribunal is also generally empowered to issue directions as to the costs of a discrete order, direction or interim measure.

(ii) What are the elements of costs that are typically awarded?

Under Section 74 of the Ordinance, the arbitral tribunal must only allow costs that are reasonable having regard to all the circumstances. Unless otherwise agreed by the parties, the arbitral tribunal may also allow costs incurred in the preparation of the arbitral proceedings prior to the commencement of the arbitration.

The elements of costs which are typically awarded reflect the types of costs which are typically awarded under the common law system. These include costs of solicitors and counsel, photocopying and other document preparation costs, arbitrator's costs, cost of arbitral venues and other reasonable costs incurred by the parties.

Of course, subject to the restriction against parties agreeing to bear their own costs under Section 74(8) of the Ordinance, the parties are generally free to agree which costs will be recoverable.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

Yes. Unless the parties agree otherwise, the arbitral tribunal has jurisdiction to decide its own costs under Section 74 of the Ordinance.

(i) **Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?**

Yes. The arbitral tribunal has power to apportion costs, and often does so in Hong Kong using the common law principles discussed at XI(i) above.

(iv) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

Under Section 75 of the Ordinance, if the parties have agreed that the costs of the arbitration are to be taxed by the Court, then unless the arbitral tribunal directs otherwise, the award is deemed to have included the tribunal's direction that the costs (other than the fees and expenses of the tribunal) are to be taxed by the Court. The arbitral tribunal must make an additional award of costs reflecting the result of such taxation.

Any award as to costs will be able to be reviewed by the courts on the same grounds and subject to the same restrictions as any other award made by the arbitral tribunal.

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

In Hong Kong, arbitral awards are usually final and not subject to review on their merits. However, there are two situations where arbitral awards may be challenged. These are where a party makes an application for setting aside of the arbitral award under Section 81 of the Ordinance which incorporates Article 34 of the Model Law and where the award is appealed on the basis of a question of law.

The appeal on the basis of a question of law is only available where the Opt-In Provisions apply. There is no provision in the Ordinance limiting the time in which such an appeal may be made. However, an appeal on a question of law can only be made with the agreement of all parties to the arbitration or with the leave of the Court (paragraph 6 of Schedule 2 to the Ordinance). An appeal on a question of law will typically take three to four months.

Section 81 of the Ordinance which incorporates Article 34 of the Model Law provides that an award may be challenged and set aside if the party making the challenge can prove that:

1. A party to the arbitration was under some incapacity, or the agreement to arbitrate is invalid under the law to which the parties subjected it to, or failing any indication on to the agreement as to which law the agreement is subject to, under the law of Hong Kong;

2. The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitration or was otherwise unable to present his case;

3. The award deals with a dispute not contemplated by the terms of the submission to arbitration, or contains a decision on matters not contemplated by the terms of the submission to arbitration (provided that if it is possible to separate the relevant parts of the award, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside);

4. That the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties unless such agreement was in conflict with a provision of the Ordinance.

Alternatively, the Court can set aside the award if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of Hong Kong or the award is in conflict with the public policy of the Hong Kong.

An application under Section 81 of the Ordinance which incorporates Article 34 of the Model law must be made within three months of the date on which the party making the application received the award, or, if a correction or interpretation of the award has been requested under Section 69 of the Ordinance, within three months of the date on which that request had been disposed of by the arbitral tribunal.

Challenge proceedings under Article 34 can last anywhere from a few months to a year, depending on their complexity.

Sections 86, 89, 95 and 98D of the Ordinance provide that the enforcement of an award may be refused by the person against who such enforcement is invoked under the same grounds as a party is able to challenge the award under Section 81 of the Ordinance which incorporates Article 34 of the Model Law. Furthermore, Section 86(4) provides that if an application has been made for the setting aside or suspension of an award has been made to a competent authority, the court before which the enforcement of the award is sought may adjourn the proceedings for the enforcement of the award and, on application of the party seeking to enforce the award, order the person against whom the enforcement is invoked to give security.

As it is in Court's discretion whether or not to grant an adjournment of enforcement proceedings, there is no express provision in the Ordinance for leave to enforce the award notwithstanding the stay. If the Court thought it appropriate for the award to be enforced notwithstanding the application to set aside, it is not going to stay the enforcement proceedings. Furthermore, under Section 86(5), a decision as to whether or not to adjourn the enforcement proceedings is not subject to appeal.

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

The Ordinance makes no express comment on the issue. As a result the right to apply for the setting aside of an arbitral award under Section 81 of the Ordinance which incorporates Article 34 of the Model Law most likely may by waived by an arbitral agreement.

The right to appeal the award on a question of law, provided in Schedule 2 of the Ordinance will normally not apply unless opted into in compliance with the requirements of the Ordinance.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

If the parties have opted into the Opt-In Provisions provided for in Schedule 2, they are entitled to appeal an arbitral award on the basis of a question of law. In order to do so, the party seeking to appeal is required to get the agreement of all parties to the arbitration, or to obtain leave of the Court.

A party may only appeal from a decision of the Court to grant or refuse leave to appeal on a question of law under Sections 5 and 6 of Schedule 2 of the Ordinance with leave of the Court or the Hong Kong Court of Appeal (Section 6(5) of Schedule 2 of the Ordinance). The Court or the Court of Appeal will only grant leave if the question in dispute is one of general importance or the Court determines that it should be considered for some other special reason.

Section 5(8) of Schedule 2 of the Ordinance provides that a party may apply for leave to appeal against any order of the Court to confirm, vary or set aside the award, or to remit the award back to the arbitral tribunal to be reconsidered.

Such leave to appeal will not be granted unless the question is one of general importance or the Court or the Court of Appeal determines that it should be considered by the Court of Appeal for some other special reason.

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

Yes. The Courts may decide to remand an award (although, in Hong Kong, the expression used is ‘to remit’) to the arbitral tribunal for consideration.

Unless otherwise ordered by the Court, the arbitral tribunal has all powers which it would otherwise have, but must take into account the Court’s finding on the matter(s) which were successfully appealed.

XIII. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

Section 84 of the Ordinance provides that an award is enforceable in the same manner as a judgment of the Hong Kong courts, provided that the Court gives its leave to do so.

Section 85 of the Ordinance provides that the party seeking to enforce an award is required to produce an original or certified copy of the award, regardless of where it was made. The party seeking to enforce the award is also required to produce the arbitration agreement and any relevant translation of that award into a language of the Court (if required).

The procedure that must be adopted to enforce an award will depend on whether the award was an award made in Hong Kong, a Mainland award (an award made in China, but outside of Hong Kong or Macau), a Macao award or an award made in a country which is a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

Award made in a New York Convention Country

An award made in a jurisdiction which is a party to the New York Convention is enforced under Section 87 of the Ordinance either by action in the Court or in the same manner as set out in Section 84 of the Ordinance.

The grounds on which the enforcement of a Convention award can be opposed, as provided for in Section 89 of the Ordinance, are identical to those provided for in Section 81 of the Ordinance which incorporates Article 34 of the Model Law to set aside an award.

Mainland and Macao Award

Despite operating under different legal systems, Mainland China, Hong Kong and Macao are part of the same country. Therefore, the provisions of the New York Convention are not applicable to the enforcement in Hong Kong of an award made in Mainland China or Macao.

Divisions 3 and 4 of Part 10 of the Ordinance provide that Mainland and Macao awards are enforceable in Hong Kong either by action in the Court or in the same manner as an arbitral award enforced under Section 84. For Mainland awards only, only those awards that have been made by a recognised Mainland Chinese arbitral authority will be enforceable. The list of recognised Mainland Chinese

arbitral authorities can be found in the Hong Kong legislative Gazette, which is published periodically. The latest list was published on 23 December 2016 and contained 246 Mainland Chinese arbitral authorities.

The grounds for opposing the enforcement of a Mainland or Macao Award in Hong Kong as provided for in Sections 95 and 98D of the Ordinance are identical to those provided for in Section 81 of the Ordinance which incorporates Article 34 of the Model Law for setting aside an award.

For a Mainland Award, under Section 93 of the Ordinance, if an application has been made on the Mainland for an enforcement of the award, it will not be enforceable in Hong Kong while that enforcement application is pending. If such an application is unsuccessful, or the award has not been fully satisfied as a result of such application, then a party may seek to enforce that part of the award which is unsatisfied in Hong Kong.

For a Macao Award, if it is not fully satisfied by way of enforcement proceedings taken in Macao or in any other place other than Hong Kong, then a party may seek to enforce, in Hong Kong, the part of the award which has not been satisfied elsewhere.

Additionally, the Mainland and Macao governments have instituted reciprocal procedures through which a Hong Kong arbitration award may be enforced in Mainland China and Macao.

Other Countries

With respect to awards made by states outside of China which are not signatories to the New York Convention (*eg*, Taiwan), under section 84 of the Ordinance, these awards are enforceable with the leave of the Court regardless of where they are made. Generally, the Courts will be predisposed to honour a valid arbitral award, provided that in deciding to do so it does not contravene Hong Kong law or public policy.

The Court is entitled to refuse to enforce an award under section 86 of the Ordinance on grounds similar to those provided for in Article 34 of the Model Law, incorporated by Section 81 of the Ordinance

Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

Under the Ordinance, if the enforcement of the award has been objected to under the relevant sections, the Court has the discretion to adjourn proceedings for the enforcement of the relevant award.

A decision to adjourn proceedings under the relevant sections is not subject to appeal.

(ii) If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

Under Order 73, Rule 10 of the High Court Rules, an order of the Court granting leave to a party to enforce an award must be drawn up by the party seeking to enforce (the 'Creditor') and must be served on the person against whom the award is to be enforced (the 'Debtor') by delivering a copy to him personally or by sending a copy to him at his usual or last known place of abode or business or in such other manner as the Court directs.

The Debtor may apply to set aside that order within 14 days of its service upon the Debtor, and if such application is made, the Creditor shall not be able to enforce the award until such time as that application is resolved.

(iii) Are conservatory measures available pending enforcement of the award?

No conservatory measures are provided for under the Ordinance for the period between the time at which any award is made and the time at which it is enforced. However, as detailed in part XI above, during the arbitral proceedings either party may apply for interim measures from the arbitral tribunal or the Court to protect relevant assets.

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Hong Kong's arbitration regime is set up to facilitate parties determining the manner in which they will resolve their dispute. Hong Kong, subject to the exceptions detailed in part III above, requires that parties adhere to their agreement to arbitrate and will assist the arbitral tribunal in conducting that arbitration in a fair and efficient manner. It will, subject to limited exceptions, enforce arbitral awards from other jurisdictions subject to relatively simple evidentiary requirements.

However, the Court is entitled to, and will generally act to, set aside an award if it has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

Enforcement proceedings can take from weeks (for simple and unopposed cases) to months (for complicated or heavily opposed cases).

Section 14 of the Ordinance provides that the limitation periods in the Limitation Ordinance apply to arbitrations. Section 84 of the Ordinance provides that an arbitral award may be enforced in the same manner as a judgment of the Court.

Section 4(4) of the Limitation Ordinance provides that an action shall not be brought upon any judgment more than 12 years after which the judgment becomes enforceable, and that no arrears of interest shall be recovered more than six years after the interest became due. These limitations will apply to an arbitral award in the same way as they apply to the judgment of a court.

XIV. Sovereign Immunity

(i) Do State parties enjoy immunities in your jurisdiction? Under what conditions?

Foreign States enjoy absolute immunity from enforcement and jurisdiction in Hong Kong. An arbitral award which is made against a foreign State will not be enforceable in Hong Kong unless that State agrees to waive immunity. The arbitration agreement itself will not be construed as a waiver of immunity with regards to the enforcement of arbitral awards.

This immunity will not apply to the People's Republic of China (PRC), as it cannot be considered a foreign State in Hong Kong. However, it will be entitled to 'crown immunity.' The PRC will be entitled to immunity from suit and enforcement of judgment or awards against it in Hong Kong.

(ii) Are there any special rules that apply to the enforcement of an award against a State or State entity?

The Crown Proceedings Ordinance (Cap 300) applies in Hong Kong to the enforcement of awards against the State of the Hong Kong SAR and provides for the process by which an award can be enforced. There are no explicit rules that apply to the enforcement of an award against other States or State entities.

XV. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

Yes. This convention was ratified by the People's Republic of China in 1993. However, the PRC also entered a reservation to the Convention which allows it to notify a class or classes of a dispute which it would not submit to the jurisdiction of the International Centre for the Settlement of Investment Disputes. China has subsequently limited the jurisdiction of the Centre to disputes over compensation caused by expropriation and nationalization.

(ii) Has your country entered into Bilateral Investment Treaties with other countries?

Hong Kong has entered into 19 Bilateral Investment Treaties ("BITs") with countries, including, among others, Australia, Switzerland and Thailand, 18 of which are in force at the date of drafting.

Any BITs which China has entered into are not applicable to Hong Kong because Hong Kong is entitled to enter into bilateral economic agreements independently of China.

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

Useful reference materials include '*Arbitration in Hong Kong: A Practical Guide*', published by Sweet and Maxwell Hong Kong; and '*Halsbury's Laws of Hong Kong,*' published by LexisNexis.

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

A number of organisations do host regular and varied events on important issues in international arbitration. These include the following:

- HKIAC (www.hkiac.org) hosts regular lectures and seminars on issues related to international arbitration;
- The Chartered Institute of Arbitrators East Asia Branch (www.ciarbasia.org) hosts regular events in Hong Kong;
- The Hong Kong Institute of Arbitrators (www.hkiarb.org.hk) also hosts occasional events;
- The Society of Construction Law (www.scl.hk) holds events on varied topics, including on issues in arbitration.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

Yes. Arbitration is a widely used and accepted alternative to court proceedings in Hong Kong. Indeed, Hong Kong has established itself as a regional centre for

arbitration services and it continues to grow and develop as a preferred location for arbitral proceedings among both local and international parties.

It is common to see arbitration clauses included in commercial contracts entered into in Hong Kong. Indeed, it is standard practice for major government contracts to include a dispute resolution clause providing for mediation followed by arbitration.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

ADR in general is broadly accepted as an important alternative to traditional dispute resolution. The courts have supported this development. Recent practice directions encourage parties to litigation to enter into mediation before trial and, unless the parties have good reason for refusing to do so, will consider the imposition of an adverse order as to costs for the party which refused to mediate.

The Hong Kong government has embraced mediation as a policy objective to reduce and to deal effectively with disputes relating to government contracts. On 22 June 2012, the Hong Kong Mediation Ordinance was enacted, further establishing mediation as a preferred method of ADR in Hong Kong.