Arbitration

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GETTING THE DEAL THROUGH

Hong Kong

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Laws and institutions

1 Multilateral conventions relating to arbitration

Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Though Hong Kong is not technically a contracting state to the New York Convention, the New York Convention has effect in Hong Kong. Before the 1997 handover of sovereignty from the United Kingdom to China, the New York Convention applied in Hong Kong. It continued to apply following the handover as China extended its application to Hong Kong, pursuant to the provisions of the Basic Law of Hong Kong. China originally acceded to the Convention in 1987 (subject to the reciprocity and commercial reservations).

The relevant conventions to which China is a party include the Convention Establishing the Multilateral Investment Guarantee Agency, the International Centre for Settlement of Investment Disputes (ICSID) Convention and the 2004 Convention on Jurisdictional Immunities of States and Their Property (though the latter has not yet entered into force). In addition, China is an observer to the Energy Charter Conference, but neither China nor Hong Kong is a party to the Energy Charter Treaty.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

In accordance with the provisions of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Hong Kong may conclude agreements on its own with foreign states in relation to matters dealt with in bilateral investment treaties. There are currently 18 bilateral investment treaties in force in Hong Kong, signed with the following countries and organisations: Australia, Austria, the Belgo-Luxembourg Economic Union, Canada, Denmark, Finland, France, Germany, Italy, Japan, Korea, Kuwait, the Netherlands, New Zealand, Sweden, Switzerland, Thailand and the United Kingdom. The full texts of these treaties are available at the website of the Hong Kong Department of Justice (doj.gov.hk). Further, Hong Kong signed a bilateral investment treaty with Chile in November 2016 that has not yet entered into force.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary source of law in Hong Kong relating to domestic and foreign arbitral proceedings is the Arbitration Ordinance (Chapter 609) (the Ordinance), which entered into force in June 2011. Its provisions apply equally to domestic and international arbitration without any distinction. However, the previous Arbitration Ordinance (Chapter 341) did maintain a distinction between domestic and international arbitration. In respect of all arbitrations commenced on or after 1 June 2011, the new provisions apply without distinction between domestic and international arbitration. In respect of arbitrations commenced before that date, the old regime applies.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The UNCITRAL Model Law (the Model Law), including the 2006 amendments, is incorporated into the Ordinance. The principal differences, as in many other jurisdictions, lie in the additional provisions that govern issues not addressed by the Model Law. Notable additional provisions include closed court proceedings in arbitration matters, the ability of an arbitrator to act as mediator with the parties' consent and such person's power to continue to act as arbitrator subsequent to the mediation. Of critical importance is the provision that an order or direction made by an arbitral tribunal is generally enforceable in the same manner as an order or direction of the Hong Kong courts.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Specific mandatory provisions on arbitration procedure as such are few. The Ordinance generally provides that the parties to the arbitration are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a number of Model Law provisions given effect by the Ordinance. Among other things, the arbitration agreement must be in writing, the parties must be treated with equality, the arbitral tribunal is required to be independent, and to act fairly and impartially as between the parties, the parties are to be given a reasonable opportunity to present their cases and to deal with the cases of their opponents, and the arbitral tribunal is required 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.

6 Substantive law

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?

As per the Model Law, choice of substantive law is a matter for the parties to the arbitration to agree upon. In the absence of such agreement, the substantive law is to be determined by the arbitral tribunal applying the conflict of laws rules it considers applicable.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your jurisdiction?

Prominent arbitral institutions situated in Hong Kong include the Hong Kong International Arbitration Centre (the HKIAC), the International Chamber of Commerce (the ICC), the China International Economic

and Trade Arbitration Commission (the CIETAC) and the China Maritime Arbitration Commission (the CMAC):

HKIAC
38th Floor, Two Exchange Square
8 Connaught Place
Central Hong Kong
www.hkiac.org

Secretariat of the International Court of Arbitration of the International Chamber of Commerce Asia Office
Suite 2
12th Floor, Fairmont House
8 Cotton Tree Drive
Central Hong Kong
www.iccwbo.org

CIETAC Hong Kong Arbitration Centre (and CMAC)
4705 Far East Finance Centre
16 Harcourt Road
Admiralty Hong Kong
www.cietachk.org

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Hong Kong follows the general principle of arbitration that matters affecting the rights of third parties or rights enforceable against the world at large are non-arbitrable; these include, for example, matters of personal status and criminal liability, or those relating to administrative law, such as taxation and immigration. So, for example, in the case of *Paquito Lima Buton* (2008) 11 HKCFAR 464, [2008] 4 HKC 14, employees' statutory compensation rights were held to be non-arbitrable. However, an arbitration agreement covering employment matters otherwise within the Labour Tribunal's jurisdiction may be upheld if there is no compelling reason why it should not be. Subject to exceptions, an agreement to submit future disputes to arbitration cannot be enforced against a consumer. However, the Consumer Council of Hong Kong has proposed to establish a dispute resolution centre, which will employ arbitration as a means of resolving consumer disputes. Nonetheless, the Hong Kong courts generally take a pro-arbitration approach and are likely to permit a matter to be resolved by arbitration unless it is clearly not in the public interest to do so. Further, family law-related disputes are not arbitrable in Hong Kong.

Whether a matter is arbitrable should be distinguished from the relief that an arbitral tribunal may award; in *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd & Another* [2014] HKCU 1750 (a dispute under a shareholders' agreement), the arbitrator was held to be competent to decide the underlying basis on which a joint venture was to end but he or she could not order a winding up of the company; the arbitrator's decision could instead be used as the basis for a winding-up petition on just and equitable grounds in court. An amendment to the Ordinance enacted in June 2017 has additionally made clear that disputes over intellectual property rights may be resolved via arbitration and that arbitration of such disputes is not contrary to public policy. The amendments are reflected in sections 103B to 103J.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The Ordinance defines an arbitration agreement as 'an agreement by the parties to submit to arbitration all or certain disputes that have arisen or that may arise between them in respect of a defined legal relationship, whether contractual or not'. As per the Ordinance, incorporating the Model Law, the arbitration agreement is required to be 'in writing', though it need not be signed.

The arbitration agreement may be in the form of an arbitration clause in a contract or in a separate agreement. The 'in writing' requirement is deemed to be met, inter alia, if the arbitration agreement is contained in an exchange of statements of claim and defence in which its existence is not denied.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The death of a party does not discharge an arbitration agreement, and it may be enforced by or against the party's personal representatives. As provided by the Ordinance, an award is final and binding both on the parties and 'any person claiming through or under any of the parties', which can cover, inter alia, insolvency and assignment situations. As provided by the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32), when a winding-up order has been made against a company, no proceeding (including arbitrations) shall be proceeded with or commenced against the company without leave of the court.

The balance of convenience is a significant factor in the court's deliberations as to whether to allow an arbitration to proceed; where arbitration is the most convenient means of resolution, especially where the dispute presents complex legal and factual issues, the court is likely to allow it to move forward.

In a recent case (*Lasmos Limited v Southwest Pacific Bauxite (HK) Limited* [2018] HKCFI 426), the Hong Kong court considered the impact of an arbitration clause on its discretion to grant a winding-up order. In this case, the court decided that it ought to exercise its discretion consistently with the intended policy of the arbitration legislation and give due recognition to the arbitration agreements and the parties' agreed method of dispute resolution. Accordingly, it dismissed the winding-up petition in light of the arbitration provision contained in the agreement between the parties, holding that the dispute over the alleged debt should be determined in an arbitration pursuant to the arbitration agreement in the underlying contract between the parties. This represents a significant departure from the previous position in Hong Kong – where a company would be required to establish before the court that there was a bona fide dispute on substantial grounds, regardless of whether there was an arbitration provision – and is consistent with modern thinking on the effect of arbitration provisions on the exercise of the court's discretion to grant a winding-up order, reflected in the positions adopted in other countries such as the United Kingdom and Singapore.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Generally, third parties or non-signatories are not bound by an arbitration agreement. However, where a contract that contains an arbitration agreement is assigned to a third party, the third party will likely be bound by that arbitration agreement under Hong Kong law. Further, the legal doctrine of privity of contract has been relaxed somewhat within the Hong Kong law context following the entering into force of the Contracts (Rights of Third Parties) Ordinance (Chapter 623); a third party is now able to enforce a term in a contract where the contract expressly provides that he or she may do so, or where the term purports to confer a benefit on that third party. A third party will generally be treated as a party to the arbitration agreement in the contract where he or she seeks to enforce a terms of that contract in a dispute.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Normally, a third party may only participate in an arbitration with the agreement of the parties to the arbitration. The Ordinance contains provisions which parties can opt into empowering the court to order consolidation of arbitrations where:

- a common question or law or fact arises in all of the cases in question;
- the rights to relief claimed in the cases are in respect, or arise out, of the same transaction or series of transactions; or
- the court deems that it is desirable to make such an order.

In some construction cases (generally of no concern to foreign parties), these provisions apply without express agreement. In addition, the 2013 HKIAC Rules contain provisions enabling the joinder of

additional parties to arbitrations and the consolidation of arbitrations. Furthermore, the HKIAC Administered Arbitration Rules 2018 (the 2018 HKIAC Rules), which came into force on 1 November 2018, extend the power to join additional parties to include situations where all parties (including the additional party) have expressly agreed, regardless of whether the additional party is bound by an HKIAC arbitration agreement (article 27.1). In addition, a new provision on concurrent proceedings gives the arbitral tribunal power to conduct two or more arbitrations at the same time, one after the other, or to stay one pending determination of the other, in situations where a common question of law or fact arises and the arbitrations have not been consolidated under the 2018 HKIAC Rules (article 30).

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Where the issue is governed by Hong Kong law, save possibly where fraud or bad faith are involved, courts and arbitral tribunals are unlikely to extend an arbitration agreement to a non-signatory parent or to subsidiary companies of a signatory company, which would require a piercing of the corporate veil. Where the arbitration agreement is governed by a foreign law that recognises the 'group of companies' doctrine, that doctrine will, however, likely be recognised in a Hong Kong arbitration in an appropriate case.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

Multiparty arbitration agreements are recognised. The Ordinance does not restrict the number of parties to an agreement to arbitrate. No specific requirements are needed for the formation of a valid multiparty arbitration agreement. Multiparty arbitrations by way of joinder or consolidation are also expressly recognised under both the 2013 and 2018 HKIAC Rules.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

There are generally no restrictions on who may act as an arbitrator. Under the Ordinance, the parties are free to determine the number of arbitrators or authorise a third party to make that determination, and to agree on a procedure for the appointment of arbitrators. Further, unless the parties otherwise agree, no person may be precluded from acting as an arbitrator by reason of their nationality. The parties may also agree that an arbitrator is required to possess certain qualifications. Except where the courts deem it is contrary to public interest, an agreement between the parties as to a religion or gender restriction or requirement would likely be upheld. Though employment discrimination is unlawful (and might therefore lead to situations similar to the English case of *Jivraj v Hashwani* [2011] UKSC 40), it is unlikely that an arbitrator would be considered an employee within the employment discrimination context. A requirement placed upon an arbitrator may also be justified where there the requirement is a genuine occupational necessity. Where any restriction or requirement is found unlawful, the question would then be whether the arbitration agreement should be deemed invalid, or the offensive requirement simply severed.

16 Background of arbitrators

Who regularly sit as arbitrators in your jurisdiction?

A wide variety of professional individuals from various backgrounds and with varying qualifications sit as arbitrators. Having said this, a significant proportion of active arbitrators consist of individuals with a legal background, primarily former or practising lawyers, or retired judges. Some arbitrators also possess specialist qualifications to preside over disputes requiring specialist knowledge, such as construction disputes. Both the HKIAC and the ICC actively promote gender diversity in institutional appointments – they have both signed the Pledge on Equal Representation in Arbitration. The Pledge seeks to increase, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve a fair representation as soon as practically possible, with the ultimate goal of full parity. The ICC's Nomination Committee membership observes gender diversity, and the ICC encourages the Nomination Committee to favour gender diversity in its proposals.

17 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Under the Ordinance, in an arbitration with three arbitrators, the default mechanism is that each party appoints one arbitrator, and the two arbitrators thus appointed appoint the third. In an arbitration under the HKIAC Rules, if either party or the two appointed arbitrators fail to appoint an arbitrator, or the parties do not agree on a sole arbitrator, the appointment is made by the HKIAC. In doing so, the appointment will be made by the HKIAC giving due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator, and, in the case of a sole or third arbitrator, as well as the advisability of appointing an arbitrator of a nationality other than those of the parties. The appointment by the HKIAC is not subject to appeal. The Ordinance also provides rules for arbitrations with an even number of arbitrators or an uneven number greater than three, and for the appointment of umpires in arbitrations with an even number of arbitrators.

18 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Under the Ordinance, arbitrators can be challenged and replaced on justifiable doubts as to their impartiality or independence, or if they lack the qualifications agreed upon by the parties. Absent an agreed procedure, a challenge is made to and decided by the tribunal. Where such a challenge is unsuccessful, the aggrieved party may lodge an appeal to the Court of First Instance (CFI), whose decision is final and not subject to appeal. If an arbitrator, because of, for example, illness, is unable to perform or fails to act without undue delay, the CFI may, upon any of the parties' request, terminate the arbitrator's mandate, subject to no appeal. An arbitrator's mandate also terminates on his or her death. Where an arbitrator's mandate has been terminated for any of the above reasons, a substitute arbitrator is appointed in accordance with the rules applicable to the previous appointment. In considering challenges to arbitrators, counsel, the tribunal and the court are likely to seek support or take guidance from the IBA Guidelines. However, the IBA Guidelines are not binding on the court and, though they generally provide useful guidance, the court has, on occasion, declined to give them judicial approval, as was the case in the English case of *W Ltd v M SDN BHD* [2016] EWHC 422. Where an allegation of bias has been made, the test to be applied is as stated by the CFI in *Jung Science Information Technology Co Ltd v ZTE Corporation* [2008] 4 HKLRD 776; namely whether an objective, fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased.

19 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

Within the context of an ad hoc arbitration with a tribunal consisting of three arbitrators, it is for the appointing party and respective party-appointed arbitrators to agree terms as to fees, expenses, cancellation fees and other matters. The chairperson of a three-arbitrator tribunal or sole arbitrator normally agrees such terms with both parties. The Ordinance provides that the parties are jointly and severally liable to pay reasonable fees and expenses to the tribunal that are appropriate in the circumstances. Both the 2013 and 2018 HKIAC Rules ask that arbitrators accept the standard terms of appointment of the HKIAC; where hourly fees are applicable, these are capped at a rate set by the HKIAC, currently HK$6,500 per hour. Fees payable to a co-arbitrator are agreed between that arbitrator and the nominating party; fees payable to a sole or presiding arbitrator are agreed between that arbitrator and both parties. In the absence of such agreement, the HKIAC determines the rates to be paid. Every arbitrator (whether party-nominated or otherwise) is imposed with a duty of independence and act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents. Further, the Ordinance empowers arbitral tribunals to perform certain functions that may be considered atypical in other jurisdictions, such as the administering of oaths or taking affirmations of witnesses; arbitrators have been described by courts as exercising quasi-judicial functions.

20 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

An arbitral tribunal is liable in law for an act done or omitted to be done by the tribunal, or an employee or agent of the tribunal, only if it is proved that the act was done or omitted to be done dishonestly, and only if the act itself was in relation to the exercise or performance of the tribunal's arbitral functions.

Jurisdiction and competence of arbitral tribunal

21 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Under the Ordinance, the court will refer parties to arbitration where a party so requests no later than when submitting its first statement on the substance of the dispute, unless the court deems the arbitration agreement null and void, inoperative or incapable of being performed. The deciding factor is whether the dispute in question falls within the ambit of a binding arbitration agreement. In practice, courts do not conduct an in-depth inquiry into the matter and, where there exists a prima facie or good arguable case that the arbitration agreement covers the dispute, the parties will be referred to arbitration and court proceedings stayed. Where the court decides not to refer the parties to arbitration, the decision may be appealed, with leave; a decision to refer the parties to arbitration is, however, not subject to appeal.

22 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

The Ordinance provides that the arbitral tribunal may rule on its own jurisdiction, including upon any objections with respect to the existence or validity of the arbitration agreement. Unless a delay is justified, a plea that the tribunal lacks jurisdiction must be raised at the latest when the statement of defence is submitted, and a party must raise a plea that the tribunal is exceeding its jurisdiction as soon as the matter alleged to be beyond the jurisdiction is raised. The tribunal may rule on the issue either as a preliminary question or in an award on the merits. If the tribunal rules as a preliminary question that it has jurisdiction, any party may request the CFI to decide the issue within 30 days of having received notice of that preliminary ruling. The Ordinance expressly provides that a tribunal's decision to decline jurisdiction is subject to no appeal and that the court must hear the dispute if it has jurisdiction (which requires a relevant connection with Hong Kong).

Arbitral proceedings

23 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Under the Ordinance, failing prior agreement, the tribunal will determine the seat of the arbitration having regard to the circumstances of the case, including the convenience of the parties. Under both the 2013 and 2018 HKIAC Rules, where the parties are unable to agree as to the seat of the arbitration, the seat shall be Hong Kong, unless the arbitral tribunal determines that another seat is more appropriate. The language of the arbitration is also determined by the arbitral tribunal, although under the 2018 HKIAC Rules, where the parties have not previously agreed on the language, any party can communicate in English or Chinese prior to any determination on the language of the arbitration by the arbitral tribunal (article 15).

24 Commencement of arbitration

How are arbitral proceedings initiated?

An arbitration commences when the respondent receives the request for the dispute to be referred to arbitration. That request must be in writing, including electronic communication. In HKIAC arbitrations, the notice of arbitration must also be submitted to the HKIAC, and that notice must contain certain particulars, as outlined in the HKIAC Rules.

25 Hearing

Is a hearing required and what rules apply?

Unless the parties have agreed not to have hearings, the tribunal must hold hearings at appropriate stages of the arbitration, if requested by a party or if it deems that hearings are appropriate. The parties must be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspecting goods, other property or documents. Unless the parties agree otherwise, hearings are held in private. Where a party fails to appear at a hearing, the tribunal may nonetheless continue with the proceedings and make an award on the evidence before it. Where the HKIAC's expedited procedure is adopted, the dispute can be decided on the basis of documentary evidence only, unless the tribunal decides that hearings are appropriate.

26 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Under the HKIAC Rules, the arbitral tribunal determines the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence. In the absence of a contrary agreement between the parties, the arbitral tribunal may itself opt to take the initiative in ascertaining the legal and factual issues pertinent to the dispute. In all cases, the parties are entitled to be given an opportunity to comment and adduce evidence on anything that results from such tribunal initiative. The Ordinance empowers tribunals to, inter alia, direct discovery of documents, delivery of interrogatories, evidence to be given by affidavit and inspection of property. The arbitral tribunal may also direct witnesses to appear before it, and examine witnesses and parties on oath or affirmation. It may also appoint experts where appropriate. Written witness statements are common in Hong Kong arbitrations, and the IBA Rules on the Taking of Evidence in International Arbitration are often relied upon as a source of guidance in this regard.

27 Court involvement

In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

Under the Ordinance, the arbitral tribunal or a party (with the tribunal's approval) may request assistance from the court in the taking of evidence; the court may provide its assistance regardless of whether the tribunal in question possesses similar powers. Where the matter is subject to ongoing arbitral proceedings, the court may decline to assist if it deems that it is more appropriate for the tribunal to deal with it. Alternatively, the court may grant the request for assistance in accordance with its own rules on the taking of evidence. The decision of the court (whether to provide assistance or otherwise) is not subject to appeal.

28 Confidentiality

Is confidentiality ensured?

The Ordinance expressly provides that no party may disclose any information relating to the arbitral proceedings or an award. There are, however, exceptions to this duty of confidentiality; inter alia, disclosures may be made in order to pursue a legal right or to enforce or challenge an award. As mandated by the Ordinance, court proceedings in arbitration matters, such as setting-aside proceedings, are generally not open to the public, unless any party makes an application to that effect or the court deems that the proceedings ought to be heard in open court. There are also restrictions on the publication of information relating to such court cases. The HKIAC Rules impose obligations of confidentiality upon the parties, tribunals, emergency arbitrators, experts, witnesses, tribunal secretaries and the HKIAC. These confidentiality obligations also apply to any information communicated to third-party funders.

Interim measures and sanctioning powers

29 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

A party may request, before or during arbitral proceedings, an interim measure of protection from the CFI and the court may grant such measure. This is not seen as incompatible with the agreement to arbitrate, but a case of the court coming to the aid of the parties to the arbitration. The CFI may grant interim measures, including those that a tribunal may grant, in relation to arbitrations that are to or have been commenced, whether in or outside Hong Kong. The court may decline to grant a measure if the interim measure sought is currently the subject of arbitral proceedings or if the court considers that it is more appropriate for the tribunal to deal with it.

30 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The Ordinance provides for an 'emergency arbitrator', defined as an emergency arbitrator appointed under the arbitration rules, including rules of a permanent arbitral institution, agreed to by the parties to deal with the parties' applications for emergency relief before a tribunal is constituted. Emergency relief granted by an emergency arbitrator is, with the leave of the court, enforceable in the same manner as an order or direction of the court that has the same effect. Under the 2018 HKIAC Rules, the application for emergency relief can be made before as well as concurrently with or following a request for arbitration but in all cases must be made prior to the constitution of the tribunal. The 2017 ICC Rules and the 2015 CIETAC Rules also contain provisions for obtaining relief from an emergency arbitrator. Arbitrations administered by the CIETAC Hong Kong Arbitration Centre are generally intended to be seated in Hong Kong and thus governed by the Ordinance.

31 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Interim measures (including ex parte preliminary orders) that a tribunal may order, and the test for granting such measures, mirror the 2006 Model Law amendments. In essence, under the Ordinance, the arbitral tribunal may grant interim measures that are defined as temporary measures, whether in the form of an award or otherwise, at any time prior to the issuance of the final award, ordering a party to:

- maintain or restore the status quo pending resolution of the dispute;
- take action or refrain from taking action so as to avoid harm or prejudice to the arbitral process;
- provide a means of preserving assets that may be used to satisfy a subsequent award; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

The Ordinance provides that the tribunal may order the claimant to give appropriate security for costs and non-compliance may be followed by an award dismissing the claim (with prejudice) or a stay. In practice, several factors are balanced where a tribunal considers applications for security.

32 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

A tribunal may issue an order, as an interim measure, to require a party to cease conduct that the tribunal deems to threaten the integrity of the proceedings on the basis that it is likely to cause prejudice to the arbitral process. Where a party engages in delaying tactics – such as a failure to communicate its statement of defence, appear at a hearing or produce documentary evidence – a tribunal is empowered to proceed with an arbitration. The Ordinance also empowers the tribunal to make peremptory orders where a party has previously failed to comply with an order to the same effect. Non-compliance with the peremptory order may result in a tribunal drawing adverse inferences justifiable from the non-compliance, and may lead to negative cost consequences for the non-compliant party. Moreover, the Ordinance imposes a duty upon a party making a claim to pursue that claim without unreasonable delay; failure to do so empowers the tribunal to make an award dismissing a party's claim and an order prohibiting the party from commencing further arbitral proceedings in respect of the claim, if the tribunal deems that the delay is likely to give rise to a substantial risk that the issues in the claim will not be resolved fairly or likely causes serious prejudice to the other party. Under the Ordinance, the tribunal may generally conduct the arbitration in the manner it considers appropriate. However, the Ordinance is silent as to tribunal-ordered sanctions against counsel, so it is unclear whether such a power exists.

The HKIAC Rules impose a duty upon the parties to do everything necessary to ensure the fair and efficient conduct of the arbitration, and the parties' right to be represented by persons of their choice is expressly subject to this provision. Furthermore, in all matters not expressly provided for in the HKIAC Rules, parties are expressly obliged to act in the spirit of the Rules; the 2015 CIETAC Rules provide that arbitration participants shall proceed with the arbitration in good faith. The HKIAC and CIETAC Rules are silent with regard to sanctions against counsel.

Awards

33 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Arbitral decisions are made as a matter of majority, although awards are commonly unanimous. The fact of one arbitrator dissenting generally has no consequences for the parties.

34 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The Ordinance does not address dissenting opinions.

35 Form and content requirements

What form and content requirements exist for an award?

An arbitral award is required to be in writing and signed by a majority of the arbitrators or, in the case of the sole arbitrator, the sole arbitrator. A reason for any omitted signature must also be provided. The award should also contain the reasons upon which it is based unless the parties have agreed otherwise. Further, the award must also state its date and the place of arbitration.

36 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The Ordinance does not impose any specific time limits for an award to be rendered. Where the HKIAC's expedited procedure is adopted, an award must be rendered within six months of the date when the HKIAC transmits the file to the tribunal, unless there are exceptional circumstances that justify the HKIAC extending the time limit. Further, pursuant to article 31.2 of the 2018 HKIAC Rules, after the arbitral proceedings are declared closed, the arbitral tribunal must notify the parties and the HKIAC of the anticipated date of delivering an award. The default time limit for rendering the award is three months from the close of proceedings, subject to extension by agreement of the parties or the HKIAC.

37 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Under the Ordinance, the date of receipt of notice of the ruling to be challenged is decisive in terms of the time limit for lodging that challenge where a party wishes to request the court to review a positive ruling on jurisdiction. In the context of a request that the tribunal correct or interpret an award, or for an application to the court to set aside the award, the date of receipt of the award is decisive. The date of the award is decisive in relation to the tribunal's correction of the award on its own initiative and the tribunal's review of an award on costs.

38 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

A tribunal can issue final, partial and interim awards, and consent orders under Hong Kong law. A final award is generally the definitive determination of the dispute submitted to arbitration, but is not necessarily the only award as substantive issues may have been decided in partial or interim awards rendered ahead of the final award. Where the parties agree to settle, this may be recorded as an 'award on agreed terms'. A tribunal may order the same relief as if the dispute had been the subject of civil proceedings before a court, except specific performance of a contract relating to land or any interest in land.

39 Termination of proceedings

By what other means than an award can proceedings be terminated?

Apart from by a final award, arbitral proceedings may also be terminated by an order of the tribunal upon the default of a party or settlement. There are no formal requirements for such orders but it is generally advisable to follow the formal requirements for an award to the extent possible when drafting such an order.

40 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The arbitral tribunal decides the issue of costs having regard to all relevant circumstances, including, if appropriate, any written offers of settlement. The tribunal must generally also assess the amount of costs. In this regard, the tribunal is not required to follow the scales and practices employed by the court. Recoverable costs must be reasonable. The HKIAC Rules empower the arbitral tribunal to apportion costs between the parties in a manner that it considers reasonable, taking into account the circumstances of the case. A tribunal may direct that the parties' recoverable costs be limited to a specified amount in advance of the costs being incurred, but this is uncommon. An agreement between parties that they must pay their own costs is void unless it forms part of an arbitration agreement concluded in respect of an already existing dispute.

Costs may also be ordered to be paid at an earlier stage of proceedings in respect of rulings and interim measures. The general rule is that costs follow the event. Where written settlement offers have been made 'without prejudice save as to costs' (or using other words to similar effect), the winning party may not recover its costs incurred subsequent to its rejection of that offer if the amount it is ultimately awarded is less than the amount of the settlement offer; it may also have to pay the losing party's costs incurred from that time.

The tribunal may review an award on costs within 30 days of the date of the award, if it was not aware of any information relating to costs that it should have taken into account, including any settlement offer.

41 Interest

May interest be awarded for principal claims and for costs, and at what rate?

The arbitral tribunal may award simple or compound interest on all claims, including claims for costs and amounts payable as a consequence of an award. Unless the tribunal decides otherwise, interest is payable at the judgment rate (currently 8 per cent) from the date of the award or order.

Proceedings subsequent to issuance of award

42 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

An arbitral tribunal may correct an award on its own initiative or at the request of a party. Where the tribunal is making the correction on its own initiative, this should be done within 30 days of the date of the award. Where a party requests a correction, that request must be made within 30 days of receipt of the award, after which the tribunal must generally make the correction, where appropriate, within 30 days of receipt of the request.

A party may request an interpretation of a specific point or part of the award, following which the tribunal may do so within 30 days of the date of receipt of that request. Any interpretation issued by the tribunal as a consequence of such a request forms part of the award.

Where the tribunal has omitted to make an award in respect of any claims presented in the arbitral proceedings, a party may request that the tribunal make an additional award in respect of those claims. If the tribunal considers the request to be justified, the additional award must be made within 60 days of the receipt of the request.

Where necessary, the tribunal may extend the time limits within which it is required to make a correction, interpretation or additional award.

43 Challenge of awards

How and on what grounds can awards be challenged and set aside?

A party seeking to set aside an arbitral award must make an application to the CFI. Further, where the court has upheld a challenge against an arbitrator, it may also set aside an award made by the arbitral tribunal that includes the challenged arbitrator.

Under the Ordinance, an arbitral award may be set aside only where the party making the application proves:

- a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it to;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case;
- the award deals with a difference not contemplated by or falling within the terms of the submission to arbitration; or
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

Or where the court finds that:

- the subject matter of the dispute is not capable of settlement by arbitration under Hong Kong law; or
- the award is in conflict with public policy.

Schedule 2 of the Ordinance provides for an additional avenue by which an award may be challenged. A challenge under Schedule 2 of the Ordinance is only available where the arbitration agreement expressly provides that its provisions are to apply, or where they automatically apply in certain cases, namely where (i) the arbitration agreement is entered into before or within six years after 1 June 2011 and that provides for domestic arbitration; or (ii) the arbitration agreement is contained in a subcontract, and where the main contract is a construction contract with an arbitration agreement, and situation (i) applies, provided that the subcontract in question has the defined linkage to Hong Kong. Under Schedule 2, an arbitral award can be challenged on the ground of serious irregularity affecting the tribunal, the arbitral proceedings or the award. The Ordinance lists out nine factors that the court will consider when deciding whether there is a serious irregularity that will cause, or has already caused, substantial injustice to the applicant.

These include, inter alia:

- failure by the tribunal to conduct the arbitral proceedings in accordance with the procedure agreed by the parties;
- failure by the tribunal to deal with all the issues that were put to it;
- the arbitral tribunal exceeding its powers;
- failure to comply with the requirements as to the form of the award; and
- the award being obtained by fraud, or being contrary to public policy.

If serious irregularity is shown, the court may remit the award to the arbitral tribunal for reconsideration, set aside the award or declare the award to be of no effect, in whole or in part.

An application to challenge an arbitral award on such a ground must be made within 30 days after the award is delivered.

Schedule 2, sections 5 and 7 further provide for the appeal against an arbitral award on a point of law, as well as other supplementary provisions on the challenge to or appeal against an arbitral award.

44 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Appeals (where available) may be made to the CFI, and, from the CFI to the Court of Appeal (CA) and subsequently the Court of Final Appeal (CFA), subject to the granting of leave by the court to do so. Proceedings in the CFI normally take about a year or a little less, whereas CA and CFA proceedings can take longer.

The apportionment of costs is determined at the discretion of the courts, with costs normally following the event and taxed (ie, assessed by the court) on a party and party basis, where all costs necessary or proper for the attainment of justice, or enforcing or defending rights, are payable. In appropriate cases, the court can order taxation on the more generous indemnity basis, where all costs are allowed except where they are unreasonably large or unreasonably incurred, with any doubts as to reasonableness resolved in favour of the party being compensated. In the absence of special circumstances, unsuccessful challenges tend to result in indemnity cost orders, as stated in *Gao Haiyan v Keeneye Holdings Ltd (No. 2)* [2012] 1 HKC 491 and affirmed in *Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Ltd* [2016] 1 HKC 149.

45 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

The original arbitral award and arbitration agreement, or a certified copy thereof, must be produced in order for a court to order enforcement. If neither document is in English or Chinese, a certified translation in either of these languages is also required. With leave, the CFI may enter judgment in terms of all awards. New York Convention awards, mainland China awards and Macao awards are also enforceable by action in the court.

The Ordinance provides that enforcement may be refused where any of the following is proved:

- that a party to the arbitration agreement was under some incapacity;
- the arbitration agreement was invalid;
- the person against whom enforcement is sought was not given proper notice of the arbitration or was otherwise unable to present his or her case;
- the award deals with a difference not falling within the terms of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place; or
- 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 the award was made.

A party wishing to ask a court to refuse recognition or enforcement of an award should apply to the CFI to set aside the award. The Hong Kong courts generally maintain a pro-enforcement stance in relation to arbitral awards, as reflected in the CFI decision in *KB v S* [2015] HKEC 2042, and affirmed in *China Solar Power (Holdings) Ltd v Ulvac, Inc* [2015] HKEC 2559. Courts will reject challenges to enforcement based on unmeritorious technical points of law or minor procedural complaints. Only where the conduct complained of is serious, for example, where the error has undermined due process, will it be considered sufficient to justify setting aside an award (see *U v A* [2017] HKEC 468). Provisions on enforcement also govern the recognition of awards.

46 Time limits for enforcement of arbitral awards

Is there a limitation period for the enforcement of arbitral awards?

As for other proceedings, the limitation period is 12 years from the date on which the cause of action accrued (that is the effective date of the arbitral award) (section 4(3) of the Limitation Ordinance (Chapter 347).

47 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Where one party is seeking to enforce a foreign award that has been set aside at the place of arbitration, in absence of Hong Kong jurisprudence on the issue, Hong Kong courts are likely to take guidance from the English case of *Yukos Capital SARL v OJCS Rosneft Oil Company* [2013] 3 WRL 1329 (Court of Appeal) and assess whether the court that set aside the award was impartial and independent, and whether the court was involved in conduct contrary to public policy of Hong Kong.

48 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The Ordinance provides that orders made by an emergency arbitrator appointed under the arbitration rules to which the parties have agreed are enforceable in the same manner as a court order, with the CFI's

Update and trends

Belt and Road Initiative

On 16 May 2018, the Secretary for Justice, Ms Teresa Cheng, SC, outlined new trends in the development of cross-border commercial dispute resolution amid the growth of commercial activities among countries, and the popularity of international arbitration and mediation. Among the key trends highlighted were those relating to the mediation of investment disputes, online dispute resolution and the establishment of a dispute resolution centre especially designed for the Belt and Road Initiative (BRI) – an extensive outbound investment strategy developed by the Chinese government in 2013 that will generate significant investment and commercial opportunities across numerous sectors and in many countries around the world

China's investment in the BRI is projected to grow in the coming years. In this context, international arbitration will play a significant role in resolving cross-border disputes arising from BRI projects, as one of the key benefits of arbitrating BRI disputes is the ability to enforce foreign arbitral awards in China and other countries under the New York Convention. Since ratifying the New York Convention in 1987, Chinese courts have increasingly demonstrated a pro-enforcement stance, as seen in a series of judicial interpretations issued in late 2017 by the Supreme People's Court, which has provided detailed guidance on the enforcement of laws.

HKIAC Revised Rules

The HKIAC recently revised its Administered Arbitration Rules, with effect from 1 November 2018, with the objective of improving procedural certainty and the cost-efficiency of arbitrations administered by the HKIAC. The provisions address:

- The effective use of technology: the HKIAC encourages the use of technology to manage proceedings and deliver documents, as the increased adoption of technology can lessen the costs and increase the time-effectiveness of arbitration. The new provisions allow for the uploading of documents onto a secured online repository as a valid means of service. Parties may agree to use their own repositories or a dedicated repository provided by the HKIAC. The 2018 Rules also identify the effective use of technology as a factor for the arbitral tribunal to consider when adopting suitable procedures for an arbitration.
- Multiparty and multi-contract disputes: the HKIAC has previously developed effective provisions for disputes involving multiple parties or contracts, or both. The 2018 HKIAC Rules further expand the provisions allowing a party to commence a single arbitration under multiple agreements even though the agreements are between different parties. They also include provisions expressly allowing the same arbitral tribunal to run multiple arbitrations concurrently with, for instance, common procedural timetables and pleadings, concurrent or consecutive hearings, and separate awards, provided a common question of law or fact arises in all of the arbitrations. This new provision is intended to enhance efficiency and reduce costs arising from multiple proceedings, where consolidation is not possible or desirable.
- Third-party funding: with the implementation of legislative amendments permitting the use of third-party funding in arbitration and associated proceedings in Hong Kong, the 2018 HKIAC Rules include provisions addressing related issues such as disclosure, confidentiality and the costs of third-party funding. These provisions require a funded party to disclose the existence of a funding arrangement and the identity of the funder, as well as any changes to these details that occur after the initial disclosure. The confidentiality provisions that apply to HKIAC-administered arbitrations are amended to allow a funded party to disclose arbitration-related information to its existing or a potential funder for the purposes of obtaining or maintaining funding. In addition, a new provision confers discretion on an arbitral tribunal to take into account any funding arrangement when fixing or apportioning the costs of arbitration.
- Early determination of points of law or fact: the 2018 HKIAC Rules introduce an early determination procedure (article 43) expressly empowering an arbitral tribunal to determine a point of law or fact in a summary fashion, on the basis that the points of law or fact are manifestly without merit; manifestly outside the arbitral tribunal's jurisdiction; or such that, even if assumed to be correct, would not result in an award being rendered in favour of the party submitting those points. The tribunal must decide whether to proceed with a request for early determination within 30 days from the date of a request. If the request is allowed to proceed, the tribunal must issue an order or award, which may be in summary form, on the relevant point within 60 days from the date of its decision to proceed. These time limits may be extended by the HKIAC or party agreement. Pending the determination of the request, the tribunal may decide how to proceed with the underlying arbitration.
- Procedural certainty: the HKIAC's Emergency Arbitrator Procedure under Schedule 4 has been updated to confirm the timing of filing an application for emergency relief, the test for issuing such relief and the maximum fees payable to an emergency arbitrator. The procedure has also been expanded to allow a party to file an application before, concurrent with or after the submission of a notice of arbitration, but prior to the constitution of an arbitral tribunal. Time limits under the procedure have been shortened, and an emergency arbitrator's fees are subject to a maximum amount. A new provision clarifies that the granting of emergency arbitrator relief is subject to the same test applied by an arbitral tribunal when deciding whether to issue an interim measure.

The HKIAC has also introduced a default three-month time limit for rendering an arbitral award after the closure of the proceedings or the relevant phase of the proceedings. There is also a requirement that, after proceedings are declared closed, the tribunal must notify the parties and the HKIAC of the anticipated date of delivering an award.

All these requirements bring certainty as to when parties can expect to receive a decision on their dispute.

The full text of these rules is available at the HKIAC's website.

New test for Hong Kong: arbitration provision and freedom of contract

On 22 January 2018, the Honourable Mr Justice Harris struck out a winding-up petition presented by Lasmos Limited (Lasmos) against Southwest Pacific Bauxite (HK) Ltd (the Company) in favour of arbitration (*Lasmos Limited v Southwest Pacific Bauxite (HK) Limited* [2018] HKCFI 426).

Lasmos and the Company were shareholders in a joint venture company. A dispute arose between them where Lasmos alleged that the Company had failed to pay for services rendered to it by Lasmos under a management services agreement (the Agreement). The Agreement contained an arbitration provision. Lasmos issued a petition based on what it claimed was an undisputed debt, though the Company never admitted the debt. The Company applied to dismiss the petition in favour of arbitration.

In rendering his decision, Mr Justice Harris recognised the trend in Hong Kong to give effect to arbitration provisions and uphold parties' autonomy to agree the means by which they resolve disputes, consistent with section 3 of the Arbitration Ordinance (Chapter 609). Having considered English and Singaporean authorities, Mr Justice Harris formulated a new test for Hong Kong – if a company disputes a debt relied on by the petitioner, the dispute is covered by an arbitration provision and the company takes steps to commence that dispute resolution process, the petition should generally be stayed.

Appealing arbitral awards

Under current legislation, parties to Hong Kong-seated arbitrations do not generally have the right to appeal an arbitral award on a question of law. Such a right, along with other special rights of recourse to the courts set out in Schedule 2 of the Ordinance (Chapter 609), was a key feature of the old 'domestic regime'. Since 1 June 2017, parties wishing to enjoy such rights must expressly 'opt in' to those provisions pursuant to section 99 of the Ordinance.

In *A and Others v Housing Authority* (HCCT 54/2017), the CFI reiterated that – in cases where there is a right of appeal – the threshold for the grant of leave to appeal an arbitral award on a question of law is high, and leave would only be granted if it can be demonstrated, clearly, quickly and easily, without meticulous legal argument that the decision is 'obviously, or demonstrably, wrong', or that the correctness of the decision is 'seriously in doubt'. It is therefore not sufficient to simply show that the decision of the tribunal is arguably wrong, or that it is arguable that the decision is open to some doubt. Even where a right to appeal exists, therefore, leave to appeal is only granted in exceptional cases where it can be demonstrated that the arbitrator was plainly wrong.

This decision is consistent with the very strongly pro-arbitration approach adopted by the Hong Kong judiciary, and demonstrates the reluctance of Hong Kong courts to interfere with decisions of arbitral tribunals.

No bilateral investment treaties have been recently terminated.

There is no pending investment arbitration case in which Hong Kong is a party.

leave. This is true whether the relief granted is within or outside of Hong Kong, but the court may refuse leave to enforce emergency relief granted outside Hong Kong if the enforcing party cannot demonstrate that the relief achieves one of a number of objectives, including maintaining or restoring the status quo pending the determination of the dispute, or prevention of harm or prejudice to the arbitral process.

49 Cost of enforcement

What costs are incurred in enforcing awards?

Costs associated with award enforcement are generally relatively modest unless the respondent opposes the application.

Other

50 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

In addition to the laws of Hong Kong, courts often make reference to legal precedents of other common law jurisdictions, in particular England and Wales, and the CFA invites judges from other common law jurisdictions to sit on its bench. In addition, the Ordinance also provides that its interpretation is to be done with regard to the Model Law's international origin and the need to promote uniformity in its application and the observance of good faith, and so authorities from other Model Law jurisdictions may also be relevant to the interpretation. Nonetheless, as many arbitrators reside in Hong Kong tend to have a common law background, many would naturally be more familiar with the common law approach than other approaches found in Model Law jurisdictions.

Insofar as discovery of documents goes, the Ordinance provides that unless otherwise agreed by the parties, the arbitral tribunal may make orders relating to discovery. The Ordinance further states that a person is not required to produce any document or evidence in arbitral proceedings that he or she could not be required to produce in civil proceedings before a court. The use of witness statements in arbitral proceedings are a common practice in Hong Kong.

51 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Solicitors and barristers are bound by their respective professional codes of conduct. Many of these individuals are also members of various other optional professional bodies and organisations, some of which provide their own codes of ethics. Best practice generally reflects the IBA Guidelines on Party Representation in International Arbitration.

52 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding of arbitration was historically not expressly permitted in Hong Kong. In June 2017, amendments to the Ordinance were enacted to make clear that the common law offences of maintenance and champerty do not apply to third-party funding of arbitration, essentially clearing the path for third-party funding of arbitration in Hong Kong.

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Following a two-month public consultation on a draft code of practice on third-party funding of arbitration, on 7 December 2018 the government published the Code of Practice for Third Party Funding of Arbitration, setting out the practices and standards with which third-party funders are ordinarily expected to comply in carrying on activities in connection with third-party funding of arbitration. The government also appointed 1 February 2019 as the date on which the relevant provisions of the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 shall come into operation, expressly permitting third-party funding of arbitration in Hong Kong.

Under the Ordinance, the funded party will be obliged to disclose the fact of the funding arrangement and the name of the third-party funder to the other parties in the arbitration and the arbitration body.

53 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign counsel, arbitrators, witnesses and other individuals involved in arbitration proceedings may require an appropriate visa in order to enter and, for counsel arbitrators, experts and the like, to work in Hong Kong.