International Commercial Arbitration in Hong Kong

A Guide

Stephen D. Mau

The research funding for this book was sponsored by
the Hong Kong Institute of Surveyors.

Hong Kong University Press
The University of Hong Kong
Pokfulam Road
Hong Kong
https://hkupress.hku.hk

ISBN 978-988-8528-22-6 (*Hardback*)
ISBN 978-988-8528-23-3 (*Paperback*)

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

10 9 8 7 6 5 4 3 2 1

Printed and bound by Hang Tai Printing Co., Ltd. in Hong Kong, China

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Foreword

Historically, the role of Hong Kong in international arbitration was limited. That was the reflection of the state of international arbitration in Asia at the time up to the 1980s. So Professor Julian DM Lew QC, in his key note address entitled 'Increasing Influence of Asia in International Arbitration' at the inaugural Hong Kong Arbitration Week in 2012, observed that "Asia's past contribution to international arbitration has been small" and that "[t]he Asian region was largely a bystander to the development of international arbitration and had little influence and perhaps little interest."[1]

His view fits in with my own recollections. I was first involved in Hong Kong arbitration over 30 years ago. It was of course already an established arbitration centre with a healthy diet of construction and maritime cases but with a strong connection to Hong Kong. There were no especial innovations in the practice or law of arbitration. Within a few years, however, there was an explosion of international cases. Moreover, in common with a limited number of other centres, Hong Kong is now in the forefront of arbitral innovations and has established itself as a firm favourite with the consumers of international arbitration services.

1985 saw two important developments which have greatly contributed to this development of Hong Kong as an international arbitration centre. One was the promulgation of the UNCITRAL Model Law in 1985 and its subsequent success in many countries including just a few years later its adoption by Hong Kong. That coupled with the continuous recognition by Asian governments of the nature and potential benefits of arbitration as a method for resolving private disputes galvanized the development of arbitration in Asia. Hong Kong adopted the Model Law, including the 2006 amendments, in June 2011, by introducing the Arbitration Ordinance (Cap 609).

Another event in 1985 was the establishment of the Hong Kong International Arbitration Centre. Led by successive far-sighted Chairpersons and Secretaries General and assisted by a Council with strong international representation HKIAC

[1] Julian D. M. Lew, 'Increasing Influence of Asia in International Arbitration', *Asian Dispute Review* (Hong Kong International Arbitration Centre (HKIAC); Hong Kong International Arbitration Centre (HKIAC) 2014, Volume 16 Issue 1) pp. 4–9.

has been a great success. The Centre and arbitrations there have not been a pale imitation of other arbitration centres. On the contrary, there have been specifically Hong Kong and Asian innovations in a number of areas being ahead of other institutions. At the heart of this are the HKIAC Rules which have been updated to keep pace with the demands of arbitration in the region. Users need to know how these rules operate.

As for the law in Hong Kong, the Arbitration Ordinance provides a modern and reliable statutory framework for the conduct of arbitration in Hong Kong. Importantly, and consistent with the letter and spirit of the Model Law, the Arbitration Ordinance only permits minimal curial intervention—in cases expressly envisaged by the law, such as granting interim relief in support of arbitration, assisting with taking of evidence and deciding challenges to awards, in the context of set aside and/or enforcement proceedings. So far Hong Kong courts have been careful not to abuse their arbitration-related powers and adhered strictly to the principal of minimal curial intervention, at the heart of the UNCITRAL Model Law.

Hong Kong has also proved a popular choice for international arbitration.

It is accessible. Hong Kong is within a five-hour flight to half of the world's population. Visa and entry requirements are minimised. Visitors may, for example, obtain a visa for a short-term visit on arrival. Anyone who has not been able to secure a witness or expert attendance due to visa issues—and these things happen more often than you think—will no doubt appreciate the potential benefits of this visa regime for the smooth conduct of arbitration proceedings.

Hong Kong also displays an extraordinarily large pool of multilingual professionals who can easily compete with leading arbitral centres. The city is a home to more than 1,300 barristers[2] and 1,299 registered foreign lawyers (from 31 jurisdictions),[3] not to mention an impressive, in size and quality of its members, pool of non-legal professionals, including engineers, accountants, surveyors, and architects (particularly important for construction disputes).

Finally, when it comes to *where* to hold a hearing, Hong Kong has excellent hearing facilities. HKIAC, Hong Kong's flagship arbitral institution, boasts of 20 meeting spaces including seven hearing rooms and 10 conference rooms. (I declare an interest as a past Vice Chairman). In October 2016, the Centre announced that it would offer its hearing and meeting rooms to parties free-of-charge in respect of dispute resolution proceedings administered by HKIAC in which at least one party is a State listed on the OECD DAC List of ODA assistance.[4]

[2] See the introductory page on the Hong Kong Bar Association website: http://www.hkba.org/the-bar/aboutus/index.html (accessed 28 October 2018).

[3] Law Society of Hong Kong, statistics as of 31 December 2015, available at: http://www.hklawsoc.org.hk/pub_e/about/ (accessed 28 October 2018).

[4] http://www.hkiac.org/news/free-hearing-space-cases-involving-states.

Adaptiveness/Ability to React to Users' Changing Demands

Hong Kong has also an enviable ability to innovate and to listen and respond—promptly and adequately—to the changing needs and preferences of the users of international arbitration.

Some examples will suffice. Traditionally, Hong Kong law did not permit third party funding for litigation, except in few narrow circumstances. However, as the use and demand for litigation finance in arbitration increased, in 2013 Hong Kong's Law Reform Commission launched a public consultation on whether to permit third party funding for arbitration in Hong Kong. In October 2016, the Commission issued a comprehensive report recommending that third party funding should be expressly permitted for arbitrations seated in Hong Kong, and in June 2017 Hong Kong passed a bill amending the Arbitration Ordinance to allow third party funding in arbitration.[5]

The most recent manifestation of Hong Kong's receptiveness to the changing needs and demands of the users of international arbitration is the revision of the 2013 HKIAC Arbitration Rules. The 2018 HKIAC Arbitration Rules contain a number of notable market-driven innovations. So, the Rules introduce the early determination procedure, which expressly empowers an arbitral tribunal to decide any point of law or fact by way of early determination on the basis that it is "manifestly without merit," "manifestly outside the arbitral tribunal's jurisdiction," or that, even if the point were "assumed to be correct," it would not result in an award in favour of the party that submitted it (Article 43). This mechanism was introduced in recognition of increasing demands for early determinations—a procedure already available under certain other rules but absent from many others. This is potentially a useful tool to narrowing the issues in dispute, increasing the prospects of settlement, or even providing a full answer to claims.

Other notable innovations include:

- an arbitral tribunal's enhanced powers with respect to the conduct of multiple arbitrations where the same tribunal is constituted and where common issues of law or fact are involved (Article 30) (an arbitral tribunal now has a menu of case management options: to run the arbitrations concurrently, consecutively, or even suspend any of the arbitrations pending resolution of the others); and
- provisions clarifying the test for and streamlining the process of emergency arbitration (Schedule 4).

Together with the 2018 Rules, HKIAC has also released a Practice Note on Appointment of Arbitrators, which sets out its general practice of appointing arbitrators, including a non-exhaustive list of the many factors that the Centre considers when selecting arbitrators. The Note provides some useful insights into what has

[5] The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016, 14 June 2017.

long been one of the most enigmatic aspects of the arbitral process—appointment of arbitrators—and thus represents an important step towards greater transparency in arbitrations conducted under HKIAC's Rules.

So, all this shows that thus far Hong Kong has proved to be a flexible, reliable, and modern platform for resolution of disputes that values innovation. Indeed, Hong Kong is consistently recognised as one of the leading arbitral seats for resolving international disputes. The 2018 Queen Mary survey, for example, placed Hong Kong among the top five global dispute resolution seats, along with London, Paris, Geneva, and Singapore.[6] Hong Kong also appears to be a popular seat for Russian disputes. While most recent statistics is not available, according to the Russian Arbitration Association Survey conducted in 2016, 22.5% of the users chose Hong Kong as a seat in the contracts drafted in 2014–2015.[7]

This work by Stephen D. Mau is therefore very welcome and very much needed. With its own practices, law, and rules it is no longer possible to get by in a Hong Kong arbitration by reliance purely on knowledge of the law and practices of other jurisdictions. Stephen's excellent work provides therefore an important reference work for those embarking in Hong Kong arbitration. Additionally, in a broader perspective, it also provides an extremely useful introduction to arbitration law and practice in an eminently clear, logical, and readable way.

For the practitioner this book will also provide an important source of theoretical understanding and practical guidance; from the initial choice of arbitration and choice of rules to the appointment of arbitrators and throughout the reference. The important topics of jurisdiction and arbitral duties are dealt with in a thoughtful way with of course ample citation of authority to rules, laws, and cases. Practical guidance is provided on such topics as the preliminary meeting and the difference between a memorials-based and a pleadings-based approach. It also covers some critical practical areas such as the giving and reception of expert evidence and the duties this places on the expert.

The work also rightly deals not only with the contents of the award but also the recognition and enforcement of awards. This is a topic of very great importance in an international arbitration.

Nor does the author ignore the very practical questions of how to improve efficiency and reduce cost in arbitration as he devotes a chapter to this important question.

I am privileged therefore to have been asked to provide this foreword and happy to commend it.

Lord Goldsmith QC, PC
Attorney General for England and Wales (2001–2007)
Vice Chairman of the Hong Kong International Arbitration Centre
London
January 2019

[6] http://www.arbitration.qmul.ac.uk/research/2018/ (accessed 16 October 2018).
[7] https://shop.americanbar.org/PersonifyImages/ProductFiles/297648970/Roundtable%206.pdf.

Foreword

"Dispute resolution" is now a popular, if not fashionable, term. Included in the concept of dispute resolution are different modes of resolving or settling disputes, and arbitration is certainly one of the key components. Arbitration is no stranger to the Hong Kong community. Indeed, researches reveal that arbitration was used as a means of dispute resolution in Hong Kong more than a century ago. However, the more significant modern development of arbitration in Hong Kong started in the early 1980s, especially in the context of construction disputes and with the setting up of the Hong Kong International Arbitration Centre. Since then, arbitration has become a well-received means of dispute resolution in different areas and Hong Kong has established herself as one of the important international arbitration hubs in the region.

In the past, there were not many arbitration textbooks produced by local authors. The trend, however, has changed, and the change is a positive one. This book, written by a learned author who has many years of experience of dispute resolution both as a practitioner and as an academic, provides a cogent and succinct exposition of the law of arbitration. Apart from the conventional areas which would certainly be covered, the contents of this book illustrate the recent changes we have seen in the development of arbitration in Hong Kong. Emergency relief and third-party funding, for instance, are two of the topics covered in this book. These two topics currently command much attention in the arbitration community in Hong Kong and in the region. In short, this book provides handy and useful assistance to both lawyers and non-lawyers who are in one way or another involved in arbitration or who are interested in the dispute resolution regime of Hong Kong.

I started off by saying that arbitration has a long history in Hong Kong. I would like to conclude by saying that arbitration will have a good prospect in the future. Globalization and development of international trade aside, international arbitration has an important role in the context of the Belt and Road Initiative and that is one of the areas where Hong Kong can and should contribute. Needless to say, much more work would have to be done to promote Hong Kong as an arbitration centre. Publication of books such as this should be encouraged and commended as it would

enable more people to understand the arbitration regime in Hong Kong as well as to induce more research and publication in this area.

Last but certainly not least, I congratulate the learned author of this book for the timely publication of this work, which I believe would be a useful addition to the bookshelf of practitioners and students of dispute resolution.

Rimsky Yuen
GBM, SC, JP
Secretary for Justice, Hong Kong SAR (2012–2018)
January 2019

Foreword

The Hong Kong Institute of Surveyors is delighted to sponsor the publication of this reference book, *International Commercial Arbitration in Hong Kong: A Guide*, which is not only written for the HKIS members, but also for global business people and students. Additionally, it is a useful reference for the general public.

The local construction industry continues to grow and evolve. This growth and evolution results in differences and disputes arising from commercial relationships. In response to these disagreements, *International Commercial Arbitration in Hong Kong: A Guide* seeks to offer a sufficiently detailed introduction to methods of resolving disputes other than court litigation, particularly arbitration. This book firstly introduces various alternative dispute resolution solutions before going into detail to review international commercial arbitration. *International Commercial Arbitration in Hong Kong: A Guide* includes a wide range of examples and court cases to illustrate the principles to professionals and non-law students. It is written in accessible language with detailed notes and references expanding upon the principles.

The subjects covered in this book are relevant to both professional and lay readers. It also serves as an excellent reference for undergraduate and postgraduate students who are studying courses related to the field.

Sr Dr Tony Ka Tung Leung
President (2018–2019)
The Hong Kong Institute of Surveyors
28 January 2019

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Overview of Alternative Dispute Resolution and Arbitration in Hong Kong

I. Introduction

The purpose of this chapter is to provide a cursory overview of some of the Alternative Dispute Resolution [hereinafter "ADR"] choices or processes available in Hong Kong. This overview is to demonstrate the vast array of ADR processes available to parties involved in a dispute[1] and also to compare and contrast ADR with arbitration in particular.

For this chapter, the term *ADR* refers to dispute resolution processes other than court litigation, including arbitration.[2] As this author noted in another publication, ADR evolves in order to satisfy the needs of its users, in substantial part because ADR is flexible and frequently is a process determined by agreement between the parties.[3] This party control of the dispute resolution process is referred to as being *party-driven* or as *party autonomy*.[4] Thus, ADR is unlike court litigation. A listing of some ADR processes follows with a short description of that particular ADR process.[5] This chapter concludes with a discussion of the influence which the two primary and different legal cultures might have upon dispute resolution.

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[1] Butterworths Hong Kong Arbitration Law Handbook para. [2.09] (Damon YC So, Christopher To *et al.*, eds., 2nd ed. 2018) [hereinafter So & To] defines "dispute" as: "A dispute will exist unless there is a clear and unequivocal admission not only of liability but also of quantum" (citations omitted).

[2] In some jurisdictions, arbitration is distinguished from ADR in that arbitration, like court litigation, results in a final and binding decision known as an *award*. For example, the International Chamber of Commerce distinguishes arbitration from ADR. Donald L Marston, *The Internationalisation of ADR* ICLR 16, 19 [2005].
In other jurisdictions, *e.g.*, the United States and Canada, arbitration comes under the heading of ADR. In the United Kingdom, arbitration is not generally considered to be a form of ADR. Despite this, the UK government includes arbitration within its definition of ADR. Rupert Choat, *ADR*, paper delivered at the IBC Legal's Construction Law Summer School held at Cambridge University, 5–8 Sep. 2016, p. 3 [hereinafter Choat].

[3] Stephen D. Mau, *Arbitration to Mediation to Arbitration with the Same Parties in the Same International Commercial Dispute Before the Same Neutral: Innovative Evolution or Receipt for Disaster?* 31(8) Construction Law Journal 429 (2015).

[4] Arbitration in Hong Kong: A Practical Guide paras. 6.003–6.019 (The Hon Chief Justice Geoffrey Ma and Denis Brock, eds., 4th ed. 2017) [hereinafter Ma & Brock].

[5] *See also id.* at Chapt. 4.

II. Adjudication

The term *adjudication* is defined as the "exercise of a power delegated by contract to a third party to resolve disputes on an interim or final basis as they arise without recourse to formal arbitration or litigation."[6] Adjudication is frequently associated with construction disputes relating to payment.[7] Adjudication is considered to be "rough and ready justice"[8] or a "pay first, argue later"[9] ADR process where the decision is binding upon the disputing parties until the conclusion of the construction works or project whereupon the adjudication decision can be challenged, for example, in an arbitration or in litigation. Adjudication is intended to ensure that cash flow, the life-blood of many small contractors or subcontractors,[10] can be preserved rather than one party withholding payment as a result of a dispute which will not be heard or decided until the completion of the construction works or project. Adjudication is provided for in the UK's *Housing Grants, Construction and*

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[6] The Academy of Experts, *The Language of ADR* (hereinafter TAE). *See* TAE's website: https://www.academyofexperts.org/alternative-dispute-resolution/language-adr (last visited 11 Jul. 2017).
The Hong Kong International Arbitration Centre [hereinafter HKIAC] provides this definition:

> Adjudications are a simple, effective and quick method of resolving disputes.
> Adjudications are conducted by a sole adjudicator in accordance with the Rules and terms of the contract and its applicable law.
> Adjudicators make decisions which are binding on the parties; in most cases the decision of an adjudicator can be revised in another forum such as arbitration. Adjudications are common in construction disputes.

Id. at: http://www.hkiac.org/adjudication/what-is-adjudication (last visited 11 Jul. 2017).
Development Bureau, *Proposed 'Security of Payment' Legislation for Construction Industry* (Jun. 2015) translates "adjudication" as 審裁. Available at: http://www.devb.gov.hk/filemanager/en/content_880/SOPL_leaflet.pdf (last visited 10 Aug. 2017).
For a reference source on adjudication in the United Kingdom, *see*, *e.g.*, Sir Peter Coulson, Coulson on Construction Adjudication (3rd ed. 2013).

[7] Hong Kong's Construction Industry Council explained:

> The specific issue to be resolved will be referred to decision by a third party neutral, the Adjudicator. The Adjudicator produces a decision after the parties present their evidence and made their written and/or oral submissions. The decision is binding in the interim, that is, during the currency of the works. But the Adjudicator's decision is not final and can be challenged in post-completion arbitration. Adjudication has not been commonly used in Hong Kong. It was provided for as a mandatory process in the Airport Core Programme (ACP) in 1990s, in which four construction disputes were resolved in two adjudications with no further steps taken to challenge the adjudicator's decisions. One other adjudication was conducted in 2009 in another context.
> . . . voluntary adjudication has been adopted in capital engineering works contracts of the Government with contract value exceeding HK$200 million.

Construction Industry Council, *Reference Materials for Application of Dispute Resolution in Construction Contracts* 24 (Version 2, Aug. 2015) [hereinafter CIC]. This publication may be found at the following website: http://www.cic.hk/cic_data/pdf/about_cic/publications/eng/reference_materials/Reference%20Materials%20Dispute%20Resolution%20(August%202015)_e.pdf (last visited 11 Jul. 2017).

[8] As the court stated in *RSL (South West) Ltd v Stansell Ltd* [2003] EWHC 1390, at para. 31:

> The price, which Parliament, and to a large extent the industry, has considered justified, is that the procedure adopted in the interests of speed is inevitably somewhat rough and ready and carries with it the risk of significant injustice. That risk can be minimised by adjudicators maintaining a firm grasp upon the principles of natural justice and applying them without fear or favour.

[9] *See*, *e.g.*, International Contractual and Statutory Adjudication 251 (Andrew Burr, ed., 2017); James Pickavance, A Practical Guide to Construction Adjudication 479 (2016).

[10] *See*, *e.g.*, *Modern Engineering Ltd v Gilbert-Ash* [1974] AC 689.

Regeneration Act 1996; Malaysia's *Construction Industry Payment and Adjudication Act 2012*; and Hong Kong's pending Security of Payment legislation.

III. Arbitration

A long-established ADR process, arbitration is defined as:

> the private judicial resolution by an arbitrator of a civil dispute or difference (which may be legal, technical or commercial, or a combination of these), by the agreement of the parties. The arbitrator is a neutral and independent person, other than a judge in a court of competent jurisdiction, who is selected by or on behalf of the parties on the basis of his expertise, reputation and experience in the legal, professional or economic speciality from which the dispute stems. The normal outcome of the process is an award which is final, legally binding and ultimately enforceable in court in the same manner as a judgement.[11]

The Asian region is amply represented by arbitral institutions in Hong Kong,[12] Kuala Lumpur, mainland China, Seoul, and Singapore.[13] We discuss more about arbitral institutions in the following chapters.

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[11] Robert Morgan, The Arbitration Ordinance of Hong Kong: A Commentary 1 (1997).
2 Halsbury's Laws of Hong Kong para. [25.001] (2nd ed. 2016) provides this definition:

> Arbitration is the process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined in a judicial manner, with binding effect, by the application of law by one or more persons (the arbitral tribunal) instead of by a court of law. The decision of the arbitral tribunal is usually called an award. (citation omitted)

For a discussion on the meaning of the phrase "dispute or difference," *see*, *e.g.*, So & To, *supra* note 1, at para. [20.09].
The Hong Kong *Arbitration Ordinance* (Cap. 609) § 2 translates "arbitration" as 仲裁.
For a review of the history of arbitration, *see*, *e.g.*, Redfern and Hunter on International Arbitration Chapt. 1 (Nigel Blackaby *et al.*, eds., 6th ed. 2015) [hereinafter Redfern & Hunter]. *Id.* at para. 1.04 provides this definition:

> Arbitration is essentially a very simple method of resolving disputes. Disputants agree to submit their disputes to an individual whose judgement they are prepared to trust. Each puts its case to this decision maker, this private individual – in a word, this 'arbitrator'. He or she listens to the parties, considers the facts and the arguments, and makes a decision. That decision is final and binding on the parties – and it is final and binding because the parties have agreed that it should be, rather than because of the coercive power of any state. Arbitration, in short, is an effective way of obtaining a final and binding decision on a dispute, or series of disputes, without reference to a court of law (although, because of national laws and international treaties such as the New York Convention, that decision will generally be enforceable by a court of law if the losing party fails to implement voluntarily). (footnote omitted)

[12] The Hong Kong International Arbitration Centre ranked third internationally after the International Chamber of Commerce in Paris and the London Court of International Arbitration according to an international survey. *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, Queen Mary University of London 12 (2015). Available at: www.arbitration.qmul.ac.uk/docs/164761.pdf (last visited 11 Jul. 2017).
[13] The Singapore International Arbitration Centre ranked fourth in the same survey. *Id.*

IV. Conciliation

"Conciliation and Mediation are often used interchangeably and indiscriminately."[14] In this book, conciliation[15] is distinguished from mediation.[16] Therefore, we use the following definition of the term *conciliation*:

> a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.
>
> Note: there are wide variations in meanings for 'conciliation', which may be used to refer to a range of processes used to resolve complaints and disputes including:
>
> — Informal discussions held between the parties and an external agency in an endeavour to avoid, resolve or manage a dispute
> — Combined processes in which, for example, an impartial party facilitates discussion between the parties, provides advice on the substance of the dispute,

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[14] TAE, *supra* note 6.

[15] § 2 of the *Arbitration Ordinance*, *supra* note 11, translates "conciliation" as 調停 and "mediation" as 調解. Hong Kong's *Mediation Ordinance* (Cap. 620) provides the identical Chinese translation for "mediation."

Art. 1(3) of UNCITRAL's *Model Law on International Commercial Conciliation* (2002) provides:

> "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

Id. at Art. 6(4) provides that: "The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute."

See also the *Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation* (2002), particularly para. 7.

The text of this *Model Law* is available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf (last visited 11 Jul. 2017).

UNCITRAL is the acronym for the United Nations Commission on International Trade Law.

[16] The National Alternative Dispute Resolution Advisory Council of Australia, *Dispute Resolution Terms – The use of terms in (alternative) dispute resolution* (Sept. 2003) [hereinafter NADRAC] notes:

> In NADRAC's view, 'mediation' is a purely facilitative process, whereas 'conciliation' may comprise a mixture of different processes including facilitation and advice. NADRAC considers that the term 'mediation' should be used where the practitioner has no advisory role on the content of the dispute and the term 'conciliation' where the practitioner does have such a role. NADRAC notes, however, that both 'mediation' and 'conciliation' are now used to refer to a wide range of processes and that an overlap in their usage is inevitable.

Id. at 3.

Its website can be found at: https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF (last visited 11 Jul. 2017).

See also So & To, *supra* note 1, at para. [2.16].

> makes proposals for settlement or actively contributes to the terms of any agreement.[17]

V. Dispute Resolution Advisor/Dispute Resolution Board [DRA/DRB]

At times referred to as a *Dispute Adjudication Board, Dispute Board* or *Dispute Panel*, a DRB is a "panel set up under the terms of a contract to adjudicate, mediae [*sic*], or settle claims, disputes or controversies referred them, either on an interim or a final and binding basis."[18]

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[17] NADRAC, *supra* note 16, at 5.

The Resolution Institute, based in Australia, provides a similar definition:

> Conciliation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.

The Resolution Institute's website is at: http://www.resolution.institute/dispute-resolution/conciliation (last visited 1 Aug. 2017).

Alessandra Sgubini *et al.*, *Arbitration, Mediation and Conciliation: Differences and Similarities from an International and Italian Business Perspective* (Aug. 2004) provides a similar definition:

> Conciliation tries to individualize the optimal solution and direct parties towards a satisfactory common agreement. Although this sounds strikingly similar to mediation, there are important differences between the two methods of dispute resolution. In conciliation, the conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement. In conciliation, the neutral is usually seen as an authority figure who is responsible for the figuring out the best solution for the parties. The conciliator, not the parties, often develops and proposes the terms of settlement. The parties come to the conciliator seeking guidance and the parties make decisions about proposals made by conciliators. In this regard, the role of a conciliator is distinct from the role of a mediator. The mediator at all times maintains his or her neutrality and impartiality. A mediator does not focus only on traditional notions of fault and a mediator does not assume sole responsibility for generating solutions. Instead, a mediator works together with the parties as a partner to assist them in finding the best solution to further their interests. A mediator's priority is to facilitate the parties' own discussion and representation of their own interests, and guide them to their own suitable solution- a good common solution that is fair, durable, and workable. The parties play an active role in mediation, identifying interests, suggesting possible solutions, and making decisions concerning proposals made by other parties. The parties come to mediator seeking help in finding their own best solution.

Id. at http://www.mediate.com/articles/sgubinia2.cfm (last visited 11 Jul. 2017).

See also the German Arbitration Institute (*Deutsche Institution für Schiedsgerichtsbarkeit*) [hereinafter DIS] whose Conciliation Rules (2002) § 11 provides in part:

> 1. The conciliators shall support the parties in an impartial and independent manner in their attempt to settle the dispute amicably.
>
> . . .
>
> 3. If the parties so wish, the conciliators can make suggestions towards settling the dispute at every stage of the proceedings. Grounds for the suggestions must not be stated.

Similarly, the DIS Mediation Rules (2012) at § 3.4 states: "The mediator shall encourage the settlement of the conflict between the parties in an orderly and efficient manner. He may make proposals for the resolution of the dispute upon consensual wishes of all parties."

Link at: http://www.disarb.org/en/16/rules/overview-id0 (last visited 1 Aug. 2017).

[18] TAE, *supra* note 6.

The Hong Kong Construction Industry Council [hereinafter "CIC"] provides this definition:

> The basic concept of a Dispute Resolution Advisor (DRA) involves the use of a neutral third person who advises the parties to a potential dispute and suggests possible options to avoid the dispute.
>
> The DRA is jointly appointed by the employer and the contractor from contract commencement to contract completion. The DRA's main role is to assist the parties to identify potential disputes and assist in the resolution of disagreements, which if unresolved, may turn into formal disputes.
>
> The DRA has no power to make any decision and his function is to be facilitative, encouraging parties to jointly work towards a common goal of completing the works in accordance with the contract.
>
> If disputes do arise, and where necessary, the DRA can advise on the choice of one of the five means of resolving disputes.
>
> Currently, DRA is engaged in projects involving the Development Bureau and the Housing Authority in Hong Kong.
>
> The DRA is appointed by the employer and the main contractor but is involved in avoiding disputes at main contract and nominated subcontract levels.[19]

Frequently encountered in construction projects, a DRB is intended to address issues as they arise thus providing a "real time" solution. For example, the FIDIC Red Book (1999), Sub-clause 20.4 provides for a Dispute Adjudication Board [hereinafter "DAB"]:

> If a dispute (of any kind whatsoever) arises between the Parties . . . either Party may refer the dispute in writing to the DAB for its decision . . . The decision shall be . . . binding on both Parties . . .
>
> If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party . . .

The CIC envisages that a DRA/DRB would operate in the following manner:

> DRA is used in main contract and nominated subcontract only. A DRA should be brought in at the beginning of a contract, continue to participate regularly for the duration of the contract and preferably till the completion of the final account of the contract.
>
> The DRA who [*sic*] meets at regular intervals with representatives of the Employer, Consultant, Main Contractor, Nominated Subcontractors and major Domestic Subcontractors, takes note of potential disagreements between the Employer/Consultant and the Main Contractor as they arise. The DRA will help settle disagreements before they finally turn into disputes which require more formal and timely method to resolve.[20]

[19] CIC, *supra* note 7, at 14.
[20] *Id.*

In summary, the DRA/DRB is intended to be a pro-active endeavour by the parties to resolve quickly potential or actual disputes in real time. As noted by the CIC, dispute avoidance "should be introduced through the use of a Dispute Resolution Advisor (DRA), jointly appointed by the Employer and Contractor, who will help the parties to avoid differences crystallising into dispute."[21]

VI. Early Neutral Evaluation

This is:

> a process in which the parties to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a dispute resolution practitioner. That practitioner makes a determination on the key issues in dispute, and the most effective means of resolving the dispute without determining the facts of the dispute.[22]

An international dispute resolution consultancy explaines this process in greater detail. This ADR process is one in which an independent neutral assesses the merits of the disputing parties' case, and provides a recommendation as to the outcome. Early Neutral Evaluation [hereinafter "ENE"] is different from arbitration. ENE is non-binding and more informal. Unless the parties agree otherwise, ENE is not subject to "due process" and can therefore be more flexible. There is usually no trial-type hearing. Unless the parties agree otherwise, and unlike arbitration, the neutral may conduct investigations independently of the parties and make its recommendation based on those investigations without reference to the parties. Parties may obtain legal advice when undertaking this process, but do not need to be legally represented during the ENE procedure.[23]

VII. Expert Determination

The CIC describes its concept of this ADR process as being:

> a final and binding dispute resolution process. The Expert has to make a determination on the issue before him and is allowed to use his own expertise in coming to his conclusion. Expert Determination can only be challenged in limited circumstances.
>
> The Expert may conduct the determination in such manner as he considers appropriate, taking into account the circumstances of the case, the wishes of the

[21] *Id.* at 7.

[22] NADRAC, *supra* note 16, at 6. For further information on this ADR process, *see*, *e.g.*, Wayne D. Brazil, Early Neutral Evaluation (2012).

[23] Introduction, *Model Early Neutral Evaluation Agreement*, Centre for Effective Dispute Resolution (2016) [hereinafter CEDR].

CEDR states on its website that the organization is "the largest conflict management and resolution consultancy in the world." *Id.* at https://www.cedr.com/about_us/ (last visited 30 Jul. 2017).

> parties and the need for a speedy resolution of the dispute. Expert Determination will be involved if a final decision on the dispute is expected.[24]

Another source provides this definition: "The use of an independent Expert to investigate the referred matters and to give his opinion which becomes binding on the parties. Not strictly an ADR process."[25]

A third source explains that expert determination:

> is a process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner, who is chosen on the basis of a specialist qualification or experience in the subject matter of the dispute (the expert) and who makes a determination.[26]

From these definitions, it is apparent that the concept of expert determination is similar; however, there is variation as to the methodology which an expert undertakes in coming to a determination. Whether the expert determination is binding or non-binding will be determined by the disputing parties' original agreement or upon any rules to which the disputing parties have subsequently agreed.[27]

One comment notes the difficulty of distinguishing expert determination from ENE:

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[24] CIC, *supra* note 7, at 30.

[25] TAE, *supra* note 6.

[26] NADRAC, *supra* note 16, at 7.

To these definitions, CEDR, *supra* note 23, would add:

> Expert determination is a private process involving an independent technical expert who makes a binding decision on technical rather than legal issues and who has the power to ask questions of the parties before rendering his or her decision. The decision is binding unless it is agreed by the parties at the outset that the determination will not be. Expert determination is particularly suited to disputes of valuation or a purely technical nature across a range of sectors.

https://www.cedr.com/solve/expert/ (last visited 30 Jul. 2017).

For further information on this ADR process, *see*, *e.g.*, the website of the Building Disputes Tribunal of New Zealand: http://www.buildingdisputestribunal.co.nz/EXPERT+DETERMINATION.html (last visited 11 Jul. 2017).

[27] For example, Clause 2 of the CEDR *Model Expert Determination Agreement* (2016) provides that the determination "will be final and binding on the parties." CEDR, *supra* note 23.

Rule 5(5) of TAE's Rules for Expert Determination states that "the Expert's determination shall be final and binding on the parties," although under Rule 5(11) and Rule 7(2) the parties can agree otherwise. "The expert's decision is—by prior agreement of the parties—legally binding on the parties." TAE, *supra* note 6. The Academy of Experts' Rules are found at this website: https://www.academyofexperts.org/alternative-dispute-resolution/what-expert-determination (last visited 11 Jul. 2017).

The International Chamber of Commerce [hereinafter ICC] has published its Rules for Expertise, Art. 12(3) of which provides: "Unless otherwise agreed by all of the parties, the findings of the expert shall not be binding upon the parties."

These ICC rules are found at this website: http://library.iccwbo.org/content/dr/RULES/RULE_ALL_Expertise_EN_0034.htm?l1=Bulletins&l2=ICC+International+Court+of+Arbitration+Bulletin+Vol.13%2FNo.2+-+Eng&reqhref=%5Ccontent%5Cdr%5CAWARDS%5CAW_0309.htm?l1=Bulletins (last visited 28 Aug. 2017).

The DIS, *supra* note 17, "advises all parties wishing to obtain an expert determination with preliminary binding effect in order to clarify a dispute" to resort to expert determination. Rules on Expert Determination (2010). Link: http://www.disarb.org/en/16/rules/dis-rules-on-expert-determination-id28 (last visited 17 Aug. 2017).

> differences may be that (1) the type of dispute referable to ENE is not so limited as for expert determination and (2) ENE is carried out with other court or arbitration proceedings under way . . . Expert determination on the other hand is a process in its own right (and tends to envisage the parties making full disclosure).[28]

VIII. Mediation

As used here, *mediation* refers to facilitative mediation which is defined as:[29]

> a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.[30]

An alternative definition of mediation is: "a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute."[31]

Facilitative mediation is used in Hong Kong. The Hong Kong Department of Justice states:

> Mediation is a voluntary process in which a trained and impartial third person, the mediator, helps the parties in dispute to reach an amicable settlement that is responsive to their needs and acceptable to all sides.
>
> During the process, each party to the dispute has a chance to put his/her case and to hear what the other side has to say. The mediator's job is not to make a decision for the parties, but to assist the parties to explore the strengths and weaknesses of their own cases and to identify possible solutions, so as to facilitate them to reach a settlement agreement. The mediator does not decide who is right or wrong and

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[28] Choat, *supra* note 2, at 10.

[29] A facilitative mediator does not make recommendations to the parties, give advice or opinions as to the outcome of the case or predict a court's disposition of the dispute. An evaluative mediator would point out weaknesses in the case and could provide an opinion on the merits of the case. *Id.* at 12.

[30] The Australian Disputes Centre. Website at: https://disputescentre.com.au/knowledge-resources/mediation/ (last visited 7 Aug. 2017).

[31] NADRAC, *supra* note 16, at 9. This definition is also the one used by the Hong Kong Department of Justice as its working definition and for the draft of the *Mediation Ordinance*, *supra* note 15.

See also The Accord Group, *Mediation Training Course Notes* (2017) defining "mediation" as:

> a process which is aimed at building consensus and agreement which is voluntarily reached between the parties where the [neutral] does not act as a judge to decide how the parties should resolve their dispute nor give advice or recommendations to tell the parties how to resolve their dispute.
>
> The mediator acts as a catalyst or facilitator for effective communication and negotiation so that the parties themselves are able to reach an agreement.

Compare these definitions to that of § 3(2) of the United States' *Uniform Mediation Act*: "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntarily agreement regarding their dispute."

> has no authority to impose a settlement on the parties, the decision-making power rests in the hands of them. The mediator is skilled in unlocking negotiations that have become deadlocked and in keeping everyone focused on finding a solution.[32]

The territory's *Mediation Ordinance* (Cap. 620), section 4(1) defines mediation to be:

> 1. For the purposes of this Ordinance, mediation is a structured process comprising one or more sessions in which one or more impartial individuals, without adjudicating a dispute or any aspect of it, assist the parties to the dispute to do any or all of the following—
>   (a) identify the issues in dispute;
>   (b) explore and generate options;
>   (c) communicate with one another;
>   (d) reach an agreement regarding the resolution of the whole, or part, of the dispute.

Another definition and explanation of the mediation process in the territory is provided by the Hong Kong International Arbitration Centre:

> Mediation is a voluntary and private dispute resolution process in which a neutral person, the mediator, helps the parties to reach their own negotiated settlement agreement. The mediator has no power to impose a settlement. His/Her function is to overcome any impasse and encourage the parties to reach an amicable settlement.
>
> In commercial disputes an impasse most often arises from either a lack of trust in the integrity of the other party or a genuine good faith difference of opinion on the facts underlying the dispute or on the probable outcome of the case were it to go to court. The mediator may act as a shuttle diplomat and a channel for communication, by filtering out the emotional elements and allowing the parties to focus on the underlying objectives. The mediator will encourage the parties to reach an agreement themselves as opposed to having it imposed upon them.[33]

The UNCITRAL Working Group II has proposed an update of the UNCITRAL *Model Law on International Commercial Conciliation* (2002). It is expected that the updated version will be known as the UNCITRAL *Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* (2018).[34] Furthermore, this Working Group has also proposed an

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[32] *See* the Hong Kong Judiciary's *FAQs on Mediation* at: http://mediation.judiciary.gov.hk/en/mediation_faq.html#01 (last visited 11 Jul. 2017). *See also Mediation Ordinance*, *supra* note 15, at § 4; Hong Kong Mediation Accreditation Association Ltd's website at: www.hkmaal.org (last visited 11 Jul. 2017).
For more information on this ADR process, *see*, *e.g.*, Hong Kong Mediation Handbook (Raymond Hai Ming Leung, gen. ed., 2nd ed. 2014); Mediation in the Construction Industry: An International Review (Penny Brooker, *et al.* eds., 2010). *See* Ma & Brock, *supra* note 4, at para. 4.001 for a flowchart of a Hong Kong International Arbitration Centre mediation.

[33] HKIAC, *supra* note 6, at: http://www.hkiac.org/mediation/what-is-mediation (last visited 30 Jul. 2017).

[34] For further information, *see* http://www.uncitral.org/pdf/english/commissionsessions/51st-session/ACN9-943_advance_copy_website.pdf (last visited 5 May 2018).

international treaty through which signatory states agree to the enforcement of mediated settlements. The name of this international agreement is anticipated to be: *United Nations Convention on International Settlement Agreements Resulting from Mediation*.[35] It is expected that both these instruments will be presented by the Working Group to UNCITRAL for approval in the near future.

IX. Negotiation

As its name implies, with this method the disputing parties meet to negotiate or attempt to negotiate a settlement to their dispute. As explained by one authority:

> Negotiation can be defined as a process through which parties move from their initially divergent positions to a point where agreement can be reached. It is a consensual bargaining process in which parties attempt to reach agreement on a disputed, or potentially disputed, matter. Negotiation allows parties to get something they would not get by acting unilaterally. What sets negotiation apart from the other dispute resolution techniques . . . is that it allows, but does not compel, autonomy without third party intervention, although it can form an important part of certain ADR procedures, *e.g.* mediation or conciliation.[36]

In conclusion, a variety of ADR processes is available to disputing parties, some of which are listed above. Most ADR processes are available before a dispute arises (*e.g.*, an agreement to arbitrate) and most are available after a dispute arises (*e.g.*, an *ad hoc* arbitration). It is possible for these ADR methodologies to overlap in practice and function as well as in name (*e.g.*, conciliation and mediation) as these processes continue to evolve and as these processes frequently are determined by the parties, often resulting in a "hybrid" ADR (*e.g.*, mediation/arbitration). Thus, as noted, a rigid delineation between the different forms of ADR is difficult and

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As noted in footnote 2 to this instrument:

> In its previously adopted texts and relevant documents, UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. In preparing this Model Law, the Commission decided to use the term "mediation" instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications.

This Model Law provides the following definition of "mediation" in Art. 1.3:

> For the purposes of this Law, 'mediation' means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ('the mediator') to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.

[35] A draft of this instrument may be found at: http://undocs.org/A/CN.9/WG.II/WP.205/Add.1 (last visited 5 May 2018). Presently, it is expected that this instrument, after obtaining the requisite approvals within the United Nations organization, will be signed in the second half of 2019 in Singapore and will be referred to informally as the *Singapore Convention* or as the *Singapore Convention on Mediation*.

[36] Ma & Brock, *supra* note 4, at para. 4.007.

See id. at paras. 4.009–4.025 for further discussion, respectively, of: the objective theories of negotiation, problem-solving negotiation, competitive negotiation, subjective factors in negotiation, good faith in negotiation.

that "categorization is incapable of properly capturing the diversity of the ADR landscape."[37]

X. Legal Systems

As mentioned at the beginning of this chapter, this section addresses a matter having the potential to affect all international disputes. A person's background and training forms that person's frame of reference. This influences that individual's thought processes and attitudes. In this section, we focus on the legal system from the places where the parties and/or their legal representatives and/or the neutrals come. An individual's origin might influence the perspective and approach.

Although it is a generalization, for the purposes of this book, we classify legal systems into two categories: the common-law legal system and the civil-law legal system.[38] The former, in simplest terms, is the legal system derived from England and is practiced in that country and its former colonies. The civil-law legal system, again in simplest terms, is derived from continental Europe and its former colonies. The common-law legal system is heavily based upon precedent, *i.e.*, previous court decisions. The common-law system is also adversarial, often portrayed by the entertainment media as lawyers doing battle in the courtroom while the judge remains aloof and neutral. The civil-law legal system is more heavily based upon written law, *i.e.*, codes. The civil-law system is inquisitorial,[39] again often portrayed as active judges directly questioning the lawyers and witnesses as the judges search

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[37] Choat, *supra* note 2, at 9.

[38] For example, some countries in Saharan Africa have a mixture of civil-law and Sharia-law legal systems. Kim Rosenberg, *Weighing the evidence: documentary evidence v factual/expert witnesses*, presentation delivered at the Chartered Institute of Arbitrators' International Arbitration Conference held in Johannesburg, 19–20 Jul. 2017.

In the country of South Africa, there is a mixed legal system:

- a civil-law system inherited from the Dutch
- a common-law system inherited from the British
- a customary-law system inherited from African customary law

The English influence is mostly in procedural aspects of the legal system and methods of adjudication, and the Roman-Dutch influence is mostly in substantive private law. As a general rule, South Africa follows English law in both criminal and civil procedure, company law, constitutional law and the law of evidence. Roman-Dutch law is followed in South African contract law, law of delict (tort), law of persons, law of things, family law, *etc.* Krinesh Govender, *Arbitration—an in-house perspective*, presentation delivered at the Chartered Institute of Arbitrators' International Arbitration Conference held in Johannesburg, 19–20 Jul. 2017.

One authority states:

> [T]here is just enough uniformity in the general approach to questions concerning the presentation of evidence to justify using the expression 'civil law countries' by way of contrast to the 'common law countries' when discussing the presentation of evidence to international tribunals. Where there are differences between the two systems, they are most noticeable in the area of the procedures that lead to fact-finding.

Redfern & Hunter, *supra* note 11, at para. 6.80. For a more detailed discussion, *see id.* at paras. 6.81–6.88.

[39] The Insider Dealing Tribunal's website translates "inquisitorial" as 訊問式. The Chinese version of the website is at: http://www.idt.gov.hk/chinese/intro.html (last visited 31 Jan. 2018). The English version of this website is at: http://www.idt.gov.hk/english/intro.html (last visited 31 Jan. 2018).

for the truth. How do these different types of legal systems affect ADR, particularly arbitration?

We can take for example, evidence and the conduct of the arbitral process. In Chapter 3, we discuss the International Bar Association's *Rules on the Taking of Evidence in International Arbitration* (2010) in terms of a guideline or good practice in arbitral proceedings. These rules were produced 18 years ago and mainly adopt a common-law legal system approach. Recently, there is a new set of rules which was prepared and was launched on 14 December 2018, the *Inquisitorial Rules on the Taking of Evidence in International Arbitration* (hereinafter "The Prague Rules").[40] The Prague Rules are intended to provide a more civil-law oriented approach to the taking of evidence in an attempt to reduce the time and related costs of an arbitration.[41]

The following table should reveal some additional differences and their impact upon dispute resolution:[42]

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[40] The final version of the Prague Rules are available in English, Portuguese, Russian and Spanish. Link: https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf (last visited 21 Dec. 2018).

[41] The Working Group for the Prague Rules provided a *Note*:

> It has become almost commonplace these days that users of arbitration are dissatisfied with the time and costs involved in the proceedings. The procedures for taking evidence, particularly document production, and using multiple fact and expert witnesses and their cross-examination at lengthy hearings are, to a large extent, reasons for this dissatisfaction.
>
> The drafters of the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") bridged a gap between the common law and civil law traditions of taking evidence. The IBA Rules were very successful in developing a nearly standardized procedure in international arbitration, at least for proceedings involving parties from different legal traditions and those with significant amounts at stake.
>
> However, from a civil law perspective, the IBA Rules are still closer to the common law traditions, as they follow a more adversarial approach with document production, fact witnesses and party-appointed experts. In addition, the party's entitlement to cross-examine witnesses is almost being taken for granted.
>
> In addition to that many arbitrators are reluctant to actively manage arbitration proceedings, including earlier determination of issues in dispute and the disposal of such issues, to avoid the risk of a challenge.
>
> These factors contribute greatly to the costs of arbitration, while their efficiency is sometimes rather questionable. . . . most commentators admit that it is very rare, if ever, that document production brings a smoking gun to light. . . . many commentators express doubts as to the usefulness of fact witnesses and the impartiality of party-appointed experts. Many of these procedural features are not known or used to the same extent in non-common law jurisdictions, such as continental Europe, Latin America, Middle East and Asia.
>
> In light of all of this, the drafters of the Prague Rules believe that developing the rules on taking evidence, which are based on the inquisitorial model of procedure and would enhance more active role of the tribunals, would contribute to increasing efficiency in international arbitration.
>
> By adopting a more inquisitorial approach, the new rules will help the parties and tribunals to reduce the time and costs of arbitrations.

Link: http://www.praguerules.com/upload/medialibrary/697/697f654d36c0275b310cb3ccc1e0e9f3.pdf (last visited 3 May 2018).

[42] This is a modified version of the table prepared by Grant Herholdt, *The Role of Counsel—Civil v Common Law*, for a presentation delivered at the Chartered Institute of Arbitrators' International Arbitration Conference held in Johannesburg, 19–20 Jul. 2017. Link: http://www.ciarb.org/docs/default-source/ciarbdocuments/events/2017/July/day-2-johannesburg-conference.pdf?sfvrsn=2 (last visited 3 May 2018).
See also So & To, *supra* note 1, at para. [47.09] for a similar table.

11
Cost-saving Techniques in Arbitration

I. Introduction

Time is money. In the past few years, techniques have been introduced in an attempt to reduce the costs of adversarial proceedings while ensuring a fair resolution. Some of these time and cost-saving techniques have been mentioned previously in relation to the hearing stage. In this chapter, we look into yet other techniques, in no particular order. These assorted techniques have one common goal: to reduce the time and cost of arbitration. Some techniques reviewed in this book have become accepted and established as common practice without much controversy. Some others are more recent innovations which are less readily accepted by stakeholders due to the techniques' novelty and/or controversial procedure.

II. Requirement for Efficiency

Some institutional rules require the parties and the arbitral tribunal to conduct the arbitration in an expeditious manner. For example, the International Chamber of Commerce [hereinafter "ICC"] requires every effort by the parties and the tribunal to "conduct the arbitration in an expeditious and cost-effective manner," including a mandatory case management conference.[1]

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[1] ICC Rules of Arbitration (2017) [hereinafter ICC Rules], Art. 22(2) provides:

> In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.

Appendix VI of these Rules provides in relevant part:

> Article 1: Application of the Expedited Procedure Rules
>
> 1) Insofar as Article 30 of the Rules of Arbitration of the ICC (the "Rules") and this Appendix VI do not provide otherwise, the Rules shall apply to an arbitration under the Expedited Procedure Rules.
> 2) The amount referred to in Article 30(2), subparagraph a), of the Rules is US$ 2,000,000.
>
> . . .
>
> Article 2: Constitution of the Arbitral Tribunal
>
> 1) The Court may, notwithstanding any contrary provision of the arbitration agreement, appoint a sole arbitrator.
> 2) The parties may nominate the sole arbitrator within a time limit to be fixed by the Secretariat. In the absence of such nomination, the sole arbitrator shall be appointed by the Court within as short

In Hong Kong, there are several provisions aimed at achieving efficiency. One example is § 3(1) of the *Arbitration Ordinance* (Cap. 609) which mandates: "The object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense." Another example is the Hong Kong International Arbitration Centre [hereinafter "HKIAC"] which has rules which contain provisions implementing the Ordinance's object. For instance, the HKIAC's Administered Arbitration Rules (2018) provide:

> Article 13—General Provisions
>
> 13.1 Subject to these Rules, the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense, having regard to the complexity of the issues, the amount in dispute and the effective use of technology . . .
>
> . . . 13.5 The arbitral tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration.

The HKIAC's Domestic Arbitration Rules (2014) provide in Art. 5(2):

> The Arbitrator shall have the power to adopt wherever possible a simplified or expedited procedure and in any case shall have the widest discretion allowed by law to conduct the proceedings so as to ensure the just, expeditious, economical, and final determination of the dispute.

Art. 17.1 of the UNCITRAL Arbitration Rules (2013) contains similar language:

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a time as possible.

Article 3: Proceedings

1) Article 23 of the Rules shall not apply to an arbitration under the Expedited Procedure Rules.
2) After the arbitral tribunal has been constituted, no party shall make new claims, unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration, any cost implications and any other relevant circumstances.
3) The case management conference convened pursuant to Article 24 of the Rules shall take place no later than 15 days after the date on which the file was transmitted to the arbitral tribunal.
   . . .
4) The arbitral tribunal shall have discretion to adopt such procedural measures as it considers appropriate. . . . the arbitral tribunal may . . . decide not to allow . . . document production or to limit the number, length and scope of written submissions and written witness evidence (both fact witnesses and experts).
5) The arbitral tribunal may . . . decide the dispute solely on the basis of the documents submitted by the parties, with no hearing and no examination of witnesses or experts. When a hearing is to be held, the arbitral tribunal may conduct it by videoconference, telephone or similar means of communication.

Article 4: Award

1) The time limit within which the arbitral tribunal must render its final award is six months from the date of the case management conference. The Court may extend the time limit pursuant to Article 31(2) of the Rules.

. . .

Further details on the expedited procedure provisions may be found here: https://iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provisions/ (last visited 17 Aug. 2017).

> The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

Similarly, the Vienna International Arbitral Centre's Rules of Arbitration and Mediation (2018) provide:

> The arbitral tribunal shall conduct the arbitration in accordance with the Vienna Rules and the agreement of the parties in an efficient and cost-effective manner, but otherwise according to its own discretion.[2]

A tribunal's failure to observe this rule may result in the: "conduct of any or all arbitrators . . . may be taken into consideration by the General Secretary in determining the arbitrators' fees."[3] There is a similar obligation and potential penalty for the parties:

> The conduct of any or all parties as well as their representatives . . . and in particular their contribution to the conduct of efficient and cost-effective proceedings, may be taken into consideration by the arbitral tribunal in its decision on costs.[4]

III. Submissions

Here, we discuss procedures during the actual hearing which might result in saved time and hence costs. These procedures involve the parties submitting written documentation and the arbitral tribunal accepting these documents in place of the traditional verbal presentations made by the parties or their representatives. For example:

- written opening submissions in place of the parties delivering the same information verbally at the beginning of the arbitral hearing process
- written closing submissions in lieu of the parties delivering a verbal summary of the case at the conclusion of the arbitral hearing procedures
- written submissions on preliminary points of law which would permit the arbitral tribunal to read the parties' arguments and to be prepared to question

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[2] Vienna International Arbitral Centre's Rules of Arbitration and Mediation (2018), Art. 28(1).

[3] *Id.* at Art. 16(6).

There is a similar provision in the German Arbitration Institute (*Deutsche Institution für Schiedsgerichtsbarkeit*) [hereinafter DIS] Arbitration Rules (2018):

> Article 37 Time Limit for the Final Award
> The arbitral tribunal shall send the final award to the DIS for review pursuant to Article 39.3, in principle within three months after the last hearing or the last authorized Submission, whichever is later. The Arbitration Council, in its discretion, may reduce the fee of one or more arbitrators based upon the time taken by the arbitral tribunal to issue its final award. In deciding whether to reduce the fee, the Arbitration Council shall consult the arbitral tribunal and take into consideration the circumstances of the case.

[4] *Id.* at Art. 38(2).

Parties." The latest version of arbitration rules by the HKIAC provides in Art. 27 for "Joinder of Additional Parties."

X. Hybrid Processes

The DIS issued a new set of arbitration rules in 2018. Art. 26 of these rules provides in full: "Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues." This provision seems to expand the role of the tribunal in permitting the tribunal to participate in assisting amicable settlement.

Other jurisdictions such Hong Kong,[49] New Zealand[50] and Australia[51] permit an arbitration/mediation/arbitration procedure before the same neutral. Singapore provides for a similar process; however, the arbitration procedure is conducted at the Singapore International Arbitration Centre while the mediation process is conducted at the Singapore International Mediation Centre, before different neutrals at each centre.[52]

Proponents posit that the purpose of these hybrid processes is to save time and costs, as there is no duplication of time to convey the case to different neutrals: the mediator and the arbitral tribunal. Additionally, having one neutral familiar with the details of the case would assist in the neutral's evaluation of the parties'

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[49] *Arbitration Ordinance*, *supra* note 20, at § 33 states:

33. Power of arbitrator to act as mediator

(1) If all parties consent in writing, and for so long as no party withdraws the party's consent in writing, an arbitrator may act as a mediator after the arbitral proceedings have commenced.
(2) If an arbitrator acts as a mediator, the arbitral proceedings must be stayed to facilitate the conduct of the mediation proceedings.
(3) An arbitrator who is acting as a mediator—
  (a) may communicate with the parties collectively or separately; and
  (b) must treat the information obtained by the arbitrator from a party as confidential, unless otherwise agreed by that party or unless subsection (4) applies.
(4) If—
  (a) confidential information is obtained by an arbitrator from a party during the mediation proceedings conducted by the arbitrator as a mediator; and
  (b) those mediation proceedings terminate without reaching a settlement acceptable to the parties,

  the arbitrator must, before resuming the arbitral proceedings, disclose to all other parties as much of that information as the arbitrator considers is material to the arbitral proceedings.
(5) No objection may be made against the conduct of the arbitral proceedings by an arbitrator solely on the ground that the arbitrator had acted previously as a mediator in accordance with this section.

[50] The New Zealand International Arbitration Centre refers to this process as *Arb – Med*. *See* the Centre's Arb – Med Rules available at: https://www.nziac.com/arb-med/arb-med-rules/ (Last visited 3 May 2018).

[51] For domestic arbitrations only. *See*, *e.g.*, § 27D of the *Commercial Arbitration Act 2017* for the Australian Capital Territory. Link: http://www.legislation.act.gov.au/a/2017-7/current/pdf/2017-7.pdf (last visited 3 May 2018). New South Wales' *Commercial Arbitration Act 2010* contains identical provision as does South Australia's *Commercial Arbitration Act 2011*.

[52] *See*, *e.g.*, Christopher Boog, *The New SIAC/SIMC AMA-Protocol: A Seamless Multi-tiered Dispute Resolution Process Tailored to the User's Needs*, Asian Dispute Review 91 (2015).

positions which in the mediation phase might encourage the parties to reconsider their positions.

Another advantage of these hybrid processes is that any settlement agreement reached during the mediation phase can be incorporated into a final award which would be easily enforceable internationally through the *New York Convention*. While this procedure remains an advantage, its effect is anticipated to be diminished with the impending implementation of the *Convention on International Settlement Agreements Resulting from Mediation* (to be known as the *Singapore Convention* 2019) which would permit the international enforcement of mediation settlements in a similar manner to the international enforcement of arbitration awards under the *New York Convention*.[53]

Opponents posit that there is a reluctance to adopt these hybrid processes, especially by practitioners trained in the common-law legal system due to the perception of a conflict of interest when a single neutral assumes both an arbitrator's role and a mediator's role.[54] This conflict is most obvious in the treatment of confidential and privileged information obtained during the mediation phase when in private caucus sessions, where each party is encouraged to make full and frank disclosure. Should this phase be unsuccessful, there is a perception that the information obtained might influence the neutral's adjudication of the resumed arbitration.

This tension is further exacerbated by the requirement that confidential information obtained during the private caucus during the mediation phase is to be disclosed to the other party. For example, the *Arbitration Ordinance* at § 33(4) provides:

> If confidential information is obtained by an arbitrator from a party during the mediation proceedings conducted by the arbitrator as a mediator; and those mediation proceedings terminate without reaching a settlement acceptable to the parties, *the arbitrator must*, before resuming the arbitral proceedings, *disclose to all other parties as much of that information as the arbitrator considers is material* to the arbitral proceedings. (emphasis added)

There is also a tension in a blended mediation and arbitration procedure on a theoretical basis. Mediation, particularly facilitative mediation, is seen as a process where a neutral facilitates the parties to negotiate an acceptable settlement based on the parties' true needs rather than perceived legal rights. Arbitration, on the other hand, is seen more as private litigation where the neutral serves as the decision-maker determining each party's legal rights rather than as facilitator.

The traditional stepped-process contained in a multi-tiered dispute resolution clause, also known as an *escalation clause*, seems less controversial. Here, for example, the parties may require friendly negotiation between them to be concluded within a contract-specified time, failing which the parties would proceed to

[53] Also discussed in Chapter 1 along with the *Singapore Convention* is the UNICTRAL *Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation* (2018).

[54] Those practitioners from other legal systems, particularly the PRC and Germany, seem to have less reluctance to adopt these hybrid procedures.

mediation with one neutral with settlement before a contract-specified time, failing which the parties would proceed to arbitration before a different neutral. This type of dispute resolution clause has been held to be a valid arbitration clause.[55] Further, each step in the dispute resolution process is considered to be a pre-requisite before escalation to the next step.[56]

XI. Summary

In this chapter, we gathered a variety of time-saving and cost-saving measures which are intended to lower the costs of an arbitration. Some of these diverse and unrelated measures are already in use and accepted as a standard or routine choice for the parties or the tribunal. Other measures are more innovative and not as readily accepted due to the measure's untested nature. An example of this reluctance to adopt new measures can be seen as a result of the cases of *AQZ v ARA* and *Noble Resources v Shanghai Good Credit*, where in each case the validity of the award was challenged. As the principal purpose of an arbitral tribunal is to produce a valid and thus enforceable award, due process paranoia might limit the inclination to adopt innovative approaches to expedite proceedings. A uniform interpretation and application of the rules and certainty of enforcement should eliminate inconsistencies and uncertainty, which are an anathema for business and for arbitration.

[55] *Ling Kong Henry v Tanglin Club* [2018] SGHC 153; *Westco Airconditioning Ltd v Siu Chong Construction & Engineering* [1998] 1 HKC 254; and, *Channel Tunnel Group v Balfour Beatty Ltd* [1993] 1 All ER 664. *See also Lim Choon Hock (also known as William Lim) v Hung Ka Hai Clement* [2016] HKCFI 1439; *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm); and, Ewelina Kajkowska, Enforceability of Multi-Tiered Dispute Resolution Clauses (2017).

[56] *See, e.g., Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3193; *DGT Steel and Cladding Ltd v Cubitt Building and Interiors Ltd* [2007] EWHC 1584 (TCC).

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