International Commercial Arbitration in Hong Kong

A Guide

Stephen D. Mau

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Contents

Foreword by Lord Goldsmith x
Foreword by Rimsky Yuen xiv
Foreword by Tony Ka Tung Leung xvi

1. Overview of Alternative Dispute Resolution and Arbitration in Hong Kong 1
   I. Introduction 1
   II. Adjudication 2
   III. Arbitration 3
   IV. Conciliation 4
   V. Dispute Resolution Advisor/Dispute Resolution Board [DRA/DRB] 5
   VI. Early Neutral Evaluation 7
   VII. Expert Determination 7
   VIII. Mediation 9
   IX. Negotiation 11
   X. Legal Systems 12

2. Considerations for Selecting Arbitration: An Introduction 15
   I. Introduction 15
   II. Differences between Arbitration and Other Dispute Resolution Methods 17
   III. Types of Arbitration 19
   IV. Advantages of Arbitration 24
   V. Disadvantages of Arbitration 26
   VI. Party Autonomy 28
   VII. The Arbitration Agreement 31
   VIII. Summary 42

3. Laws and Rules of Arbitration 43
   I. Introduction 43
   II. Laws 43
      A. UNCITRAL Model Law on International Commercial Arbitration 44
B. Law of the Seat

C. New York Convention

D. Arbitration Ordinance
   i. Unification of domestic and international arbitration regimes
   ii. Opt-in provisions
   iii. Interim measures
   iv. Greater efficiency in arbitration proceedings
   v. More stringent confidentiality requirements

III. Rules
   A. UNCITRAL Arbitration Rules
   B. Institutional Rules
   C. Others
      i. UNCITRAL Notes on Organizing Arbitral Proceedings (2016)
      ii. International Bar Association
         a. Guidelines on Conflict of Interest in International Arbitration (2014)
         b. Rules on the Taking of Evidence in International Arbitration (2010)
      iii. Chartered Institute of Arbitrators

IV. Summary

4. Appointment of the Arbitrator/Tribunal
   I. Introduction
   II. Appointment of the Arbitrator
      A. Procedure for the Appointment
      B. Qualifications and Qualities Expected of the Tribunal
         i. Qualifications required by the Arbitration Ordinance
         ii. Qualifications required by the Arbitration Agreement
   III. Challenge to the Arbitrator
   IV. Summary

5. Jurisdiction, Duties, and Powers
   I. Introduction
   II. Jurisdiction
   III. Duties
   IV. Powers
   V. Summary

6. Preliminary Meeting and Interlocutories
   I. Introduction
   II. Arbitral Tribunal
Part 1. The Award
I. Arbitral Awards: Generally 171
II. Types of Award 173
III. Rules Applicable to the Merits 178
IV. Remedies 180
V. Essentials of a Valid and Enforceable Award 181
   A. Requirements as to Form 182
   B. Substantive Requirements 184
   C. Effects of Non-compliance with Substantive Requirements 185
   D. Delivery to Parties/Publication of the Arbitral Award 185
   E. Correction, Interpretation, and Addition to the Award 186
Part 2. Costs and Interest
I. Introduction to Costs 188
   A. Deposits 189
   B. General Rules in Awarding Costs 190
   C. Offers to Settle and Their Effect 192
   D. Limiting Recoverable Costs 194
   E. The Bases of Costs 195
   F. Taxation of Costs 197
II. Introduction to Interest 198
III. Summary 202

10. Recognition and Enforcement of the Award 203
   I. Introduction 203
   II. Recognition and Enforcement 203
      A. Recognition 203
      B. Enforcement 205
         i. Formal requirements 206
         ii. Grounds for refusing recognition and enforcement 208
         iii. Suspension of enforcement proceedings and order of security for costs 221
         iv. Recourse against an award 222
         v. Grounds for setting aside 223
         vi. Remission of the award 228
   III. Summary 229

11. Cost-saving Techniques in Arbitration 231
   I. Introduction 231
   II. Requirement for Efficiency 231
   III. Submissions 233
   IV. Emergency Arbitrators 234
   V. Third Party Funding 236
   VI. Expedited Procedure 237
VII. Summary Procedures  242
VIII. Consolidation  244
IX. Joinder  246
X. Hybrid Processes  247
XI. Summary  249

Finding Aids
Table of Cases  251
Table of Legislation (Institutional Rules and Other Publications)  256
Table of Legislation (Laws and Subsidiary Legislation)  261
Index  269
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 keynote 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.”

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

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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 and 1,299 registered foreign lawyers (from 31 jurisdictions), 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.

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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. 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.

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
Vice Chairman of the Hong Kong International Arbitration Centre
London
January 2019

“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
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
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 dispute¹ 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.

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].
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.” Adjudication is frequently associated with construction disputes relating to payment. Adjudication is considered to be “rough and ready justice” or a “pay first, argue later” 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, 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 Development Act*.

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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.


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.


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).

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.\(^\text{11}\)

The Asian region is amply represented by arbitral institutions in Hong Kong,\(^\text{12}\) Kuala Lumpur, mainland China, Seoul, and Singapore.\(^\text{13}\) We discuss more about arbitral institutions in the following chapters.


\(^{2}\) 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)


\(^{13}\) 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, conciliation15 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,

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.


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.


See also So & To, supra note 1, at para. [2.16].
makes proposals for settlement or actively contributes to the terms of any agreement.\textsuperscript{17}

\section*{V. Dispute Resolution Advisor/Dispute Resolution Board [DRA/DRB]}

At times referred to as a \textit{Dispute Adjudication Board}, \textit{Dispute Board} or \textit{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.”\textsuperscript{18}

\textsuperscript{17} NADRAC, \textit{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 \textit{et al.}, \textit{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.


See also the German Arbitration Institute (\textit{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.

\ldots

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.”


\textsuperscript{18} TAE, \textit{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

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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.”

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.

An international dispute resolution consultancy explains 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.

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

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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:

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.


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&eqhreff=%5Content%5Cдр%5CAWARDS%5CAW_0309.htm?l1=Bulletins (last visited 28 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

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.
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.\textsuperscript{32}

The territory's \textit{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.\textsuperscript{33}

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


\textsuperscript{33} HKIAC, supra note 6, at: http://www.hkiac.org/mediation/what-is-mediation (last visited 30 Jul. 2017).

\textsuperscript{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*. 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.

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.

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*.

**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.”

**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. 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, 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.

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


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.

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”).

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.

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


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.

See also So & To, supra note 1, at para. [47.09] for a similar table.
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.

...
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:

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

² Vienna International Arbitral Centre’s Rules of Arbitration and Mediation (2018), Art. 28(1).
³ Id. at Art. 16(6).
⁴ 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.
⁵ 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, New Zealand and Australia 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.

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’

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).


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

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53 Also discussed in Chapter 1 along with the *Singapore Convention* is the UNICITRAL *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.

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).
<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
<th>Page Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>A v B [2015]</td>
<td>3 HKLRD 586</td>
<td>214n44, 221n81</td>
</tr>
<tr>
<td>ABB Ag v Hochtief Airport GmbH [2006]</td>
<td>2 Lloyd's Rep 1</td>
<td>103n51</td>
</tr>
<tr>
<td>Abner Soleimany v Sion Soleimany [1999]</td>
<td>QB 785</td>
<td>30n72, 220</td>
</tr>
<tr>
<td>ACC Limited v Global Cements (2012)</td>
<td>7 SCC 71</td>
<td>77</td>
</tr>
<tr>
<td>Ajay Kanoria v Tony Francis Guinness [2006]</td>
<td>EWCA Civ 222, Arb LR 513</td>
<td>212</td>
</tr>
<tr>
<td>American Diagnostica Inc v Gradipore Ltd (1998)</td>
<td>44 NSWLR 312</td>
<td>52n33</td>
</tr>
<tr>
<td>Angela Raguz v Rebecca Sullivan [2000]</td>
<td>NSWCA 240</td>
<td>51–52, 52n33</td>
</tr>
<tr>
<td>Antilles Cement Corporation (Puerto Rico) v Transficem (Spain) [2006]</td>
<td>XXXI YBCA 846</td>
<td>216</td>
</tr>
<tr>
<td>Apex Tech Investment Ltd v Chuang's Development (China) Ltd [1996]</td>
<td>2 HKLRD 155</td>
<td>103, 108n76, 161</td>
</tr>
<tr>
<td>AQZ v ARA [2015]</td>
<td>SGHC 49</td>
<td>240n35, 241n37, 249</td>
</tr>
<tr>
<td>Arjowiggins HKK2 Ltd v X Co [2016]</td>
<td>HKEC 2472</td>
<td>166, 225–227, 228n109</td>
</tr>
<tr>
<td>Arsanovia Ltd v Cruz City 1 Mauritius Holdings [2012]</td>
<td>EWHC 3702 (Comm)</td>
<td>51n32</td>
</tr>
<tr>
<td>Astro Nusantara International B.V. v PT First Media TBK [2018]</td>
<td>HKCFA 12</td>
<td>217, 224–225</td>
</tr>
<tr>
<td>AT&amp;T Corp &amp; Lucent Technologies Inc v Saudi Cable Co [2000]</td>
<td>2 All ER (Comm) 625</td>
<td>83n36</td>
</tr>
<tr>
<td>Autoridad del Canal de Panama v Sacyr SA [2017]</td>
<td>EWHC 2228 (Comm), EWHC 2337 (Comm)</td>
<td>245n45</td>
</tr>
<tr>
<td>BCY v BCZ [2016]</td>
<td>SGHC 249</td>
<td>37n90, 51n32</td>
</tr>
<tr>
<td>Blanalko Pty Ltd v Lysaght Building Solutions Pty Ltd [2017]</td>
<td>VSC 97</td>
<td>176n22</td>
</tr>
<tr>
<td>Braes of Doune Wind Farm v Alfred McAlpine Business Services Ltd [2008]</td>
<td>EWHC 426 (TCC)</td>
<td>38–39,48n22</td>
</tr>
<tr>
<td>Brunswick Bowling &amp; Billiards Corp v Shanghai Zhonglu Industrial Co Ltd [2011]</td>
<td>1 HKLRD 707</td>
<td>97n27, 149n1</td>
</tr>
<tr>
<td>Calderbank (Jacqueline Anne) v Calderbank (John Thomas) [1975]</td>
<td>3 All ER 333</td>
<td>94, 194n87</td>
</tr>
<tr>
<td>Cannonway Consultants Ltd v Kenworth Engineering Ltd [1995]</td>
<td>1 HKC 179</td>
<td>236n20</td>
</tr>
<tr>
<td>CEED (Shanghai) Solar Science &amp; Technology Co, Ltd v LUMOS LLC, 829 F.3d 1201 (10th Cir. 2016)</td>
<td>EWHC 2050 (TCC)</td>
<td>52</td>
</tr>
<tr>
<td>Chalbury McCouat International Limited v PG Foils Limited [2010]</td>
<td>EWHC 2050 (TCC)</td>
<td>52</td>
</tr>
<tr>
<td>Channel Tunnel Group v Balfour Beatty Ltd [1993]</td>
<td>1 All ER 664</td>
<td>51n32, 249n55</td>
</tr>
<tr>
<td>Checkpoint Ltd v Strathclyde Pension Fund [2003]</td>
<td>EWCA Civ 84</td>
<td>103n55</td>
</tr>
</tbody>
</table>
Chen Hongqing v Mi Jingtian [2017] HKCFI 1148 125n26
Chilton v Saga Holidays plc [1986] 1 All ER 841 104
China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd [1995] 2 HKLR 215 214n45
Chloro Controls India Pvt Ltd v Severn Trent Water Purification (2013) 1 SCC 641 37n93
Clarapede & Co v Commercial Union Association (1883) 32 WR 262 146nn32–34
Consolidation Coal Co v Local 1643, United Mine Workers of America, 48 F.3d 125 (4th Cir. 1995) 84n42
Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55 131n43
Cropper v Smith (1884) 26 Ch D 700 146n32, 146n34
Cutts (Oliver) v Head (Albert and George) [1984] 1 All ER 597 194n87
D Frampton & Co Ltd v Sylvio Thibeault and Navigation Harvey & Freres Inc [1988] FCJ No. 305 183n42
DGT Steel and Cladding Ltd v Cubitt Building and Interiors Ltd [2007] EWHC 1584 (TCC) 249n56
Dallah Real Estate v Ministry of Religious Affairs [2010] UKSC 46 211
Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd [2014] EWHC 2104 249n55
Encyclopaedia Universalis SA (Luxembourg) v Encyclopaedia Britannica Inc. (US) [2005] XXXYBCA 1136 214
Fiona Trust and Holding Corporation v Yuri Privalov [2007] EWCA Civ 20 98
FirstLink Investments Corp Ltd v GT Payment Pte Ltd [2014] SGHCR 12 39n97
Fung Sang Trading Ltd v Kai Sun Sea Products & Food Company Ltd [1992] HKLR 40 56n50, 98n33
General Organization of Commerce and Industrialisation of Cereals of the Arab Republic of Syria v SpA SIMER (Società delle Industrie Meccaniche di Rovereto) (Italy) (1983) VIII YBCA 386 213
George William Harris v The Queen, [2001] DTC 5322 145n30
Grand Pacific Holdings Ltd v Pacific China Holdings Ltd [2012] 4 HKLRD 1 (CA) 208n21, 229
Hardy Exploration & Production (India), Inc. v Government of India, Ministry of Petroleum & Natural Gas, United States District Court for the District of Columbia, Civil Action No.: 16–140 (RC), decided June 7, 2018 218–219, 218n69, 219n72
Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111 210n25, 229, 230
Home of Homes Ltd v Hammersmith and Fulham London BC [2003] EWHC 807 (TCC) 195n89
Hong Kong Institute of Education v Aoki Corporation [2004] 2 HKLRD 760 183n50
HKSAR v Lam Hon Kwok Popy [2012] HKEC 914 156n21
Hui v Esposito Holdings Pty Ltd [2017] FCA 648 103n49
Hui v Esposito Holdings Pty Ltd [2017] FCA 728 103n49
Imperial Leatherware Co Pty Ltd v Macri & Marcellino Pty Ltd (1991) 22 NSWLR 653 139n9, 150n3
Insigna Technology Co Ltd v Alstom Technology Ltd [2008] SGHC 134; on appeal [2009] SGCA 24 64n84, 65–67
IP Cathay II, LP v Jiting Zhou No. A13027 (Beijing Fourth Intermediate People's Court, 2018) 213
Jacqueline Anne Calderbank v John Thomas Calderbank [1975] 3 All ER 333 194, 194n87
J E Taylor & Co Ltd v Paul Brown [1993] 1 HKLR 285 132n45, 139n9
Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd [2016] SGHC 153 35–36, 37n93
Jivraj (Nurdin) v Hashwani (Sadruddin) [2011] UKSC 40 86n53, 87
Jung Science Information Technology Co Ltd v ZTE Corp [2008] 4 HKLRD 776 82, 83n34
KB v S [2015] HKCFI 1787; [2016] 2 HKC 325 229
Ketteman v Hansel Properties Ltd [1987] AC 189 146n35
Kin Shing (Leung's) General Contractors Ltd v Chinese University of Hong Kong [2011] HKEC 1049 188n71, 194n87
Klöckner Pentaplast Gmbh & Co Kg v Advance Technology (HK) Company Ltd [2011] 4 HKLRD 262 17n9, 41
KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd [2017] SGHC 32 40
Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd [1998] 4 HKC 347 112n97
Lewis v Haverfordwest Rural District Council [1953] 1 WLR 1486 188n71, 190n78
Lim Choon Hock (also known as William Lim) v Hung Ka Hai Clement [2016] HKCFI 1439 249n55
Ling Kong Henry v Tanglin Club [2018] SGHC 153 249n55
Ling Ming v Chen Shu Quan [2012] 2 HKLRD 547 98n33
London and Overseas Freighters Ltd v Timber Shipping Co SA [1972] AC 1 202n116
Lonrho Ltd v Shell Petroleum [1980] 1 LR 627 130n41
Lucky-Goldstar International v Ng Moo Kee Engineering Ltd [1993] 1 HKC 404; [1993] 2 HKLR 73 39–40, 42n107
Maguire v Motor Services Limited t/a MSL Park Motors [2017] IEHC 532 (Irish High Court) 33–35
Matheson & Co Ltd v A Tabah & Sons [1963] 2 Lloyd's Rep 270 190n79
Maximov (Nikolay Viktorovich) v Novolipetsky Metallurgichesky Kombinat [2017] EWHC 1911 (Comm) 217–218
Michael Warde v Feedex International Inc [1984] 1 Lloyd's Rep 310 178n26
Modern Engineering Ltd v Gilbert-Ash [1974] AC 689 2n10
Moor v Moor [1954] 2 All ER 458, 1 WLR 927 (CA) 164n48
Ngan Wun Yeung v The Lok Sin Tong Benevolent Society Kowloon [2000] 2 HKC 404 196n99
Noble Resources International Pte Ltd v Shanghai Good Credit International Trade Co, Ltd (2016) Hu 01 Xie Wai Ren No. 1 214–215, 241nn36 and 37, 249
Norman Stewart Taylor v Santos Ltd (1998) 71 SASR 434 130n41
Nuradin jvraj v Sadruddin Hashwani [2011] UKSC 40 86n53, 87
Oil Basins v BHP Billiton [2007] VSCA 255 183nn43 and 44
Oliver Cutts v Albert Head and George Head [1984] 1 All ER 597 194n87
Paklito Investment Ltd v Klockner East Asia Ltd (1993) 2 HKLR 39 167
Paloma Co Ltd v Capxon Electronic Industrial Co Ltd [2018] HKCFI 1147 225n97
Panel on Takeovers and Mergers v Cheng Kai-man [1995] 2 HKLR 302 83
Peterborough City Council v Enterprise Managed Services Ltd [2014] EWHC 3193 249n56
Pratt v Swanmore Builders Ltd and Baker [1980] 2 Lloyd’s Rep 504 105n61
Premium Nafta Products Limited v Fili Shipping Company Limited [2007] UKHL 40 99n34
President of India v La Pintada Compania Navegaçion SA, The La Pintada [1985] AC 104 200n110
Raguz (Angela) v Sullivan (Rebecca) [2000] NSWCA 240 51–52, 52n33
Re PetroChina International (Hong Kong) Corp Ltd [2011] HKCA 168 229
Regina v Robert Gough [1993] AC 646 82
Regina v Margaret Jean Fitch, [2005] SKQB 257 145n30
Rocco Giuseppe & Figli v Tradax Export SA [1984] 1 WLR 742 202n118
RSL (South West) Ltd v Stansell Ltd [2003] EWHC 1390 2n8
Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics [2015] EWHC 194 (Comm) 47n20
Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd [2009] 2 CLC 481 184n53
Sino Dragon Trading Ltd v Noble Resources International Pte Ltd [2016] FCA 1131 228n109
Soleimany (Abner) v Soleimany (Sion) [1999] QB 785 30n72, 220
Stuart Whitehouse (suing by his mother and next friend Eileen Whitehouse) v J A Jordan [1981] 1 WLR 246 165n53
Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638 48
Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd [2016] 5 HKLRD 221 30n68, 152, 152n9, 212
Tate & Lyle Food and Distribution Ltd v Greater London Council [1982] 1 WLR 149 201n12
Taylor (Norman Stewart) v Santos Ltd (1998) 71 SASR 434 130n41
<table>
<thead>
<tr>
<th>Case Title</th>
<th>Court and Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>TMT v The Royal Bank of Scotland [2017] SGHC 21</td>
<td>40</td>
</tr>
<tr>
<td>Top Gains Minerals Macao Commercial Offshore Ltd v TL Resources Pte Ltd [2015] HKEC 243</td>
<td>64n84</td>
</tr>
<tr>
<td>Top Shop Estates Ltd v Danino [1985] 1 EGLR 9</td>
<td>103n55</td>
</tr>
<tr>
<td>Tramountana Armadora SA v Atlantic Shipping Co SA [1978] 2 All ER 870</td>
<td>192n83</td>
</tr>
<tr>
<td>U v A [2017] HKCFI 398</td>
<td>218n69</td>
</tr>
<tr>
<td>Union of India v McDonnell Douglas [1993] 2 Lloyds Rep 48</td>
<td>31</td>
</tr>
<tr>
<td>Unistress Building Construction Co Ltd v Humphreys Estate (Forrestdale) Ltd [1992] 2 HKLR 145</td>
<td>139 n9, 150 n3</td>
</tr>
<tr>
<td>Unruh (Siegfried Adalbert) v Seeberger (Hans-Joerg) (2007) 10 HKCFAR 31</td>
<td>236n20</td>
</tr>
<tr>
<td>Virgoz Oils and Fats Pte Ltd v National Agricultural Marketing Federation of India EX.P. 149/2015 &amp; EA(OS) No. 66/2016</td>
<td>35</td>
</tr>
<tr>
<td>Warde (Michael) v Feedex International Inc [1984] 1 Lloyd’s Rep 310</td>
<td>178n26</td>
</tr>
<tr>
<td>Wadsworth v Lydall [1981] 1 WLR 598</td>
<td>200n111</td>
</tr>
<tr>
<td>Wang Din Shin v Nina Kung [2005] HKCA 133</td>
<td>197n101</td>
</tr>
<tr>
<td>Westpoint Insurance Corp v Gordon Runoff Ltd [2010] NSWCA 57</td>
<td>183n43</td>
</tr>
<tr>
<td>Whitehouse (Stuart) (suing by his mother and next friend Eileen Whitehouse) v Jordan (J A) [1981] 1 WLR 246</td>
<td>165n53</td>
</tr>
<tr>
<td>Winnie Lo v HKSAR (2012) 15 HKCFAR 16</td>
<td>236nn18 and 19</td>
</tr>
<tr>
<td>X Co v Z Ltd, 4A_84/2015 (BGE/ATF 142 III 239; First Civil Law Court of the Swiss Federal Tribunal, Judgement of February 18, 2016)</td>
<td>37n89</td>
</tr>
<tr>
<td>Xiamen Xingjingdi Group Ltd v Eton Properties Ltd [2009] HKCA 223</td>
<td>229</td>
</tr>
<tr>
<td>Zhejiang Yisheng Petrochemical Co v INVISTA Technologies S.á.r.l</td>
<td>Stanford Law School China</td>
</tr>
<tr>
<td>陳偉文 訴 入境事務處處長 (HCAL20/2000)</td>
<td>173n8, 205n6</td>
</tr>
</tbody>
</table>
Index

Ad hoc arbitration
choice, 21–23, 33n81, 50
generally, 19, 21–23, 27, 33n81, 63,
64n84, 67, 68, 74n5, 94n12, 114n1,
115n3, 119, 121, 142n16, 151, 189, 190,
197

Adjudication
circumstances, 2, 5, 6
introduction, 2–3
meaning, 2, 184, 227, 284
procedure, 2
rules, 3
strengths, 2
weaknesses, 2

Amendments
conduct of proceeding, 143, 144n22,
155–156, 244n41
exercise of discretion, 141n16, 144n22,
244n41
generally, 124, 145–146, 239
powers of tribunal, 20, 92n3, 101, 110,
111, 141n16, 148n8, 155–156, 175,
186–188

Amiable compositeur
generally, 93n7, 178–179

Anti-suit injunction
Conflict of laws, and, 49

Appeals from awards
application, 60
confirmation of awards, 204
costs, 67
courts’ role, 56–57, 169
effect of order, 209–210, 223
general, 216n60
originating summons, 207n18
procedure, 207n18
question of law, 57, 60
remission of awards, 187n63, 221–222, 228
rights, 208–221
setting aside awards, 61, 221–223, 229
time limits, 229
variation/rectification of awards, 181n39

Applicable law
arbitration agreement, of, 17n9, 47n20,
48, 52n32
dispute, 45n7, 48n24, 179, 220, 242
generally, 45n7, 23, 111, 148n8, 210–211
powers of tribunal, 20, 92n3, 101,
110–111, 141n16, 148n8, 155–156, 175,
186–188

Appointment of arbitrator/tribunal
generally, 16–17, 21, 72–90
number, 73n1, 74–75, 238n27, 241
provisions, 19, 20n22, 21n27, 76–79
characteristics 77, 80n24
conflict of interest, and, 52, 68, 73
constitution
appointment of arbitrators, 63,
65–67, 76–79
default appointment, 74–75, 78–79
multi-party arbitration, 15n2, 20n22,
79, 244n42, 246
number of arbitrators, 73n1, 74–75,
238n27, 241
substitute arbitrator, 89
proceedings, 29n63, 87, 138, 158, 209,
214–215, 224, 227, 238
Arbitration

Agreement

see Arbitration Agreements

arbitrators

see Arbitrators

bias, 80n24, 81–82, 83

commencement, 28, 59, 102, 114, 152, 159, 189, 191n80, 200, 237n22, 238n25, 240

confidentiality, 24, 55, 61, 62n79, 67, 69n103, 132–133, 153, 162n41, 163, 170, 234, 247n49, 248

disqualification of arbitrators 60n74, 73, 76–77, 80–90

domestic arbitration 15–16, 44, 53–56, 58n66, 60, 74n7, 178n26, 205, 208, 247n51

commencement before 1 June 2011, 56–57

commencement on or after 1 June 2011, 56–57

enforceability

see Enforcement of Awards

finality, 1n2, 3, 17, 18, 65n84, 174–176, 182, 184, 187n65, 204, 205n6, 211, 216n60, 222–223, 235n13

finding by third parties, 8n27

governing law

arbitration agreement, of, 17n9, 22, 39n97, 45n7, 111n92, 214n43, 226

dispute, of, 31, 38–39, 45–53

independence, 29n62, 83–84, 92n5, 101, 102, 150n2

informality, 104, 149–150

international arbitration, defined, 15–16

law of arbitration agreement, 17n9, 22, 31, 38–39, 45–53, 111n92, 214n43, 226

main features, 15–17

neutrality, 3, 16, 24, 205, 220–221, 247–248

party autonomy, 1, 15, 17n7, 28–31, 44n4, 66, 74, 76, 86, 101, 117, 211n28, 215, 242

privacy, 3, 16, 17, 24, 153, 248

procedural law, 31n74, 38n94, 45, 47, 48, 53n39

seat, 15–16, 22, 23n34, 31, 37–39, 43, 45–54, 74, 75, 78–79, 93, 100, 105, 149n1, 162, 172n7, 176n22, 179, 199, 205, 215–217, 222n82, 222n84, 223, 225, 235, 237, 246

small claims process, 104, 116n5, 239n27

strengths, generally, 24–25

third party funding, 19n22, 236–237

weaknesses, generally, 26–28

Arbitration agreements

ad hoc arbitrations 11, 19, 21, 22–23, 33n81, 50, 63, 64n84, 67, 68, 74n5, 94n12, 114n1, 115n3, 119, 121, 142n16, 151, 189, 190, 197

amicable compositeur, 93, 178–179

appeal, 36–37, 40n104, 49, 65–67


arbitrators

see Arbitrators

assessors, 167n56

bare, 40n104

conflict of laws, and

capacity of parties, 45n7

general rules, 31, 37n93, 45, 48n23, 179

law of the place where hearings take place, 31, 47, 51

law of the reference, 51–52, 66

procedural law, 43, 45

proper law, 48n24, 178–179

consolidation, 57, 60, 244–246

costs of arbitration, 13, 21n25, 93, 94n10, 107n68, 109n87, 110n88, 114, 122n17, 128n36, 132n44, 136n55, 137, 153n10, 167n56, 171, 178n26, 188–192, 194, 195n93, 197–198

definition, 3, 16–17

documents only, 17, 19, 23, 116, 134, 149–150, 239n27

enforcement, 99n38, 185
exclusion of courts supervisory jurisdiction, 116n6
finality, 1n2, 3, 17, 18, 23n34, 174–176, 184, 187n65, 204–205, 211, 222, 232
formation
capacity of parties, 210–211
governing law, 17n9, 23n34, 38, 39n97, 45n7, 47n20, 48–52, 111n92, 214
hearings other than at stipulated place, 37–39, 46
incorporation, 23n29, 34n83, 36, 105n63, 175
joinder, 217, 245n43, 246–247
language of arbitration, 17, 23n34, 28, 67, 76, 80n24, 114–115, 151, 207
legal representation, 70, 133, 135, 153–155, 163n42, 178n26, 212
model clauses, 21n27, 39–41, 50, 52n32, 63
multiparty arbitration, 79, 244n42, 246
“pathological” arbitration clauses 39–40
permissive language, 34n83, 55n42, 210n25, 216n54, 223
place of arbitration, 25, 31, 37–39, 45n7, 46–47, 51, 183, 201
see Place of arbitration
punitive damages, 220
“seat theory,” 51–53
secretary to the tribunal, 20n24, 26n48, 119–121
tribunal experts, 14, 29, 74, 111, 115, 140n11, 164n47, 166–167, 228n110
umpire, 72n1
writing, in, 31–37, 56n51, 211
Arbitration award
additional award, 110n89, 111, 174n13, 183–184, 186n59 & 60, 187–188, 195n93, 199
appeals, 56–57, 60, 97, 184n53, 216n60, 222–223
See also Appeal from award
challenges to award, 18n17, 45–46, 48, 57, 64n84, 119, 154n13, 172n7, 182, 184n53, 206n12, 208–223, 240, 240n41
consent award, 174n13, 176–177
contents of, 17n14, Chapt. 9
costs, 188–198
dispositive provisions, 177, 182, 204n4
operative part, 183
reasons, 177, 183
remedies, 180–181
signature, 182
type of award, 172–177
corrective awards, 110, 183, 186–187
costs, 188–198
costs award, 109n86, 136n55, 187n63, 189n75, 192
dates, 110n89, 183, 185, 186n61, 199n106, 201–202, 207n19
default awards, 122–123, 153
dispositive provisions, 177, 182, 185, 204n4
elements
date, 183, 185
finality, 184
place, 183
signature, 182
unambiguous, 184–185
written, 182
emergency arbitrator awards, 235–236
enforcement
See Enforcement of awards
interim awards, 174–176, 184
Macao awards, 175n20, 205n7
Mainland awards, 175n20, 185
indemnity, 67, 181, 196n99, 197, 227
injunctions, 205n7
interest, 93, 109, 171, 176, 185, 187n63,
interim awards, 148, 172, 174, 175n15, 176, 184, 194
majority awards, 182, 183n42
operative directions, 183
partial awards, 109, 172n7, 173n10, 174–175, 182, 184n51
place, 25, 45n7, 183, 201
reasons, 177, 183
recognition, and
emergency arbitrator awards, 235–236
interim awards, 174–176, 184
remedies, 180–181
setting aside, 18, 29, 54, 61, 81n24, 96nn19 & 20, 97, 99, 100n39, 101n41, 103, 149n1, 152, 155, 160–161, 169, 179n32, 183, 185, 186n59, 209n24, 210–213, 215–218, 221–230
signature, 182
specific performance, 181, 205n7, 210n72, 219
types, 173–177
unambiguous, 184
writing, in, 182

Arbitration Ordinance (Cap. 341)
generally, 44, 47, 55–56, 61, 129

Arbitration Ordinance (Cap. 609)
amendments, 141n16, 143, 144n22, 145, 155n17
Arb-med, 247n49
automatic provisions, 56–57
confidentiality, 24, 61, 153, 247n49, 248
emergency relief, 234
interim measures, 55, 57–58, 106, 124–125, 174n11
Med-arb, 248–249
opt-in provisions 55–57, 58n66, 178n26

Arbitration proceedings
acting fairly, 29n62, 92n5, 101, 103, 139–140, 150n2
adaptation of appropriate procedures, 29n62, 92n5, 101, 103, 139–140, 150n2
appointment of arbitral tribunal, 72–86
arbitrators, and
act fairly, 29n62, 92n5, 101, 103, 139–140, 150n2
adopt appropriate procedures, 29n62, 92n5, 101, 103, 139–140, 150n2
arbitrators, and
act fairly, 29n62, 92n5, 101, 103, 139–140, 150n2
adopt appropriate procedures, 29n62, 92n5, 101, 103, 139–140, 150n2
equivalent treatment, 29n62, 92n5, 100, 101, 102
fairness, 83, 100, 102, 103–105
impartiality, 29n62, 60n72, 80n24, 81–82, 92n5, 100n39, 101, 102, 150n2
independence, 29n62, 83–84, 92n5, 101, 102, 150n2
natural justice, 83, 100, 115, 132, 139–140, 150, 152, 212
reasonable opportunity to present case, 29n62, 60n72, 83, 92n5, 101, 102, 103–105, 152
attendance of witness, 23, 27, 46, 108, 136, 156, 164
bringing a challenge against an arbitrator 19n22, 60, 80–81, 87–89
effect of failure to raise within prescribed period, 85n51
status of proceeding pending challenge, 85n51
bundles, 23n35, 132, 134, 135, 136, 156

costs
assessment, 136, 145, 191n80, 194n88, 197, 198n104
discretion, 189n75, 191–192, 200
court-style pleadings, 139, 150
directions, 23n35, 58, 59n68, 72n1, 96n18, 109n87, 112, 116, 122n17, 145, 151, 171–172, 188n70, 191n80, 194–195, 198, 206n7
general order, 117, 141, 152n10
disclosure of documents, 129–130, 131n42
documents-only, 19, 23, 134, 116, 149–150, 239n27
duties of arbitrators
act fairly, 29n62, 60n72, 92n5, 100, 150n2
adopt appropriate procedures, 29n62, 92n5, 101, 103, 139–140, 150n2
fairness, 83, 100, 102, 103–105
impartiality, 29n62, 60n72, 92n5, 100n39, 101, 102, 150n2
independence, 29n62, 83–84, 92n5, 101, 102, 150n2
natural justice, 83, 100, 115, 132, 139–140, 150, 152, 212
reasonable opportunity to present case, 29n62, 60n72, 83, 92n5, 101, 102, 103–105, 152
equal treatment, 21, 29, 100, 101n42, 169, 179n32
evidence
admissibility, 150n3, 162–163, 165
adversarial approach, 13n41, 14, 104, 115, 129, 134n51, 137, 157, 168
authenticity, 134
bundles, 23n35, 132, 134, 135, 136, 156
collection, 25, 67, 68, 69n103, 108, 158
documentary, 14, 23, 113, 118n11, 122, 139n7, 152n6, 162
earlier arbitration awards, 205n6
hearsay, 162, 164
inquisitorial approach, 12–13, 14, 100n39, 115, 137n2, 150
inspection, 107n68, 108, 125–126, 129, 130n41, 131–135, 139, 146, 162, 166n56
oral, 14
preservation, 57, 106n64, 125nn27 & 28, 126n29
receipt in absence of party, 123, 152
weight, 107n67, 150n3, 162–163
examination of witnesses
affidavit evidence, 107n68, 108, 132n44
attendance of witness, 23, 27, 46, 108, 136, 156, 164
expert evidence, 14, 165–168
factual witnesses, 14, 161, 164, 165, 168, 234
oath, on, 107n68, 136, 156–157
exchange of pleadings, 134, 135, 141–143, 147
exchange of submissions, 23n35, 33n80, 137, 138, 143n17, 146–147
expert evidence
arbitrator relying on own knowledge, 103–104, 108, 168–169
generally, 13n41, Table 1.1, 23n35, 26n48, 62n79, 68, 70–71, 135–136, 139n7, 146, 147, 164, 189
oral evidence, 161, 167–168
procedure in adducing, 108n70, 135–136, 165–168, 169, 232n1, 234, 239n27
tribunal-appointed expert, 111, 115, 166n56, 167
factual witnesses, 14, 161, 164, 165, 168, 234
fairness, 83, 100, 102, 103–105
hearings
bundles, 23n35, 132, 134, 135, 136, 156
chess clock approach, 169, 234
exchange of submissions, 23n35, 33n80, 137, 138, 143n17, 146–147
interpreter, 114–115, 136, 151, 153
list of agreed facts, 156n19
transcript, 22, 26, 119, 136, 151
translation, 54, 151, 152n6, 207, 208n17
venue, 16, 22, 23n34, 25, 28, 51n30, 67, 93n7, 111, 177n26, 179n32, 183
hearsay evidence, 162, 164
identification of issues
court-style pleadings, 139, 150
list of issues, 93n7, 136, 156n19
modification of pleadings, 145–146
Scott schedule, 135
impartiality of arbitrators 29n62, 60n72, 80n24, 81–82, 92n5, 100n39, 101, 102, 150n2
independence of arbitrators 29n62, 83–84, 92n5, 101, 102, 150n2
information technology
real-time transcription services, 151
video conferencing, 116n3, 232n1,
inquisitorial powers, 12–13, 14, 100n39, 115, 137n2, 150
interpreters, 114–115, 136, 151, 153
jurisdiction of arbitral tribunal, 44n5, 92–99, 141n16
list of agreed facts, 156n19
list of issues, 93n7, 136, 156n19
meetings, preliminary 115, 147
agenda, 134–136
appointment of arbitral tribunal, 117, 134
disclosure of documents, 135
exchange of pleadings, 134, 135, 141–143, 147
jurisdiction, 134
necessity, 116
purpose, 115
timing, 117, 118n11, 135, 147
modified pleadings, 145–146
natural justice, 83, 100, 115, 132, 139–140, 150, 152, 212
opening submissions, 158–160
opportunity to present case, 29n62, 60n72, 83, 92n5, 101, 102, 103–105, 152
oral evidence, examination of witnesses
expert witnesses, 14, 165–168
factual witnesses, 14, 161, 164, 165, 168, 234
order of proceedings, 157–161
real evidence, 162
taking of evidence, 161–162, 164–167
oral hearings, 17, 28, 111
order for directions, 96n18, 117, 141
order of proceedings 159–168
opening submissions, 159–161
introduction, 157–159
opening submissions, 157–160
oral evidence, 161, 167–168
pleadings
amendment, 145–146
court-style, 139, 150
exchange timetable, 134, 135, 147
general, 137–140, 143–145
modified, 145–146
powers of arbitrators, 20, 92n3, 101, 110–111, 141n16, 148n8, 155–156, 175, 186–188
pre-hearing review, 118n11, 136
preliminary issues, 33, 135, 158, 174n12
preliminary meetings
agenda, 134–136
appointment of arbitral tribunal, 117, 134
disclosure of documents, 135
exchange of pleadings, 134, 135, 141–143, 147
jurisdiction, 134
necessity, 116
power of arbitrators, 20, 92n3, 101, 110–111, 141n16, 148n8, 155–156, 175, 186–188
purpose, 115
timing, 117, 118n11, 135, 147
real evidence, 162
collection, 13, 25, 67, 68, 69n103, 108, 115, 131n43, 158, 162n41, 212
inspection, 68, 107n68, 108, 126, 129, 130n41, 131–134, 135, 139, 146, 162, 166n56
preservation, 57, 106n64, 124, 125n27 & 28, 126n29
reasonable opportunity to present case, 29n62, 60n72, 83, 92n5, 101, 102, 103–105, 152
Scott schedule, 135
separation of procedural and substantive matters, 116
submissions
closing, 159–161
exchange, 23n35, 33n80, 137, 138, 143n17, 146–147
opening, 158–160
substantive matters, and, 116
transcript, 22, 26, 119, 136, 151
translation, 54, 151, 152n6, 207, 208n17
tribunal-appointed expert, 111, 115, 166–167
video conferencing, 116n3, 232n1, 243n40

Arbitrators

absence of agreement, in, 72n1, 75n12, 180
act fairly 100n39, 102
   conduct of proceedings, 29, 149n1, 150n2, 212
   institutional rules, 63–64, 67
   statutory duty, 29n62, 60n72, 92n5, 100n39, 100, 150n2, 45, 47
adopt appropriate procedure 92n5, 101, 105, 108n75, 140n11, 150n4
   generally, 30, 115, 122, 137n2, 150
   institutional rules, 231–233, 239–240, 243
appointment
   arbitration clauses, and, 76–77
   number, 73n1, 74–75, 238n27, 241
   provisions, 77–79
arbitration agreement, under
   absence of agreement, in, 78–79
   emergency, 234–236
   impartiality, 29n62, 60n72, 80n24, 81–82, 92n5, 100n39, 101, 102, 150n2
   independence, 83–84
   multiparty arbitrations, in, 15n2, 20n22, 79, 244n42, 246
   nationality restriction, 86
   number, 73n1, 74–75, 238n27, 241
   qualifications, 80–87
authority
   removal and revocation, 84, 89n67, 105n61
automatic disqualification
   pecuniary or proprietary interest in parties or proceedings, 83, 84n42
bias 81–82, 83
bringing a challenge against an arbitrator 87–90
   same test for judges and arbitrators 83n34
status of proceedings pending challenge
conduct of proceedings
act fairly, 29, 149n1, 150n2, 212
adopt appropriate procedures, 92n5, 101, 105, 108n75, 140n11, 150n4
equal treatment, 21, 29, 69n103, 92n5, 100–101, 102, 103n51, 137n2, 162n41, 179n32, 220, 243n39
fairness, 21, 25, 29, 60n72, 62n41, 69, 83, 89, 92n5, 100–103, 117, 128, 137n2, 140n11, 146, 149n1, 150n21 & 22, 155, 162n41, 178–179, 188, 195, 212, 214n44, 220, 221n81, 232–233, 243n40
impartiality, 29n62, 60n72, 80n24, 81–82, 92n5, 100n39, 101, 102, 150n2
independence, 29n62, 83–84, 92n5, 101, 102, 150n2
natural justice, 83, 100, 115, 132, 139–140, 150, 152, 212
reasonable opportunity to present case, 29n62, 60n72, 83, 92n5, 101, 102, 103–105, 152
standards in arbitration rules, 63–64, 67, 231–233, 239–240, 243
duties, generally 100–105
emergency
See Emergency arbitrators
equal treatment, 21, 29, 69n103, 92n5, 100–101, 102, 103n51, 137n2, 162n41, 179n32, 220, 243n39
fairness, 21, 25, 29, 60n72, 62n41, 69, 83, 89, 92n5, 100–103, 117, 128, 137n2, 140n11, 146, 149n1, 150n21 & 22, 155, 162n41, 178–179, 188, 195, 212, 214n44, 220, 221n81, 232–233, 243n40
fees 21, 109n87, 189–190, 198
impartiality 29n62, 60n72, 80n24, 81–82, 92n5, 100n39, 101, 102, 150n2
independence, 29n62, 83–84, 92n5, 101, 102, 150n2
multiparty arbitrations, in, 15n2, 20n22, 79, 244n42, 246
nationality restriction, 86
natural justice, 83, 100, 115, 132, 139–140, 150, 152, 212
number 73n1, 74–75, 238n27, 241
pecuniary interest in parties or proceedings, 83, 84n42
powers, 20, 92n3, 101, 105, 110, 111, 141n16, 148n8, 155–156, 175, 186–188 qualifications, 60n74, 73, 76–77, 80–86, 214
reasonable opportunity to present case, 29n62, 60n72, 83, 92n5, 101, 102, 103–105, 152
standards in arbitration rules, 63–64, 67, 231–233, 239–240, 243
withdrawal
Arb-med
See also Med-Arb
Attendance of witnesses
arbitration proceedings, 27, 46, 108, 136n54, 156
Bias
generally, 80n24, 81–82, 83
Bundles
generally, 132, 135
hearings, 134, 136, 156
Capacity of parties
conflict of laws, 45n7, 209–211
generally, 34n83, 54, 96n20, 210, 223
Certainty of terms
arbitration agreement, and, 34n83, 67, 179
Challenges to awards
“award,” 3, 18, 25, 171–172, 173
correction of awards, and, 183, 186–187
courts’ role, 173n7
finality, and, 184, 187n65, 204
jurisdictional rulings, 94–96, 97, 99nn37 & 38
serious irregularity 57, 103, 214n44
See also Serious irregularity
setting aside
See also Setting aside awards
18, 29, 54, 61, 81n24, 96nn19 & 20, 97, 99, 100n39, 101n41, 103, 149n1, 152, 155, 160–161, 169, 179n32, 183, 185, 186n59, 209n24, 210–213, 215–218, 221–230
types, 172, 173, 174, 175, 176, 177, 188
Choice of law
See also Conflict of laws
approach to issues, 179
characterization, 47n20, 48
introduction, 39n97, 47, 50–53, 179
Closing submissions
arbitration proceedings 136, 158–160, 169, 194, 233
Commercial disputes
dispute resolution, 1–14, 15–16
and see Dispute resolution
adjudication, 2–3
arbitration, 3
conciliation, 4–5, 18 dispute resolution advisors, 5–7
dispute review boards, 5–7
early neutral evaluation, 7
expert determination, 7–8
litigation, 1, 17–18
mediation, 9–11, 18
negotiation, 11–12
Conduct of arbitration proceedings
see Arbitration proceedings
Confidentiality
arbitration 61, 62n79, 68, 69n103, 132
generally, 24, 55, 153, 162 n41, 163, 234
Med-Arb, 247n49, 248
Conflict of interests
bias, 80n24, 81–82
generally, 68, 73, 81, 83, 248
Conflict of laws 50–53
anti-suit injunction, 49
arbitration agreements, and
capacity of parties, 45n7, 209–211
generally, 31–41
law of the seat where hearings take place, 16, 22, 23n34, 25, 28, 51n30, 67, 93n7, 111, 177n26, 179n32, 183
procedural law, 31, 38n94, 45, 47, 48
proper law, 48n24, 178–179
capacity of parties, 45n7, 210–211
consideration by courts, 48–49, 64n84
governing law, and, 17n9, 41n104, 45–46, 245n45
Kompetenz/Kompetenz principle, 95, 99
law of the seat where hearings take place, 16, 22, 23n34, 25, 28, 51n30, 67,
93n7, 111, 177n26, 179n32, 183
lex arbitri, 17n9, 31, 38, 45n7, 47, 48, 214
lex causae, 45n7, 51n32
lex fori, 45n7, 48, 51n32
performance of arbitration agreements
law of the seat where hearings take place, 16, 22, 23n34, 25, 28, 51n30, 67, 93n7, 111, 177n26, 179n32, 183
law of the reference
procedural law, 31, 38n94, 45, 47, 48
proper law, 48n24, 178–179
place where hearings take place, 16, 22, 23n34, 25, 28, 51n30, 67, 93n7, 111, 177n26, 179n32, 183
proof of law of foreign legal system
proper law, 48n24, 178–179
recognition of awards, and, 48–49, 64n84
stay applications, 17n9, 34n83, 213–217
Consolidation
generally, 57, 60, 244–246
Correction of errors
powers of tribunal, 20n24, 110, 186–188
Costs
arbitration agreement, 26, 27, 74, 107, 110, 191
assessment, 136, 186n61, 194n88, 197
discretion, 109n87, 188n71, 190, 191–193, 194n87, 195, 197
interlocutory applications, 123–128, 198
recoverable items, 136n55, 145, 146, 153n10, 188–192, 195–197
taxation of awards, 194n88, 197–198
Counsel, representation by
generally, 7, 133, 135, 154–155
IBA Guidelines, 69–70, 131n42
Court relief
appeals on question of law, 56–57
challenging arbitral award for serious irregularity, 56–57
consolidation of arbitrations, 57, 60
determination of preliminary question of law, 60
opt-in provisions, 55, 56–57, 58n66, 178n26
Defaulting party in proceedings
tribunal’s powers, 20n22, 28, 104, 111–113, 121–124, 152–153
Directions
general order, 58, 59n68, 96n18, 116–117, 141, 152n10, 171–172, 188n70
main hearings, for, 23n35, 117, 135, 141, 194
Disclosure of documents
See Discovery
Discovery
disclosure of documents, 130n41 & 42
discretion of tribunal, 132
failure to comply with order, 112–113, 131n42
further and better list, 145
non-compliance with order, 131n42
objection to production, privilege 132–133
order, 131n42, 132
Redfern schedule 69n103, 133, 135n53
specific discovery, 132, 133
Dismissal of claims
Delay, and
arbitrator’s powers, 109, 155n17
default of party, 109, 112n103, 113, 122–123
pursuit of proceedings, in, 99, 113, 122–123
Documents-only process
arbitration agreement, 150, 239
generally, 23, 115–116, 149–150, 239n27
Domestic arbitration
commencement before 1 June 2011
difference from international regime, 55–56, 60
generally, 54, 178
introduction, 44
commencement on or after 1 June 2011
construction arbitration, 56
introduction, 15–16, 55–56
“opt-in” for provisions, 55, 56–57, 178
Emergency arbitrators (EAPs)
apPOINTment, 74n4
appropriate circumstances, 234
enforcement of award, 235–236
expedited relief, 74n4
generally, 234–236
preserving confidentiality, 234
relief prior to formation of arbitral tribunal, 74n4

**Enforcement of awards**

approach in Hong Kong, 206n13, 225n97, 229
arbitration agreement, and, 203, 205n7
courts' role, 203–230
emergency arbitrator awards, 235–236
Hong Kong awards
action on the award, 185, 206–207
summary enforcement, 177, 185, 189
interim awards, 58, 172, 174, 175n15
Mainland awards 175n20, 185
Macao awards 175n20, 205n7
New York Convention awards
generally, 25, 29, 32–33, 35, 46, 53–55, 81, 97n28, 99n36, 171n1, 172n7, 181–182, 183, 185, 248
grounds of opposition, 208–221, 222–227

**Evidence**

admissibility, 162–163
adversarial approach, 13n41, 104, 115, 129, 134n51, 137, 157, 168–169
authenticity, 134
bundles, 23n35, 132, 134, 135, 136, 156
documentary evidence, 23, 113, 118n11, 122, 139n7, 152n6, 162
expert evidence
- *See Expert Evidence*
general rules, 162–164
hearsay evidence, 162, 164
inquisitorial approach, 12–13, 14, 100n39, 115, 137n2, 150
inspection, 68, 107n68, 108, 126, 129, 130n41, 131–134, 135, 139, 146, 162, 166n56
oral evidence, examination of witnesses
- expert witnesses, 14, 165–168
- factual witnesses, 14, 161, 164, 165, 168, 234
- order of proceedings, 159–168
- real evidence, 162
taking of evidence, 161–162, 164–167
preservation, 57, 106n64, 124, 125nn27 & 28, 126n29
real evidence 162

**Examination of witnesses**

*See Witnesses*

**Expedited procedure**

generally, 215, 231n1, 232, 237–242, 244n42, 246

**Expert evidence**

arbitrator relying on own knowledge, 103–104, 108, 168–169
generally, 13n41, Table 1.1, 23n35, 26n48, 62n79, 68, 70–71, 135–136, 139n7, 146, 147, 164, 189
oral evidence, 161, 167–168
procedure in adducing, 108n70, 135–136, 165–168, 169, 232n1, 234, 239n27
tribunal-appointed expert 111, 115, 166n56, 167
generally, Table 1.1, 29, 118n11, 131n42, 133, 140n11, 164n47, 228n110
terms of reference, 165–167

**Fees**

arbitrators', generally 21, 109n87, 189–190, 198

**Further and better particulars**

generally, 143, 145

**Governing law**

arbitration agreement, of, 17n9, 22, 45, 51–52
dispute, of, 31, 38–39, 48–49
generally, 17, 47, 48–49, 51–52, 111n92, 149n1

**Hearings**

arbitration agreement, and
generally, 151, 152–153, 159
other than at stipulated place, 37–39, 46, 151
bundles, 134, 136, 156
chess clock approach, 169, 234
estimation of duration, 118n11, 135
exchange of submissions, 23n35, 33n80, 137, 138, 143n17, 146–147
interpretation, 114–115, 136, 151, 153
list of agreed facts, 156n19
transcript, 22, 26, 119, 136, 151
translation, 54, 151, 152n6, 207, 208n17
venue, 38–39, 46
Hearsay evidence
generally, 162, 164
Impartiality of arbitrators
conduct of proceedings, 29n62, 60n72, 92n5, 100n39, 150n2
generally, 80n24, 100–101
same test for judges and arbitrators, 83n34
statutory duty, 100n39
Independence of arbitrators
conduct of proceedings, 29n62, 92n5, 100–102, 150n2
generally, 83–84
same test for judges and arbitrators, 83n34
statutory duty, 100n39
Injunctions
introduction, 57n61, 58n61, 125–126
power of court, 27, 106, 205
power of tribunal, 27, 106, 124, 125n27, 126
Inspection of property
discretion of arbitrator, 132
generally, 129–134
power of court, 107n66
power of tribunal, 107n68, 108, 126, 166n56
“relevant” property, 107n68
Interest
powers of tribunal to award, 93, 109, 171, 176, 185, 187n63, 188, 198–202, 218–219
Interim measures
applications to court, 27
concurrent powers of tribunal and court, 125, 126n28
conditions, 106nn64 & 65, 126–127
costs, 128, 191n80
discretion of arbitrator, 126–127
enforcement
emergency relief, 234–236
generally, 58–59, 172–173, 174n11
governing principles, 106n64
introduction, 123–124, 173
powers of court, 106, 107n66, 112, 125
powers of tribunal, 105–106, 107n68, 109n87, 117, 124–125
scope of power, 57–58, 125–126
security for costs, 127–128
Interim relief
generally, 27, 48, 55, 57–59
Interlocutory applications
amend, 125n27
costs, 125n28, 198
interim measures, 124–128
generally, 123n21, 125–126
power of court, 125–127
power of tribunal, 125–127
peremptory orders
default of parties, 122n17, 152–153
definition, 152n10
enforcement, 152n10
power of tribunal, 122n17
preliminary orders
generally, 58–59, 106n65, 127
preliminary point of law 60, 148, 169, 173, 233
generally, 145, 169, 233
Redfern schedule 69n103, 133, 135n53
security for claim 125n28, 128
security for costs 127–128
Interpreters
arbitration proceedings, 114, 119, 136, 151, 153, 157n26
Interrogatories
generally, 107n68, 108, 128n36, 132n44
Jurisdiction
arbitration agreement, 22, 27, 91n1
conflict of laws
see Conflict of laws
generally, 92–99
scope of reference, 92–93, 178–179
Kompetenz/Kompetenz principle 94n13, 95, 99
Language of arbitration
arbitration agreement, and, 17, 28, 67, 114–115, 151

Legal representation
generally, 104–105, 133, 135, 151, 153–155, 163n42, 178n26, 212
IBA Guidelines, 69–70, 131n42

Limitation periods
generally, 34n83, 183, 207, 234

Litigation
generally, 1, 2, 17–18, 26–27, 80n24, 171
procedure, 138n5, 150, 154n14, 157–160, 162, 164
sanctioned offers and payments, 192

Mediation-Arbitration (Med-Arb)
generally, 11, 247–249

Multiparty arbitrations
appointment of arbitrators 15n2, 20n22, 79
consolidation, 244–245
joinder, 246–247

Natural justice
generally, 2n8, 115, 132, 140, 150, 152, 220
overview, 29, 83, 100–101, 212

New York Convention
adjournment of enforcement proceedings, 186n59, 216–217, 221–222
distinguishing non-NYC awards
generally, 25, 29, 33, 53–55, 81, 208, 222n82
statutory framework, 53n39, 97n74
stay of enforcement proceedings,
186n59, 216–217, 221–222, 228n110
summary enforcement, 177

Opening submissions
generally, 158–160

Opt-in provisions
generally, 55–57, 58n66, 178n26

Oral evidence, examination of witnesses
expert witnesses, 14, 165–168
factual witnesses, 14, 161, 164, 165, 168, 234
order of proceedings, 159–168
real evidence, 162
taking of evidence, 161–162, 164–167

Oral hearings
generally, 17, 28, 111

Order for directions
generally, 96n18, 117, 141

Order of proceedings
closing proceedings, 159–161
introduction, 157–159
opening submissions, 158–160
oral evidence, 161, 167–168

Party autonomy
arbitrators, 17n7, 74, 76, 117, 212
generally, 1, 16–17, 27–31, 86, 105, 215
governing law, 17n9
law of arbitration agreement, 17n9
rules, 179
seat of arbitration, 28, 215

Party representation
generally, 70, 133, 135, 153–155, 163n42, 178n26, 212
IBA Guidelines, 69–70, 131n42

Peremptory orders
generally, 122n17, 152–153

Performance
arbitration agreements
law of the seat where hearings take
place, 16, 22, 23n34, 25, 28, 51n30, 67, 93n7, 111, 177n26, 179n32, 183
procedural law, 31, 38n94, 45, 47, 48

Permissive language
arbitration agreement 34n83
statutory language 55n42, 210n25, 216n54, 223

Place of arbitration
see also Seat of arbitration
generally, 16, 23n34, 25, 28, 51n30, 67, 93n7, 111, 177n26, 179n32, 183, 215
law of, 15, 22, 38, 40n104, 41n104, 45–47, 49, 51, 200, 201, 206, 209n24, 210, 222n82

Pleadings
generally, 26n48, 135, Chapt. 7, 149, 155–156, 165, 239n27

Preliminary meeting
agenda, 134–136
appointment of arbitral tribunal, 117
disclosure of documents, 135
exchange of pleadings, 134, 135, 141–143
jurisdiction, 134
necessity, 116
power of arbitrators, 20, 92n3, 101, 110–111, 141n16, 148n8, 155–156, 175, 186–188
purpose, 115
timing, 117, 118n11, 135, 147

Preliminary order
costs, 128
disclosure, 125n27, 127n33
discretion of arbitrator
generally, 57n61, 58–59, 127, 148n38, 173n9
modification, 125n27
powers of tribunal, 58–59, 106n65, 125n27, 173n9
security, 128
termination, 125n27

Preliminary point of law
generally, 60, 148, 169, 173, 233

Preservation of evidence
generally, 57, 124, 126n29

Redfern schedule
discovery, and 69n103, 133, 135n53

Reference of the arbitration
generally, 27, 65n84, 92n7

Remission of awards
generally, 103, 187n63, 221–223, 228

Representative of parties
generally, 7, 133, 135, 154–155
IBA Guidelines, 69–70, 131n42

Scott schedule
generally, 135

Seat of arbitration
generally, 16, 22, 23n34, 25, 28, 51n30, 67, 93n7, 111, 177n26, 179n32, 183
appointment of arbitrator, 74–75, 78–79
award, enforcement or challenge at, 54, 71, 215–216, 217, 219–220, 222n82, 222n84, 223, 225, 235
law of, 15, 22, 31, 37–38, 40n104, 41n104, 43, 45–47, 49, 51, 93, 100, 105, 149, 176n22, 179, 199, 200, 201, 206
209n24, 210, 215, 222n82
Secretary to the tribunal
generally, 20n24, 26n48, 119–121

Security for claim
generally, 128–129

Security for costs
discretion of tribunal, 129n38
dismissal of claim, and, 112n102
foreign claimants, and, 107
power of court, 222
power of tribunal, 105–107, 122n17, 124, 128
restriction on discretion, 107

Serious irregularity
generally, 57, 103, 214n44

Service of notice
generally, 29n63, 214n43
arbitration, 54, 75n12, 92, 93n7, 123n20, 141n16, 152, 209, 212, 224, 229
mediation, 49

Setting aside awards
generally, 18, 29, 54, 61, 81n24, 96nn19 & 20, 97, 99, 100n39, 101n41, 103, 149n1, 152, 155, 160–161, 169, 179n32, 183, 185, 186n59, 209n24, 210–213, 215–218, 221–230

Severability/Separability
Doctrine of, 95n14, 98–99

Specific discovery
generally, 69n103, 130, 131nn42 & 43, 132–133, 135

Stay of proceedings
generally, 34n83, 35, 41n104, 46, 49n27, 107n68, 112n102, 245n45, 247n49

Submissions
closing, 136, 158, 160, 169, 194, 233
exchange, 23n35, 117n7, 134, 135, 137–138, 143–145, 146–147
opening, 136, 158–160, 169, 233

Third party funding
generally, 19n22, 236–237

Time limits
contractual, 53n39, 100n38
generally, 58n61, 79n20, 89, 118n11, 120n16, 123n20, 141n16, 145, 152n10, 186, 187–188, 207, 223, 224–225,
231n1, 233n3, 240

**Transcript/Transcription**
- generally, 22, 26, 119, 136, 151

**Translation**
- generally, 54, 151, 152n6, 207, 208n17

**Tribunal**
- *See* Arbitrator

**Umpire**
- generally, 72n1

**“Unless” orders**
- *See* Peremptory orders

**Witnesses**
- attendance, 23, 27, 46, 108, 136, 156, 164
- examination
  - affidavit evidence, 107n68, 108, 132n44
- attendance of witness, 23, 27, 46, 108, 136, 156, 164
- expert evidence, 14, 165–168
- factual witnesses, 14, 161, 164, 165, 168, 234
- oath, on, 107n68, 136, 156–157
- experts
  - arbitrator relying on own knowledge, 103–104, 108, 168–169
  - generally, 70, 165–168
  - procedure in adducing, 108n70, 135–136, 165–168, 169, 232n1, 234, 239n27
  - tribunal-appointed expert, 111, 115, 166–167