可强制执行

在所有有利于仲裁的因素中，裁决可强制执行也许是最重要的。在亚洲，外国法院判决通常难以执行，这一点尤为重要。

要在一国快捷地执行另一国法院的民事判决，通常得由执行地国家同判决地国家签署条约。在亚洲，相互执行民事判决的条约极少。例如，香港仅仅同十五个国家有这类安排，还不包括其主要贸易伙伴，如英国、美国、加拿大和日本。

一国法院作出的判决，要在被告财产所在的另一国执行，常常需要在执行地的法院提起新的诉讼。有可能，外国法院作出的判决会被丢在一边，当事人得就争议再诉讼一次。无疑，费用会加倍，而且对胜诉方很不利——与其这样，还不如最初就在执行地法院起诉。

相反，根据《承认和执行外国仲裁裁决公约》（下称“《纽约公约》”），执行在其它公约成员国作出的仲裁裁决，就相当容易，除非在有限的情况下裁决被质疑。而且，质疑裁决仅限于针对仲裁程序中的缺陷。《纽约公约》不允许执行地法院审核裁决中的实体问题。只有在以下情况下，才可能拒绝承认和执行在公约成员国作出的裁决：

- 当事人为某种法律上无行为能力者，或仲裁条款是无效的；
- 没有给予被执行人公正的审理；
- 仲裁庭超越其权限或对争议没有管辖权（但裁决中不属于该情形的部分仍可强制执行）；
- 仲裁庭组成不当；
- 裁决对当事人还没有约束力；或根据裁决作出地国家的法律，是无效的；
- 根据执行地国家的法律，争议不能通过仲裁解决；
- 承认和执行裁决将和执行地国家的公共政策相抵触。

至写作本书时止，已经有一百三十三个国家加入了《纽约公约》。中华人民共和国于 1987 年加入公约。1997 年，中国的成员国资格延伸到了香港。亚洲地区所有主要的贸易国家和地区，除缅甸和台湾以外，都是《纽约公约》的成员国。

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- **enforceability –**

of all of the factors which argue in favour of arbitration, enforceability is perhaps the single most important one. It is especially important in Asia where there are frequently difficulties in enforcing foreign court judgments.

Enforcing a civil judgment quickly in any jurisdiction usually requires the country in question to have entered into an appropriate treaty with the country whose courts have made the judgment. In Asia, there are very few such treaties permitting the easy enforcement of civil judgments. Hong Kong, for example, has agreed arrangements for enforcement of judgments with only fifteen countries. These do not include major trading partners, such as the United Kingdom, the United States, Canada, and Japan.

Enforcing a court judgment obtained in one jurisdiction against a defendant's assets in another jurisdiction usually requires a fresh action to be commenced in the courts of the country where the judgment is sought to be enforced. This may lead to the matter being relitigated with little or no regard for the original decision of the foreign court. In turn, this leads to a duplication of costs and often puts the successful litigant in no better position than if it had started proceedings in that jurisdiction in the first place.

By contrast, under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention") enforcement of arbitral awards made in another Convention country is made far easier and subject to only very limited grounds of challenge. These grounds relate to procedural defects only. Most importantly, the New York Convention does not permit an enforcing court to conduct any review of the merits of an award. Recognition and enforcement may only be denied on the grounds that:

- the parties were under some incapacity or the arbitration agreement was invalid;
- the party against whom enforcement is sought was denied a fair hearing;
- the arbitrators exceeded their authority or lacked jurisdiction over the subject matter of the dispute (although the non-offending part of the award may still be allowed to stand);
- the arbitral tribunal was not properly constituted;
- the award is not yet binding on the parties or is otherwise invalid according to the laws of the country in which the award was made;
- the subject matter of the dispute is not arbitrable according to the laws of the state in which enforcement is sought; or
- the recognition or enforcement of the award would be contrary to the public policy of the state in which enforcement is sought.

At the time of writing, 149 countries have ratified the New York Convention. The People's Republic of China ratified the treaty in 1987. China's membership of the Convention was extended to Hong Kong in 1997. With the exception of Taiwan, all of the major trading countries and jurisdictions in Asia are members of the New York Convention.

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¶2-040 由香港国际仲裁中心管理仲裁程序

如当事人要求，中心可以管理国际仲裁和本地仲裁。在管理仲裁程序时，中心充当“邮箱”的角色，是当事人与仲裁庭沟通的渠道；保管仲裁员费用的保证金；或经仲裁庭指示，保管争议金额的保证金，或保管仲裁费用的保证金；并应当事人的要求，为仲裁程序提供其它行政支持。

中心自 2008 年 9 月 1 日起根据《香港国际仲裁中心机构仲裁规则》管理国际仲裁（和本地仲裁，如当事人要求）。中心起草了仅适用于本地争议的《本地仲裁规则》。《本地仲裁规则》现有版本发布于 1993 年，应与 1998 年发布的《经修订仲裁指引》共同使用。

当事人即使选择由其它仲裁机构管理仲裁程序，如：国际商会(ICC)、伦敦国际仲裁院(LCIA)、美国仲裁协会(AAA)、中国国际经济贸易仲裁委员会(CIETAC)或者任何别的仲裁机构，也可以约定仲裁程序的全部或者部分在中心进行。

简易形式仲裁、小额索偿和书面仲裁

简易形式仲裁 ¶2-051
小额索偿程序 ¶2-052
香港国际仲裁中心书面仲裁程序 ¶2-053

为了提高香港仲裁的效率，香港国际仲裁中心近年来制定了一些特别规则，专门适用于简易形式仲裁、小额索偿和书面仲裁。

¶2-051 简易形式仲裁

《香港国际仲裁中心简易形式仲裁规例》自 1992 年 8 月 1 日起生效，是为那些希望使用简易程序进行仲裁的当事人设计的，无论是开庭，还是仅作书面审理。该规例最早由皇家特许测量师学会（香港分会）订立，以配合小型工程标准形式合同使用。但也可以适用于各种商业纠纷。

按照该规例，由香港国际仲裁中心指定一位独任仲裁员，当事人要在较短的时段内互换诉辩文件。依据该规例，仲裁员有义务“尽最大努力”于开庭后一个月内作出裁决；如果是书面审理，则须在收到最后一份文件后一个月内作出裁决。

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¶2-040 Administered arbitration proceedings

The HKIAC administers both international and domestic arbitration proceedings when requested to do so by the parties. When it administers an arbitration, the HKIAC will: act as a “post box” and a channel of communication between the parties and the tribunal; hold security for fees and expenses of arbitrators; hold security for the amount in dispute or security for costs as directed by the arbitrator; and provide other administrative support for the proceedings as requested by the parties.

The HKIAC administers international arbitration proceedings (and domestic proceedings, if agreed by the parties) in accordance with the HKIAC Administered Arbitration Rules, which is discussed in further detail in Chapter 9. The HKIAC has drafted its own Domestic Arbitration Rules for use in exclusively domestic cases. The current edition of the Domestic Arbitration Rules was published in 2012.

Should the parties choose to have their arbitration proceedings administered by another arbitration institution, such as the International Chamber of Commerce (the “ICC”), the London Court of International Arbitration (the “LCIA”), the American Arbitration Association (the “AAA”) the China International Economic and Trade Arbitration Commission (the “CIETAC”) or any other arbitral institution, they may agree that all or part of the proceedings shall be held at the HKIAC in Hong Kong.

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Short Form, Small Claims, and Documents-only Proceedings

Short Form Rules ¶2-051
Small Claims Procedure ¶2-052
The HKIAC Documents Only Procedure ¶2-053

In an effort to increase the efficiency of arbitration in Hong Kong, the HKIAC has in recent years introduced special rules designed to be applied in short form, small claims and documents-only proceedings.

¶2-051 Short Form Rules

The HKIAC Short Form Arbitration Rules, effective from 1 August 1992, were designed for adoption by parties wishing to conduct an arbitration according to a shortened form of procedures, whether by hearing or on documents only. The rules were originally developed by the Royal Institution of Chartered Surveyors (Hong Kong Branch) for use with the Minor Works form of construction contract. However, the rules may be adopted in any kind of commercial dispute.

Under the rules, a sole arbitrator is appointed by the HKIAC. Pleadings are exchanged by the parties within an expedited time frame. The arbitrator is obliged under the rules to use “best endeavours” to render an award within one month of the hearing or, in the case of “documents only” arbitrations, within one month of the receipt of the last document.

¶3-061 采用《示范法》的理由

《示范法》的主要优点是它的国际性。《示范法》的首要目的，是为所有采用它的国家，提供一套全面的法律，以促进通过私下的仲裁方式解决跨国商业争议。这也正是香港采用《示范法》的主要理由。采用《示范法》的另一个理由，正如一位评论家所说，是人们认识到：

"《示范法》行文中的大陆法风格，能吸引来自大陆法背景的当事人，如中国内地"。[7]

¶3-062 "示范"法

正如其名，贸法委的《示范法》，永远只是一个"示范"，各国可根据其特殊需要，加以修改。除了一些增加，香港几乎是原封不动地采用《示范法》。增加的内容，主要是说明其适用范围并不仅限于商业仲裁，[8]以及明确授权仲裁员裁决费用和利息。[9]应强调，增加的内容并不违反《示范法》的原则，即仲裁地的法院应该支持仲裁，不应干预仲裁。

¶3-063 （第 341 章）《仲裁条例中》《示范法》适用于国际仲裁

在 2011 年被废止前，（第 341 章）《仲裁条例》建立了国际仲裁和本地仲裁两套不同的制度。根据其中颇为复杂的定义，是本地仲裁还是国际仲裁，取决于仲裁协议是国际的还是本地的。（关于仲裁协议的要求及意义，请见第四章）。

[7] 见 Morgan 著 "*Hong Kong Arbitration: A Decade of Progress – But Where to Next?*", *Hong Kong Lawyer*, 1999 年 10 月，第 66 页。

[8] 见（第 341 章）《仲裁条例》第 34C(2)条。（第 609 章）《仲裁条例》第 5 条取代了《示范法》第 1 条。第 5 条扩大了《仲裁条例》的适用范围，而《示范发》仅适用于国际仲裁。

[9] 见（第 341 章）《仲裁条例》第 34D(1)(a)条和第 34D(1)(d)条，现已废止。

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¶3-061 Rationale for implementing the Model Law

The principal advantage of the Model Law derives from its international origin. Its overriding objective is to provide all jurisdictions that adopt it with a comprehensive set of laws to facilitate resolution through private arbitration of civil disputes that are both international and commercial in character. This objective was the principal rationale for implementing the Model Law in Hong Kong. A further rationale for adopting the Model Law, as described by one commentator, was the realisation that:

> "…the civil law flavour of the Model Law's drafting would make it appeal to users of arbitration who came from civil law-type backgrounds, such as Mainland China".[7]

¶3-062 The "Model" Law

As its name suggests, the Model Law was always intended by the UNCITRAL to be "a model" which may be specialised or adapted to reflect the needs of any specific jurisdiction. In Hong Kong, the Model Law was adopted almost verbatim with a number of additions. These include, principally, clarifying that its scope was not merely limited to commercial matters[8] and expressly granting power to award costs and interest.[9] It is important to emphasise that these modifications did not in any way challenge the underlying principle of the Model Law, namely, that the local courts in the place of arbitration should support, but not interfere with, the arbitral process.

¶3-063 The repealed ordinance and its application of the Model Law to International Arbitrations

Before its repeal in 2011, Hong Kong *Arbitration Ordinance (Cap 341)* had established a bifurcated arbitration regime which treated domestic and international arbitrations conducted in Hong Kong differently. Under the (somewhat convoluted) definitions set out in the repealed Ordinance, the distinction between a domestic and an international arbitration hinged on whether the relevant arbitration **agreement** is international or domestic in character. For a further discussion on the requirements for, and significance of, arbitration agreements, see Chapter 4.

[7] See Morgan, *Hong Kong Arbitration: A Decade of Progress – But Where to Next?*, Hong Kong Lawyer, October 1999, at p66.

[8] See s34C(2) of the repealed Ordinance. Section 5 of *Arbitration Ordinance (CAP 609)* has effect in substitution for Art 1 of the UNCITRAL Model Law. Section 5 broadens the scope of the Ordinance's application, as the Model Law is limited to apply to international commercial arbitration.

[9] See ss34D(1)(a) and 34D(1)(d) of the repealed Ordinance. This section has been repealed.

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¶4-040 “书面协议”要求

《示范法》第 7(2) - (6)条规定：

“(2) 仲裁协议应为书面形式。

(3) 若仲裁协议的内容以任何形式记录下来，则为书面形式，无论该协议或合同是以口头、行为方式还是其它方式订立的。

(4) 电子通信所含信息可以调取以备日后查用的，即满足了仲裁协议的书面形式要求。“电子通信”系指当事人以数据电文方式发出的任何通信；“数据电文”系指经由电子手段、光学手段或类似手段生成、发送、接收或储存的信息；电子手段包括但不限于电子数据交换、电子邮件、电报、电传或传真。

(5) 仲裁协议如载于相互往来的索赔声明和抗辩声明中且一方当事人声称有协议而另一方当事人不予否认的，即为书面协议。

(6) 在合同中提及载有仲裁条款的任何文件，即构成书面仲裁协议，条件是此种提及可使该仲裁条款成为该合同的一部分。”

《仲裁条例》第 19(2)和(3)条补充了第 19(1)条中的书面要求。《仲裁条例》第 19(2)和(3)条规定：

“(2) 在不影响第(1)款的原则下，仲裁协议如符合以下规定，即属以书面订立——

(a) 该协议是载于文件之内的，不论该文件是否由该协议的各方签署；或

(b) 该协议虽然并非以书面订立，但却是在该协议的每一方的授权下，由该协议的其中一方或由第三者记录下来的。

(3) 如在协议中提述书面形式的仲裁条款，而该项提述的效果是使该条款成为该协议的一部分的，该项提述即构成仲裁协议。”

《仲裁条例》第 19 条规定仲裁协议不需“签署”。此外，第 19 条也认可部分书面部分口头的仲裁协议。但是，完全是口头的仲裁协议，仍不属《仲裁条例》下

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¶4-040 Requirement for "Agreement in Writing"

Arts 7(2) – (6) of the Model Law provides:

"(2) [t]he arbitration agreement shall be in writing.

(3) An agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange ("EDI"), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract".

Sections 19(2) and (3) of the *Arbitration Ordinance* are supplementary to the "writing" requirement set forth in s19(1). Sections 19(2) and (3) of the new Ordinance provide that:

"(2) [w]ithout affecting subsection (1), an arbitration agreement is in writing if –

(a) the agreement is in a document, whether or not the document is signed by the parties to the agreement; or

(b) the agreement, although made otherwise than in writing, is recorded by one of the parties to the agreement, or by a third party, with the authority of each of the parties to the agreement.

(3) A reference in an agreement to a written form of arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement".

Section 19 of the *Arbitration Ordinance* provides that the arbitration agreement need not be "signed". In addition, s19 brings arbitration agreements that are partly in writing and partly oral within the scope of the *Arbitration Ordinance*. Note, however, that arbitration agreements which are entirely oral continue to fall outside the Arbitration

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¶4-073 本地仲裁

“凡因本合同产生或与本合同有关的任何争议或歧见均应提交香港国际仲裁中心并按其本地仲裁规则通过仲裁解决。”

¶4-074 选择适用旧《仲裁条例》下本地仲裁制度中的规定

仲裁当事人可以选择适用列于附件2中的旧《仲裁条例》下本地仲裁制度中的一些规定。

“本协议各方在此一致同意《仲裁条例》（香港法律第609章）附件2第1到第7条的规定适用于本协议。”

¶4-075 适用《伦敦国际仲裁院仲裁规则》的仲裁

“任何因本合同产生或与本合同有关的争议，包括关于合同的存在、效力或终止的任何问题，均应提交并最终由仲裁解决。仲裁按《伦敦国际仲裁院仲裁规则》进行。该规则经提及应被视为已包括在本条款中。仲裁地点在香港的香港国际仲裁中心。”

“本合同的适用法律应为……的实体法。仲裁员人数应为(1或3)人。仲裁程序中使用的语言应是……。”

¶4-076 适用《国际商会仲裁规则》的仲裁

“因本合同产生或与本合同有关的一切争议应按照《国际商会仲裁规则》，由一位或多位依据该规则委任的仲裁员最终解决。

仲裁地点应在香港的香港国际仲裁中心。”

¶4-077 适用《香港国际仲裁中心机构仲裁规则》的仲裁

“凡因本合同引起的或与之相关的任何争议、纠纷、分歧或索赔，包括合同的存在、效力、解释、履行、违反或终止，或因本合同引起的或与之有关的任何有关非合同性义务的争议，均应提交由香港国际仲裁中心按提交仲裁通知时有效的《香港国际仲裁中心机构仲裁规则》管理的仲裁最终解决。

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¶4-073 Domestic Arbitration Clause

"Any dispute or difference arising out of or in connection with this contract shall be referred to and determined by arbitration at the Hong Kong International Arbitration Centre and in accordance with its Domestic Arbitration Rules".

¶4-074 Opting into provisions under the domestic regime of the repealed ordinance

Parties to an arbitration can opt into certain provisions of the repealed domestic regime, which is set out in Sch 2 of the *Arbitration Ordinance*.

"The parties to this agreement hereby agree that sections 1 through 7 of Schedule 2 of the Arbitration Ordinance Chapter 609 of the Laws of Hong Kong apply to this agreement".

¶4-075 Arbitration under the London Court of International Arbitration Rules

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause. The place of arbitration shall be in Hong Kong at Hong Kong International Arbitration Centre".

"The governing law of this contract shall be the substantive law of ... The number of arbitrators shall be... (one or three). The language to be used in the arbitral proceedings shall be...".

¶4-076 Arbitration under the ICC Rules of Arbitration

"All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

The place of arbitration shall be in Hong Kong at Hong Kong International Arbitration Centre".

¶4-077 Arbitration under the HKIAC Administered Arbitration Rules

"Any dispute, controversy, difference, or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof, or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre under the Hong Kong International Arbitration Centre Administered Arbitration Rules in force when the Notice of Arbitration is submitted.

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若干初步事项

仲裁地 ¶5-021
法院的角色 ¶5-022
仲裁语言 ¶5-023
代表 ¶5-024
实体法 ¶5-025
保密性 ¶5-026

在转入讨论仲裁程序之前，宜先简单看一看与香港仲裁有关的几个事项。

¶5-021 仲裁地

通常，仲裁地由当事人在仲裁协议中约定。仲裁地的意义有三层。首先，仲裁地决定仲裁受什么地方的仲裁法的管辖。除非当事人另有约定，以香港为仲裁地的仲裁受香港《仲裁条例》管辖。第二，仲裁地决定裁决的地点。换句话说，在香港是仲裁地的情况下，裁决会被视为在香港作出。在执行裁决时，这很重要。因为香港是中国的一部分，而中国是《纽约公约》的成员国，就在境外执行而言，在香港作出的裁决会被视为公约裁决。第三，仲裁地决定哪里的法院有权支持和监督仲裁，以及法院可以介入的程度（有关这一点，请见以下的¶5-022）。

选定香港为仲裁地，并不意味着仲裁程序的每一步都必须在香港。《示范法》第 20(2)条规定，在以香港为仲裁地的仲裁中，仲裁庭可以在香港境外开庭或召开会议。尽管香港国际仲裁中心提供开庭用的房间和其它设施，当事人可以不用。如果愿意，他们可以使用其它设施，如酒店的会议设施、律师的办公室或其它类似的地方。

¶5-022 法院的角色

在香港仲裁中，法院扮演什么样的角色呢？《仲裁条例》第 3 条明确限定了法院可以干预的范围。

基本原则是当地法院应该支持而不是干预仲裁。《示范法》第 5 条即反映这一原则，将法院的干预限制在其规定的范围内。第 12(4)和(5)条明确规定高等法院是

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Some Preliminary Matters

The place of arbitration ¶5-021
The role of the courts ¶5-022
The language of the arbitration ¶5-023
Representation ¶5-024
The applicable substantive law ¶5-025
Confidentiality ¶5-026

Before turning to the discussion of arbitration procedures, it will be useful to look briefly at a number of issues which are relevant to arbitrations in Hong Kong.

¶5-021 The place of arbitration

The place of arbitration (often referred to as the "seat" of the arbitration) is typically agreed between the parties in the arbitration agreement. The significance of the place of arbitration is threefold. First, it determines which jurisdiction's arbitration laws will govern the conduct of the arbitration. Unless the parties agree otherwise, an arbitration which has Hong Kong as its seat or *situs* will be governed by the Hong Kong *Arbitration Ordinance*. Second, the place of the arbitration fixes the place of the award. In other words, where Hong Kong is designated as the *situs* of the arbitration, the award will be considered to have been "made" in Hong Kong. This is important in the context of enforcement of the award. As Hong Kong is a part of the PRC, and the PRC is a member of the New York Convention, an award "made" in Hong Kong will be considered an award made in a Convention member state for purposes of enforcement abroad. Thirdly, the seat of the arbitration specifies which court may exercise supportive and supervisory powers over arbitrations and the extent to which the courts may intervene (as to which, see ¶5-022 below).

Designating Hong Kong as the seat or *situs* of an arbitration does not necessarily mean that everything done in connection with the arbitration proceedings must take place in Hong Kong. Art 20(2) of the Model Law provides that, for arbitrations for which Hong Kong is the place of arbitration, hearings or meetings of the arbitral tribunal may be held outside Hong Kong. Although the HKIAC provides hearing rooms and other facilities, the parties to a Hong Kong arbitration are not bound to use them. They are free to use any other facilities – a hotel conference facility, a solicitor's office or any other similar place – if they choose to do so.

¶5-022 The role of the courts

What role do the courts play in an arbitration conducted in Hong Kong? Section 3 limits the intervention of the Court to what has been expressly provided in the Ordinance.

The guiding principle is that the local courts should support, but not interfere with, the arbitral process. This principle is reflected in Art 5 of the Model Law, which seeks to limit the intervention of the courts to what is provided in the Model Law. Sections 13(4)

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在香港，如果是三名仲裁员，而当事人没有预先确定指定程序，每一方将指定一名仲裁员，两位当事人指定的仲裁员随后指定第三位仲裁员（《示范法》第11(3)(a)条）。如果是一名仲裁员，而当事人无法就人选达成一致，经一方申请，由香港国际仲裁中心代为指定（《示范法》第11(3)(b)条）。[24]

一方当事人必须在收到另一方要求指定仲裁员的通知后 30 日内，指定仲裁员。否则，另一方可要求香港国际仲裁中心指定（《示范法》第11(3)(a)条）。

如果两名当事人指定的仲裁员在被指定后的 30 天内，不能选定第三位仲裁员，经要求，香港国际仲裁中心可以指定。香港国际仲裁中心的决定，当事人不得上诉。

指定仲裁员通常是书面的，但《示范法》没有任何形式要求。

如果约定的指定程序失效，或是因为一方不按约定行事，或是因为第三方不按授权履行职能，则任何一方可要求香港国际仲裁中心采取必要的措施（除非关于指定程序的协议规定了落实指定的其它方法）（《示范法》第11(4)条）。

但是，即便是由于一方不配合，致使不得不申请香港国际仲裁中心指定仲裁员，香港国际仲裁中心也无权指令由该方承担相应费用。

《仲裁条例》第 105 条规定，如果在履行职能过程中不诚实地就某事作为或不作为，指定机构须对其行为的后果承担法律责任。这一条同样适用于指定机构的雇员或代理。

¶5-053 仲裁员的资格和独立性

有时候，可能会要求仲裁员具备特定的资格，例如特定领域的专长、专业资格或国籍。但是，应注意，除非当事人对国籍有约定，《示范法》第 11 条不允许以所属国籍为理由，排除任何人担任仲裁员。

候选仲裁员应披露可能会对其公正性或独立性引起合理怀疑的任何情况。一旦被指定，仲裁员在整个程序期间，有持续的义务向当事人披露任何这类情况（《示范法》第12(1)条）。

[24] 根据《仲裁条例》第 34C 条，香港国际仲裁中心是授权的指定机构。

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In Hong Kong, where there are to be three arbitrators and the parties have not pre-determined the selection procedure, each party will appoint one arbitrator and the two appointed arbitrators will, in turn, appoint the third (Art 11(3)(a) of the Model Law). Where there is to be only one arbitrator and the parties cannot agree on the arbitrator, the arbitrator will be appointed, upon the request of a party, by the HKIAC[24] (Art 11(3)(b) of the Model Law).

A party must appoint an arbitrator within 30 days of receipt of a request to do so from the other party, failing which the other party may request the HKIAC to make the appointment (Art 11(3)(a) of the Model Law).

If the two party-appointed arbitrators fail to agree on a third arbitrator within 30 days of their appointment, the HKIAC can make the appointment upon request. There is no right of appeal from the decision of the HKIAC.

Appointments of arbitrators are normally made in writing, but the Model Law requires no formalities for the appointment.

Where an agreed appointment procedure breaks down, including where a party fails to act as required or a third party fails to perform any function entrusted to it under such procedure, any party may request the HKIAC to take the necessary measure (unless the agreement on the appointment procedure provides other means for securing the appointment) (Art 11(4) of the Model Law).

The HKIAC does not, however, have power to make an order for costs against a party whose failure to cooperate in constituting a tribunal has made an application for a default appointment necessary.

Section 105 of the Ordinance provides that an appointing body is liable in law for the consequences of doing or omitting to do an act in the exercise of its functions if the act was done or omitted to be done dishonestly. This also applies to employees or agents of such appointing body.

¶5-053 Qualifications and independence of arbitrators

Sometimes, an arbitrator may be required to possess certain specified qualifications, such as expertise in a particular area, professional qualifications, or nationality. Note, however, that unless nationality requirements are stipulated by the parties, Art 11 of the Model Law provides that no individual should be prohibited from being appointed an arbitrator by reason of nationality.

A potential arbitrator must disclose any circumstances that would give rise to reasonable doubt as to his/her neutrality or independence. Once appointed, an arbitrator is under a continuing obligation to disclose any such matters to both parties during the course of the proceedings (Art 12(1) of the Model Law).

[24] The HKIAC is the designated appointing authority pursuant to s13 of the *Arbitration Ordinance*.

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书面陈述：诉辩文件和案件陈述

书面陈述的性质 .... ¶5-081
典型的陈述 .... ¶5-082
《仲裁条例》第 51、53 条和《示范法》的规定 .... ¶5-083

¶5-081 书面陈述的性质

在法院诉讼，交换书面陈述，要遵守一套非常正式、机械的规则。在香港，这些规则都规定在《高等法院规则》里。仲裁中，不必遵守这些规则。在仲裁中，简单、不那么正式的书面案件陈述取代了传统的法院诉讼式的“诉辩文件”。只是，“诉辩文件”、“案件陈述”和“陈述”，在仲裁中常交替使用。“诉辩文件”一词既可以指法院诉讼式的诉辩文件，也可以指不那么正式的案件陈述。

不管用什么术语，重要的是，这些诉辩文件、案件陈述或陈述必须明确需由仲裁员决定的问题和要求的救济。因为正是这些文件，决定案件的实体问题。而且，决定一些中期事宜，例如申请披露文件，或决定是否存在纯粹法律问题等，也都需基于这些文件。

一般来说，用什么样的书面陈述，取什么风格和语气，取决于当事人。如果当事人已约定适用一套现成的仲裁规则，术语和交换书面陈述的顺序可能已规定在规则里。例如，如果适用《联合国国际贸易法委员会仲裁规则》，则包括：(1)申请书；(2)答辩书；(3)反诉书；(4)就反诉的答辩书；(5)对申请和答辩的修改；和(6)进一步书面陈述。《示范法》第 23(1)条基本上采用的是类似的命名。

¶5-082 典型的陈述

实践中，当事人之间最初交换的书面陈述的性质和数量，通常在程序会议上决定。在大多数香港仲裁中，包括以下几种：

(i) 申请书

申请书通常：(i)描述事实背景；(ii)指出争议相关的事实和事件；(iii)指出申请的法律依据；(iv)概述申请人的法律论点；和(v)说明要求的救济。

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Written Submissions: Pleadings and Statements of Case

Nature of written submissions........ ¶5-081
Typical submissions........ ¶5-082
Sections 51 and 53 of the Ordinance and Model Law Provisions ..... ¶5-083

¶5-081 Nature of written submissions

Court proceedings require strict adherence to a highly formal and mechanistic set of rules governing the exchange of written submissions. In Hong Kong, these are embodied in the Rules of the High Court. In arbitration proceedings, these rules do not need to be followed. As a result, traditional court-style “pleadings” are usually replaced in arbitrations with simpler and less formal written statements of case than those found in court proceedings. The terms “pleadings”, “statement of case”, and “submissions” are, however, often used interchangeably in arbitrations. The term “pleadings” may also be used to describe collectively both court-style pleadings and less formal statements of case.

Whatever the terminology used, the importance of these pleadings, statements of case or submissions is that they must be able to identify the issues to be decided by the arbitrator as well as the relief sought. This is so because it is from these proceedings that the substantive matters would be decided and, indeed, they form the basis for the decisions to be made in a number of interlocutory matters such as discovery applications, decision on whether to have preliminary issues, etc.

In general, it is up to the parties to decide what kinds of written submissions and the style and tone thereof they wish to adopt. Where the parties have already agreed on the adoption of a set of arbitration rules, the terminology and nature of sequence of exchange of written submissions may already be set. For example, where the UNICTRAL Rules apply, the following written submissions are referred to: statement of claim; statement of defence; counterclaim; defence to counterclaim; amendments to claim and defence; and further written statements. Broadly speaking, similar nomenclatures are used in Art 23(1) of the UNCITRAL Model Law.

¶5-082 Typical submissions

In practice, the nature and number of written submissions to be initially exchanged between the parties is something which is usually agreed during the preliminary meeting. In most arbitrations in Hong Kong, these will consist of the various written submissions described below:

(i) statement of claim –

the claimant’s statement of claim will typically: describe the factual background to the dispute; set out the facts and events to which the dispute relates; set out the legal basis for the claim; outline the legal arguments in support of the claimant’s case; and specify the relief which the claimant seeks;

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在现代商事仲裁中，仲裁庭总不希望看到各方提供相互矛盾的专家证据。一种解决办法，是由仲裁庭指定独立的专家就具体问题向仲裁庭报告，除非当事人另有约定（《示范法》第 26 条）。这也是个节省费用的办法。在香港仲裁中，很可能因为当事人偏好传召“自己”的专家，《示范法》第 26 条设想的办法迄今似乎很少使用。

另一个办法，是所谓“热浴盆”（Hot Tub）程序。“热浴盆”程序是由澳大利亚联邦法院的法官 Lockhart 发明的，专门用来处理专家证据，尤其是针对经济学专家。在“热浴盆”程序中，各方指定的专家同时出庭作证。当着同行的面作证，专家证人会有所收敛；而且，其提供的任何证据都可能被即时检验。“热浴盆”程序可以节省时间。而且，专家通常会觉得自己已说了想说的一切，而不象在传统的对抗制中，只能回答被问到的问题。

开庭

开庭审理 ¶5-141
开庭程序 ¶5-142

¶5-141 开庭审理

在国际仲裁中，当事人可约定开庭审理，在庭审中提出证据并作口头辩论。或者，可以约定不开庭，而由仲裁员仅基于书面文件裁决争议。如果当事人不能达成一致，由仲裁庭会决定是否开庭。但需注意，根据《示范法》第 24(1)条，如果当事一方要求开庭，仲裁庭必须在适当的时候开庭。

有时候，一方不出庭或不提供证据文件。在此情况下，《示范法》第 25(c)条授权仲裁庭继续仲裁程序，并在该方缺席的情况下作出裁决。出庭的一方仍需证明其主张，说服仲裁庭。这类裁决称为“缺席”裁决。

¶5-142 开庭程序

如果要开庭，应事先确定好开庭的程序，以保证开庭尽可能有效率。在这方面，没有固定的做法。开庭的方式可以有很大的不同，取决于争议的性质和复杂程度，当事各方及其律师的期望，以及仲裁员的偏好和习惯作法。

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It is invariably the case in modern commercial arbitrations that an arbitrator has no wish for each party to present conflicting expert evidence. One possibility, in an international arbitration, is for the tribunal to appoint independent experts to report to it on specific issues, unless the parties agree otherwise (Art 26 of the Model Law). This may also be a useful means of minimising costs. The Art 26 mechanism appears to have been little-used to date in Hong Kong, most likely due to parties' preference to calling their "own" appointed experts.

As another alternative, an arbitrator may wish to place the expert witnesses in what is known as a "Hot Tub". The Hot Tub procedure was developed by Justice Lockhart of the Federal Court of Australia as a means of dealing with expert evidence, particularly that of economists. It allows the experts to give their evidence concurrently and in the presence of their peers, which acts as a constraint on their evidence and ensures that any evidence that they give may be tested immediately. The other advantages are that the time required is reduced and the experts normally feel that they have said everything that they wish to say, by contrast with the adversarial system in which they are constrained by the questions asked of them.

Hearings

Oral hearings ¶5-141
The order of proceedings ¶5-142

¶5-141 Oral hearings

In an international arbitration, the parties may agree to hold oral hearings for the presentation of evidence and oral argument. Alternatively, they may agree to have the case decided by the arbitrator without a hearing on a "documents only" basis. Where the parties cannot agree, the arbitral tribunal will decide whether to hold oral hearings. Note, however, that under Art 24(1) of the Model Law the arbitral tribunal must hold hearings at an appropriate stage of the proceedings if requested to do so by one of the parties.

Sometimes, a party may fail to appear at the hearing or fail to produce documentary evidence in support of its case. If this occurs, Art 25(c) of the Model Law gives the tribunal the power to continue the proceedings and make an award in the absence of the party. The party present still has to move its claim. Such an award is referred to as a "default" award.

¶5-142 The order of proceedings

If an oral hearing is to be held, the order of proceedings will need to be fixed well before the hearing to ensure it is conducted as efficiently as possible. There is no fixed practice in this regard. The way in which oral hearings are conducted can differ significantly depending on the nature and complexity of the dispute, the wishes of the parties and their counsel, and the preferences and customary practices of the arbitrators.

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但在 2012 年 5 月，上诉法院推翻了原诉法院的判决。[33]上诉法院并未发现任何违反《示范法》第 34(2)(a)的情况，认定“所抱怨的行为必须足够严重或恶劣，以至可以说剥夺了一方的正当程序”。[34] Pacific China Holdings Ltd 试图上诉。上诉法院未准。[35] Pacific China Holdings Ltd 直接向终审法院申请。2013 年 2 月，终审法院驳回了申请。[36]值得注意的是，上诉法院和终审法院的决定表明，申请撤消裁决，并非属于可据《香港终审法院条例》第 22(1)(a)条“不需法院批准”即可上诉的事项。

¶6-012 《仲裁条例》附件 2 适用时质疑裁决的理由

就质疑根据《仲裁条例》第 11 部分而适用《仲裁条例》附件 2 的裁决，《仲裁条例》赋予了香港法院更大的权力。根据《仲裁条例》附件 2 第 4(1)条，法院可以影响到仲裁庭的严重不当为由撤销裁决。根据 4(2)条，“严重不当”被定义为(a)－(i)款定义的“不当”。但不包括轻微的程序不当和事实或法律上的错误。《高等法院规则》第 73 号命令第 5 条规定了这类申请的程序。

根据《仲裁条例》第 81(3)条的规定，香港法院无权以认定事实有误为由撤销裁决。但是，根据《仲裁条例》附件 2 第 6 条，在下述情况下，可针对裁决中的法律问题，向法院上诉：

(1) 仲裁当事各方均同意上诉；或

(2) 没有当事各方的同意，但法院准予上诉。

法院只有在认为《仲裁条例》附件 2 第 6(4)条规定的条件满足时，才会准予上诉。第 6(4)条规定如下：

(1) 决定相关问题对一方或多方的权利有重大影响；

(2) 相关问题是应由仲裁庭决定的问题；及

[33] *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd* [2012] 4 HKLRD 1.

[34] 同上，94 段。

[35] *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd* [2012] 4 HKLRD 576.

[36] *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd*. FAMV No. 18/2012,February 19, 2013.

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Instance.[33] The Court of Appeal found no breach of Art 34(2)(a) of the Model Law, holding that the "conduct complained of must be sufficiently serious or egregious so that one could say a party has been denied due process".[34]

Pacific China Holdings Ltd sought to appeal the Court of Appeal's judgment. The Court of Appeal refused to grant leave for appeal to the Court of Final Appeal.[35] Pacific China Holdings Ltd then applied for leave directly to the Court of Final Appeal. In February 2013, the Court of Final Appeal dismissed the application for leave.[36] Notably, the decisions by the Court of Appeal and the Court of Final Appeal make it clear that an application to set aside an award is not an appeal "as of right" under s22(1)(a) of the Hong Kong Court of Final Appeal Ordinance.

¶6-012 Grounds for challenging awards when Sch 2 of the ordinance applies

The *Arbitration Ordinance* gives Hong Kong courts broader powers in respect of recourse against awards that are subject to Sch 2 of the Ordinance by virtue of Part 11 of the Ordinance.

Under s4(1) of Sch 2 of the Ordinance, the courts may set aside an arbitral award where an arbitrator or umpire on the ground of serious irregularity affecting the tribunal. Under s4(2), the notion of "serious irregularity" is defined as an irregularity described in subsections (a) to (i). It does not extend to minor procedural irregularities or to errors of fact or law. The procedure for such applications is set out in Order 73, r5 of the Rules of the High Court.

Under s81(3) of the Ordinance, Hong Kong courts have no jurisdiction to set aside an arbitration award on the ground of errors of fact. However, under s6 of Sch 2 of the Ordinance, an appeal may be brought before the courts on a question of law arising out of an arbitration award where:

(1) all parties to the arbitration consent to the appeal; or

(2) absent such consent, with the leave of the Court.

Leave to appeal is to be granted only if the Court finds that the conditions under s6(4) of Sch 2 are satisfied. Section 6(4) provides as follows:

(1) that the decision of the question will substantially affect the rights of one or more of the parties;

(2) that the question is one which the arbitral tribunal was asked to decide; and

[33] *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd* [2012] 4 HKLRD 1.

[34] *Id*, at paragraph 94.

[35] *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd* [2012] 4 HKLRD 576.

[36] *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd*, FAMV No. 18/2012, 19 February 2013.

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泰国[52]和英国[53]这十五个国家，签订了双边条约。香港的情况特殊：香港是个特别行政区，当然不是一个“国家”；[54]但根据《基本法》，它又有权与其它国家签订双边条约。迄今为止，还没有根据上述条约针对香港特别行政区政府提起的仲裁。但将来出现这类仲裁，也不是不可能。

本章简述双边条约的主要作用，及香港签署的上述十五个双边条约中常见的实体和程序规定。

¶8-010 双边条约的作用

双边条约源于双边友好、通商和通航条约。[55]但双边条约增加了解决投资者和东道国间争议的机制，因而更加完善。因此，双边条约的主要作用之一，是为东道国建立一个争议解决机制，进而提供一个吸引和留住来自资本输出国的投资所需的最基本的法律、行政和监管框架。[56]这一机制是投资者的有力保护，投资者可据以直接针对东道国要求救济，甚至可以绕开依东道国法律确立其索赔权这一步。

[48] 香港政府和荷兰王国政府关于鼓励投资和保护投资协定。生效日期：1993 年 9 月 1 日。见 http://www.legislation.gov.hk/IPPANetherlandse.PDF。

[49] 香港政府和新西兰政府关于促进和保护投资协定。生效日期：1995 年 8 月 5 日。见 http://www.legislation.gov.hk/IPPANZe.PDF。

[50] 香港政府和瑞典王国政府关于促进和保护投资协定。生效日期：1994 年 6 月 26 日。见 http://www.legislation.gov.hk/IPPASwedene.PDF。

[51] 香港政府和瑞士联邦议会关于促进和相互保护投资协定。生效日期：1994 年 10 月 22 日。见 http://www.legislation.gov.hk/IPPASwitzerlande.PDF。

[52] 中华人民共和国香港特别行政区政府和泰王国政府关于促进和保护投资协定。生效日期：2006 年 4 月 12 日。见 http://www.gld.gov.hk/cgi-bin/gld/egazette/gazettefiles.cgi?lang=c&year=2006&month=5&day=4&vol=10&no=18&gn=2&header=1&acurrentpage=12&df=1&nt=s5&agree=1&gaz_type=ls5&part=1&newfile=1&pid=

[53] 中华人民共和国香港特别行政区政府和大不列颠和北爱尔兰联合王国政府关于促进和保护投资协定。生效日期：1999 年 4 月 12 日。见http://www.legilation.gov.hk/IPPAUKe.PDF。

[54] 香港作为一个特别行政区引发的一个有意思的问题，是香港居民能否有资格成为中华人民共和国签署的双边投资协定下的投资者。在比较近的一个 ICSID 案件中，仲裁庭认为居住香港的中国 公民可援引中国-秘鲁双边投资协定起诉秘鲁政府。见 Tza Yap Shun v Republic of Peru, ICSID 案号：ARB/07/6， 管辖权决定， 2009 年 6 月 19 日。

[55] 参看 Campbell McLachlan QC, Laurence Shore and Matthew Weiniger 著《国际投资仲裁实体原则》第 2.05 段。

[56] 参看 W.M.& R.Sloane，《双边投资条约年代的非直接征收及其估值》，75 British Y.B.Int'L L. 117 (2004)。

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Korea,[47] Netherlands,[48] New Zealand,[49] Sweden,[50] Switzerland,[51] Thailand,[52] and the United Kingdom.[53] This position is unusual, as Hong Kong is of course not a "state".[54] However, the Hong Kong SAR does possess the power to enter into BITs, with foreign states pursuant to the Basic Law. To date, no arbitration proceedings have been commenced against the Government of the Hong Kong SAR pursuant to any of these BITs. However, the possibility that this may occur in the future remains open.

This chapter summarises the key functions of a BIT as well the substantive and procedural provisions commonly found in the 15 BITs to which Hong Kong is a signatory.

¶8-010 Functions of a BIT

BITs have their origins in bilateral treaties of Friendship, Commerce and Navigation ("FCN Treaties").[55] However, BITs improved upon these FCN Treaties by providing for an investor-host state dispute resolution mechanism. Accordingly, one of the main functions of a BIT is to establish a dispute resolution mechanism for host states that

[46] Protection of Investment. Entry into Force: 18 June 1997 (http://www.legislation.gov.hk/IPPAJapane.PDF).

[47] Agreement between the Government of Hong Kong and the Government of the Republic of Korea For the Promotion and Protection of Investments. Entry into Force: 30 July 1997 (http://www.legislation.gov.hk/IPPAKoreae.PDF).

[48] Agreement on the Encouragement and Protection of Investments between the Government of Hong Kong and the Government of the Kingdom of the Netherlands. Entry into Force: 1 September 1993 (http://www.legislation.gov.hk/IPPANetherlandse.PDF).

[49] Agreement between the Government of Hong Kong and the Government of New Zealand for the Promotion and Protection of Investments. Entry into Force: 5 August 1995 (http://www.legislation.gov.hk/IPPANZe.PDF).

[50] Agreement between the Government of Hong Kong and the Government of the Kingdom of Sweden on the Promotion and Protection of Investments. Entry into Force: 26 June 1994 (http://www.legislation.gov.hk/IPPASwedene.PDF).

[51] Agreement between the Government of Hong Kong and the Swiss Federal Council on the Promotion and Reciprocal Protection of Investment. Entry into Force: 22 October 1994 (http://www.legislation.gov.hk/IPPASwitzerlande.PDF).

[52] Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments. Entry into Force: 12 April 2006 (http://www.gld.gov.hk/cgi-bin/gld/egazette/gazettefiles.cgi?lang=e&year=2006&month=5&day=4&vol=10&no=18&gn=2&header=1&part=0&df=1&nt=s5&newfile=1&acurrentpage=12&agree=1&gaz_type=ls5).

[53] Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments. Entry into Force: 12 April 1999 (http://www.legislation.gov.hk/IPPAUKe.PDF).

[54] Hong Kong's peculiar status as a Special Administrative Region has given rise to an interesting question as to whether residents of Hong Kong may qualify as an investor under BITs entered by the People's Republic of China. In a fairly recent ICSID decision, an arbitral tribunal determined that a Chinese national with Hong Kong residence may invoke the China-Peru BIT to bring a claim against the Peruvian Government. See *Tza Yap Shum v Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction, 19 June 2009.

[55] See Campbell McLachlan QC, Laurence Shore and Matthew Weiniger, *International Investment Arbitration Substantive Principles*, at para 2.05.

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¶9-032 紧急仲裁员

2013《规则》为当事人在仲裁庭组成之前申请紧急措施规定了一套指定紧急仲裁员的程序。

2013《规则》附件4规定了申请指定紧急仲裁员所需满足的要求，包括但不限于：说明导致申请的情形以及提交仲裁的基础争议；陈明所申请的紧急措施；申请人需迫切申请紧急措施的原因；申请人有权获取紧急措施救济的理由；及(5)随申请交纳预付金。[70]

此外，2013《规则》第23条列出了仲裁员可给予的临时措施的种类，以及在决定是否给予临时措施是要考虑的因素。

¶9-033 追加新增当事人

根据2008《规则》，只有仲裁庭有权追加当事人。2013《规则》授权香港国际仲裁中心就在仲裁庭组成之前提出的追加申请，作初步决定。对在仲裁庭组成之后提出的追加申请，2013《规则》规定仍由仲裁庭决定。

在决定是否追加当事人时，香港国际仲裁中心将考虑新增当事人是否受导致仲裁的有效的仲裁条款的约束。任何有关管辖权的问题都将由仲裁庭在其组成后决定。

如果香港国际仲裁中心决定追加当事人，所有当事人应视为放弃提名仲裁员的权利，且香港国际仲裁中心可撤回对任何仲裁员的指定。在此情况下，香港国际仲裁中心将指定仲裁庭。[71]

¶9-034 合并仲裁

2013《规则》推出了一些新规定，授权香港国际仲裁中心合并两个或多个香港国际仲裁中心的仲裁。根据2013《规则》第28.1条，香港国际仲裁中心可在下述情况下合并仲裁：

(a) 当事各方同意合并；

(b) 各项仲裁中的所有请求均依据同一仲裁协议提出；或

[70] 2013《规则》附表4第2部分。

[71] 2013《规则》第27.11条。

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¶9-032 Emergency arbitrator

The 2013 Rules establish a procedure for appointing an emergency arbitrator in circumstances where a party seeks to apply for urgent relief prior to the constitution of an arbitral tribunal.

Sch 4 of the 2013 Rules sets forth the requirements of an application for the appointment of an emergency arbitrator, which include *inter alia*: a description of the circumstances giving rise to the application and of the underlying dispute referred to arbitration; a statement of the emergency relief sought; the reasons why the applicant needs urgent relief; the reasons why the applicant is entitled to such relief and; the deposits payable together with such application.[70]

In this connection, Art 23 of the 2013 Rules describes the type of interim relief that may be granted by an arbitrator and the factors to be taken into account when deciding whether to grant relief.

¶9-033 Joinder of additional parties

Under the 2008 Rules, the power to join additional parties to an existing arbitration is conferred on the arbitral tribunal only. The 2013 Rules grant the power to the HKIAC to determine *prima facie* the issue of joinder where an application for joinder is submitted before constitution of the arbitral tribunal. Where an application is submitted after the constitution of the arbitral tribunal, the 2013 Rules maintain that the tribunal will determine such application.

When deciding on a request for joinder, the HKIAC would consider whether the additional party is bound by a valid arbitration agreement that gives rise to the arbitration. Any question of jurisdiction would be decided by the arbitral tribunal after it is constituted.

If the HKIAC decides that an additional party shall be joined, all parties will be deemed to have waived their right to designate an arbitrator and the HKIAC may revoke the appointment of any arbitrator. In such case, the HKIAC will appoint the arbitral tribunal.[71]

¶9-034 Consolidation of arbitrations

The 2013 Rules introduce new provisions granting power to the HKIAC to consolidate two or more HKIAC arbitrations. Pursuant to Art 28.1 of the 2013 Rules, the HKIAC may consolidate where:

(a) the parties agree to consolidate;

(b) all of the claims in the arbitrations are made under the same arbitration agreement; or

[70] Section 2, Sch 4 of the 2013 Rules.

[71] Art 27.11 of the 2013 Rules.

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11. 临时仲裁有什么优点？

因为不需要向仲裁机构支付费用，临时仲裁可能会更便宜。理论上，当事人可以根据争议情况，灵活设计更合适的规则和程序。但实践中，谈妥一套规则，需要大量的专业知识和精细的谈判。

12. 仲裁比诉讼便宜吗？

仲裁的费用，很大程度上取决于仲裁机构（如果有）的收费，及仲裁员的人数和收费。由于仲裁程序灵活随意，仲裁可以较法院更便宜。但是，如果当事人选择典型的对抗式，仲裁可能会像诉讼一样贵。

13. 仲裁比诉讼更快吗？

同样，由于仲裁程序灵活，通常能较诉讼更快。裁决不能上诉，能使争议的最终解决缩短几个月或几年。但是，不像法院，即使不存在真正的争议，仲裁中也无法作出缺席或简易判决，通常还得开庭。

14. 仲裁员的决定是否构成具约束力的先例？

仲裁私下进行，是保密的，除个别情况外，当事人通常不得披露仲裁结果。因此，如果想通过一案设立先例，以约束其他人，仲裁不是理想的选择。

15. 仲裁裁决能否上诉？

仲裁裁决通常是终局的，法院不能复核实体问题。在香港，当事人可在仲裁协议中明示约定，在有限的情况下，裁决可以因仲裁员适用法律有误或有其他不当行为上诉。

¶10-020 在香港仲裁

16. 为什么在香港仲裁？

香港位于中国大陆的门户，很方便，与东亚各主要商业中心的交通也很便利；法律体系坚实，支持仲裁；有很多仲裁员，律师和其他专业人士；香港作出的仲裁裁决在所有东亚国家（包括内地）很容易执行。

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11. What are the advantages of ad hoc arbitration?

Ad hoc arbitration may be cheaper insofar as no administration fees are payable to an arbitration institute. In principle, it may also provide the parties with flexibility to devise rules and procedures appropriate to their disputes. In practice, however, devising and agreeing to a set of ad hoc procedures will require substantial specialist input and detailed negotiation between the parties.

12. Is arbitration cheaper than litigation?

The cost of arbitrating can depend greatly on the fees charged by the arbitration institute used (if any), how many arbitrators are appointed, and the fees charged by the arbitrators. Because of its flexibility and informality, arbitration can be conducted more cheaply than court proceedings. If the parties adopt a strongly adversarial approach, however, arbitration proceedings can be as expensive as litigation.

13. Is arbitration quicker than litigation?

Again, because of its procedural flexibility, it is generally possible to conduct arbitration proceedings more quickly than litigation. Restrictions on the parties' rights to appeal arbitration awards can shorten a dispute by months or years. Unlike courts, however, arbitrators generally do not have power to issue default or summary judgment in simple cases where there is no real issue to be determined, and are generally required to hold a hearing of the claim.

14. Do arbitrators' decisions create binding legal precedent?

As arbitration proceedings are private and confidential, the parties are generally prohibited from disclosing the outcome of an arbitration, except in limited circumstances. As a result, arbitration may not be ideal where a party hopes to set a precedent in one case that it can use against other parties in future.

15. Are arbitral awards subject to appeal?

Arbitration awards are usually final and not subject to review on the merits. In Hong Kong, parties may expressly agree in the arbitration agreement that the award may be appealed in limited circumstances on the grounds that an arbitrator has made an error of law or has committed misconduct.

¶10-020 Arbitration in Hong Kong

16. Why arbitrate in Hong Kong?

Hong Kong is conveniently located on the doorstep to Mainland China and is easily accessible from all East Asia's major commercial centres. It has a strong, arbitration-friendly legal system, and a large pool of arbitrators, lawyers and other professionals. Arbitral awards made in Hong Kong are readily enforceable in all East Asian jurisdictions, including Mainland China.

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23. 在香港仲裁，是不是必须聘请香港律师？

不是。当事人可以选择香港律师或境外律师，甚至非律师，作代理。

24. 在哪儿能找到有关香港仲裁的更多信息？

香港国际仲裁中心网站 www.hkiac.org 载有大量信息，包括香港国际仲裁中心的作用和管理服务、香港国际仲裁中心制定或建议的仲裁规则、香港国际仲裁中心示范仲裁协议和香港国际仲裁中心仲裁员名册。

¶10-030 程序法和程序规则

25. 在香港仲裁，适用什么法律？

《仲裁条例》对于在香港进行的仲裁规定了基本的法律框架。具体仲裁程序，由当事人（通常在仲裁协议中）选择的仲裁规则管辖。《仲裁条例》和由当事人选择的仲裁规则没有规定的，仲裁员有权决定采用适当的程序，以保证仲裁能公正和有效率地进行。

26. 如果当事人没有约定，适用什么仲裁规则？

对在香港国际仲裁中心进行的国际仲裁，通常适用《香港国际仲裁中心机构仲裁规则》和 UNCITRAL 仲裁规则。对在香港国际仲裁中心进行的本地仲裁，通常适用《香港国际仲裁中心本地仲裁规则》。如果没有约定仲裁规则，《仲裁条例》为当事人和仲裁员设计恰当的仲裁程序，提供了框架。

27. 区别对待"国际"仲裁和"本地"仲裁吗？

香港于 2010 年修改了《仲裁条例》。新的《仲裁条例》统一了旧的视仲裁为本地仲裁或国际仲裁而有不同程序规定的制度。在新的《仲裁条例》中，已没有这一区别，且《示范法》基本上适用于所有香港仲裁。

28. 新《仲裁条例》的主要特点有哪些？

新《仲裁条例》的结构仿效了《示范法》，更为方便用户。又引进了 2006 年修订《示范法》时补充的有关临时措施和初步指令的详细的规定。新的《仲裁条例》同时包含了可由当事人选择适用的有关就法律问题上诉、合并仲裁和质疑仲裁裁决的规定。

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23. Must the parties retain Hong Kong legal counsel in a Hong Kong arbitration?

No. The parties are free to appoint locally-qualified or foreign legal advisors or non-legal representatives to represent them in an arbitration.

24. Where can I find more information on arbitration in Hong Kong?

The HKIAC website, www.hkiac.org, contains information relating to the HKIAC's role and administrative services, the arbitration rules adopted or recommended by the HKIAC, its model arbitration agreements and the HKIAC's panel of arbitrators.

¶10-030 Procedural laws and rules

25. What rules govern arbitration proceedings in Hong Kong?

Arbitrations conducted in Hong Kong are governed by the Arbitration Ordinance, which provides the basic legal framework. The detailed arbitration procedure is governed by the arbitration rules chosen by the parties (usually in their arbitration agreement). Where the Arbitration Ordinance and the chosen arbitration rules are silent, the arbitrator has a discretion to adopt appropriate procedures to ensure fair and efficient conduct of the arbitration.

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26. What arbitration rules will be applied if none have been agreed to by the parties?

For international arbitrations conducted at the HKIAC, the HKIAC Administered Arbitration Rules or the UNCITRAL Arbitration Rules will typically be applied. For domestic arbitrations conducted at the HKIAC, the HKIAC Domestic Arbitration Rules will normally be used. If no rules have been agreed upon, the Arbitration Ordinance provides a procedural framework for the parties and the arbitrator to devise appropriate procedures for their dispute.

27. Is there a difference in how international and domestic arbitrations are treated?

Hong Kong amended its Arbitration Ordinance in 2010. The new Arbitration Ordinance unifies a system that formally provided different procedures depending on whether the arbitration was considered "international" or "domestic". With the new Arbitration Ordinance, there is no longer such distinction and the UNCITRAL Model Law in effect applies to all arbitrations in Hong Kong.

28. What are the key features in the new Arbitration Ordinance?

The structure of the Arbitration Ordinance mirrors that of the UNCITRAL Model Law, making the Ordinance more user-friendly. The legislation also incorporates detailed provisions drawn from the 2006 additions to the UNCITRAL Model Law regarding interim measures and preliminary orders. The new Arbitration Ordinance also provides for opt-in provisions on appeals of points of law, consolidation of arbitrations and challenging of an arbitral award.

当事人应商定确定仲裁庭收费和费用的方式，并于被申请人收到仲裁通知后 30 日内通知香港国际仲裁中心。若当事人未能商定，则应按附录 2 所载的条款确定仲裁庭的收费和费用。

10.2 若仲裁庭的收费依附录 2 确定，则以附录 2 第 9.3 和 9.5 节为前提：

(a) 当事人提名的仲裁员的适用费率应由仲裁员和提名一方商定；

(b) 独任或首席仲裁员的适用费率应由其与当事各方商定。

若当事人未能商定仲裁员费率，可由香港国际仲裁中心决定。

10.3 若仲裁庭的收费按附录 3 确定，则应由香港国际仲裁中心依附录 3 和下述各款核定仲裁庭的收费：

(a) 仲裁庭的收费金额应合理，应考虑到争议金额的大小、标的的复杂程度、仲裁庭及任何根据第 13.4 款指定的秘书所花费的时间和案件的其他有关情况，包括但不限于仲裁程序因和解或其他原因终止的情形；

(b) 若案件提交三位仲裁员，则香港国际仲裁中心有权酌情增加仲裁庭的总收费至最高金额——通常不超过独任仲裁员收费的 3 倍；

(c) 若香港国际仲裁中心认为存在特殊情况，仲裁庭的收费可超过依附录 3 确定的金额。上述特殊情况包括但不限于当事人进行仲裁的方式超出了仲裁庭在其组成时的合理预期。

第 11 条 — 仲裁员的资格和对仲裁员的质疑

11.1 依本规则被确认的仲裁庭应始终保持公正及独立于当事人。

11.2 以第 11.3 款为限，依本规则仲裁时，作为一般原则，若当事人国籍不同，独任仲裁员或首席仲裁员不得由与任一当事人的国籍相同的人士担任，除非当事各方另有书面特别约定。

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The parties shall agree the method for determining the fees and expenses of the arbitral tribunal, and shall inform HKIAC of the applicable method within 30 days of the date on which the Respondent receives the Notice of Arbitration. If the parties fail to agree on the applicable method, the arbitral tribunal's fees and expenses shall be determined in accordance with the terms of Schedule 2.

10.2 Where the fees of the arbitral tribunal are to be determined in accordance with Schedule 2,

(a) the applicable rate for each co-arbitrator shall be the rate agreed between that co-arbitrator and the designating party;

(b) the applicable rate for a sole or presiding arbitrator shall be the rate agreed between that arbitrator and the parties,

subject to paragraphs 9.3 and 9.5 of Schedule 2. Where the parties fail to agree the rate of an arbitrator, HKIAC may determine the rate.

10.3 Where the fees of the arbitral tribunal are determined in conformity with Schedule 3, such fees shall be fixed by HKIAC in accordance with that Schedule and the following rules:

(a) the fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitral tribunal and any secretary appointed under Article 13.4, and any other circumstances of the case, including, but not limited to, the discontinuation of the arbitration in case of settlement or for any other reason;

(b) where a case is referred to three arbitrators, HKIAC, at its discretion, shall have the right to increase the total fees up to a maximum which shall normally not exceed three times the fees of a sole arbitrator;

(c) the arbitral tribunal's fees may exceed the amounts calculated in accordance with Schedule 3 where in the opinion of HKIAC there are exceptional circumstances, which shall include but shall not be limited to the parties conducting the arbitration in a manner not reasonably contemplated by the arbitral tribunal at the time of appointment.

Article 11 – Qualifications and Challenge of the Arbitral Tribunal

11.1 An arbitral tribunal confirmed under these Rules shall be and remain at all times impartial and independent of the parties.

11.2 Subject to Article 11.3, as a general rule, where the parties to an arbitration under these Rules are of different nationalities, a sole arbitrator or the presiding arbitrator of an arbitral tribunal shall not have the same nationality as any party unless specifically agreed otherwise by all parties in writing.

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