

PREFACE

This book is intended as a practitioner's guide to the conduct of arbitration in Hong Kong, with specific reference to the work of the Hong Kong International Arbitration Centre (HKIAC) and proceedings under the HKIAC Administered Arbitration Rules (2013) (HKIAC Rules).

Since the HKIAC was founded in 1985, Hong Kong has been at the forefront in the development of international arbitration in Asia. Hong Kong was the first Asian jurisdiction to adopt the UNCITRAL Model Law to govern international arbitrations. The territory's arbitration legislation is innovative and up to date. The courts have been consistently arbitration-friendly. The HKIAC has been widely acknowledged as a leading institution in the international community, lauded for its efficiency, creativity, and value for money.

The focus of this book is on how the HKIAC Rules operate in practice. Chapters 1–4 set the stage by describing the legal framework for arbitration in Hong Kong, the organization and work of HKIAC, and model arbitration clauses. Chapters 5–12 deal with the provisions contained in the HKIAC Rules and their application. The appendices at the back of the book provide important additional information about the HKIAC Rules and arbitration practice in Hong Kong.

In preparing this book, we have benefited from the assistance and support of many colleagues and friends who make up the robust arbitration community in Hong Kong.

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Needless to say, any errors that may be found in the text are entirely our own. Corrections, comments, and suggestions are welcome. It should also be noted that the content of this book does not bind the HKIAC, its Secretariat, or the authors in any way.

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INTRODUCTION TO ARBITRATION IN HONG KONG

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Hong Kong is the most preferred seat of arbitration outside of Europe and the third most preferred arbitral seat worldwide.¹ This chapter discusses the contributing factors that make Hong Kong a global arbitration centre that 'meets or even exceeds all standards' in the Chartered Institute of Arbitrators' ten principles of an 'effective, efficient, and 'safe' seat of international arbitration.² **1.01**

A. Hong Kong—'Asia's World City'

Hong Kong is one of the premier venues for international arbitration in the world. Described as a 'barren rock' some 150 years ago, Hong Kong is today a world-class international commercial and business centre and the financial capital of Asia. **1.02**

After more than 150 years of colonial rule under the British, Hong Kong reverted to Chinese sovereignty on 1 July 1997 under the 'one country, two systems' principle. As a Special Administrative Region (SAR), Hong Kong enjoys a high degree of autonomy (except in defence and foreign affairs) and retains a separate legal system from that of mainland China. Hong Kong's legal system is based on the English common law and is guaranteed in Hong Kong's constitutional instrument, the Basic Law.³ Hong Kong has a long tradition of upholding the rule of law and judicial independence, which are two key foundations for the city's success as a global dispute resolution centre. **1.03**

¹ See Queen Mary University of London and White & Case, '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration' <<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>> (last accessed 14 December 2016) at 12.

² See Hong Kong Economic and Trade Office, 'HKIAC Tops Prestigious Global Arbitration Survey' <<http://www.hketosf.gov.hk/sf/chk/chongkong81/hkiac.htm>> (last accessed 14 December 2016).

³ Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China enacted in 1990 by the National People's Congress (Basic Law).

- 1.04** Hong Kong has long been at the forefront of international arbitration developments. As the first Asian jurisdiction to adopt the latest version of the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law),⁴ Hong Kong has taken consistent and measured steps to build a sustainable world-class arbitral framework, which includes modern arbitration legislation and a reputable arbitral institution, the Hong Kong International Arbitration Centre (HKIAC). As a result, Hong Kong has been recognized as the world's second most improved seat over the past five years.⁵
- 1.05** Today, there are forty-plus arbitral institutions around Asia that are 'seeking to emulate Hong Kong's success'.⁶ Hong Kong's position as a leading international arbitration seat is underpinned by a number of important factors that together provide a favourable environment for the conduct of international arbitration proceedings. These include:
- (1) its strategic location;
 - (2) its strong industry expertise;
 - (3) a developed legal framework;
 - (4) an independent judiciary;
 - (5) free choice of arbitral procedures, legal representation, and arbitrators; and
 - (6) the worldwide enforceability of Hong Kong awards.
- 1.06** Each of these factors is now discussed.
- 1. Strategic location**
- 1.07** Hong Kong is Asia's capital for finance and trade. Strategically located in the heart of the fast-developing Asia-Pacific region, Hong Kong boasts an international community and first-class infrastructure, making navigation around the city simple and efficient. In particular, Hong Kong enjoys a convenient geographical location for the conduct of arbitrations involving Asian parties. It can be reached in under four hours on a flight from Beijing, Tokyo, or Seoul in North Asia, and Bangkok, Singapore, and Jakarta in South-East Asia. There are direct flights connecting Hong Kong to major business centres in North America and Europe. Further, Hong Kong has an open visa policy where nationals of more than 170 countries can visit Hong Kong without a visa.
- 1.08** Hong Kong is the premier gateway to Asia and, in particular, to mainland China, the world's largest trading economy. Hong Kong's unique geographical and geopolitical position makes it the first stop for international companies seeking access to Asia and for Asian companies reaching out to the world. As a result, international companies choose Hong Kong as their preferred place to establish a presence in the region.
- 1.09** Hong Kong is also an international financial centre with an integrated and sophisticated network of financial institutions and markets. The city features highly developed

⁴ The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly in 1966.

⁵ See Queen Mary University of London, White & Case (n 1) at 2.

⁶ According to Global Arbitration Review's *Guide to Regional Arbitration 2016*, '[t]oday there are 40-plus international arbitration institutions around Asia seeking to emulate Hong Kong's success': Global Arbitration Review, 'Institutions Worth a Closer Look: Asia Pacific' *Guide to Regional Arbitration 2016* (Global Arbitration Review 2016) vol 4, <<http://globalarbitrationreview.com/regional-arbitration/guide-regional-arbitration/>> (last accessed 20 February 2016).

communications and first-class transportation infrastructure. This includes Hong Kong's international airport and metro system, which are regarded as some of the best and busiest in the world, alongside its leading hotels and restaurants.

2. Strong industry expertise

Hong Kong has a large pool of experienced and multilingual professionals who can be called upon to assist in international arbitration proceedings. These include lawyers, accountants, translators/interpreters, and technical experts, such as architects, surveyors, and engineers. **1.10**

Hong Kong is home to many of the world's leading corporations, financial institutions, and professional service organizations. Of the largest 100 banks in the world, 70 have an operation in Hong Kong and 63 of the top 100 global law firms ranked by revenue have offices in Hong Kong.⁷ Many international companies choose to establish operations in Hong Kong for the following reasons: **1.11**

- (1) it is one of the most open and transparent economies in the world, with a low level of corruption;
- (2) it has a stable government and an independent judiciary;⁸
- (3) it has access to high-quality professional services, such as accountants, architects, and engineers;
- (4) it has freedom of information;
- (5) it is a regional marketplace for intellectual property (IP) services, such as copyright trading, licensing, franchising, design services, and technology transfer; and
- (6) it is a premier gateway in connecting the Asian region with the rest of the world.

Hong Kong's competitiveness is recognized by numerous global rankings, including: **1.12**

- (1) the world's freest economy by the Heritage Foundation for over twenty consecutive years since 1995;⁹
- (2) one of the top three financial centres in the world;¹⁰
- (3) ranked second worldwide for foreign direct investment (FDI) flowing in and out of the city;¹¹
- (4) ranked fifth out of 189 economies for ease of doing business according to the World Bank's *Doing Business 2016* report; and¹²
- (5) ranked second for attractiveness to FDI in the Milken Institute's *2015 Global Opportunity Index*.¹³

⁷ Based on statistics published in 'The Global 100' (2015) 37(10) *American Lawyer* 88.

⁸ As discussed at paragraphs 1.16–1.20.

⁹ Heritage Foundation, *2016 Index of Economic Freedom* (Heritage Foundation 2016) <<http://www.heritage.org/index/country/hongkong>> (last accessed 14 December 2016). See also James Gwartney, Robert Lawson, and Joshua Hall, *Economic Freedom of the World 2014 Annual Report* (Fraser Institute 2014) at 8.

¹⁰ See eg GFCI & Long Finance, *The Global Financial Centres Index* (GFCI September 2015) <http://www.longfinance.net/images/GFCI18_23Sep2015.pdf> (last accessed 14 December 2016).

¹¹ UNCTAD, *World Investment Report 2015* (United Nations June 2015) <http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf> (last accessed 14 December 2016).

¹² World Bank, *Doing Business Data 2016* (World Bank 2016) <<http://www.doingbusiness.org/data/exploreconomies/hong-kong-china/>> (last accessed 14 December 2016).

¹³ *2015 Global Opportunity Index: Attracting Foreign Investment* (Milken Institute 2015) <<http://www.globalopportunityindex.org/>> (last accessed 14 December 2016).

3. Developed legal framework

- 1.13** Hong Kong has a well-established and respected legal system. Under the Basic Law, Hong Kong's English-based common law system is preserved and safeguarded. English and Chinese are both official languages in the courts and Hong Kong judges enjoy a strong reputation for independence, professionalism, and efficiency.
- 1.14** The Hong Kong Arbitration Ordinance (Cap 609) (Arbitration Ordinance) is the arbitration legislation in Hong Kong and governs all arbitrations seated in the territory. The Arbitration Ordinance came into force on 1 June 2011 and was subsequently amended in July and December 2013, and in July 2015.¹⁴ The Arbitration Ordinance is a modern piece of legislation that supports arbitration and restricts court involvement in the arbitral process. It also creates a unitary regime applicable to both domestic and international arbitrations. Hong Kong is the first Asian jurisdiction to adopt the UNCITRAL Model Law (2006), which provides an internationally recognized procedural framework for arbitral proceedings, accessible to users from both civil law and common law jurisdictions.
- 1.15** A detailed discussion of the Arbitration Ordinance is contained in Chapter 2.

4. Independent judiciary

- 1.16** The rule of law and judicial independence in Hong Kong are constitutionally guaranteed by the Basic Law. Article 18 of the Basic Law provides that:
- The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.
- 1.17** The independence of the courts ensures that arbitrations in Hong Kong are free from government interference or influence. Hong Kong has been ranked as Asia's most judicially independent jurisdiction for the past eight years by the World Economic Forum's Global Competitiveness Report. In the latest report, Hong Kong is ranked fourth worldwide for judicial independence, just behind New Zealand, Finland, and Norway.¹⁵
- 1.18** Hong Kong's judicial independence is further affirmed by the White Paper published by China's State Council Information Office entitled 'The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region' on 10 June 2014. The White Paper confirms that the Chinese government will continue to adhere to the 'one country, two systems' principle and that it has no intention of undermining Hong Kong's special status under the Basic Law:¹⁶

The central government strictly adheres to the Basic Law of Hong Kong, earnestly performs its constitutional duties and stands firm in supporting the administration of the chief executive and the government of the Hong Kong Special Administrative Region (HKSAR) in accordance with the law. The HKSAR exercises a high degree of autonomy in accordance with the

¹⁴ The Arbitration Ordinance is available in both English and Chinese. The full text of the English version can be found at Appendix 9.

¹⁵ See World Economic Forum, *The Global Competitiveness Report 2015–2016*, on judicial independence. This puts Hong Kong ahead of many other major economies such as the UK (10th), Australia (13th), Singapore (23rd), the US (28th), India (64th), and China (67th).

¹⁶ *The Practice of the 'One Country, Two Systems' Policy in the Hong Kong Special Administrative Region*, Pt II, <http://www.china.org.cn/government/whitepaper/2014-06/10/content_32623425.htm> (last accessed 14 December 2016).

law, and is vested with executive, legislative and independent judicial power, including that of final adjudication.

Judicial independence in Hong Kong is assured by the unique composition of the Court of Final Appeal (CFA). In June 1997, the CFA replaced the Privy Council in London as the highest appellate court in Hong Kong and it plays an important role in the development of the common law in Hong Kong. The CFA consists of the Chief Justice, three permanent judges, and thirteen non-permanent judges. The CFA may invite judges from other common law jurisdictions to sit on the court, and a number of distinguished judges from England and Wales, Australia, and New Zealand sit as non-permanent members of the court. Lord Millet, a non-permanent judge of the CFA, has commented as follows:¹⁷ **1.19**

I have sat on the Court of Final Appeal of Hong Kong for 14 years and have never experienced any political inference from China or anywhere else in all that time. All my colleagues have at all times conducted themselves exactly as English judges would in England. The local Permanent Judges are professionals to their fingertips. At no time in our discussions have I heard any of them express the slightest interest in what Beijing might think of our decisions. If I believed that the Court was susceptible to outside influence I would not be prepared to be a member of it, and nor would any of my overseas colleagues. I am proud to be a member of one of the strongest appellate courts in the common law world. The presence of such eminent jurists as Sir Anthony Mason, Lord Neuberger, Lord Hoffmann, Lord Walker and Lord Phillips is a guarantee of its total independence of Chinese influence, but the guarantee is unnecessary as I have found the local Permanent Judges as independently minded as are English and Australian judges.

Judges from foreign courts have also endorsed Hong Kong as a neutral forum for international arbitrations. In *Shagang v Daewoo*, Justice Hamblen of the English High Court observed that 'whilst Hong Kong is no doubt geographically convenient, it is also a well known and respected arbitration forum with a reputation for neutrality, not least because of its supervising courts'.¹⁸ **1.20**

5. Free choice of arbitral procedures, legal representation, and arbitrators

Hong Kong provides complete flexibility to parties in relation to the procedure of their arbitration. Parties are free to choose institutional arbitration proceedings in Hong Kong under the auspices of HKIAC, the International Chamber of Commerce (ICC) or any other arbitral institution. Alternatively, parties may opt for ad hoc proceedings where the arbitration is conducted without the involvement of an arbitral institution. Both types of arbitrations are permitted under Hong Kong law. **1.21**

Parties to arbitration in Hong Kong are free to choose their legal representatives and advisors from anywhere in the world, without restriction. This is enshrined in section 63 of the Arbitration Ordinance that lifts restrictions on foreign counsel to represent and advise parties in arbitral proceedings in Hong Kong. The only exception is that Hong Kong-qualified solicitors and barristers must be retained to present any arbitration-related applications before the Hong Kong courts.¹⁹ **1.22**

¹⁷ Yves Fortier QC and Olga Boltenko, 'Hong Kong—Trouver le pot aux roses' [2014] Asian Dispute Review 170.

¹⁸ *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] EWHC 194 (Comm) at [37].

¹⁹ Michael J Moser and Teresa Y W Cheng SC, *Hong Kong Arbitration: A User's Guide* (3rd edn, Wolters Kluwer 2014) at § 5-024.

- 1.23** Equally, parties to arbitrations in Hong Kong enjoy full freedom to appoint arbitrators of their choice. The Arbitration Ordinance does not prescribe any requirement regarding the qualifications of an arbitrator, except that he or she must be independent and impartial. HKIAC also does not require a party to designate an arbitrator from its panel or list of arbitrators.

6. Worldwide enforceability of Hong Kong awards

- 1.24** In 1997, China extended its membership of the New York Convention to Hong Kong. As a result, arbitral awards made in Hong Kong may be enforced in all other New York Convention member states. Under the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong SAR, which came into force in 2000, awards made in Hong Kong may be enforced in mainland China and vice versa on terms that largely mirror those contained in the New York Convention.²⁰

B. HKIAC

- 1.25** HKIAC is the flagship institution in Hong Kong providing dispute resolution services worldwide. It was established in 1985 and is one of the longest-standing arbitral institutions in the Asia-Pacific region. Situated in the heart of Asia, HKIAC provides a one-stop-shop service for resolving arbitration, mediation, adjudication, and domain name disputes. The growing popularity of HKIAC's services is reflected by the large number of cases HKIAC has handled since its establishment. In total, HKIAC has managed over 9,000 cases over the past thirty two years. In relation to administered arbitrations, HKIAC experienced a 70 per cent increase from 2012 to 2015 and 43 per cent growth since 2013.
- 1.26** HKIAC plays a leading role in developing innovative practices to address the evolving needs of users of arbitration. In the last few years, HKIAC has introduced a number of procedures and services that have received worldwide recognition. In August 2014, HKIAC became the first arbitral institution to include an express governing law provision in its model arbitration clause, in order to avoid uncertainty as to which law governs the arbitration clause and related jurisdictional disputes. It also introduced a tribunal secretary service in June 2014 allowing arbitral tribunals to appoint an HKIAC Secretariat member as tribunal secretary. In July 2015, HKIAC launched an evaluation system allowing users to evaluate the conduct of their arbitral proceedings and the performance of their arbitrators. HKIAC's initiatives were recognized by Global Arbitration Review for best innovation by an individual or organization in 2014.
- 1.27** A detailed discussion of HKIAC and its services is contained in Chapter 3.

C. The Hong Kong Arbitration Community

- 1.28** Hong Kong has a vibrant international arbitration community focused around professional organizations, practitioners, and educational institutions.

²⁰ Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, signed in Shenzhen on 21 June 1999 <<http://www.doj.gov.hk/eng/mainland/pdf/mainlandmutual2e.pdf>> (last accessed 14 December 2016).

Hong Kong owes much of its success as a leading arbitral seat to its legal community. At the time of publication, Hong Kong has 7,800 practising solicitors and 1,200 barristers. Over 1,400 foreign lawyers qualified in twenty-nine different overseas jurisdictions, including England and Wales, New York, and mainland China, are practising in Hong Kong. In addition, many of the world's leading international law firms base their regional dispute resolution practices in Hong Kong. As a result, Hong Kong is home to a large number of leading arbitration practitioners and arbitrators. **1.29**

Users of arbitration have direct access to a variety of world-class arbitral organizations in Hong Kong. In addition to HKIAC, Hong Kong receives strong institutional support from other arbitration organizations including the Chartered Institute of Arbitrators (CIArb) (East Asia Branch), the ICC's Asia Secretariat, the China International Economic and Trade Arbitration Commission's (CIETAC) Hong Kong Arbitration Centre, and the China Maritime Arbitration Commission's (CMAC) Hong Kong Arbitration Centre. Hong Kong is at the forefront of bringing the next generation of ADR professionals into the fold. Founded by a group of young arbitration practitioners, HK45 is a young practitioners' group that has developed into a well-regarded arbitration organization for young professionals to discuss and share ideas related to developments in arbitration.²¹ **1.30**

Hong Kong has long been a centre for training future alternative dispute resolution (ADR) professionals in the region. HKIAC has organized and hosted a large number of dispute resolution conferences and training that have attracted legal professionals from all over the world to Hong Kong. Arbitrators and practitioners based in Hong Kong often travel to neighbouring jurisdictions, such as mainland China, Myanmar, Indonesia, India, the Philippines, and Mongolia, to work with the local community to improve and develop their arbitration framework. There are three principal law schools in Hong Kong, each of which has dedicated programmes in arbitration and ADR.²² The Vis Moot (East), the sister of the renowned Willem C Vis Moot Competition, is held annually in Hong Kong and attracts students from twenty-eight countries from around the world. **1.31**

D. Investor-State Arbitration

In addition to commercial arbitration, Hong Kong is an attractive venue for investor-state arbitration.²³ As the world's freest economy and a 'super-connector' for global FDI, Hong Kong encourages both investments and arbitration.²⁴ **1.32**

Hong Kong has seen increasing interest as a place for conducting investor-state arbitration proceedings in recent years. This is reflected by the host country agreement entered into between the Permanent Court of Arbitration (PCA) and China in January 2015 to provide a legal framework for PCA-administered proceedings in Hong Kong.²⁵ The PCA's host country agreement was preceded by a network of cooperation agreements that HKIAC **1.33**

²¹ See Chapter 3 for further information about HK45.

²² These law schools are the University of Hong Kong Faculty of Law, City University of Hong Kong School of Law, and the Chinese University of Hong Kong Faculty of Law.

²³ For a detailed discussion of investor-state arbitration in Hong Kong, see Moser and Cheng (n 19) ch 8.

²⁴ At the time of writing, no investment claims have been filed against the Hong Kong government.

²⁵ See 'Permanent Court of Arbitration provides arbitration services in HK' <<http://www.info.gov.hk/gia/general/201501/04/P201501040801.htm>> (last accessed 14 December 2016).

concluded with various international bodies specializing in investment treaty disputes, including the PCA²⁶ and the International Centre for Settlement of Investment Disputes (ICSID).²⁷ In recent years, HKIAC has hosted an increasing number of hearings involving investor-state disputes.

- 1.34** Hong Kong has entered into eighteen bilateral investment treaties (BITs)²⁸ and three free trade agreements,²⁹ one of which was the subject of a high-profile dispute. In *Philip Morris v Australia*,³⁰ Philip Morris's Hong Kong subsidiary filed a multibillion-dollar claim against Australia for its alleged breaches of the Hong Kong–Australia BIT by passing legislation requiring the plain packaging of tobacco products. The case was administered by the PCA under the 2010 UNCITRAL Rules.³¹ The tribunal declined jurisdiction over Philip Morris's claim on 17 December 2015.
- 1.35** To attract more investor-state cases to Hong Kong, HKIAC offers its hearing space free of charge to parties to dispute resolution proceedings administered by HKIAC, in which at least one party is an OECD state.

E. The 'China Connection'

1. Insights on China-related disputes

- 1.36** Hong Kong is ideally placed to handle disputes arising out of all types of international transactions. However, it enjoys a particular advantage in relation to international disputes involving Chinese parties.
- 1.37** Hong Kong is widely regarded as the natural choice of seat for arbitrations between Chinese and non-Chinese parties. The Hong Kong government and judiciary, and a large number of Hong Kong legal professionals and industry experts, are able to practise and conduct business in both English and Chinese. All Hong Kong legislation and regulations are enacted in both languages. This bilingual capability, alongside the historical and cultural link to mainland China, sets Hong Kong apart as an ideal place for doing business and resolving disputes with Chinese parties.
- 1.38** HKIAC's particular expertise in managing China-related disputes is reflected in the large number of Chinese cases referred to it each year. In 2015, HKIAC handled 108 arbitrations involving mainland Chinese parties (ie 40 per cent of the total arbitration cases handled by HKIAC that year).³²

²⁶ Cooperation Agreement between the Permanent Court of Arbitration and the Hong Kong International Arbitration Centre dated 18 November 2010.

²⁷ Agreement on General Arrangement between the International Centre for Settlement of Investment Disputes and the Hong Kong International Arbitration Centre dated 23 May 2011.

²⁸ See 'List of Investment Promotion and Protection Agreements (as at 18.2.2016)' Department of Justice, Government of Hong Kong <<http://www.doj.gov.hk/eng/laws/table2ti.html>> (last accessed 14 December 2016).

²⁹ See 'Free Trade Agreements (as at 24.11.2014)' Department of Justice, the Government of Hong Kong, <<http://www.doj.gov.hk/eng/laws/table11ti.html>> (last accessed 14 December 2016).

³⁰ *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12.

³¹ See the PCA website <<http://www.pcacases.com/web/view/5>> (last accessed 14 December 2016).

³² In 2015, ICC handled 64 arbitrations involving mainland Chinese parties, SIAC handled 36, LCIA handled six and SCC handled one.

Further, Hong Kong awards maintain a stellar track record in respect of enforcement globally, and, in particular, in mainland China. This has often been cited as a key strength of arbitrating in Hong Kong. Chinese courts have not refused to enforce any awards made in Hong Kong or issued by HKIAC between 2011 and 2014. Other jurisdictions have not been able to match this track record.³³ 1.39

2. Legal stability

Hong Kong has remained at the forefront of developments in Asia due, in part, to the enduring stability of its well-established and respected common law system for FDI, cross-border transactions, and dispute resolution, alongside an independent judiciary. These qualities are protected under the Basic Law.³⁴ While some commentators have expressed concern that the principle of 'one country, two systems' may change after 2047,³⁵ other commentators are of the view that the legal system of mainland China will not be practised in Hong Kong,³⁶ since the Basic Law does not provide for the automatic expiration of the common law system in Hong Kong on or after 2047.³⁷ Further, some academics have proposed that the Chinese government is likely to maintain the 'one country, two systems' principle after 2047, with Hong Kong remaining an SAR governed by the common law legal system.³⁸ 1.40

Indeed, the Chinese government has repeatedly confirmed that the 'one country, two systems' principle is 'firm' and 'unswerving' and 'it would not sway or change'.³⁹ 1.41

³³ Teresa YW Cheng SC and Joe Liu, 'Enforcement of Foreign Awards in Mainland China: Current Practices and Future Trends' (2014) 31(5) *Journal of International Arbitration* 651.

³⁴ Basic Law, arts 5, 7, 17, 19, 66.

³⁵ Under the Basic Law, the existing economic, legal, and social systems will be maintained in Hong Kong for fifty years after 1 July 1997.

³⁶ See the views of Geoffrey Ma (Chief Justice of Hong Kong) and Michael Davis (constitutional law professor of the University of Hong Kong), 'Preserve common law, says top judge Chief justice says legal system must continue as it is after 2047, and warns against a repeat of 1999 case in which top court was overruled' in Stuart Lau, *South China Morning Post (Hong Kong)* 24 January 2013.

³⁷ D Gittings, 'What Will Happen to Hong Kong After 2047?' (2011) 42 *California Western International Law Journal* 37, 50.

³⁸ D Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) at 303–14; Gittings (n 37) 49–50. Another scholar has noted that one may 'reasonably hope' the 'one country, two systems' arrangement will continue after 2047: Benny Tai, 'Basic Law, Basic Politics: The Constitutional Game of Hong Kong' (2007) 37 *Hong Kong Law Journal* 503, 577.

³⁹ SCMP, 'Protect the rule of law, NPC chairman Zhang Dejiang tells Hong Kong', http://www.scmp.com/news/hong-kong/politics/article/1920913/protect-rule-law-npc-chairman-zhang-dejiang-tells-hong-kong?utm_source=edm&utm_medium=edm&utm_content=20160305&utm_campaign=scmp_today.

THE LEGAL ARBITRATION FRAMEWORK

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A. The Hong Kong Arbitration Ordinance

1. Historical development of Hong Kong arbitration law

In 1963, Hong Kong established an arbitration framework by enacting the Arbitration Ordinance (Cap 341).¹ The ordinance closely followed the English Arbitration Act 1950. Later amendments to the Arbitration Ordinance reflected the subsequent amendments to the 1950 Act.² 2.01

In 1981, the Hong Kong Law Reform Commission (HKLRC) issued a report identifying shortcomings with Hong Kong's arbitration regime and made recommendations for improvement.³ The report noted that there was a 'strong and widespread belief that Hong Kong had the potential to develop into the leading arbitration centre in the region'.⁴ The HKLRC proposed that the arbitration ordinance should be more robust than the English model. The HKLRC's report led to the enactment of the Arbitration (Amendment) Ordinance 1982. 2.02

In 1987, the HKLRC proposed that Hong Kong should move away from the English model and towards a more international framework. In recommending the adoption of the UNCITRAL Model Law (1985),⁵ the HKLRC observed as follows:⁶ 2.03

The major benefit we envisage accruing to Hong Kong if the Model Law is adopted ... will be the confidence which international parties will feel when considering Hong Kong as an

¹ Arbitration Ordinance (Hong Kong [hk]) Cap 341, No 22 of 1963. See also Michael Moser and John Choong, 'Hong Kong's Development as an International Arbitration Centre: Some Historical Notes' in Chiann Bao and Feliz Lautenschlager (eds), *Arbitrator's Insights: Essays in Honour of Neil Kaplan* (Sweet & Maxwell 2012) at 255.

² Robert Morgan, 'Hong Kong Arbitration: A Decade of Progress But Where to Next?' (October 1999) *Hong Kong Lawyer* 66.

³ HKLRC, *Report on Commercial Arbitration*, Report Number 1 (1982) at ii.

⁴ *ibid* at 5.

⁵ Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL]) UN Doc A/40/17, Annex I.

⁶ HKLRC, *Report on the Adoption of the UNCITRAL Model Law of Arbitration*, Report No 17 (1987) at 12–13.

arbitration venue. This confidence will stem from a feeling of familiarity with an arbitration law which will be readily available, recognisable, and in many cases similar, to the domestic law of the parties concerned. The foreign lawyer, seeking to find out what law applies in Hong Kong to international commercial arbitrations will need only 2 references—the Model Law and the UNCITRAL rules ... [T]he Model Law was the product of the work of arbitration experts from many countries ... [and] represented a compromise between the differing views represented by differing legal systems.

2.04 The Hong Kong Legislative Council accepted the HKLRC's recommendation and enacted the Arbitration (Amendment) (No 2) Ordinance in 1989. This amendment created a dual track for arbitration in Hong Kong: the domestic regime that reflected the English Arbitration Act 1979; and the international regime that incorporated the UNCITRAL Model Law (1985). As the first Asian jurisdiction to adopt the UNCITRAL Model Law in its domestic legislation, Hong Kong started the trend for other Asian jurisdictions to follow.⁷

2.05 In May 1991, the Hong Kong Attorney General invited HKIAC to form a Committee on Arbitration Law (HKIAC Committee) to consider several amendments to the arbitration ordinance, including the application of the UNCITRAL Model Law to all arbitrations in Hong Kong. In 1996, the HKIAC Committee published a report proposing that the 1989 Arbitration Ordinance should be:⁸

completely redraw[n] in order to apply the Model Law equally to both domestic and international arbitrations, and arbitration agreements, together with such additional provisions as are deemed, in the light of experience in Hong Kong and other Model Law jurisdictions, both necessary and desirable. In the process the legislation would keep pace with the needs of the modern arbitration community, domestically and globally, and would free Hong Kong from outdated and illogically arranged English Arbitration Acts ...

2.06 The HKIAC Committee explained that the amendment should be made because:⁹

the Model Law has proved effective and relatively trouble free in international arbitrations and ... its incorporation in the Arbitration Ordinance in 1989 has undoubtedly assisted in elevating Hong Kong to a prominent position in the global community as a venue favourable to international arbitration.

2.07 The Hong Kong Legislative Council accepted a number of recommendations from the HKIAC Committee and enacted the Arbitration (Amendment) (No 2) Ordinance in 1996 (although the proposal to unify the dual regimes was not adopted at the time). These recommendations included that HKIAC would serve as the default appointing authority and empowered HKIAC to determine the number of arbitrators.¹⁰ These functions gave HKIAC a statutory function in the arbitration legislation and grounded its role in Hong Kong's arbitral infrastructure.

⁷ See eg Bangladesh (2001), Cambodia (2006), Macao (2011), Japan (2003), Malaysia (2005), Republic of Korea (1999), Singapore (1994), Sri Lanka (1995), Thailand (2002). UNCITRAL, *Status of the UNCITRAL Model Law on International Commercial Arbitration* (2015) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> (last accessed 14 December 2016).

⁸ HKIAC Committee on Arbitration Law, *Report on Arbitration Law* (1996) at [1.1.9].

⁹ HKLRC, *Report on the Adoption of the UNCITRAL Model Law of Arbitration*, Report No 17 (1987) at 3.

¹⁰ See paragraphs 3.47–3.49 for further discussions on HKIAC's statutory functions under the Arbitration Ordinance.

In 1998, a second committee on Hong Kong Arbitration Law (referred to in this chapter as the Second Committee) was formed by the Hong Kong Institute of Arbitrators (HKI Arb) together with HKIAC. The Second Committee was tasked to reconsider the HKIAC Committee's earlier recommendations. The Second Committee recognized that: **2.08**

[One advantage of adopting a unified system is that the] issue of whether one or the other regime should apply is avoided. It is also in accord with the recognised international trend in reducing the extent of judicial supervision and intervention in arbitral proceedings, whether domestic or international.

[A] unified arbitration regime would have the added beneficial effect of further enabling the Hong Kong business community and the local legal profession to operate an arbitration regime which accords with international arbitration practices and development.

In addition, [it will] attract disputes which have little connection with Hong Kong since it is familiar to [civil and common lawyers] ... In effecting this, we are of the view that it would be of fundamental importance that Hong Kong should continue to be clearly seen as a Model Law jurisdiction.¹¹

In April 2003, the Second Committee published a report to reiterate the HKIAC Committee's recommendation that, among other things, a unitary system of arbitration be established. **2.09**

In September 2005, the Hong Kong Department of Justice established a working group to conduct a further review and consultation in relation to the report of the Second Committee. In December 2007, the working group prepared a consultation paper and draft arbitration bill. In July 2009, the arbitration bill was introduced to the Hong Kong Legislative Council. After years of debate and consultation with users, the Arbitration Ordinance was passed into law in November 2010 and came into force on 1 June 2011. **2.10**

To keep pace with developments in international arbitration, the Arbitration Ordinance was amended in July and December 2013. These amendments include: **2.11**

- (1) the addition of express provisions to recognize emergency arbitrators and the enforceability of their decisions issued in or outside Hong Kong;
- (2) amendments to provisions regarding taxation of arbitration costs;
- (3) updates on the schedule of parties to the New York Convention; and
- (4) the addition of provisions to implement the arrangement concerning reciprocal recognition and enforcement of arbitral awards between Hong Kong and Macau, which was entered into in January 2013.

The amendment to the Arbitration Ordinance to permit judicial enforcement of emergency relief granted by emergency arbitrators was the direct result of the work carried out by HKIAC when drafting the HKIAC Rules.¹² During the drafting process, HKIAC liaised with the Department of Justice to amend the Arbitration Ordinance to expressly recognize the role of an emergency arbitrator and the enforceability of emergency decisions.¹³ **2.12**

In July 2015, the Hong Kong government made further amendments to the Arbitration Ordinance by way of the Arbitration (Amendment) Ordinance 2015 to remove some legal **2.13**

¹¹ Committee on Hong Kong International Arbitration Law, *Final Report* (2003), 19–20.

¹² See Chapter 8 for further discussions on the enforceability of emergency arbitrator relief in Hong Kong.

¹³ Chiann Bao, 'Developing the Emergency Arbitrator Procedure—the Approach of the Hong Kong International Arbitration Centre' (Chapter 14)—Interim and Emergency Relief in International Arbitration—International Law Institute Series on International Law, Arbitration and Practice (May 2015).

uncertainties relating to the opt-in provisions. The amendments were made in response to requests by the Hong Kong arbitration community, including parties from the construction industry, to allow parties opting for the relevant provisions to decide on the number of arbitrators, while retaining their right to seek assistance of the Court of First Instance (CFI) on the matters set out in sections 2 to 7 of Schedule 2 to the Arbitration Ordinance. Prior to the amendments, the provisions in Schedule 2 allowed for the appointment of a sole arbitrator only. The amendments also included updates on the list of parties to the New York Convention attached to the Arbitration Ordinance.¹⁴ In October 2016, the Hong Kong Law Reform Commission released a report recommending that the law be amended to state that third party funding of arbitration and associated proceedings under the Arbitration Ordinance is permitted, and that appropriate financial and ethical safeguards be complied with. This amendment is expected to be incorporated into the Ordinance by July 2017. In December 2016, the Hong Kong government published a bill proposing to amend the Ordinance to clarify that disputes over intellectual property rights can be resolved by arbitration in Hong Kong and that it is not contrary to Hong Kong's public policy to enforce awards involving IP rights.

- 2.14** The responsiveness by the Hong Kong government in amending its arbitration legislation is evidence of its commitment to provide prompt support to the changing needs of the international arbitration community.

2. Structure and scope of the Arbitration Ordinance

- 2.15** The Arbitration Ordinance contains fifteen parts and 118 sections and adopts the UNCITRAL Model Law (2006). The Arbitration Ordinance precedes each applicable provision of the UNCITRAL Model Law (2006) with the following text 'Article [x] of the UNCITRAL Model Law, the text of which is set out below, has effect'. Any modifications or supplements to the provision are set out in the subsections within that article. The provisions of the Arbitration Ordinance are arranged in accordance with the ordinary arbitral process for ease of navigation.
- 2.16** The Arbitration Ordinance applies to arbitrations seated in Hong Kong.¹⁵ If the seat is outside Hong Kong, certain provisions of the Arbitration Ordinance will apply if a party:¹⁶
- (1) requests a Hong Kong court to refer the parties to a matter which is the subject of a valid and operative arbitration agreement to arbitration;
 - (2) seeks an interim measure from the CFI;
 - (3) seeks leave of the CFI to enforce any emergency relief issued by an emergency arbitrator or interim relief issued by an arbitral tribunal;
 - (4) requests the CFI to issue an incidental order in relation to any relevant property; and
 - (5) seeks recognition and enforcement of an arbitral award from the CFI.
- 2.17** Schedule 2 of the Arbitration Ordinance contains a number of opt-in provisions that may be expressly agreed upon by parties and incorporated in the arbitration agreement or are

¹⁴ Hong Kong Government, 'Amendments Proposed for Arbitration Ordinance to clear legal uncertainties' (2015) <<http://www.info.gov.hk/gia/general/201501/21/P201501210341.htm>> (last accessed 14 December 2016).

¹⁵ Arbitration Ordinance, s 5(1).

¹⁶ Arbitration Ordinance, s 5(2).

automatically applicable in certain situations.¹⁷ In particular, these opt-in provisions deal with the following matters:

- (1) section 1 of Schedule 2 provides for disputes to be submitted to a sole arbitrator, if the parties to an arbitration agreement fail to agree on the number of arbitrators;
- (2) section 2 of Schedule 2 empowers the CFI to consolidate arbitrations;
- (3) section 3 of Schedule 2 empowers the CFI to decide preliminary questions of law;
- (4) sections 4 and 7 of Schedule 2 authorize the CFI to deal with challenges to an arbitral award for serious irregularity;
- (5) sections 5–7 of Schedule 2 allow the CFI to deal with appeals against an arbitral award on a question of law.

These provisions are a vestige of the domestic arbitration regime, which has been retained due to its use in some arbitrations in Hong Kong (eg construction arbitrations). Parties engaged in an arbitration seated in Hong Kong will, therefore, have a choice of further support from the courts than is otherwise provided in the UNCITRAL Model Law. 2.18

3. Key features of the Arbitration Ordinance

The enactment of the Arbitration Ordinance represents a significant step forward for Hong Kong in its efforts to further attract international arbitrations. The main features of the Arbitration Ordinance include the following: 2.19

- (1) *Unitary arbitration regime.* As discussed above, the Arbitration Ordinance adopts a single regime that applies to both domestic and international arbitrations seated in Hong Kong. Jurisdictions providing for separate regimes for domestic and international arbitrations sometimes give rise to confusion as to which competing regime applies to an individual case.¹⁸ The single regime created by the Arbitration Ordinance directly addresses this issue.
- (2) *Adoption of the UNCITRAL Model Law (2006).* The Arbitration Ordinance is substantially modelled, in both form and substance, on the 2006 version of the UNCITRAL Model Law. The Arbitration Ordinance is the first arbitration legislation in Asia that has adopted the latest version of the UNCITRAL Model Law. The key difference between the 1985 and 2006 versions of the UNCITRAL Model Law is that the latter incorporates extensive provisions on the issue of interim relief by an arbitral tribunal and a competent court, and the recognition and enforcement of such relief.
- (3) *Complete protection of confidentiality.* Hong Kong is one of a comparatively small number of jurisdictions to have incorporated express provisions on confidentiality in its arbitration legislation (the UNCITRAL Model Law (2006) does not contain any provision regarding confidentiality).¹⁹ Section 18 of the Arbitration Ordinance defines the scope of the duty of confidentiality and codifies a number of exceptions to such duty. Notably, sections 16 and 17 of the Arbitration Ordinance extend the scope of confidentiality to cover related court proceedings and judgments. As a result of these provisions, the

¹⁷ Arbitration Ordinance, pt 11.

¹⁸ For example, Singapore, Australia, and mainland China have adopted dual regimes for domestic and international arbitrations.

¹⁹ J Choong and J Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Sweet & Maxwell 2011) at 89.

appeal from a decision of the CFI shall be made to the CA. Any subsequent appeal to the CFA requires special leave.⁴⁸ An appeal from a judgment of the CA in any civil matter can be made to the CFA if, in the opinion of the CFA or the CA, the question involved is one which ought to be decided by the CFA by reason of its great general or public importance.⁴⁹ One such question was the applicability of absolute sovereign immunity in Hong Kong, which was decided by the CFA in *Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC*.⁵⁰

C. Judicial Support of Arbitration

2.25 The Hong Kong courts are internationally renowned for their pro-arbitration and pro-enforcement approach to arbitration. Hong Kong judges have produced a body of non-interventionist case law that demonstrates the Hong Kong judiciary's support for the arbitral process and awards. This is evident from Justice Au's remark in *Grant Thornton International Ltd v JBPB & Co (a partnership)*:⁵¹

Arbitrations are intended and supposed to be an expedient, procedurally less complicated and cost effective private dispute resolution process. The courts and the [Arbitration Ordinance] are there to facilitate the effective and fair operation of arbitrations through interlocutory court orders and enforcement of the awards.

2.26 The courts' role as described by Justice Au is consistent with the objective of the Arbitration Ordinance, which is 'to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expenses'.⁵² Consequently, the courts will only 'interfere in the arbitration of a dispute only as expressly provided for in this Ordinance'.⁵³

2.27 Over the years, the Hong Kong courts have developed a number of principles, which demonstrate the continued support for minimal curial intervention and enforcement of awards in Hong Kong. These principles are summarized in Madam Justice Mimmie Chan's judgment in *KB v S and others* as follows:⁵⁴

- (1) The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.
- (2) Under the Arbitration Ordinance, the court should interfere in the arbitration of the dispute only as expressly provided for in the Ordinance.
- (3) Subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how their dispute should be resolved.
- (4) Enforcement of arbitral awards should be 'almost a matter of administrative procedure' and the courts should be 'as mechanistic as possible'.⁵⁵

⁴⁸ Hong Kong Court of Final Appeal Ordinance (Cap 484), ss 22 and 23.

⁴⁹ Hong Kong Court of Final Appeal Ordinance (Cap 484), ss 22(1)(b).

⁵⁰ *Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC* [2011] HKCFA 41, 8 June 2011. See Section E for further discussions on state immunity in Hong Kong.

⁵¹ *Grant Thornton International Ltd v JBPB & Co (a partnership)* [2013] HKCFI 523 at [44].

⁵² Arbitration Ordinance, s 3(1).

⁵³ See Arbitration Ordinance, ss 3(2)(b) and 12.

⁵⁴ *KB v S and others* [2015] HKCFI 1787 at [1].

⁵⁵ See *Re PetroChina International (Hong Kong) Corp Ltd* [2011] 4 HKLRD 604.

- (5) The courts are prepared to enforce awards except where complaints of substance can be made good. The party opposing enforcement has to show a real risk of prejudice and that its rights are shown to have been violated in a material way.⁵⁶
- (6) In dealing with applications to set aside an arbitral award, or to refuse enforcement of an award, whether on the ground of not having been given notice of the arbitral proceedings, inability to present one's case, or that the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement, the court is concerned with the structural integrity of the arbitration proceedings. In this regard, the conduct complained of 'must be serious, even egregious', before the court would find that there was an error sufficiently serious so as to have undermined due process.⁵⁷
- (7) In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction.⁵⁸
- (8) Failure to make prompt objection to the Tribunal or the supervisory court may constitute estoppels or want of bona fide.⁵⁹
- (9) Even if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground.⁶⁰
- (10) The Court of Final Appeal clearly recognized in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* that parties to the arbitration have a duty of good faith, or to act bonafide.⁶¹

Another principle that the Hong Kong courts have developed is the indemnity cost rule. This rule means that where a party unsuccessfully resists enforcement of or challenges an award, or unsuccessfully seeks to reopen through court proceedings an issue dealt with in an arbitration, it will pay costs on an indemnity basis unless special circumstances exist.⁶² This rule was established by the CFI in 2009 to deter unmeritorious attempts to challenge enforcement of arbitral awards or to undermine the effectiveness of arbitral proceedings. This practice has not been firmly established in any other jurisdiction in the region. Justice Saunders has summarized the rationale behind the practice as follows:⁶³

2.28

The whole principle of arbitration is that a person who obtains an award in his favour is entitled to expect that the Court will enforce the award as a matter of course. It is not necessary for a party successfully resisting an application seeking to challenge the award, to establish the application itself as an abuse of process to justify indemnity costs. The nature of arbitration is such that, having regard to the underlying objectives in the [Rules of the High Court], an unsuccessful application to challenge an arbitrator's award will normally attract indemnity costs against the applicant.

⁵⁶ See *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2012] 4 HKLRD 1 (CA).

⁵⁷ See *ibid.*

⁵⁸ See *Xiamen Xingjingdi Group Ltd v Eton Properties Limited* [2009] 4 HKLRD 353 (CA).

⁵⁹ See *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKCFAR 111.

⁶⁰ See *ibid* 136A–B.

⁶¹ See *ibid* 120I and 137B.

⁶² See eg *A v R* [2009] HKCFI 342, [2009] 3 HKLRD 389; *Wing Hong Construction Ltd v Tin Wo Engineering Co Ltd* [2010] HKCFI 1994 at [11]; *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq)* [2012] HKCA 332, [2012] 4 HKLRD 569 (CA); *T v TS* [2014] HKCFI 1426, [2014] 4 HKLRD 772; *T v B* [2014] HKCFI 1427, [2014] 4 HKLRD 772; *T v J* [2014] HKCFI 1428, [2014] 4 HKLRD 772.

⁶³ *Wing Hong Construction Ltd v Tin Wo Engineering Co Ltd* [2010] HKCFI 1994 at [11].

This excellent track record clearly demonstrates the pro-arbitration approach of the Hong Kong judiciary. 2.33

E. Sovereign and Crown Immunity in Hong Kong

In Hong Kong, sovereign and crown immunity are absolute. In *Democratic Republic of the Congo v FG Hemisphere Associates LLC*,⁶⁹ the CFA held that sovereign immunity is absolute in Hong Kong, meaning that states are immune from Hong Kong court proceedings and there is no exception for a state's commercial activities. Further, the CFA held that a state cannot waive its immunity by way of a contractual agreement in advance of any Hong Kong court proceedings. State immunity can be waived only 'in the face of the court' (ie after the commencement of court proceedings). 2.34

Similarly, the Chinese state enjoys absolute crown immunity in Hong Kong court proceedings, irrespective of whether the underlying transaction is commercial in nature.⁷⁰ In *Intraline Resources v Hua Tian Long*⁷¹ the CFI held that in order to determine whether a Chinese state-owned enterprise (SOE) is part of the Chinese state, the Hong Kong courts will consider whether the enterprise enjoys powers of independent management and freedom from interference from the Chinese government, with complete ownership of its assets and the capacity to assume civil liabilities independently.⁷² Further, the same principles governing the waiver of sovereign immunity should govern the question of waiver of crown immunity.⁷³ 2.35

Notwithstanding the above, sovereign and crown immunity should not affect the choice of Hong Kong as an arbitral seat. Where immunity applies, enforcement in Hong Kong may be difficult, regardless of where the arbitral award or judgment was rendered. For example, the awards in *FG Hemisphere* were made in Paris and Zurich. Further, the cases do not affect the widely recognized principle that by submitting to arbitration in Hong Kong, a state or SOE consents to the jurisdiction of the arbitral tribunal to decide the issues within the scope of the arbitration agreement. 2.36

The doctrine of absolute sovereign and crown immunity also does not affect the supervisory jurisdiction of the Hong Kong courts in respect of arbitral proceedings involving states or SOEs in Hong Kong. The CA's judgment in *FG Hemisphere* referred to the leading text, *The Law of State Immunity*, as follows:⁷⁴ 2.37

The general conclusion must be that, in jurisdictions other than the US, UK and Australia, practitioners at the present time should consider that the exception for arbitration agreements

⁶⁹ *Democratic Republic of the Congo* (n 50). The CFA's decision was subsequently confirmed by the Standing Committee of the PRC National People's Congress on 26 August 2011.

⁷⁰ *Intraline Resources v Hua Tian Long* [2010] HKCFI 361; [2010] 3 HKLRD 611. Note however that the Hong Kong government is generally not immune in respect of Hong Kong court proceedings due to the operation of the Crown Proceedings Ordinance (Cap 300).

⁷¹ *ibid.*

⁷² *ibid.* In a statement made by Li Fei, Deputy Secretary-General of the Standing Committee of the National People's Congress, on 26 August 2011, the Chinese government's position is that Chinese SOEs generally cannot invoke the state immunity that is enjoyed by the Chinese state. See Ted Howes and Henry Chen, 'Commercial Arbitration in China' (Global Arbitration Review 7 June 2013) <<http://globalarbitrationreview.com/know-how/topics/61/jurisdictions/27/china/>> (last accessed 20 November 2015). Bloomberg Law Reports, November 2009 <http://files.mwe.com/info/pubs/BLR_1109.pdf> (last accessed 13 December 2016).

⁷³ *Intraline Resources* (n 70).

⁷⁴ *Democratic Republic of the Congo v FG Hemisphere Associates LLC* [2010] HKCA 19 at [142]. The statement is now replicated in latest edition of H Fox and P Webb, *The Law of State Immunity* (3rd edn, OUP 2013)

operates solely to remove state immunity from the first stage of arbitration in which the national courts exercise supervisory powers.

2.38 This position was adopted by the CFA and its majority judgment stated:⁷⁵

Against that background, one should distinguish three situations in which a waiver may be relevant. First, by taking part in an arbitration, a State is obviously agreeing to submit to the contractual jurisdiction of the arbitrators. But that is obviously not the same thing as submitting to the jurisdiction of another State's courts. Such conduct may however constitute an implicit submission to the jurisdiction of the courts—the French and Swiss courts in the present case—exercising a supervisory jurisdiction over the conduct of the arbitration.

2.39 The courts' comments above constitute a compelling basis for the view that the application of absolute immunity in Hong Kong does not affect the ability of the Hong Kong courts to exercise supervisory jurisdiction to deal with applications in relation to arbitration involving states or SOEs. Many legal scholars have expressed similar views.⁷⁶

2.40 Further, the impact of *FG Hemisphere* and *Hua Tian Long* on the choice of Hong Kong law to govern contracts that involve states or SOEs is limited. The extent to which a state or SOE will be able to claim immunity is a matter of law of the forum where the court proceedings are commenced, rather than the governing law of the contract. Therefore, selecting Hong Kong law as the governing law of a contract does not confer immunity on a state party, where court proceedings are brought in another jurisdiction.

at 301. There is a statement to similar effect in N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern & Hunter on International Commercial Arbitration* (6th edn, OUP 2015) at [11.144]–[11.145].

⁷⁵ *Democratic Republic of the Congo* (n 50) 43, 378.

⁷⁶ See eg Anselmo Reyes, 'On Two Supposed Immunity Problems with Hong Kong Arbitration Awards' (Cambridge International Journal of Comparative Law Blog 28 January 2013) <<http://cjl.org.uk/2013/01/28/on-two-supposed-immunity-problems-with-hong-kong-arbitration-awards-2/>> (last accessed 19 November 2015); Teresa Cheng SC and Adrian Lai, 'Lessons Learned from the *FG Hemisphere v DRC and Hua Tian Long* Case' (International Council for Commercial Arbitration) <http://www.arbitration-icca.org/media/4/13523372058325/media1132342764462706-lessons_learned_from_the_fg_hemisphere_vs_drc_and_huatianlong_case.pdf> (last accessed 14 December 2016).

3

INTRODUCTION TO HKIAC

A. History of HKIAC	3.04	F. Domain Name Disputes at HKIAC	3.56
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This chapter introduces HKIAC, one of the longest-standing and most prominent providers of dispute resolution services in the Asia-Pacific region. According to a leading arbitration journal, '[r]egional arbitration pretty much began with HKIAC. No regional institution has been running for so long. Or with such success.'¹ It has also been recognized that the emergence of HKIAC proved that the concept of regional arbitration would work.² **3.01**

HKIAC's success is due to four main strengths: **3.02**

- (1) An experienced international secretariat;
- (2) State-of-the-art rules;
- (3) A reputable independent provider of a full range of dispute resolution services including arbitration, mediation, adjudication, and domain name disputes; and
- (4) Premier location and modern facilities.

This chapter summarizes the history of HKIAC, describes its structure and services, provides an overview of recent case statistics, and outlines the arbitration process under the HKIAC Rules. A summary of the key advantages of HKIAC arbitration is provided in Appendix 2. **3.03**

A. History of HKIAC

In 1980, HKLRC was constituted to review Hong Kong's laws and to consider reforms necessary to meet the needs of the local and international community in Hong Kong.³ The drive for law reform was partly motivated by Hong Kong's interest in establishing itself as an **3.04**

¹ Global Arbitration Review, 'White List: Asia' *Guide to Regional Arbitration 2017* (2017) vol 5 <<http://globalarbitrationreview.com/benchmarking/guide-to-regional-arbitration-volume-5-2017/1070151/white-list-asia>> (last accessed 11 December 2016).

² *ibid.*

³ HKLRC, *About Us* (19 January 2015) <<http://www.hkreform.gov.hk/en/index/index.htm>> (last accessed 14 December 2016).

international financial centre. Cross-border transactions flourished with the growth of the Asian economy during this period, and Hong Kong was already gaining a reputation as an important regional financial centre. China was also opening up at this time and becoming an important trading partner. The international contracting parties in the region preferred to use arbitration to resolve cross-border commercial disputes. However, no established international arbitration centre existed in the region at the time. HKLRC found that Hong Kong had the potential to fill the gap in the market by developing into a leading centre in the region for resolving local and international commercial disputes.

- 3.05** The infrastructure required for a leading arbitration centre did not exist in Hong Kong at the time. As mentioned in Chapter 2, improving the arbitration legislative framework was a key component to developing Hong Kong into a regional arbitration hub. The second component was the availability of arbitration facilities. HKLRC found that parties wishing to arbitrate in Hong Kong did not have the necessary premises and support services to host a hearing.⁴
- 3.06** Prompted by the recommendations made in HKLRC's report of 1982, the then Attorney General formed a Steering Committee in 1982 which was tasked to consider the feasibility of establishing an arbitral institution in Hong Kong.⁵ Led by Mr Justice David Hunter, the Steering Committee considered the financial viability of setting up an arbitral institution as well as the rules such an institution should adopt.
- 3.07** Upon request by members of the Steering Committee, the Hong Kong government agreed to support this initiative by pledging to match every dollar raised from the private sector to establish an arbitration institution as well as providing premises at the old Central Magistracy Building.
- 3.08** In September 1985, HKIAC opened its doors. Established as a non-profit company limited by guarantee, HKIAC began its operations with the support of the business and legal community. Mr Justice David Hunter was the first chairman and Mr Brian Tisdall was the first Secretary-General.
- 3.09** In October 1994, following an increase in demand for centralized hearing premises, the Hong Kong government granted HKIAC a lease on favourable terms for premises comprising half of the thirty-eighth floor of a prime office building, Two Exchange Square. HKIAC further expanded into the remainder of the thirty-eighth floor in 2012 to meet the need for additional facilities to host hearings. Ranked first for location, value for money, IT services, and helpfulness of staff by the Global Arbitration Review's 2017 Hearing Centres Survey,⁶ HKIAC is known as one of the most in-demand dispute resolution premises in the world today.
- 3.10** In May 2013, HKIAC opened its first overseas office in Seoul to promote its services in South Korea. In November 2015, HKIAC opened its second overseas office in Shanghai, marking the first time an offshore arbitral institution has set up a formal presence in mainland China.

⁴ HKLRC, *Report on Commercial Arbitration* Report Number 1 (1982) at 4.

⁵ Neil Kaplan, 'Arbitration in Asia, Developments and Crises' (2002) 19(2) *Journal of International Arbitration* 165.

⁶ *Global Arbitration Review* (n 1).

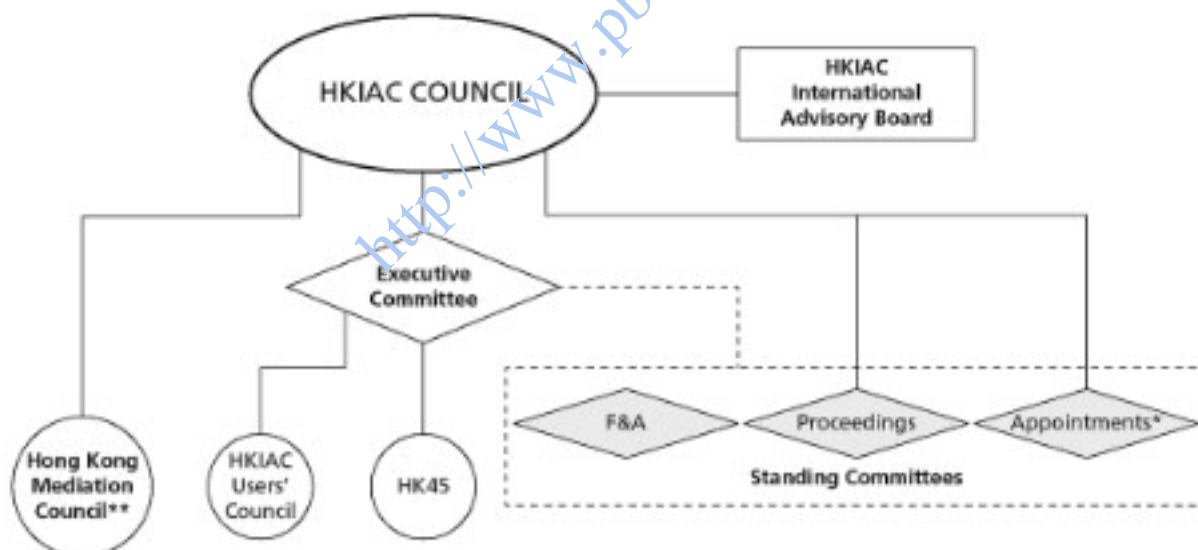
B. Organizational Structure

In February 2014, HKIAC introduced an organizational structure to deal effectively with matters concerning its business operations and the functions entrusted to HKIAC under its rules and the Arbitration Ordinance. This structure is reflected in Figure 3.1. 3.11

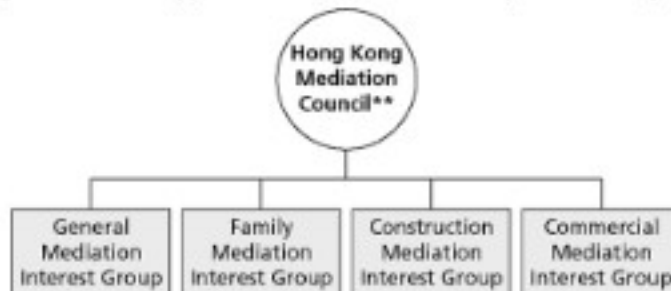
1. HKIAC management bodies

HKIAC is governed by the HKIAC Council, which comprises twenty-five lawyers, industry professionals, and corporate executives from around the world. Council members are led by a chairperson and responsible for the corporate governance and overall management of the institution. Such responsibilities include establishing strategic directions for its business operations and dispute resolution services. 3.12

The Council is supported by the HKIAC International Advisory Board, an entity composed of leading figures in the local and international arbitration and business community. It currently consists of twenty-four members, including eminent business persons, academics, arbitrators, judges, and legal practitioners. The International Advisory Board is consulted from time to time on matters relating to HKIAC's policies and its future developments. 3.13



* Including the Arbitrator Appointment Board as established pursuant to Cap 609.



Partnerships

Asian Domain Name Dispute Resolution Centre
Hong Kong Mediation Accreditation Association Limited
Joint Mediation Helpline Office
Maritime Arbitration Group

Secretariat

Chartered Institute of Arbitrators
Hong Kong Institute of Arbitrators
Hong Kong Mediation Accreditation Association Limited
Society of Construction Law Hong Kong

Figure 3.1 HKIAC Organizational structure

The specific functions exercised by the Proceedings Committee under the HKIAC Rules are: **3.21**

- (1) deciding challenges to arbitrators or emergency arbitrators;⁷
- (2) interpreting all provisions of the HKIAC Rules;⁸
- (3) deciding whether and to what extent an arbitration should proceed where a jurisdictional question arises before the constitution of the arbitral tribunal;⁹
- (4) where an arbitrator's mandate is terminated after an arbitration is declared closed, authorizing (where appropriate) the remaining arbitrators to proceed with the arbitration and to make any decision or award;¹⁰
- (5) deciding whether to join an additional party to an arbitration before the constitution of the arbitral tribunal;¹¹
- (6) deciding whether to consolidate two or more arbitrations;¹²
- (7) deciding whether an arbitration is to be conducted in accordance with the expedited procedure;¹³
- (8) at the request of the Secretariat, exercising any other powers that have been conferred on HKIAC under the HKIAC Rules and associated practice notes, to the extent that such powers are not to be exercised by the Appointments Committee.

Similar to members of the Appointments Committee, a Proceedings Committee member must not participate in discussions of any matter where that member has a conflict of interest or is involved in the matter in the capacity of an arbitrator or party representative. **3.22**

2. HKIAC Secretariat

The daily administration of dispute resolution services is carried out by the HKIAC Secretariat led by the Secretary General. The current Secretariat comprises twenty-three individuals, with multinational and multilingual lawyers from civil and common law jurisdictions. The HKIAC Secretariat also has overseas offices in Shanghai and Seoul, which can provide practical support to local users. All lawyers within the HKIAC Secretariat are highly experienced and competent legal professionals specializing in dispute resolution. The Secretariat currently has eight lawyers providing arbitration services, two members in the mediation team, and two members in the domain name disputes team. **3.23**

The Secretariat works closely with the Appointments and Proceedings Committees and performs a number of practical functions under the HKIAC Rules, which include the following: **3.24**

- (1) Examining the completeness of a Notice of Arbitration.¹⁴
- (2) Amending the time limits set by HKIAC or provided for in the HKIAC Rules.¹⁵
- (3) Consulting with the Appointments Committee in relation to decisions on the number of arbitrators and the appointment of arbitrators or emergency arbitrators.¹⁶

⁷ HKIAC Rules, art 11 and para 8 of sch 4.

⁸ HKIAC Rules, art 3.1.

⁹ HKIAC Rules, art 19.4.

¹⁰ HKIAC Rules, art 12.2(b).

¹¹ HKIAC Rules, art 27.8.

¹² HKIAC Rules, art 28.

¹³ HKIAC Rules, art 41.

¹⁴ HKIAC Rules, art 4.

¹⁵ HKIAC Rules, art 2.4.

¹⁶ HKIAC Rules, arts 6–9.

- (4) Assisting the Appointments Committee with fixing fees and expenses of HKIAC and arbitrators (if their fees are determined based on the amount in dispute).¹⁷
- (5) Assisting the Proceedings Committee with exercising its functions under the HKIAC Rules.
- (6) Collecting and managing deposits for costs of arbitration, and processing payment of fees and expenses of arbitrators and emergency arbitrators.¹⁸
- (7) Assisting in arranging hearing rooms, transcription, and interpretation services.
- (8) Acting as secretary to arbitrators or emergency arbitrators.¹⁹
- (9) Correspondence with arbitrators and parties in relation to case matters.

3.25 The HKIAC Secretariat assigns a case manager to each arbitration case submitted to HKIAC. Such a case manager serves as the primary HKIAC contact for the parties and arbitral tribunal.

3. HKIAC Users' Council

3.26 The Users' Council is a subdivision of HKIAC. In an effort to promote the growing interest of international dispute resolution in the Asia-Pacific region and to provide a platform for the exchange of information and experience among users of dispute settlement services, HKIAC established the Users' Council in 2009. Membership is open to individuals and institutions, who wish to participate in shaping the future of dispute resolution services in Hong Kong and the region.

4. HK45

3.27 Founded in 2010, HK45 is a group for under-45 professionals interested in the practice of arbitration. The mission of the group is to promote interest in, and knowledge of, issues relating to arbitration. It is intended to provide opportunities for both professional development and social interaction. Membership of HK45 is free.²⁰

3.28 HK45 actively organizes events to discuss the latest issues in international arbitration and regularly publishes newsletters to report on recent arbitration developments in the region. HK45 has also established an ambassador programme whereby young lawyers have been designated by HK45 to serve as an ambassador for the group and represent HK45 around the world.

5. HKMAG

3.29 The Hong Kong Maritime Arbitration Group (HKMAG) is a group within HKIAC established in February 2000 for the purposes of promoting the development and use of maritime arbitration and mediation in Hong Kong. HKMAG comprises a group of professionals resident in Hong Kong who are prepared to sit as arbitrators or mediators in maritime disputes. A list of HKMAG arbitrators and mediators is provided on the Hong Kong Shipowners Association website.²¹ All empanelled arbitrators and mediators are specialists who are highly experienced in deciding or managing maritime disputes. Through HKMAG, HKIAC has gained significant experience and expertise in handling maritime disputes.

¹⁷ HKIAC Rules, art 10.3, schs 1 and 3.

¹⁸ HKIAC Rules, art 40 and schs 2 and 3.

¹⁹ See paragraphs 3.76–3.80 for further on HKIAC's tribunal secretary service.

²⁰ To join HK45, see <<http://www.hkiac.org/hk45>>.

²¹ See Hong Kong Shipowners Association, *Maritime Arbitration* (2015) <http://www.hksoa.org/links/maritime_arbitration.html> (last accessed 14 December 2016).

C. Arbitration at HKIAC

While HKIAC serves as a 'one-stop shop' by providing a range of dispute resolution services, its primary functions are to administer arbitrations under its own arbitration rules or under the UNCITRAL Rules and to serve as the statutory appointing authority pursuant to the Arbitration Ordinance. This section explains the features of each of these functions. **3.30**

1. Administering arbitrations under the HKIAC Administered Arbitration Rules

On 1 September 2008, HKIAC established its first set of administered arbitration rules. The 2008 HKIAC Administered Arbitration Rules (HKIAC Rules (2008)) were largely based on the UNCITRAL Arbitration Rules (1976) (UNCITRAL Rules (1976)) as well as the then-proposed amendments which led to the UNCITRAL Rules (2010). In devising the HKIAC Rules (2008), the HKIAC Drafting Committee also drew inspiration from the 'light touch' administration approach of the Swiss Rules of International Arbitration. The 'light touch' approach was intended to facilitate the arbitral process without unnecessary bureaucratic interference. One consequence is that HKIAC does not scrutinize awards.²² Instead, HKIAC places great emphasis in appointing the appropriate and suitable arbitrator for a given case and ensuring that the arbitrator performs his or her duties competently and renders a valid award. This approach also ensures that the arbitral tribunal makes its decisions independently without interference from the institution and minimizes any delay from the time the tribunal renders the award to the time when the parties receive the award. **3.31**

Following the popularity of the HKIAC Rules (2008), HKIAC introduced the 2013 Administered Arbitration Rules (HKIAC Rules) on 1 November 2013. In drafting the HKIAC Rules, the Rules Revision Committee drew upon lessons learned from five years of administering arbitrations under the HKIAC Rules (2008) and the recommendations of arbitration practitioners, arbitrators, industry specialists, and other stakeholders. The HKIAC Rules maintain the 'light touch' approach but incorporate a number of innovative mechanisms to facilitate cost-efficient and effective dispute resolution. **3.32**

Recognized by the Global Arbitration Review as one of the best developments of 2013, the HKIAC Rules reflect HKIAC's efforts to ensure quality administrative services and its ability to address the changing needs of its users.²³ The result is a set of rules which feature the following key innovative provisions to guarantee an efficient and effective arbitral process, with the administrative support of the HKIAC Secretariat. **3.33**

(a) *Multiple-party and multiple-contract provisions*

In recognition of the growing complexity of international commercial disputes and a large number of multi-party and/or multi-contract cases,²⁴ the HKIAC Rules maximize the **3.34**

²² This is in contrast to the approach taken by, eg, ICC, SIAC, and CIETAC, which requires an award to be scrutinized by the arbitral institution.

²³ Global Arbitration Review, 'Vote Now for the GAR Awards 2014' (Global Arbitration Review Awards 2014, 24 January 2014) <<http://globalarbitrationreview.com/news/article/32341/vote-gar-awards-2014/>> (accessed 14 December 2016).

²⁴ It has been estimated that about 40 per cent of arbitration cases worldwide involve more than two parties. See Nathalie Voser, 'Multi-Party Disputes and Joinder of Third Parties' in Albert Jan Van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (2009) 14 ICCA Congress Series

ability of HKIAC and arbitral tribunals to handle these types of disputes. HKIAC has introduced three mechanisms in its rules which deal with multi-party and multi-contract disputes:

- (1) *Joinder of additional parties.*²⁵ The joinder provisions enhance the ability of a tribunal to join an additional party to an arbitration and allow an additional party to request joinder on a prima facie basis. HKIAC itself also gains prima facie power to join an additional party if a request for joinder is submitted prior to the tribunal's constitution. Unlike the parallel provisions in the HKIAC Rules (2008), the new joinder provisions set out an express test for joining additional parties and clarify the consequences of the granting of a joinder application.²⁶
- (2) *Consolidation.*²⁷ Compared to other arbitral institutions, HKIAC has adopted a practical and flexible approach to consolidation. The HKIAC Rules allow HKIAC to consolidate two or more arbitrations where the parties so agree or where all of the claims are made under the same arbitration agreement or compatible arbitration agreements in respect of the same transaction, or a series of related transactions. A notable feature is that HKIAC may consolidate several related arbitrations even where the parties to each arbitration are different. This approach properly accommodates the need for consolidation in situations where related contracts are concluded by different parties, for example, in the situation of a chain of contracts. Such need typically arises in banking, insurance/reinsurance, construction, and M&A transactions. While many other institutional rules do not allow disputes arising in these situations to be consolidated,²⁸ these disputes can be consolidated under the HKIAC Rules.²⁹
- (3) *Single arbitration under multiple contracts.*³⁰ Under the HKIAC Rules, claims arising out of or in relation to multiple contracts can also be raised in a single proceeding from the outset if certain criteria are satisfied. This provides parties with an efficient alternative to consolidation.³¹

(b) *Twin-track fee regime and standard terms of appointment*

3.35 HKIAC is the first institution to offer parties an ability to foresee and control arbitrators' fees—a choice regarding the determination of the arbitral tribunal's fees calculated either on the basis of the amount in dispute or on the basis of agreed hourly rates.³² Where parties choose the latter, the arbitrator's rate shall not exceed a fee cap,³³ barring a contrary agreement by the parties or determination by HKIAC. The HKIAC Rules also institute standard

343–410 at 343. These figures accord with HKIAC's experience, with over 20 per cent of new cases filed under its administered arbitration rules in 2014 involving multiple parties or multiple contracts. See Ruth Stackpool-Moore, 'Joinder and Consolidation—Examining Best Practice in the Swiss, HKIAC and ICC Rules' (2014) 44 ASA Special Series 16.

²⁵ HKIAC Rules, art 27.

²⁶ See Chapter 10 for further discussion on joinder of additional parties under the HKIAC Rules.

²⁷ HKIAC Rules, art 28.

²⁸ These institutional rules include the ICC, ICDR, LCIA, and CIETAC Rules.

²⁹ See Chapter 10 for further discussion on consolidation under the HKIAC Rules.

³⁰ HKIAC Rules, art 29.

³¹ See Chapter 10 for further discussion on single arbitration under multiple contracts under the HKIAC Rules.

³² HKIAC Rules, art 10, schs 2 and 3.

³³ At the date of writing, the fee cap is HK\$6,500/hour (approximately US\$830).

terms of appointment (subject to variations through party agreement or by HKIAC) which must be agreed by all arbitrators appointed in accordance with the HKIAC Rules. The uniformity created by these features will facilitate negotiations between parties and arbitrators, leading to a transparent appointment process and quicker start to the substantive proceedings.³⁴

(c) Emergency arbitrator procedures

The HKIAC Rules provide for emergency relief concurrent with, or following, the filing of a Notice of Arbitration.³⁵ Given the urgent nature of emergency arbitrator proceedings, the HKIAC Rules provide a highly efficient process for an emergency arbitrator's appointment and his or her decision on the application for emergency relief. Under the Rules, HKIAC will seek to appoint an emergency arbitrator within two days of HKIAC's acceptance of an application for emergency relief. In practice, HKIAC has managed to appoint all emergency arbitrators within just a few hours. After an emergency arbitrator is appointed, the parties can expect a decision on the application within fifteen days from the date on which the emergency arbitrator receives the file. Furthermore, a decision issued by an HKIAC emergency arbitrator is recognized and enforceable under the Arbitration Ordinance in the same manner as an order or direction of the CFI.³⁶ **3.36**

(d) Expedited procedure

Under the HKIAC Rules, HKIAC is empowered to decide whether an arbitration is to be conducted on an expedited basis upon a party's request.³⁷ The HKIAC Rules broaden the circumstances in which parties may apply for the expedited procedure. For example, the Rules raise the applicable monetary threshold for the expedited procedure where the amount in dispute does not exceed HK\$25,000,000 (the equivalent of over US\$3 million). A party may also apply for expedited procedure when all parties agree or in situations of exceptional urgency. If applicable, the expedited procedure will result in a presumption that a sole arbitrator will hear the proceedings and the award will be rendered within six months of transmission of the file to the tribunal.³⁸ **3.37**

(e) Prima facie power to proceed

The HKIAC Rules also empower HKIAC to decide whether, and to what extent, an arbitration shall proceed where a jurisdictional question arises before the constitution of the arbitral tribunal.³⁹ Unlike many other institutional rules, the HKIAC Rules provide a clear basis for HKIAC to keep arbitral proceedings moving forward where a party raises a jurisdictional objection or seeks to interrupt the proceedings at an early stage.⁴⁰ **3.38**

The provisions set out above have proved to be extremely successful and well received by users. HKIAC plays a critical role in implementing these provisions when administering proceedings under the HKIAC Rules. **3.39**

³⁴ See Chapter 7 for further discussion on arbitrators' fees and terms of appointment under the HKIAC Rules.

³⁵ HKIAC Rules, art 23.1 and sch 4.

³⁶ See Chapter 8 for further discussion on emergency arbitrator relief under the HKIAC Rules.

³⁷ HKIAC Rules, art 41.

³⁸ See Chapter 12 for further discussion on expedited procedure under the HKIAC Rules.

³⁹ HKIAC Rules, art 19.4.

⁴⁰ See Chapter 9 for further discussion on HKIAC's prima facie power to proceed under the HKIAC Rules.

pursuant to an arbitration agreement or an investment treaty, which either: (1) provides for these procedures to apply; or (2) provides for arbitration administered by HKIAC under the UNCITRAL Rules or words to similar effect. While the 2005 version may be interpreted to apply only to arbitrations under the UNCITRAL Rules (1976), the 2015 Procedures incorporate updates which bring them in conformity with all versions of the UNCITRAL Rules, ie the 1976 and 2010 versions (with or without paragraph 4 of Article 1 as introduced in 2013). The 2015 Procedures create a single and user-friendly system that applies to arbitrations administered by HKIAC under any version of the UNCITRAL Rules.

HKIAC will perform the functions of the appointing authority and administrator in an arbitration under the 2015 Procedures and the UNCITRAL Rules. These functions include: **3.45**

- (1) Interpreting all provisions of the 2015 Procedures including any associated schedules.⁴⁴
- (2) Amending the time limits provided for in the 2015 Procedures and any time limits that HKIAC has set.⁴⁵
- (3) Issuing practice notes to supplement, regulate, or implement the 2015 Procedures from time to time.⁴⁶
- (4) Examining and receiving the Notice of Arbitration, Response to the Notice of Arbitration, and other documents submitted by the parties.⁴⁷
- (5) Appointing an arbitrator if any party fails to make the appointment or the agreed procedure fails to result in an appointment. Where HKIAC is to appoint a sole or presiding arbitrator, it will usually follow the list procedure provided for in the UNCITRAL Rules unless the parties agree or HKIAC determines otherwise.⁴⁸
- (6) Determining a challenge against an arbitrator where the parties cannot agree to the challenge and the arbitrator elects not to withdraw.⁴⁹
- (7) Deciding whether, and to what extent, an arbitration shall proceed if a jurisdictional question arises before the tribunal is constituted.⁵⁰
- (8) Upon the parties' request, consulting with the tribunal to establish its hourly or daily rates applicable to the arbitration.⁵¹
- (9) Assessing whether a fee proposal provided by the arbitral tribunal is reasonable, and making any appropriate adjustments in accordance with the UNCITRAL Rules.
- (10) At the parties' request, assisting in arranging transcription, translation, interpretation, and other logistical services at additional cost.⁵²
- (11) Facilitating correspondence among the parties and between the parties and the arbitral tribunal.
- (12) Providing convenient facilities within which the arbitrations may be conducted.

⁴⁴ 2015 Procedures, art 5.1.

⁴⁵ 2015 Procedures, art 5.2.

⁴⁶ 2015 Procedures, art 5.6.

⁴⁷ 2015 Procedures, arts 6–8.

⁴⁸ 2015 Procedures, art 9.

⁴⁹ At the time of writing, the applicable procedure is set out in the Practice Note on the Challenge of an Arbitrator, which came into force on 31 October 2014: HKIAC, *Practice Note on the Challenge of an Arbitrator 2014* <http://staging.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/4_Practice%20Note_2014_0.pdf> (accessed 14 December 2016).

⁵⁰ 2015 Procedures, art 11.

⁵¹ 2015 Procedures, art 14.

⁵² 2015 Procedures, art 15.2.

- (13) Providing general administrative or secretarial support for the arbitration or arbitral tribunal, including monitoring compliance with schedules and timelines, liaising regarding the service of notices, arranging hearing facilities, and organizing all other matters necessary for conducting the arbitration.
- (14) Managing and collecting deposits towards the costs of arbitration.⁵³
- (15) Settling the arbitral tribunal's invoices.
- (16) Fixing HKIAC's administrative fees.⁵⁴
- (17) Upon any party's request, assisting in the filing or registration of an award in countries where such filing or registration is required by law.⁵⁵

3.46 HKIAC charges registration and administrative fees for administering an UNCITRAL arbitration. These fees are set out in a fee schedule published on HKIAC's website.⁵⁶

4. Appointing authority in ad hoc cases seated in Hong Kong

3.47 Since 1997, HKIAC has served the statutory function of the appointing authority prescribed under the Arbitration Ordinance. Under the Arbitration Ordinance, HKIAC has the following functions:

- (1) Determining the number of arbitrators where the parties have not reached an agreement on the matter.⁵⁷
- (2) Appointing an arbitrator where a party fails to make an appointment, or the agreed appointment procedures fail to result in appointment of an arbitrator.⁵⁸
- (3) Appointing a mediator if a person designated by an arbitration agreement fails to make the appointment.⁵⁹

3.48 When carrying out the above functions, HKIAC follows the Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) Rules (Cap 609C) (the Appointment Rules).⁶⁰ In fulfilling its functions, HKIAC must consider the various factors set out in the Appointment Rules.⁶¹ It also has an additional responsibility of involving the Appointment Advisory Board, consisting of eleven members from a diverse range of industry groups, to ensure that matters are determined with transparency and involvement of stakeholders.⁶² Before HKIAC appoints an arbitrator or mediator, or decides the appropriate number of arbitrators for a particular dispute, HKIAC must consult with at least three members of the Appointment Advisory Board and must consider their advice but is not bound by it.⁶³

⁵³ 2015 Procedures, art 16.

⁵⁴ 2015 Procedures, sch 1, para 4.

⁵⁵ 2015 Procedures, art 18.

⁵⁶ See the Fee Schedule to the 2015 Procedures at HKIAC, *Fee Schedule for HKIAC Procedures for the Administration of Arbitration under the Arbitration Rules 2015* (2015) <<http://www.hkiac.org/arbitration/rules-practice-notes/procedures-administration-international>> (last accessed 14 December 2016).

⁵⁷ Arbitration Ordinance, s 23.

⁵⁸ Arbitration Ordinance, s 24.

⁵⁹ Arbitration Ordinance, s 32.

⁶⁰ The full text of these Rules is available at: Legislative Council, *Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrators) Rules (Cap 609C)* (2014) <[http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/D4546FC0B644AF3748257B990054661D/\\$FILE/CAP_609C_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/D4546FC0B644AF3748257B990054661D/$FILE/CAP_609C_e_b5.pdf)> (last accessed 14 December 2016).

⁶¹ Appointment Rules, rr 7(1), 9(1), and 11(1).

⁶² Appointment Rules, r 5.

⁶³ Appointment Rules, r 5.

The Appointment Rules provide for specific procedures for a party to request HKIAC to determine the number of arbitrators and to appoint an arbitrator or a mediator. A requesting party must complete Form 1 for appointment of an arbitrator,⁶⁴ Form 2 for a decision on the number of arbitrators,⁶⁵ or Form 3 for appointment of a mediator.⁶⁶ HKIAC charges a fee for processing each of these applications.⁶⁷ **3.49**

D. Mediation at HKIAC

As part of HKIAC's remit as a one-stop shop for dispute resolution services, HKIAC currently maintains a roster of over 1,000 accredited mediators for public appointments. HKIAC has three panels of mediators, ie the General Panel, the Family Panel, and the Panel of Family Supervisors. Mediators admitted onto these panels must satisfy the relevant requirements of HKIAC. Mediators on the General Panel can handle mediations of a wide variety of disputes. Mediators on the Family Panel are trained to facilitate separating/divorcing couples to reach agreements regarding any ongoing arrangements for their children and/or the resolution of any related financial matters. The Family Supervisors are experienced family mediators who assist in family mediation trainees. **3.50**

HKIAC published a set of Mediation Rules on 1 August 1999. Where the parties have stipulated in their contract, or by subsequent agreement, to adopt the Mediation Rules, they will notify HKIAC if they have agreed on a mediator and if the proposed mediator is willing to serve. If the parties fail to agree within the time period stipulated in the Mediation Rules, they will request HKIAC to appoint a qualified mediator or mediators. Upon receipt of an application to appoint a mediator or mediators pursuant to the Mediation Rules, HKIAC shall appoint a suitable person, having regard to: **3.51**

- (1) the nature of the dispute;
- (2) the availability of mediator(s);
- (3) the identity of the parties;
- (4) the independence and impartiality of the mediator(s);
- (5) any stipulation in the relevant agreement; and
- (6) any suggestions made by the parties themselves.

HKIAC may request parties to submit further information, and where a party fails to supply the information within the specified time, HKIAC may appoint a mediator based on the information available. HKIAC charges a fee for the appointment service.⁶⁸ A mediator will charge the parties a mediation service fee on an hourly basis, the amount of which shall depend on a number of factors, including the nature and complexity of the dispute and the **3.52**

⁶⁴ Form 1 is available at HKIAC, *Form 1* <http://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/5diii_Form_1_Request_for_Appointment_of_Arbitrator.pdf> (accessed 14 December 2016).

⁶⁵ Form 2 is available at HKIAC, *Form 2* <http://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/5diii_Form_2_Application_for_Decision_on_Number_of_Arbitrators.pdf> (accessed 14 December 2016).

⁶⁶ Form 3 is available at HKIAC, *Form 3* <http://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/5diii_Form_3_Application_for_Appointment_of_a_Mediator.pdf> (accessed 14 December 2016).

⁶⁷ At the time of writing, the fee charged for processing a Form 1 or Form 2 application is HK\$8,000.00.

⁶⁸ At the time of writing, the fee for the appointment of an arbitrator is HK\$2,000.00 (ie HK\$1,000.00 per party).

professional qualifications of the mediator.⁶⁹ When HKIAC has appointed a mediator, it shall notify the parties and the mediator accordingly.

- 3.53** As indicated above, HKIAC may also appoint mediators pursuant to section 32 of the Arbitration Ordinance, which designates HKIAC as the statutory appointing authority to appoint a mediator during the course of an arbitration.
- 3.54** To promote the development and use of mediation as an alternative method of resolving disputes, and to meet the increasing demand for mediation services, the Hong Kong Mediation Council (HKMC) was set up within HKIAC in January 1994. HKMC is run by a committee responsible for coordinating activities and promoting the use of mediation in a wide variety of areas. HKMC has set up various mediation interest groups concentrating their mediation activities in specialist areas such as commercial, construction, family, and general matters. HKMC and its mediation interest groups hold seminars and meetings on various aspects of mediation from time to time.

E. Adjudication Service

- 3.55** HKIAC established a set of Adjudication Rules in September 2008. These Adjudication Rules provide for the quick disposition of disputes and are used most frequently in construction matters. Parties may agree on the appointment of the adjudicator, but in default HKIAC may appoint the adjudicator.⁷⁰ Any adjudication decision takes effect as a settlement agreement under the Arbitration Ordinance.⁷¹ Adjudication, as distinct from arbitration, is only of a preliminary nature and is often undertaken during the subsistence of a contract. Accordingly, any decision of the adjudicator will not bind any subsequent tribunal or court, or prevent such decision-makers from considering the dispute.⁷²

F. Domain Name Disputes at HKIAC

- 3.56** HKIAC places great emphasis on providing online dispute resolution services for resolving domain names disputes.
- 3.57** In 2001, HKIAC accepted appointment from the Hong Kong Internet Registration Corporation Limited (HKIRC) to resolve disputes concerning domain names registered under the .hk country code Top-Level Domain (ccTLD).
- 3.58** In 2002, HKIAC entered into a joint venture with CIETAC to establish the Asian Domain Name Dispute Resolution Centre (ADNDRC). The ADNDRC is a charitable institution registered in Hong Kong and provides a variety of domain name dispute resolution services. It is one of the only five dispute resolution providers appointed by Internet Corporation for Assigned Names and Numbers (ICANN).⁷³

⁶⁹ In practice, such a mediation service fee can range from HK\$1,000/hour to HK\$5,000/hour.

⁷⁰ Adjudication Rules (2008), rr 10–16.

⁷¹ Adjudication Rules (2008), r 68.

⁷² Adjudication Rules (2008), r 84.

⁷³ List of Approved Dispute Resolution Providers ICANN <<https://www.icann.org/resources/pages/providers-6d-2012-02-25-en>> (last accessed on 14 December 2016).

to suit the requirements of any event, meeting, or hearing. In addition, HKIAC provides a wide range of individualized services including global videoconferencing, hotel and airline reservations, and onsite catering.

HKIAC's facilities are located in a prime office building in the central business district of Hong Kong, overlooking the famous Victoria Harbour. The building is within a five-minute walk or taxi ride from most major law firms, financial institutions, companies, and hotels. These facilities are available for HKIAC and non-HKIAC cases. In recent years, HKIAC's hearing facilities have attracted high profile investment treaty cases, such as Michael McKenzie's US\$3.75 billion claim against Vietnam, the Cambodia Power Company's ICSID claim against Cambodia and Tethyan Copper Company Pty Limited's ICSID claim against Pakistan. **3.73**

These arrangements have been made possible pursuant to the cooperation agreements entered into between HKIAC and ICSID, and PCA respectively. HKIAC has also entered into similar arrangements with forty-four other arbitral institutions. **3.74**

HKIAC's hearing facilities have received global recognition including high rankings in GAR's latest hearing centres survey. The survey ranks HKIAC first for its location, value for money, IT services, and helpfulness of staff.⁸⁵ Further details about HKIAC's hearing facilities are available on the HKIAC website.⁸⁶ **3.75**

2. Tribunal secretary service and training

Recognizing the growing market demand for tribunal secretaries and the significant value they can add to the arbitral process, HKIAC introduced its tribunal secretary service and an accompanying set of guidelines in June 2014. This service allows the HKIAC Secretariat members to perform the function of tribunal secretary in HKIAC and ad hoc arbitrations concerning either commercial or investor-state disputes. HKIAC is one of a very small number of institutions that provide tribunal secretary services⁸⁷ and won the 2015 GAR innovation award for providing such services. **3.76**

Both the 2013 and 2008 versions of the HKIAC Rules expressly recognize the appointment of tribunal secretaries in arbitrations governed by these Rules.⁸⁸ The appointment of HKIAC's Secretariat members as tribunal secretary saves time and money for parties, and provides useful insights on HKIAC arbitral procedures at competitive rates. An arbitral tribunal who wishes to appoint an HKIAC Secretariat member as a secretary should send a written request to HKIAC, who will endeavour to designate a suitable Secretariat member to assist the tribunal as soon as practicable.⁸⁹ **3.77**

An HKIAC Secretariat member's appointment as tribunal secretary in an arbitration administered by HKIAC will be governed by HKIAC's Guidelines on Use of Secretary to Arbitral **3.78**

⁸⁵ 'HKIAC Achieves Top Rankings in GAR Hearing Centres', HKIAC News, 5 November 2015 <<http://www.hkiac.org/news/hkiac-achieves-top-rankings-gar-hearing-centres-survey>> (accessed 14 December 2016).

⁸⁶ HKIAC, *Facilities and Services* (2016) <<http://www.hkiac.org/our-services/facilities>> (accessed 14 December 2016).

⁸⁷ Other institutions that also provide tribunal secretary services are the ICSID and PCA.

⁸⁸ HKIAC Rules, art 13.4; HKIAC Rules (2008), art 14.5.

⁸⁹ Further information about the procedure for requesting the tribunal secretary service can be found at HKIAC, *Tribunal Secretary Service* (2016) <<http://www.hkiac.org/our-services/tribunal-secretary-service>> (last accessed 14 December 2016).

Tribunal, unless the parties agree otherwise.⁹⁰ The Tribunal Secretary Guidelines contain detailed guidance on the appointment, challenge, duties, and remuneration of tribunal secretaries. They reflect the modern practice of the use of tribunal secretaries and directly address many potential concerns associated with this practice.

- 3.79** As an extension of the award-winning tribunal secretary service, HKIAC launched the world's first tribunal secretary accreditation programme in December 2015. The programme, held around the world, is aimed to train and accredit a new generation of qualified tribunal secretaries through practical training and exercises.
- 3.80** The programme is overseen by a senior advisory board⁹¹ and taught by a faculty of experienced arbitration practitioners who have been or currently serve as tribunal secretaries.⁹² HKIAC was nominated for the 2016 GAR innovation award as a result of this new initiative.⁹³

3. Fundholding service

- 3.81** At the parties' request, HKIAC can hold funds for HKIAC and non-HKIAC arbitrations. This service covers advances for costs of arbitrators, mediators, or adjudicators, security for costs, and security for the amount in dispute. HKIAC's fundholding service allows for funds to be held in a neutral account for payments when requested.
- 3.82** HKIAC charges an annual administrative fee for holding funds to cover fees and expenses of arbitrators, mediators, or adjudicators and a different fee for holding security for the amount in dispute or security for costs.⁹⁴ Statement of accounts will be sent to the parties and arbitrators/mediators/adjudicators every quarter.

4. Authentication service

- 3.83** As required by Article IV(1) of the New York Convention, parties seeking enforcement of an arbitral award in a foreign New York Convention state may be required by the enforcing court to submit a 'duly authenticated original award or a duly certified copy'. In such circumstances, parties may request that HKIAC authenticate an HKIAC award or ad hoc award made in Hong Kong for this purpose. HKIAC can authenticate awards made in HKIAC administered arbitrations or awards made by arbitrators appointed by HKIAC in ad hoc arbitrations seated in Hong Kong.

⁹⁰ The full text of the Guidelines can be found at HKIAC, *Guidelines on Use of Secretary to Arbitral Tribunal* (2016) <http://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/services/HKIAC%20Guidelines%20on%20Use%20of%20Secretary%20to%20Arbitral%20Tribunal%20-%20Final.pdf> (last accessed 14 December 2016).

⁹¹ At the date of writing, the board members include Neil Kaplan QC, Henri Alvarez QC, Doug Jones AC, Michael Hwang SC, Prof Gabrielle Kaufmann Kohler, Hilary Heilbron QC and Julian Lew QC.

⁹² At the date of writing, the faculty members include Nicolas Wiegand, Romesh Weeramantry, Chester Brown, Niuscha Bassiri, Olga Boltenko, Natalie Reid, Joshua Fellenbaum, Janet Whittaker, Angeline Welsh and Sarah Grimmer.

⁹³ 'GAR Awards 2016: Innovation by an Individual or Organisation', 9 February 2016 <<http://globalarbitrationreview.com/news/article/34547/gar-awards-2016-innovation-individual-organisation/>> (last accessed 14 December 2016).

⁹⁴ As at the date of writing, the administrative fee for holding funds to cover fees and expenses of arbitrators, mediators, or adjudicators is HK\$4,000.00 per party per annum and HK\$10,000.00 per annum for holding security for the amount in dispute or security for costs.

HKIAC currently charges HK\$5000 for authenticating an award made in an ad hoc arbitration seated in Hong Kong. It does not charge any fee for authenticating an award issued in an HKIAC administered arbitration. **3.84**

5. Secretariat support service

HKIAC provides secretariat services for the following institutions: **3.85**

- (1) *Chartered Institute of Arbitrators (East Asia Branch)*. Established in 1972, the Chartered Institute of Arbitrators (East Asia Branch) is now the largest overseas branch of the Chartered Institute of Arbitrators with almost 1,900 members. The Chartered Institute of Arbitrators provides training and education to its members as well as arbitrator accreditation programmes.
- (2) *Hong Kong Institute of Arbitrators*. The Hong Kong Institute of Arbitrators (HKI Arb) was established in 1996 with a mandate to promote arbitration and other forms of alternative dispute resolution methods in Hong Kong. HKI Arb also provides training for arbitrators and mediators, and sets standards for the conduct of arbitrators and mediators in Hong Kong.
- (3) *Society of Construction Law*. Established in 2001, the Society of Construction Law Hong Kong promotes construction law through education and research in this area. There are approximately 250 members in the Society of Construction Law.
- (4) *Hong Kong Mediation Accreditation Association Limited*. The Hong Kong Mediation Accreditation Association Limited was established with the support of the Hong Kong government to unify the standard setting body for mediator accreditation. The four founding members include: the Hong Kong Bar Association, Hong Kong Law Society, HKMC, and HKIAC. The aim of this body is to set standards for all professionals involved in mediation in Hong Kong, to accredit mediators, to set standards for mediation training courses in Hong Kong, and to approve such courses upon satisfying the requisite standards.

H. Case Statistics

Having managed over 9000 cases since its establishment in 1985, HKIAC maintains one of the largest caseloads in the Asia-Pacific region. Table 3.1 summarizes HKIAC's case statistics from 2010 to 2015: **3.86**

Table 3.1 HKIAC case statistics 2010–15

	2010	2011	2012	2013	2014	2015
Total disputes	624	502	456	463	477	520
Overall arbitrations	291	275	293	260	252	271
Administered arbitrations	16	41	68	81	110	116
Mediations	226	100	47	33	24	22
Domain name disputes	107	127	116	170	201	227

As reflected in Figure 3.2, the number of administered arbitrations referred to HKIAC experiences a steady growth every year. **3.87**

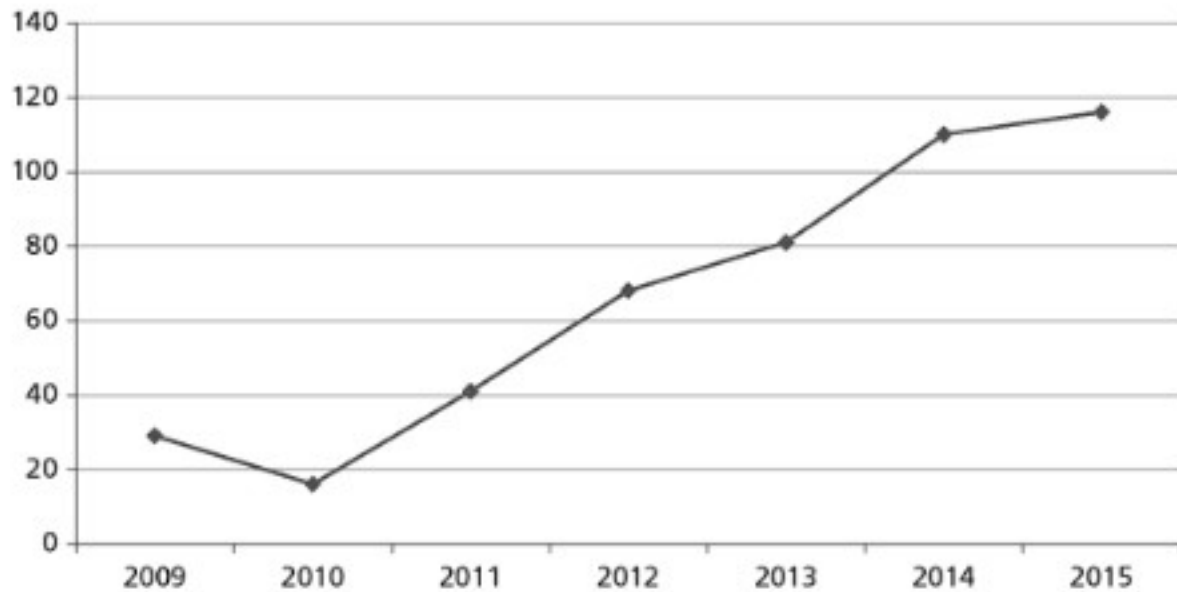


Figure 3.2 HKIAC-administered arbitration 2010 to 2014

- 3.88** In 2015, HKIAC handled a total of 520 new disputes, out of which 271 were arbitrations, 227 were domain name disputes, and 22 were mediations. Within the 271 arbitrations, 116 were administered by HKIAC. This represents a 5.5 per cent growth from 2014 and a 43.2 per cent increase from 2013. The total dispute value of the arbitration cases also increased from US\$2.8 billion in 2014 to US\$6.2 billion in 2015. HKIAC continues to be one of the most popular venues for cross-border disputes, as 94.8 per cent of its new administered arbitrations in 2015 were international cases featuring parties from forty-one jurisdictions.
- 3.89** While HKIAC continues to serve as a popular institution for China-related disputes, 2015 saw an increase in cases involving parties that were not from mainland China or Hong Kong. In 2015, HKIAC handled five types of disputes which included commercial disputes (50.0 per cent), construction disputes (22.2 per cent), maritime disputes (17.9 per cent), corporate disputes (9.0 per cent), and insurance disputes (0.9 per cent).

I. Overview of the Arbitration Process under the HKIAC Rules

- 3.90** The arbitration process under the HKIAC Rules is illustrated in Figure 3.3, which commences with the filing of the notice of arbitration, and concludes with the arbitral tribunal issuing the final award.
- 3.91** The following chapters will discuss the procedure under each provision of the HKIAC Rules in detail.

THE STEPS IN AN HKIAC ADMINISTERED ARBITRATION



Figure 3.3 Overview of HKIAC-administered arbitration process

as the willingness of the judiciary to issue interim relief in support of arbitration and the standard applied to set aside an award.

- (b) *Arbitrability*. The arbitrability of a dispute is generally decided by the law of the seat. Parties should choose a seat where the relevant dispute is capable of settlement by arbitration under the law of the seat.
- (c) *Enforceability*. Parties should choose a seat within the New York Convention States, so an award issued at the seat will be enforceable under the New York Convention.

The choice of seat is, therefore, one of the most important aspects of any arbitration agreement. It should be noted that, while the seat was, traditionally, and continues to be the place where many or all of the hearings in the arbitration will be conducted, it is not tied to the physical location of the arbitration. Therefore, the tribunal may decide to hold hearings elsewhere for reasons of convenience, such as taking evidence from witnesses located elsewhere. 4.11

(d) Use of an arbitral institution and its rules

Parties should consider whether they require their arbitration to be administered and overseen by a recognized arbitral institution or whether they are content to adopt an ad hoc procedure. 4.12

Parties often choose to have their arbitrations administered by an institution given the structure provided, clarity on and remedy for many anticipated circumstances parties may face during the course of an arbitration, and useful assistance from an arbitration institution. Most arbitral institutions, such as HKIAC, are equipped with a Secretariat that administers arbitrations. As per the HKIAC model clause, it is recommended that parties who agree to institutional arbitration specify both the institution and its corresponding rules. While a handful of institutions administer arbitrations under other institutions' rules, HKIAC has a general policy of not doing so on the basis that to do so may run the risk of the resulting arbitration award not being enforceable. It should also be noted that the ICC has expressly stipulated in its latest rules that the ICC Court is the only body authorized to administer arbitrations under its rules. Therefore any arbitration clause that designates a different institution to administer the ICC rules may give rise to arguments as to which institution has the authority to administer an arbitration under the clause, and this issue might result in non-enforcement of the arbitral award.² 4.13

Under an ad hoc arbitration, the parties can create their own rules. The key advantage is therefore flexibility, and parties may find that the involvement of an institution is unnecessary if an experienced and engaged tribunal is appointed. In practice, however, ad hoc arbitration requires a great deal of cooperation (and some goodwill) between the parties. An uncooperative party may render an ad hoc arbitration inefficient and costly. 4.14

(e) Number of arbitrators

If the parties do not specify the number of arbitrators in their arbitration clause, the HKIAC Rules provide that HKIAC shall decide whether the case shall be referred to a sole arbitrator or to three arbitrators, taking into account the circumstances of the case, as discussed further 4.15

² See the Chinese court decision refusing to enforce the *Alstom v Insignia* award (法院案号 (2011) 浙杭仲确字第7号, 被申请人为浙大网新).

in Chapter 7.³ Nevertheless, it is generally desirable for the parties to express their preference on the number of arbitrators in the arbitration clause in order to avoid delays during the appointment process.

- 4.16** The HKIAC model clauses prompt parties to specify the number of arbitrators. It is customary for a tribunal to consist of three members in an international arbitration where the case is complex and the amount in dispute is large. But where the complexity of the case and the amount in dispute do not justify the appointment of three arbitrators, a single arbitrator may be preferred. See Chapter 7 for further detail.

(f) Language of the arbitration

- 4.17** The language of the arbitration has many practical implications: it may affect the choice of counsel, the appointment of arbitrators, and the selection of witnesses. Parties should generally specify the language to be used in proceedings in their arbitration clause. The HKIAC model clauses recommend that parties specify the language of the arbitration (but do not deem such a provision mandatory). It is generally advisable to select a single language to save costs and increase efficiency of the proceedings.
- 4.18** If the parties fail to choose the language of the arbitral proceedings, the institutional arbitration rules will often fill the gap. As discussed in further detail in Chapter 9, Article 15.1 of the HKIAC Rules provides that unless the parties have agreed the language of the arbitration, the arbitral tribunal shall decide this issue and may decide to conduct the arbitration in multiple languages if the circumstances so require.

(g) Law governing the arbitration agreement

- 4.19** Under the doctrine of separability which is affirmed by Article 19.2 of the HKIAC Rules, an arbitration agreement is separate and divisible from the underlying substantive contract. Accordingly, the law governing the arbitration agreement may be distinct from the law governing the contract and the law of the seat. The governing law of an arbitration agreement generally deals with the existence, scope, validity, interpretation, performance, termination, breach, and enforceability of the arbitration agreement.
- 4.20** Recent Hong Kong,⁴ English,⁵ and Singaporean⁶ case law demonstrates the approaches in different jurisdictions to determine the law which governs the arbitration agreement in the event that the parties fail to elect such law in the arbitration clause. The case law does not speak entirely with one voice: different tests have been formulated to determine this question. As a result, this issue has given rise to uncertainty as to which law governs the arbitration agreement in the absence of an express choice.
- 4.21** HKIAC's model clauses were updated in August 2014 to allow parties to designate the governing law of their arbitration agreement. This provision is optional in the HKIAC model clauses set out in section B. However, parties would be well advised to include a specific choice of law for their arbitration agreements particularly where the law of the underlying agreement and the law of the seat are different. This is to avoid both the uncertainty and the costs of disputes arising in relation to the governing law of their arbitration agreement.

³ HKIAC Rules, art 6.1

⁴ *Klöckner Pentaplast GmbH & Co Kg v Advance Technology (HK) Co Ltd* [2011] HKCFI 458.

⁵ *Sulamerica Cia Nacional De Seguros SA & Others v Enesa Engenharia SA & others* [2012] EWCA Civ 638.

⁶ *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others* [2014] SGHCR 12.

The HKIAC model clauses do not contain a 'choice-of-law' clause for the underlying contract. This type of clause regulates the law governing the subject of the dispute, sometimes also known as the 'substantive law' of the contract. It is generally advisable for parties to include a choice-of-law clause in a separate clause rather than as part of the arbitration clause. This avoids confusion as to whether the choice of law is intended to govern the substantive dispute or the arbitration. **4.22**

B. HKIAC Model Clauses

HKIAC has drafted four model arbitration clauses. As discussed above, parties may use these clauses either in their original form or with certain modifications based on the parties' preferences or the requirements of any applicable law. **4.23**

1. Arbitration under HKIAC Rules

Where parties wish to refer any future disputes to arbitration in accordance with the HKIAC Rules, the following model clause may be adopted: **4.24**

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 (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.

*The law of this arbitration clause shall be ... (Hong Kong law).⁷

The seat of arbitration shall be ... (Hong Kong).

**The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language).⁸

Where parties to an existing dispute (in which neither an arbitration clause nor a previous agreement with respect to arbitration exists) wish to refer their dispute to arbitration under the HKIAC Rules, they may agree to do so in the following terms: **4.25**

We, the undersigned, agree to refer to arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules any dispute, controversy, difference or claim (including any dispute regarding non-contractual obligations) arising out of or relating to:

(Brief description of contract under which disputes, controversies, differences or claims have arisen or may arise).

*The law of this arbitration agreement shall be ... (Hong Kong law).⁹

The seat of arbitration shall be ... (Hong Kong).

**The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language).¹⁰

Signed: _____ (Claimant)

Signed: _____ (Respondent)

Date: _____

⁷ This provision is optional.

⁸ This provision is optional.

⁹ This provision is optional.

¹⁰ This provision is optional.

The seat of arbitration shall be ... (Hong Kong).

**The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in ... (insert language).

C. Other Considerations

1. Mandatory national laws: Substantive or procedural

In most jurisdictions, there are mandatory provisions of law which restrict the parties' ability to choose freely the law or legal rules which apply to their arbitration agreement. These mandatory requirements are provisions of the applicable law which are not subject to contrary agreement of the parties. **4.29**

For example, it is a mandatory substantive requirement of China's Arbitration Law that the contracting parties provide for institutional arbitration, failing which case the arbitration clause is likely to be deemed invalid under Chinese law.¹⁶ An award made in mainland China under an ad hoc arbitration agreement will not be enforceable in mainland China. **4.30**

2. Conditions precedent

Parties may choose to include conditions precedent in their arbitration that must be satisfied before an arbitral tribunal may hear and determine a claim. The most common conditions precedent are multi-tiered dispute resolution clauses. Such clauses include agreements to negotiate or to mediate before the right to arbitrate may be invoked. These provisions contain enforceable conditions precedent to arbitration in certain jurisdictions, provided that the conditions precedent are set out with sufficient certainty and detail as to the process involved.¹⁷ For example, it is important that the parties stipulate when they may escalate from one tier to the next. **4.31**

The main advantage of multi-tiered clauses is the possibility of amicable settlement prior to the launch of arbitral proceedings (which might be costly and disruptive to the parties). This is tempered by the fact that if amicable settlement is possible, the parties would likely wish to explore such possibilities in any event. Pre-arbitral tiers may therefore simply delay and obstruct the commencement of arbitral proceedings. **4.32**

3. Procedural considerations

Parties may wish to include provisions relating to procedure and evidence in their arbitration clause. Such provisions can assist in the efficient resolution of a dispute by stating the time period within which an arbitral award must be rendered or the procedural steps to be followed. One example of a procedural consideration that may be necessary in an arbitration clause is that many institutional arbitration rules provide for emergency relief, either **4.33**

¹⁶ See *Klöckner Pentaplast GmbH & Co Kg v Advance Technology (HK) Co Ltd* [2011] HKCFI 458 (citing art 16 the PRC Arbitration Law, which provides: 'If an arbitration agreement contains no or unclear provisions concerning the matters for arbitration or the arbitration institution, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be null and void').

¹⁷ *Cable & Wireless v IBM UK* [2002] 2 All ER (Comm); see also *Eminates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm).

by the appointment of an emergency arbitrator,¹⁸ or by expedited formation of a tribunal.¹⁹ Typically, where the chosen institutional rules offer emergency arbitrator procedures, parties must expressly choose to opt out of such procedures in the arbitration clause if they do not wish them to apply.

4. Multiple parties or multiple contracts

- 4.34** Parties may wish to include special provisions in their arbitration clause to cover a situation where there is a single contract to which there are more than two parties or where there are a number of contracts which are interlinked, possibly with different parties. Drafting a bespoke clause for multiple parties or multiple contracts requires a detailed understanding of the relationship between the different parties and contracts and of the type of disputes that may arise, and therefore careful drafting.
- 4.35** By agreeing to arbitrate under the HKIAC Rules, parties are deemed to have given consent to the possibility of joinder and consolidation in advance of any dispute in accordance with the provisions of Articles 27 to 29 (see Chapter 10 for further details). Accordingly, parties do not need to include particular provisions in their arbitration clause if they choose to apply the HKIAC Rules.

<http://www.pbookshop.com>

¹⁸ Schedule 4 of the HKIAC Rules, sch 1 of the SIAC Rules, art 29 of the ICC Rules, and art 9B of the LCIA Rules.

¹⁹ Article 41 of the HKIAC Rules, art 5 of the SIAC Rules, and art 9A of the LCIA Rules.

5

GENERAL PROVISIONS OF THE HKIAC RULES (ARTICLES 1–3)

A. Article 1—Scope of Application	5.02	C. Article 3—Interpretation of Rules	5.22
B. Article 2—Notices and Calculation of Periods of Time	5.10		

This chapter examines those provisions that generally frame an arbitration under the HKIAC Rules. Section A discusses Articles 1.1, 1.3, and 1.4 (scope of application of the HKIAC Rules and arbitrations which may be administered under the HKIAC Rules) as well as Article 1.2 (how the HKIAC Rules interact with the other rules promulgated by HKIAC). Section B discusses Articles 2.1 and 2.2 (how notices and other written communication should be delivered and when they will be deemed to have been received) and Articles 2.3 and 2.4 (calculation of time limits under the HKIAC Rules). Section C discusses Article 3 (definitions of key terms used throughout the HKIAC Rules). 5.01

A. Article 1—Scope of Application

1. Article 1.1: Arbitration agreements to which the Rules apply

These Rules shall govern arbitrations where an arbitration agreement (whether entered into before or after a dispute has arisen) either: (a) provides for these Rules to apply; or (b) subject to Articles 1.2 and 1.3 below, provides for arbitration ‘administered by HKIAC’ or words to similar effect.

(a) Purpose

Parties to an arbitration may select an arbitral institution to oversee the resolution of their dispute. If an arbitral institution is selected, that institution’s procedural rules will apply. Article 1.1 describes how parties may agree to apply the HKIAC Rules for their arbitration. The Rules may be adopted in both domestic and international arbitrations. 5.02

(b) Arbitration agreement

Parties must indicate their intention for the HKIAC Rules to apply in an arbitration agreement (or another agreement in which there is an arbitration clause) at any time before or after a dispute has arisen. An arbitration agreement is a necessary prerequisite for arbitration and forms the basis of the arbitral tribunal’s jurisdiction. 5.03

- 5.04** Article 1.1 provides that for the Rules to apply, the agreement must either: (1) indicate the HKIAC Rules are to apply; or (2) provide for arbitration 'administered by HKIAC' or words to similar effect. By way of example, the HKIAC model clauses refer to 'arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules'. The HKIAC Rules may also apply where an arbitration agreement provides for 'words to similar effect' of 'administered by HKIAC'. Whether the words used in an arbitration agreement constitute 'words to similar effect' for the purposes of Article 1.1(b) is to be assessed on a case-by-case basis.
- 5.05** If an agreement simply provides for 'arbitration administered by HKIAC' without specifying which version of the HKIAC Rules, reference must be made to Articles 1.2 and 1.3 (see paragraphs 5.06–5.09 below) to determine which version of the rules will apply. To avoid uncertainty, parties should endeavour to indicate which version of the Rules administered by HKIAC is to apply in their arbitration agreement.

2. Article 1.2: Relationship with other arbitration rules

Nothing in these Rules shall prevent parties to a dispute or arbitration agreement from naming HKIAC as appointing authority, or from requesting certain administrative services from HKIAC, without subjecting the arbitration to the provisions contained in these Rules. For the avoidance of doubt, these Rules shall not govern arbitrations where an arbitration agreement provides for arbitration under other rules, including other rules adopted by HKIAC from time to time.

- 5.06** HKIAC handles arbitrations under the HKIAC Rules as well as other rules such as the UNCITRAL Arbitration Rules,¹ the HKIAC Domestic Arbitration Rules 2014, the HKIAC Securities Arbitration Rules, and the HKIAC Electronic Transaction Arbitration Rules. Article 1.2 describes the relationship between the HKIAC Rules and these other rules. Article 1.2 provides that parties are free to designate HKIAC as the appointing authority, or request certain administrative assistance from HKIAC, without subjecting themselves to the provisions of the HKIAC Rules. For instance, parties to an ad hoc arbitration under the UNCITRAL Arbitration Rules may designate HKIAC as the appointing authority for the appointment of arbitrators, or request HKIAC to provide fund-holding services by acting as stakeholder. Article 1.2 also clarifies that the HKIAC Rules would not govern an arbitration agreement providing for an arbitration under other rules, including other rules promulgated by HKIAC. As a matter of general policy, HKIAC does not administer arbitrations under rules issued by other arbitral institutions, unless parties subsequently agree to apply the HKIAC Rules or the UNCITRAL Arbitration Rules.

3. Articles 1.3 and 1.4: Commencement and exclusion of certain provisions

- 1.3 Subject to Article 1.4, these Rules shall come into force on 1 November 2013 and, unless the parties have agreed otherwise, shall apply to all arbitrations falling within Article 1.1 in which the Notice of Arbitration is submitted on or after that date.
- 1.4 The provisions contained in Articles 23.1, 28 and 29 and Schedule 4 shall not apply if the arbitration agreement was concluded before the date on which these Rules came into force, unless otherwise agreed by the parties.

¹ Arbitration Rules 2010 (United Nations Commission on International Trade Law [UNCITRAL]) UN Doc A/RES/65/22.

Article 2.1(b) details the address requirements for communications transmitted by facsimile, email, or other means of telecommunication which provide a record of transmission. The hierarchy of addresses is equivalent to that in Article 2.1(a), subject to one exception—a communication will not be deemed to have been received if it is sent to any ‘last known’ facsimile number or email address (or equivalent) of the addressee. **5.17**

2. Article 2.2: Date of receipt

Any such notice or written communication shall be deemed to be received on the earliest day when it is delivered pursuant to paragraph (a) above or transmitted pursuant to paragraph (b) above. For this purpose, the date shall be determined according to the local time at the place of receipt. Where such notice or written communication is being delivered or transmitted to more than one party, or more than one arbitrator, such notice or written communication shall be deemed to be received when it is delivered or transmitted pursuant to paragraph (a) or (b) above to the last intended recipient.

(a) Purpose

Article 2.2 fixes the date on which a notice or other written communication is deemed to have been received. This date is of significance because it is the starting point for calculating time periods. For instance, Article 10.1(b) specifies that parties shall agree upon and inform HKIAC of a method for determining the arbitral tribunal’s fees and expenses ‘within 30 days of the date on which the Respondent receives the Notice of Arbitration’. **5.18**

(b) Determining the date of receipt

Generally speaking, receipt will be deemed to occur on the same day as delivery. A notice delivered or transmitted in accordance with the methods described in Articles 2.1(a) and 2.1(b) will be deemed to have been received on the earliest delivery date. This date will be determined according to the local time at the place of receipt. Article 2.2 also provides that where a notice or communication is to be delivered or transmitted to multiple parties or arbitrators, the date on which delivery (in accordance with Articles 2.1(a) and 2.1(b)) is made to the last intended recipient, will be deemed as the date of receipt. **5.19**

3. Articles 2.3 and 2.4: Calculation of periods of time

2.3 For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received or deemed to be received. If the last day of such period is an official holiday or a non-business day at the place of receipt, the period shall be extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time shall be included in calculating the period.

2.4 If the circumstances of the case so justify, HKIAC may amend the time limits provided for in these Rules, as well as any time limits that it has set. HKIAC shall not amend any time limits set by the arbitral tribunal unless it directs otherwise.

(a) Time limits under the Rules

Article 2.3 of the HKIAC Rules closely follows Article 2(6) of the UNCITRAL Arbitration Rules. The provision applies to specified time periods found within the HKIAC Rules (for example, Article 5.1) as well as time periods set by the arbitral tribunal pursuant to the HKIAC Rules (eg Article 20)—both are considered to be ‘under these Rules’. However, while HKIAC is permitted by Article 2.4 to modify time limits found within the HKIAC **5.20**

Rules, it is not able to amend time limits set by an arbitral tribunal unless directed to do so. Further, Article 2.4 does not empower HKIAC to amend any time limits agreed by the parties in their contract.

(b) Calculation of time

- 5.21** Time begins to run on the day after the day on which a notice, notification, communication, or proposal is received (whether actual or deemed receipt). Article 2.3 provides that if the last day of the period is an official holiday or a non-business day at the place of receipt, then the period is extended until the first business day which follows. Article 2.3 also provides that official holidays and non-business days occurring during the 'running' of the time period are included in the calculation. Under Article 2.3 time will begin to run from the day after receipt even if that day is an official holiday or a non-business day in the country of receipt.

C. Article 3—Interpretation of Rules

1. Article 3.1: Power to interpret the HKIAC Rules

HKIAC shall have the power to interpret all provisions of these Rules. The arbitral tribunal shall interpret the Rules insofar as they relate to its powers and duties hereunder. In the event of any inconsistency between such interpretation and any interpretation by HKIAC, the arbitral tribunal's interpretation shall prevail.

- 5.22** The arbitral tribunal is empowered to interpret provisions relating to its powers and duties (such provisions would include Articles 19.2, 22.3, 27.1, and 27.2). HKIAC is empowered to interpret all provisions in the Rules. However, the arbitral tribunal's interpretation will prevail to the extent that it conflicts with HKIAC's interpretation.

2. Article 3.2: Reasons and finality of the decision

HKIAC has no obligation to give reasons for any decision it makes in respect of any arbitration commenced under these Rules. All decisions made by HKIAC under these rules are final and, to the extent permitted by any applicable law, not subject to appeal.

(a) Reasons

- 5.23** Article 3.2 provides that HKIAC has no obligation to give reasons for its decisions. This provision has broad application—it covers 'any decisions [HKIAC] makes in respect of any arbitration commenced under these Rules'. While HKIAC is not required to give reasons for its decisions, in practice it gives reasons to certain types of decisions, such as decisions on challenges to arbitrators.

(b) Finality

- 5.24** One of the key attractions of arbitration is the finality of arbitral decisions. The principle of finality saves parties from spending further time and money resolving their dispute. Article 3.2 provides that all decisions made by HKIAC pursuant to the Rules are final. These decisions are generally not subject to appeal, except to the extent permitted by any applicable law. For example, for an arbitration seated in Hong Kong, a decision by HKIAC regarding a party's challenge of an arbitrator may be subject to review by the CFI under the Arbitration Ordinance. Article 13(3) of the Model Law given effect by Section 26 of the Arbitration Ordinance provides that if a challenge under any procedure agreed upon by the parties is

not successful,⁵ the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the CFI to decide on the challenge. The decision of the CFI is not subject to appeal.⁶

3. Article 3.3: References to HKIAC

References in the Rules to 'HKIAC' are to the Council of HKIAC or any committee, sub-committee or other body or person specifically designated by it to perform the functions referred to herein, or where applicable, to the Secretary General of HKIAC for the time being and other staff members of the Secretariat of HKIAC.

The HKIAC Rules designate certain roles and responsibilities to HKIAC. Article 3.3 provides that a reference to the 'HKIAC' includes the various individuals, committees, and bodies established as part of HKIAC. For the organizational structure of HKIAC, see section B of Chapter 3. 5.25

4. Articles 3.4–3.10: Definitions

3.4 References in the Rules to 'Claimant' include one or more claimants and references to 'Respondent' include one or more respondents.

3.5 Reference to 'additional party' include one or more additional parties and references to 'party' or 'parties' include claimants, respondents or additional parties.

3.6 References in the Rules to the 'arbitral tribunal' include one or more arbitrators. Such references do not include an Emergency Arbitrator as defined at paragraph 1 of Schedule 4.

3.7 Reference in the Rules to 'witness' include one or more witnesses and references to 'expert' include one or more experts.

3.8 References in the Rules to 'claim' or 'counterclaim' include any claim or claims by any party against any other party. References to 'defence' include any defence or defences by any party to any claim or counterclaim submitted by any other party, including any defence for the purpose of a set-off.

3.9 References in the Rules to 'award' include, inter alia, an interim, interlocutory, partial or final award, save for any award made by an Emergency Arbitrator as referred to in Schedule 4.

3.10 References in the Rules to the 'seat' of arbitration shall mean the place of arbitration as referred to in Article 20.1 of the UNCITRAL Model Law on International Commercial Arbitration as adopted on 21 June 1985 and as amended on 7 July 2006.

Articles 3.4–3.10 establish the meaning within the Rules of several important and frequently used terms. With the exception of Article 3.10, the HKIAC Rules adopt inclusive definitions which specify items which could fall within the meaning of a term, rather than exhaustively defining particular terms. 5.26

(a) 'Claimant', 'Respondent', 'additional party', 'party', 'claim', and 'arbitral tribunal'

Arbitrations can often involve multiple parties or multiple claims. Articles 3.4–3.8 extend the definitions of the singular term to encompass the plural form, in order to capture those types of proceedings. It should be noted that, under the HKIAC Rules, an arbitral tribunal does not include an emergency arbitrator. The reason for excluding emergency arbitrator 5.27

⁵ Agreement may be effected through the adoption of arbitration rules, for instance, HKIAC Rules, art 11.

⁶ Section 26, Arbitration Ordinance.

from the definition of arbitral tribunal is that certain provisions regarding arbitral tribunals under the Rules do not necessarily apply to emergency arbitrators, for example, the power of the arbitral tribunal to issue a final and binding award.

(b) 'Award'

- 5.28** Article 3.9 provides that an award—whether interim, interlocutory, partial, or final—is included in the definition of an ‘award’, unless it is made by an emergency arbitrator pursuant to Schedule 4.

(c) 'Seat' of arbitration

- 5.29** The meaning of the ‘seat’ of arbitration is equivalent to the ‘place of arbitration’ as stated in Article 20.1 of the Model Law, which provides as follows:

The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

5. Article 3.11: Schedules

These Rules include all Schedules attached thereto as amended from time to time by HKIAC, in force on the date the Notice of Arbitration is submitted.

- 5.30** Article 3.11 provides that the Schedules to the Rules form part of the Rules. There are currently four schedules, which deal with HKIAC’s Registration and Administrative Fees (Schedule 1), the arbitral tribunal’s fees, expenses, terms, and conditions (Schedules 2 and 3) and the emergency arbitrator procedures (Schedule 4).

6. Article 3.12: Practice notes

HKIAC may from time to time issue practice notes to supplement, regulate and implement these Rules for the purpose of facilitating the administration of arbitrations governed by these Rules.

- 5.31** Article 3.12 empowers HKIAC to issue practice notes that supplement the HKIAC Rules. There are currently four practice notes dealing with (1) the arbitral tribunal’s fees, expenses, terms, and conditions; (2) challenge of an arbitrator; and (3) consolidation of arbitrations.

7. Article 3.13: Prevailing language

English is the original language of these Rules. In the event of any discrepancy or inconsistency between the English version and the version in any other language, the English version shall prevail.

- 5.32** HKIAC offers translations of the Rules in a number of languages including Chinese, Korean, Portuguese, Spanish, Japanese, and Russian. Article 3.13 provides that English is the original drafting language of the Rules and in the event of any inconsistency between versions, the English version of the Rules must prevail.

6

COMMENCEMENT OF THE ARBITRATION (ARTICLES 4 AND 5, SCHEDULE 1)

A. Article 4—Submitting a Dispute to Arbitration	6.03	C. Schedule 1—Registration and Administrative Fees	6.104
B. Article 5—Answer to the Notice of Arbitration	6.68		

The commencement of an arbitration represents the starting point for the arbitral process. This is a critical step as (a) the commencement is relevant to timing issues including limitation periods;¹ and (b) a party commencing an arbitration precludes the possibility of referring the same dispute to a court.² **6.01**

This chapter discusses the initial procedural steps in an arbitration under the HKIAC Rules. Section A describes the form and content requirements for submitting the Notice of Arbitration ('Notice'). Section B addresses the requirements for filing an Answer to the Notice of Arbitration ('Answer') and the applicable time limit. Section C deals with payment of the Registration Fees and Administrative Fees charged by HKIAC for rendering its case administration services. **6.02**

A. Article 4—Submitting a Dispute to Arbitration

1. Article 4.1

The party initiating recourse to arbitration (hereinafter called the 'Claimant') shall submit a Notice of Arbitration in writing to HKIAC at its address, facsimile number or email address.

To initiate an arbitration under the HKIAC Rules, a party or its legal representative must submit a Notice to HKIAC. The Notice serves several important functions, including: (a) setting out the claims to be determined in the arbitration which in turn determines the scope of the arbitral tribunal's jurisdiction; (b) putting the respondent and HKIAC on notice that the arbitral proceedings have commenced; and (c) giving the respondent an initial opportunity to consider its defence and any counterclaim. **6.03**

¹ See John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (2nd edn, Sweet and Maxwell 2015) at 284.

² See UNCITRAL Model Law (2006), art 8; Arbitration Ordinance, ss 20; *Chok Yick Interior Design & Engineering Co Ltd v Fortune World Enterprises Ltd* [2010] HKCFI 86.

- (4) Whether the Notice is complete for the purposes of Article 4 of the HKIAC Rules (if the Notice is incomplete or defective, HKIAC will set a time limit for the claimant to supply additional information or remedy the defect pursuant to Article 4.7 of the Rules);
- (5) Payment of the Registration Fee;
- (6) The time limit for the respondent to submit an Answer together with any exhibits;
- (7) The time limit for the respondent to agree on the method for determining the tribunal's fees;
- (8) The requirement for the claimant to provide documentary verification of service of the Notice on the respondent; and
- (9) The identity and contact details of the Case Manager.

2. Article 4.2

An arbitration shall be deemed to commence on the date on which a copy of the Notice of Arbitration is received by HKIAC. For the avoidance of doubt, this date shall be determined in accordance with the provisions of Articles 2.1 and 2.2.

The date of commencement of an HKIAC arbitration is the date on which a copy of the Notice is first received by HKIAC. Pursuant to Article 2.2, if the claimant submits the Notice to HKIAC through multiple forms of communication, the date of commencement is deemed to be the earliest date on which HKIAC receives the Notice. **6.11**

Fixing the commencement date at the point when HKIAC receives the Notice makes it easier to determine when the arbitration begins. It also ensures timely commencement of the arbitration and prevents delay caused by the respondent to avoid service.⁷ **6.12**

The date of commencement is relevant in considering whether a claim has been brought within the applicable limitation period. In Hong Kong, section 14(1) of the Arbitration Ordinance provides that 'the Limitation Ordinance (Cap 347) and any other Ordinance relating to the limitation of actions ("limitation enactments") apply to arbitrations as they apply to actions in the court'. Section 14(2) provides that 'a reference in a limitation enactment to bringing an action is to be construed as, in relation to an arbitration, commencing the arbitral proceedings'. Accordingly, the limitation periods under Hong Kong law may be relevant in determining whether a claim is time barred in arbitrations seated in Hong Kong.⁸ **6.13**

The failure to consider a limitation issue may have significant implications on the enforceability of the resultant arbitral award. In *A v B* [2015] HKCFI 1077, the CFI considered whether an arbitral award should be set aside because the arbitrator had failed to deal with a limitation defence raised by the respondent. Mimmie Chan J held that the failure was sufficiently serious so as to justify the setting side of the award:⁹ **6.14**

The Limitation Defence is a material point and issue which could have rendered the Award materially different, and the failure to consider it, or to explain the dismissal of the Limitation

⁷ In ad hoc arbitration governed by the Arbitration Ordinance or the UNCITRAL Rules, the arbitral proceedings commence on the date on which a request for arbitration is received by the respondent. See Arbitration Ordinance, s 49; UNCITRAL Rules (2013), art 3(2).

⁸ For example, under Limitation Ordinance (Cap 347), s 4(1), the limitation period for actions for breach of contract, tortious acts and certain other actions is six years (or twelve years for contracts under seal) from the date on which the cause of action arose. See also Moser, *Asia Arbitration Handbook*, at 4.160–4.161 and Gary Born *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) at 2668–69 for discussions on whether limitation periods are a matter of procedural or substantive law.

⁹ *A v B* [2015] HKCFI 1077, at 34.

Defence, results in unfairness to A, as well as a real risk of injustice and prejudice to its case. Based on what was set out in the Reasons for the Award and the materials before the Tribunal, it cannot be said that it is plain and obvious, or beyond any doubt, that the Award would have been the same, if the Limitation Defence had been considered.

Notwithstanding the above, Chan J considered that the limitation defence was a separate and independent consideration in the sense that a finding on this issue could lead to a different outcome irrespective of the arbitrator's decision on the merits. Therefore, the judge ordered remission of the award to the arbitrator for him to take appropriate actions to remedy the defect of the award.¹⁰

3. Article 4.3

The Notice of Arbitration shall include the following:

- (a) a demand that the dispute be referred to arbitration;
- (b) the names and (in so far as known) the addresses, telephone and facsimile numbers, and email addresses of the parties and of their counsel;
- (c) a copy of the arbitration agreement(s) invoked;
- (d) a reference to the contract(s) or other legal instrument(s) out of or in relation to which the dispute arises;
- (e) a description of the general nature of the claim and an indication of the amount involved, if any;
- (f) the relief or remedy sought;
- (g) a proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon;
- (h) the Claimant's proposal regarding the designation of a sole arbitrator under Article 7, or the Claimant's designation of an arbitrator under Article 8; and
- (i) confirmation that copies of the Notice of Arbitration and any exhibits included therewith have been or are being served simultaneously on all other parties (hereinafter called the 'Respondent') by one or more means of service to be identified in such confirmation.

6.15 Article 4.3 details the information required in the Notice. This content ensures that the Notice contains sufficient detail to enable HKIAC and the respondent(s) to proceed to the next step of the arbitration.

6.16 Normally HKIAC will require the Notice to include all the information listed in Article 4.3 in order to consider a Notice to be complete. However, in some circumstances, HKIAC may proceed despite the absence of certain information and will communicate this to the claimant. An incomplete Notice will face the consequences set out in Article 4.7.

6.17 Each matter listed in Article 4.3 is discussed in turn below.

(a) A demand that the dispute be referred to arbitration

6.18 A demand for arbitration serves to indicate the claimant's intention to arbitrate and arbitral proceedings cannot commence without a party's request. Such a demand is also required by some national laws as an indispensable component of an arbitration agreement.¹¹

6.19 A clear demand for arbitration is particularly important where the claimant relies on a multi-tiered clause providing for various forms of dispute resolution. In these circumstances, the claimant is required to clearly indicate that it intends to refer the dispute to arbitration.

¹⁰ *ibid.*, at 36–41.

¹¹ See, eg, Arbitration Law of the People's Republic of China, art 16.

There is no requirement as to the form in which a demand for arbitration must be stated. The best practice is to state the 'demand' in express and clear terms. HKIAC will accept the demand in various formulations, so long as the claimant's intention to arbitrate can be identified. In the past, HKIAC treated words such as 'application for arbitration' and 'request for arbitration' as a demand for arbitration for the purposes of Article 4.3(a). **6.20**

Without such a demand, the Notice will be considered incomplete and HKIAC will not proceed with the arbitration unless a demand is provided pursuant to Article 4.7. **6.21**

(b) Contact details of the parties and their counsel

The Notice must provide the names and, in so far as available, the contact details of all the parties and their legal representatives (if any). The contact details should include postal addresses, email addresses, fax numbers, and telephone numbers. Providing both email and postal addresses at minimum will ensure timely and effective communication. **6.22**

HKIAC will apply standards set out in Article 2.1 to verify any contact details of the respondent provided in the Notice. In practice, HKIAC will cross-check the contact information provided in the Notice with that which is contained in an applicable contract between the parties to confirm the veracity of the information. Where they are different, HKIAC will ask the claimant to provide further proof that the information provided in the Notice shall apply. Claimants have provided proof by providing a screenshot of the respondent's official website showing its contact details, a copy of the contact information provided by the respondent in its filings with a regulatory authority or correspondence history evidencing the email or postal address used by the respondent. HKIAC will accept these materials if they can demonstrate that the contact details can be used for effective delivery of documents in compliance with Article 2.1 of the Rules. **6.23**

The contact information of the parties' legal counsel is also required. While powers of attorney are not required, it is helpful to have this information on hand and submitted by the parties' voluntarily. **6.24**

(c) The arbitration agreement(s) invoked

A copy of the arbitration agreement under which the arbitration is commenced must be attached to the Notice. If the arbitration clause is contained in a contract, an extract of the clause must be provided, although in practice claimants often provide a copy of the entire contract. Where a party seeks to commence a single arbitration under more than one contract, the party must provide a copy of the arbitration clauses in all the relevant contracts. **6.25**

A mere reference to the arbitration agreement(s) does not satisfy this requirement. However, the requirement that an arbitration agreement must be in writing is satisfied by that which is stipulated in the law of the seat of arbitration. In Hong Kong, section 19(1) of the Arbitration Ordinance adopts the definition of 'in writing' contained in Option I of Article 7(3) of the UNCITRAL Model Law (2006),¹² which provides that '[a]n arbitration 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'. Article 7(4) to (6) of the **6.26**

¹² Model Law on International Commercial Arbitration 2006 (United Nations Commission on International Trade Law [UNCITRAL]) UN Doc A/61/17, Annex I.

APPENDIX 1

Summary of Advantages of Arbitrating in Hong Kong

- **Choose a Top Seat for Your Disputes**
 - Hong Kong is ranked the third most preferred and used seat worldwide and the most favoured seat outside of Europe by Queen Mary and White & Case's 2015 International Arbitration Survey.
- **Enjoy the Benefits of an Independent and Neutral Forum**
 - Hong Kong enjoys a unique position—simultaneously part of China and also a special administrative region under the “one country, two systems” doctrine, with complete autonomy in all areas aside from matters of “defence and foreign affairs.”
 - Hong Kong upholds the rule of law through its common law legal system overseen by an independent judiciary comprising local and international judges who are independent, professional, and efficient.
 - Hong Kong is ranked fourth worldwide and first in Asia in the index of judicial independence published in the World Economic Forum's 'Global Competitiveness Report 2015-2016'.
 - Parties are free to choose lawyers and arbitrators from anywhere in the world without restriction.
- **Rely on the World Class Legislative Framework & Arbitration Friendly Judiciary**
 - The first Asian arbitration statute to be based on the 2006 UNCITRAL Model Law, the Arbitration Ordinance, introduced on 1 June 2011, cements Hong Kong's status as a user-friendly Model Law jurisdiction.
 - In 2013, key amendments to the Arbitration Ordinance included new provisions expressly permitting courts to enforce urgent relief ordered by emergency arbitrators in or outside Hong Kong.
 - The Arbitration Ordinance provides explicit assurance of confidentiality of arbitral proceedings, awards, related court proceedings and judgements.
 - Hong Kong's courts are pro-arbitration and take a “hands off” approach with respect to arbitration. Arbitration-related cases are heard at first instance by specialist judges.
 - The Hong Kong courts maintain an excellent track record of enforcement of arbitral awards. The courts did not refuse to enforce an award between 2011 and 2014.
 - The Hong Kong judiciary has established an indemnity costs rule to deter parties from resisting arbitral proceedings or awards on unmeritorious grounds. This means where a party unsuccessfully resists enforcement of or challenges an award, or seeks to unsuccessfully reopen through court proceedings an issue dealt with in an arbitration, it will pay costs on an indemnity basis unless special circumstances exist.
- **Benefit from the Services of a World-Class Arbitral Institution** (see Appendix 2)
- **Maximise the Cost Effectiveness & Efficiency of Your Arbitration**
 - Hong Kong, through HKIAC, offers highly cost-effective arbitration services compared to other major arbitration institutions in Asia and around the world.
 - Hong Kong has an extraordinarily large pool of multilingual professionals including:
 - o over 1,100 barristers, 94 of whom are senior counsel;
 - o over 6,700 local practicing lawyers and over 1,500 registered foreign lawyers;
 - o approximately 29,000 engineers; 37,000 accountants; more than 8,500 members of the Hong Kong Institute of Surveyors and over 4,000 architects according to the Hong Kong Institute of Architects.
 - Awards made in Hong Kong are enforceable in more than 150 jurisdictions through the New York Convention and several bilateral arrangements on mutual enforcement of arbitral awards.

- **Exploit the Convenience of Asia's World City**
 - Conveniently located for more than 50% of the world's population who live no more than a five hour flight from Hong Kong, it is also conveniently connected to most major cities in the world by direct flights.
 - Benefit from Hong Kong's East meets West culture and local professionals' fluency in Mandarin, Cantonese and English.
 - Hong Kong's liberal visa policy means nationals of more than 170 countries can visit Hong Kong visa-free.

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APPENDIX 2

Summary of Advantages of Arbitrating at HKIAC

- **Choose a Top Arbitral Institution for Your Disputes**
 - HKIAC is ranked the third most preferred and used arbitral institution worldwide and the most favoured institution outside of Europe by Queen Mary and White & Case's 2015 International Arbitration Survey.
- **Reputed Independent Provider of Innovative Dispute Resolution Services**
 - Founded in 1985, HKIAC is an independent and not-for-profit organisation.
 - "Regional arbitration pretty much began with the HKIAC. No regional institution has been running for so long. Or with such success." GAR Guide to Regional Arbitration (volume 4), 3 November 2015.
 - HKIAC is a one-stop shop which administers arbitration, mediation, adjudication and domain name cases.
 - HKIAC plays a leading role in developing innovative arbitration practices. It won the 2015 GAR innovation award for its model arbitration clauses and tribunal secretary service.
- **Premier Location, Modern Facilities**
 - Ranked first for location, value for money, helpfulness of staff and IT services by GAR's Hearing Centres Survey, 3 November 2015.
 - HKIAC's facilities are convenient, modern and comfortable. They are located in the heart of Hong Kong's central business district and are priced very competitively.
 - As well as hearing rooms, HKIAC offers individual break-out rooms, global video-conferencing equipment, an in-house library and wireless internet access throughout.
- **Experienced International Secretariat**
 - With offices in Hong Kong, Shanghai and Seoul, the Secretariat comprises individuals from diverse backgrounds, including nationals of Hong Kong, India, Korea, Mainland China, Singapore, the United Kingdom, the United States, France, and the Philippines.
 - Secretariat members are qualified in both civil and common law jurisdictions and can administer cases in 11 languages.
 - A Secretariat member can be appointed as tribunal secretary under HKIAC's detailed guidelines on the use of tribunal secretaries.
- **State-of-the-Art Rules**
 - HKIAC's 2013 Administered Arbitration Rules are the most modern and comprehensive set of rules on the market. The adoption of the Rules was nominated by GAR as one of the best developments of 2013.
 - Key features include:
 - o Structure for Payment of Arbitrator's Fees: HKIAC is the first institution to expressly provide parties with a choice between paying arbitrators based on hourly rates (capped at HK\$6,500/hour) or the amount in dispute (nominated in 2013 for a GAR award for innovation). HKIAC has also introduced standard terms and conditions for all arbitrators appointed under the Rules. These features help reduce cost and introduce greater transparency into the appointment process.
 - o Complete Mechanisms for Complex Arbitrations: comprehensive provisions on joinder, consolidation and the ability to commence a single arbitration under multiple contracts allow HKIAC to deal effectively and cost efficiently with arbitrations involving multiple parties or multiple contracts.
 - o Availability of Emergency Arbitration: the Rules provide for emergency arbitrator procedures allowing parties to apply for enforceable urgent interim relief before the tribunal is constituted.
- **Light Touch Administration, Full Service**
 - HKIAC considers itself to be a "light touch" institution. It has powers under the Rules to facilitate the efficient and effective running of an arbitration where necessary, if it's not necessary, HKIAC will not intercede.

(Brief description of contract under which disputes, controversies, differences or claims have arisen or may arise.)

* The law of this arbitration agreement shall be ... (*Hong Kong law*).

The seat of arbitration shall be ... (*Hong Kong*).

** The number of arbitrators shall be ... (*one or three*). The arbitration proceedings shall be conducted in ... (*insert language*).

Signed: _____ (Claimant)

Signed: _____ (Respondent)

Date: _____

* Optional. This provision should be included particularly where the law of the substantive contract and the law of the seat are different. The law of the arbitration agreement potentially governs matters including the formation, existence, scope, validity, legality, interpretation, termination, effects, and enforceability of the arbitration agreement and identities of the parties to the arbitration agreement. It does not replace the law governing the substantive contract.

** Optional

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SECTION I. GENERAL RULES

Article 1—Scope of Application

- 1.1 These Rules shall govern arbitrations where an arbitration agreement (whether entered into before or after a dispute has arisen) either: (a) provides for these Rules to apply; or (b) subject to Articles 1.2 and 1.3 below, provides for arbitration “administered by HKIAC” or words to similar effect.
- 1.2 Nothing in these Rules shall prevent parties to a dispute or arbitration agreement from naming HKIAC as appointing authority, or from requesting certain administrative services from HKIAC, without subjecting the arbitration to the provisions contained in these Rules. For the avoidance of doubt, these Rules shall not govern arbitrations where an arbitration agreement provides for arbitration under other rules, including other rules adopted by HKIAC from time to time.
- 1.3 Subject to Article 1.4, these Rules shall come into force on 1 November 2013 and, unless the parties have agreed otherwise, shall apply to all arbitrations falling within Article 1.1 in which the Notice of Arbitration is submitted on or after that date.
- 1.4 The provisions contained in Articles 23.1, 28, 29 and Schedule 4 shall not apply if the arbitration agreement was concluded before the date on which these Rules came into force, unless otherwise agreed by the parties.

Article 2—Notices and Calculation of Periods of Time

- 2.1 Any notice or other written communication pursuant to these Rules shall be deemed to be received by a party or arbitrator or by HKIAC if:
 - (a) delivered by hand, registered post or courier service to
 - (i) the address of the addressee or its representative as notified in writing in the arbitration; or
 - (ii) in the absence of (i), to the address specified in any applicable agreement between the relevant parties; or
 - (iii) in the absence of (i) or (ii), to any address which the addressee holds out to the world at the time of such delivery; or
 - (iv) in the absence of (i), (ii) or (iii), to any last known address of the addressee; or
 - (b) transmitted by facsimile, email or any other means of telecommunication that provides a record of its transmission, including the time and date, to:
 - (i) the facsimile number or email address (or equivalent) of that person or its representative as notified in the arbitration; or
 - (ii) in the absence of (i), to the facsimile number or email address (or equivalent) specified in any applicable agreement between the relevant parties; or
 - (iii) in the absence of (i) and (ii), to any facsimile number or email address (or equivalent) which the addressee holds out to the world at the time of such transmission.

- 2.2 Any such notice or written communication shall be deemed to be received on the earliest day when it is delivered pursuant to paragraph (a) above or transmitted pursuant to paragraph (b) above. For this purpose, the date shall be determined according to the local time at the place of receipt. Where such notice or written communication is being delivered or transmitted to more than one party, or more than one arbitrator, such notice or written communication shall be deemed to be received when it is delivered or transmitted pursuant to paragraph (a) or (b) above to the last intended recipient.
- 2.3 For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received or deemed to be received. If the last day of such period is an official holiday or a non-business day at the place of receipt, the period shall be extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time shall be included in calculating the period.
- 2.4 If the circumstances of the case so justify, HKIAC may amend the time limits provided for in these Rules, as well as any time limits that it has set. HKIAC shall not amend any time limits set by the arbitral tribunal unless it directs otherwise.

Article 3—Interpretation of Rules

- 3.1 HKIAC shall have the power to interpret all provisions of these Rules. The arbitral tribunal shall interpret the Rules insofar as they relate to its powers and duties hereunder. In the event of any inconsistency between such interpretation and any interpretation by HKIAC, the arbitral tribunal's interpretation shall prevail.
- 3.2 HKIAC has no obligation to give reasons for any decision it makes in respect of any arbitration commenced under these Rules. All decisions made by HKIAC under these Rules are final and, to the extent permitted by any applicable law, not subject to appeal.
- 3.3 References in the Rules to "HKIAC" are to the Council of HKIAC or any committee, sub-committee or other body or person specifically designated by it to perform the functions referred to herein, or, where applicable, to the Secretary General of HKIAC for the time being and other staff members of the Secretariat of HKIAC.
- 3.4 References in the Rules to "Claimant" include one or more claimants and references to "Respondent" include one or more respondents.
- 3.5 References to "additional party" include one or more additional parties and references to "party" or "parties" include claimants, respondents or additional parties.
- 3.6 References in the Rules to the "arbitral tribunal" include one or more arbitrators. Such references do not include an Emergency Arbitrator as defined at paragraph 1 of Schedule 4.
- 3.7 References in the Rules to "witness" include one or more witnesses and references to "expert" include one or more experts.
- 3.8 References in the Rules to "claim" or "counterclaim" include any claim or claims by any party against any other party. References to "defence" include any defence or defences by any party to any claim or counterclaim submitted by any other party, including any defence for the purpose of a set-off.
- 3.9 References in the Rules to "award" include, inter alia, an interim, interlocutory, partial or final award, save for any award made by an Emergency Arbitrator as referred to in Schedule 4.
- 3.10 References in the Rules to the "seat" of arbitration shall mean the place of arbitration as referred to in Article 20.1 of the UNCITRAL Model Law on International Commercial Arbitration as adopted on 21 June 1985 and as amended on 7 July 2006.
- 3.11 These Rules include all Schedules attached thereto as amended from time to time by HKIAC, in force on the date the Notice of Arbitration is submitted.
- 3.12 HKIAC may from time to time issue practice notes to supplement, regulate and implement these Rules for the purpose of facilitating the administration of arbitrations governed by these Rules.
- 3.13 English is the original language of these Rules. In the event of any discrepancy or inconsistency between the English version and the version in any other language, the English version shall prevail.

SECTION II. COMMENCEMENT OF THE ARBITRATION

Article 4—Notice of Arbitration

- 4.1 The party initiating recourse to arbitration (hereinafter called the "Claimant") shall submit a Notice of Arbitration in writing to HKIAC at its address, facsimile number or email address.

- 4.2 An arbitration shall be deemed to commence on the date on which a copy of the Notice of Arbitration is received by HKIAC. For the avoidance of doubt, this date shall be determined in accordance with the provisions of Articles 2.1 and 2.2.
- 4.3 The Notice of Arbitration shall include the following:
- (a) a demand that the dispute be referred to arbitration;
 - (b) the names and (in so far as known) the addresses, telephone and facsimile numbers, and email addresses of the parties and of their counsel;
 - (c) a copy of the arbitration agreement(s) invoked;
 - (d) a reference to the contract(s) or other legal instrument(s) out of or in relation to which the dispute arises;
 - (e) a description of the general nature of the claim and an indication of the amount involved, if any;
 - (f) the relief or remedy sought;
 - (g) a proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon;
 - (h) the Claimant's proposal regarding the designation of a sole arbitrator under Article 7, or the Claimant's designation of an arbitrator under Article 8; and
 - (i) confirmation that copies of the Notice of Arbitration and any exhibits included therewith have been or are being served simultaneously on all other parties (hereinafter called the "Respondent") by one or more means of service to be identified in such confirmation.
- 4.4 The Notice of Arbitration shall be accompanied by payment, by cheque or transfer to the account of HKIAC, of the Registration Fee as required by Schedule 1.
- 4.5 The Notice of Arbitration shall be submitted in the language of the arbitration as agreed by the parties. If no agreement has been reached between the parties, the Notice of Arbitration shall be submitted in either English or Chinese.
- 4.6 The Notice of Arbitration may also include the Statement of Claim referred to in Article 16.
- 4.7 If the Notice of Arbitration is incomplete or if the Registration Fee is not paid, HKIAC may request the Claimant to remedy the defect within an appropriate period of time. If the Claimant complies with such directions within the applicable time limit, the arbitration shall be deemed to have commenced under Article 4.2 on the date the initial version was received by HKIAC. If the Claimant fails to comply, the Notice of Arbitration shall be deemed not to have been validly submitted and the arbitration shall be deemed not to have commenced under Article 4.2 without prejudice to the Claimant's right to submit the same claim at a later date in a subsequent Notice of Arbitration.
- 4.8 The Claimant shall notify and lodge documentary verification with HKIAC of the date of receipt by the Respondent of the Notice of Arbitration and any exhibits included therewith.

Article 5—Answer to the Notice of Arbitration

- 5.1 Within 30 days from receipt of the Notice of Arbitration, the Respondent shall submit to HKIAC an Answer to the Notice of Arbitration. This Answer to the Notice of Arbitration shall include the following:
- (a) the name, address, telephone and facsimile numbers, and email address of the Respondent and of its counsel (if different from the description contained in the Notice of Arbitration);
 - (b) any plea that an arbitral tribunal constituted under these Rules lacks jurisdiction;
 - (c) the Respondent's comments on the particulars set forth in the Notice of Arbitration, pursuant to Article 4.3(e);
 - (d) the Respondent's answer to the relief or remedy sought in the Notice of Arbitration, pursuant to Article 4.3(f);
 - (e) the Respondent's proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon;
 - (f) the parties' joint designation of a sole arbitrator under Article 7 or the Respondent's designation of an arbitrator under Article 8; and
 - (g) confirmation that copies of the Answer to the Notice of Arbitration and any exhibits included therewith have been or are being served simultaneously on all other parties to the arbitration by one or more means of service to be identified in such confirmation.

- 8.2 Where there are more than two parties to the arbitration and the dispute is to be referred to three arbitrators, the arbitral tribunal shall be constituted as follows unless the parties have agreed otherwise:
- the Claimant or group of Claimants shall designate an arbitrator and the Respondent or group of Respondents shall designate an arbitrator in accordance with the procedure in Article 8.1(a) or (b), as applicable;
 - if the parties have designated arbitrators in accordance with Article 8.2(a), the procedure in Article 8.1(c) shall apply to the designation of the presiding arbitrator;
 - In the event of any failure to designate arbitrators under Article 8.2(a) or if the parties do not all agree in writing that they represent two separate sides (as Claimant(s) and Respondent(s) respectively) for the purposes of designating arbitrators, HKIAC may appoint all members of the arbitral tribunal without regard to any party's designation.
- 8.3 Appointment of the arbitral tribunal pursuant to Article 8.1 or 8.2 shall be subject to Articles 9, 10 and 11.1 to 11.4.

Article 9—Confirmation of the Arbitral Tribunal

- 9.1 All designations of any arbitrator, whether made by the parties or the arbitrators, are subject to confirmation by HKIAC, upon which the appointments shall become effective.
- 9.2 The designation of an arbitrator shall be confirmed on the terms of:
- Schedule 2; or
 - Schedule 3;
- as applicable, in accordance with Article 10 and subject to any variations agreed by all parties and any changes HKIAC considers appropriate.

Article 10—Fees and Expenses of the Arbitral Tribunal

- 10.1 The fees and expenses of the arbitral tribunal shall be determined according to either:
- an hourly rate in accordance with Schedule 2, including the terms and conditions contained therein; or
 - the schedule of fees based on the sum in dispute referred to in Schedule 3, including the terms and conditions contained therein.
- 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,
- the applicable rate for each co-arbitrator shall be the rate agreed between that co-arbitrator and the designating party;
 - 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:
- 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;
 - 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;
 - 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.
- 11.3 Notwithstanding the general rule in Article 11.2, in appropriate circumstances and provided that none of the parties objects within a time limit set by HKIAC, the sole arbitrator or the presiding arbitrator of the arbitral tribunal may be of the same nationality as any of the parties.
- 11.4 Before confirmation, a prospective arbitrator shall (a) sign a statement confirming his or her availability to decide the dispute and his or her impartiality and independence; and (b) disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, once confirmed and throughout the arbitration, shall disclose without delay any such circumstances to the parties unless they have already been informed by him or her of these circumstances.
- 11.5 No party or its representatives shall have any *ex parte* communication relating to the arbitration with any arbitrator, or with any candidate to be designated as arbitrator by a party, except to advise the candidate of the general nature of the dispute, to discuss the candidate's qualifications, availability, impartiality or independence, or to discuss the suitability of candidates for the designation of a third arbitrator, where the parties or party-designated arbitrators are to designate that arbitrator. No party or its representatives shall have any *ex parte* communication relating to the arbitration with any candidate for the presiding arbitrator.
- 11.6 Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed by the parties, or if the arbitrator becomes *de jure* or *de facto* unable to perform his or her functions or for other reasons fails to act without undue delay. A party may challenge the arbitrator designated by it or in whose appointment it has participated only for reasons of which it becomes aware after the designation has been made.
- 11.7 A party who intends to challenge an arbitrator shall send notice of its challenge within 15 days after the confirmation of that arbitrator has been notified to the challenging party or within 15 days after that party became aware or ought reasonably to have become aware of the circumstances mentioned in Article 11.6.
- 11.8 The challenge shall be notified to HKIAC, all other parties, the arbitrator who is challenged and the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.
- 11.9 Unless the arbitrator being challenged withdraws or the non-challenging party agrees to the challenge within 15 days from receipt of the notice of challenge, HKIAC shall decide on the challenge. Pending the determination of the challenge, the arbitral tribunal (including the challenged arbitrator) may continue the arbitration.
- 11.10 If an arbitrator withdraws or a party agrees to a challenge under Article 11.9, no acceptance of the validity of any ground referred to in Article 11.6 shall be implied.

Article 12—Replacement of an Arbitrator

- 12.1 Subject to Articles 12.2, 27.11 and 28.6, where an arbitrator dies, has been successfully challenged, has been otherwise removed or has resigned, a substitute arbitrator shall be appointed pursuant to the rules that were applicable to the appointment of the arbitrator being replaced. These rules shall apply even if during the process of appointing the arbitrator being replaced, a party had failed to exercise its right to designate or to participate in the appointment.
- 12.2 If, at the request of a party, HKIAC determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to designate a substitute arbitrator, HKIAC may, after giving an opportunity to the parties and the remaining arbitrators to express their views:
 - (a) appoint the substitute arbitrator; or
 - (b) after the proceedings are declared closed under Article 30.1, authorise the other arbitrators to proceed with the arbitration and make any decision or award.

- 12.3 If an arbitrator is replaced, the arbitration shall resume at the stage where the arbitrator was replaced or ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

SECTION IV. CONDUCT OF ARBITRATION

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 and the amount in dispute, and provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case.
- 13.2 At an early stage of the arbitration and in consultation with the parties, the arbitral tribunal shall prepare a provisional timetable for the arbitration, which shall be provided to the parties and HKIAC.
- 13.3 Subject to Article 11.5, all documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other parties and HKIAC.
- 13.4 The arbitral tribunal may, after consulting with the parties, appoint a secretary. The secretary shall remain at all times impartial and independent of the parties, and shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence prior to his or her appointment. A secretary, once appointed and throughout the arbitration, shall disclose without delay any such circumstances to the parties unless they have already been informed by him or her of these circumstances.
- 13.5 The arbitral tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration.
- 13.6 The parties may be represented by persons of their choice, subject to Article 13.5. The names, addresses, telephone and facsimile numbers, and email addresses of party representatives shall be communicated in writing to the other parties and HKIAC. The arbitral tribunal or HKIAC may require proof of authority of any party representatives.
- 13.7 In all matters not expressly provided for in these Rules, HKIAC, the arbitral tribunal and the parties shall act in the spirit of these Rules.
- 13.8 The arbitral tribunal shall make every reasonable effort to ensure that an award is valid.

Article 14—Seat and Venue of the Arbitration

- 14.1 The parties may agree on the seat of arbitration. Where there is no agreement as to the seat, the seat of arbitration shall be Hong Kong, unless the arbitral tribunal determines, having regard to the circumstances of the case, that another seat is more appropriate.
- 14.2 Unless the parties have agreed otherwise, the arbitral tribunal may meet at any location outside of the seat of arbitration which it considers appropriate for consultation among its members, hearing witnesses, experts or the parties, or the inspection of goods, other property or documents. The arbitration shall nonetheless be treated for all purposes as an arbitration conducted at the seat.

Article 15—Language

- 15.1 Subject to agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages of the arbitration. This determination shall apply to the Statement of Claim, the Statement of Defence, any further written statements, any award, and, if oral hearings take place, to the language or languages to be used in such hearings.
- 15.2 The arbitral tribunal may order that any documents annexed to the Statement of Claim or Statement of Defence, and any supplementary documents or exhibits submitted in the course of the arbitration, delivered in their original language, shall be accompanied by a translation into the language or languages of the arbitration agreed upon by the parties or determined by the arbitral tribunal.

Article 16—Statement of Claim

- 16.1 Unless the Statement of Claim was contained in the Notice of Arbitration (or the Claimant elects to treat the Notice of Arbitration as the Statement of Claim), the Claimant shall communicate its Statement of Claim in writing to all other parties and to each member of the arbitral tribunal within a period of time to be determined by the arbitral tribunal.

- 16.2 The Statement of Claim shall include the following particulars:
- (a) the names, addresses, telephone and facsimile numbers and email addresses of the parties;
 - (b) a statement of the facts supporting the claim;
 - (c) the points at issue;
 - (d) the legal arguments supporting the claim; and
 - (e) the relief or remedy sought.
- 16.3 The Claimant shall annex to its Statement of Claim all documents on which it relies.
- 16.4 The arbitral tribunal may vary any of the requirements referred to in Article 16 as it considers fit.

Article 17—Statement of Defence

- 17.1 Unless the Statement of Defence was contained in the Answer to the Notice of Arbitration (or the Respondent elects to treat the Answer to the Notice of Arbitration as the Statement of Defence), the Respondent shall communicate its Statement of Defence in writing to all other parties and to each member of the arbitral tribunal within a period of time to be determined by the arbitral tribunal.
- 17.2 The Statement of Defence shall reply to the particulars of the Statement of Claim (set out in Article 16.2(b), (c) and (d)). If the Respondent has raised an objection to the jurisdiction or to the proper constitution of the arbitral tribunal, the Statement of Defence shall contain the factual and legal basis of such objection.
- 17.3 Where there is a counterclaim or a set-off defence, the Statement of Defence shall also include the following particulars:
- (a) a statement of the facts supporting the counterclaim or set-off defence;
 - (b) the points at issue;
 - (c) the legal arguments supporting the counterclaim or set-off defence; and
 - (d) the relief or remedy sought.
- 17.4 The Respondent shall annex to its Statement of Defence all documents on which it relies.
- 17.5 The arbitral tribunal may vary any of the requirements referred to in Article 17 as it considers fit.

Article 18—Amendments to the Claim or Defence

- 18.1 During the course of the arbitration a party may amend or supplement its claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the circumstances of the case. However, a claim or defence may not be amended in such a manner that the amended claim or defence falls outside the jurisdiction of the arbitral tribunal.
- 18.2 HKIAC may adjust its Administrative Fees and the arbitral tribunal's fees (where appropriate) if a party amends its claim or defence.

Article 19—Jurisdiction of the Arbitral Tribunal

- 19.1 The arbitral tribunal may rule on its own jurisdiction under these Rules, including any objections with respect to the existence, validity or scope of the arbitration agreement(s).
- 19.2 The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of Article 19, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not necessarily entail the invalidity of the arbitration clause.
- 19.3 A plea that the arbitral tribunal does not have jurisdiction shall be raised if possible in the Answer to the Notice of Arbitration, and shall be raised no later than in the Statement of Defence referred to in Article 17, or, with respect to a counterclaim, in the Reply to the Counterclaim. A party is not precluded from raising such a plea by the fact that it has designated, or participated in the designation of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitration. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
- 19.4 If a question arises as to the existence, validity or scope of the arbitration agreement(s) or to the competence of HKIAC to administer an arbitration before the constitution of the arbitral tribunal, HKIAC may decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that HKIAC is satisfied, *prima facie*, that an arbitration agreement

under the Rules may exist. Any question as to the jurisdiction of the arbitral tribunal shall be decided by the arbitral tribunal once confirmed pursuant to Article 19.1.

- 19.5 HKIAC's decision pursuant to Article 19.4 is without prejudice to the admissibility or merits of any party's pleas.

Article 20—Further Written Statements

The arbitral tribunal shall decide which further written statements, if any, in addition to the Statement of Claim and the Statement of Defence, shall be required from the parties or may be presented by them and shall set the periods of time for communicating such statements.

Article 21—Periods of Time

The periods of time set by the arbitral tribunal for the communication of written statements (including the Statement of Claim and Statement of Defence) should not exceed 45 days. However, the arbitral tribunal may, even in circumstances where the relevant period has already expired, extend time limits if it concludes that an extension is justified.

Article 22—Evidence and Hearings

- 22.1 Each party shall have the burden of proving the facts relied on to support its claim or defence.
- 22.2 The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence.
- 22.3 At any time during the arbitration the arbitral tribunal may allow or require a party to produce documents, exhibits or other evidence that the arbitral tribunal determines to be relevant to the case and material to its outcome. The arbitral tribunal shall have the power to admit or exclude any documents, exhibits or other evidence.
- 22.4 The arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral arguments, or whether the arbitration shall be conducted on the basis of documents and other materials. The arbitral tribunal shall hold such hearings at an appropriate stage of the arbitration, if so requested by a party or if it considers fit. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the relevant date, time and place.
- 22.5 Any person may be a witness or an expert. If a witness or expert is to be heard, each party shall communicate to the arbitral tribunal and to the other party the name and address of the witness or expert it intends to present, and the subject upon and the language in which such witness or expert will give his or her testimony, within such time as shall be agreed or as shall be specified by the arbitral tribunal.
- 22.6 The arbitral tribunal may make directions for the translation of oral statements made at a hearing and for a record of the hearing if it deems that either is necessary in the circumstances of the case.
- 22.7 Hearings shall be held in private unless the parties agree otherwise. The arbitral tribunal may require any witness or expert to leave the hearing room at any time during the hearing. The arbitral tribunal is free to determine the manner in which a witness or expert is examined.

Article 23—Interim Measures of Protection and Emergency Relief

- 23.1 A party may apply for urgent interim or conservatory relief (the "Emergency Relief") prior to the constitution of the arbitral tribunal pursuant to the procedures set out in Schedule 4 (the "Emergency Arbitrator Procedures").
- 23.2 At the request of either party, the arbitral tribunal may order any interim measures it deems necessary or appropriate.
- 23.3 An interim measure, whether in the form of an order or award or in another form, is any temporary measure ordered by the arbitral tribunal at any time prior to the issuance of the award by which the dispute is finally decided, that a party, for example and without limitation:
- (a) maintain or restore the status quo pending determination of the dispute;
 - (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
 - (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
 - (d) preserve evidence that may be relevant and material to the resolution of the dispute.

- 26.3 If one of the parties, duly notified under these Rules, fails to present its case in accordance with these Rules including as directed by the arbitral tribunal, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration and make an award on the basis of the evidence before it.

Article 27—Joinder of Additional Parties

- 27.1 The arbitral tribunal shall have the power to allow an additional party to be joined to the arbitration provided that, prima facie, the additional party is bound by an arbitration agreement under these Rules giving rise to the arbitration, including any arbitration under Article 28 or 29.
- 27.2 The arbitral tribunal's decision pursuant to Article 27.1 is without prejudice to its power to subsequently decide any question as to its jurisdiction arising from such decision.
- 27.3 A party wishing to join an additional party to the arbitration shall submit a Request for Joinder to HKIAC. HKIAC may fix a time limit for the submission of a Request for Joinder.
- 27.4 The Request for Joinder shall include the following:
- (a) the case reference of the existing arbitration;
 - (b) the names and addresses, telephone and facsimile numbers, and email addresses of each of the parties, including the additional party;
 - (c) a request that the additional party be joined to the arbitration;
 - (d) a reference to the contract(s) or other legal instrument(s) out of or in relation to which the request arises;
 - (e) a statement of the facts supporting the request;
 - (f) the points at issue;
 - (g) the legal arguments supporting the request;
 - (h) the relief or remedy sought; and
 - (i) confirmation that copies of the Request for Joinder and any exhibits included therewith have been or are being served simultaneously on all other parties and the arbitral tribunal, where applicable, by one or more means of service to be identified in such confirmation.

A copy of the contract(s), and of the arbitration agreement(s) if not contained in the contract(s), shall be annexed to the Request for Joinder.

- 27.5 Within 15 days of receiving the Request for Joinder, the additional party shall submit to HKIAC an Answer to the Request for Joinder. The Answer to the Request for Joinder shall include the following:
- (a) the name, address, telephone and facsimile numbers, and email address of the additional party and its counsel (if different from the description contained in the Request for Joinder);
 - (b) any plea that the arbitral tribunal has been improperly constituted and/or lacks jurisdiction over the additional party;
 - (c) the additional party's comments on the particulars set forth in the Request for Joinder, pursuant to Article 27.4(a) to (g);
 - (d) the additional party's answer to the relief or remedy sought in the Request for Joinder, pursuant to Article 27.4(h);
 - (e) details of any claims by the additional party against any other party to the arbitration; and
 - (f) confirmation that copies of the Answer to the Request for Joinder and any exhibits included therewith have been or are being served simultaneously on all other parties and the arbitral tribunal, where applicable, by one or more means of service to be identified in such confirmation.
- 27.6 A third party wishing to be joined as an additional party to the arbitration shall submit a Request for Joinder to HKIAC. The provisions of Article 27.4 shall apply to such Request for Joinder.
- 27.7 Within 15 days of receiving a Request for Joinder pursuant to Article 27.3 or 27.6, the parties shall submit their comments on the Request for Joinder to HKIAC. Such comments may include (without limitation) the following particulars:
- (a) any plea that the arbitral tribunal lacks jurisdiction over the additional party;
 - (b) comments on the particulars set forth in the Request for Joinder, pursuant to Article 27.4(a) to (g);
 - (c) answer to the relief or remedy sought in the Request for Joinder, pursuant to Article 27.4(h);
 - (d) details of any claims against the additional party; and

- (c) confirmation that copies of the comments have been or are being served simultaneously on all other parties and the arbitral tribunal, where applicable, by one or more means of service to be identified in such confirmation.
- 27.8 Where HKIAC receives a Request for Joinder before the date on which the arbitral tribunal is confirmed, HKIAC may decide whether, *prima facie*, the additional party is bound by an arbitration agreement under these Rules giving rise to the arbitration, including any arbitration under Article 28 or 29. If so, HKIAC may join the additional party to the arbitration. Any question as to the jurisdiction of the arbitral tribunal arising from HKIAC's decision under this Article 27.8 shall be decided by the arbitral tribunal once confirmed, pursuant to Article 19.1.
- 27.9 HKIAC's decision pursuant to Article 27.8 is without prejudice to the admissibility or merits of any party's pleas.
- 27.10 Where an additional party is joined to the arbitration, the date on which the Request for Joinder is received by HKIAC shall be deemed to be the date on which the arbitration in respect of the additional party commences.
- 27.11 Where an additional party is joined to the arbitration before the date on which the arbitral tribunal is confirmed, all parties to the arbitration shall be deemed to have waived their right to designate an arbitrator, and HKIAC may revoke the appointment of any arbitrators already designated or confirmed. In these circumstances, HKIAC shall appoint the arbitral tribunal.
- 27.12 The revocation of the appointment of an arbitrator under Article 27.11 is without prejudice to:
- (a) the validity of any act done or order made by that arbitrator before his or her appointment was revoked; and
 - (b) his or her entitlement to be paid his or her fees and expenses subject to Schedule 2 or 3 as applicable.
- 27.13 The parties waive any objection, on the basis of any decision to join an additional party to the arbitration, to the validity and/or enforcement of any award made by the arbitral tribunal in the arbitration, in so far as such waiver can validly be made.
- 27.14 HKIAC may adjust its Administrative Fees and the arbitral tribunal's fees (where appropriate) after a Request for Joinder has been submitted.

Article 28—Consolidation of Arbitrations

- 28.1 HKIAC shall have the power, at the request of a party (the "Request for Consolidation") and after consulting with the parties and any confirmed arbitrators, to consolidate two or more arbitrations pending under these Rules where:
- (a) the parties agree to consolidate; or
 - (b) all of the claims in the arbitrations are made under the same arbitration agreement; or
 - (c) the claims are made under more than one arbitration agreement, a common question of law or fact arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and HKIAC finds the arbitration agreements to be compatible.
- 28.2 The party making the request shall provide copies of the Request for Consolidation to all other parties and to any confirmed arbitrators.
- 28.3 In deciding whether to consolidate, HKIAC shall take into account the circumstances of the case. Relevant factors may include, but are not limited to, whether one or more arbitrators have been designated or confirmed in more than one of the arbitrations, and if so, whether the same or different arbitrators have been confirmed.
- 28.4 Where HKIAC decides to consolidate two or more arbitrations, the arbitrations shall be consolidated into the arbitration that commenced first, unless all parties agree or HKIAC decides otherwise taking into account the circumstances of the case. HKIAC shall provide copies of such decision to all parties and to any confirmed arbitrators in all arbitrations.
- 28.5 The consolidation of two or more arbitrations is without prejudice to the validity of any act done or order made by a court in support of the relevant arbitration before it was consolidated.
- 28.6 Where HKIAC decides to consolidate two or more arbitrations, the parties to all such arbitrations shall be deemed to have waived their right to designate an arbitrator, and HKIAC may revoke the appointment of any arbitrators already designated or confirmed. In these circumstances, HKIAC shall appoint the arbitral tribunal in respect of the consolidated proceedings.

- 28.7 The revocation of the appointment of an arbitrator under Article 28.6 is without prejudice to:
- (a) the validity of any act done or order made by that arbitrator before his or her appointment was revoked;
 - (b) his or her entitlement to be paid his or her fees and expenses subject to Schedule 2 or 3 as applicable; and
 - (c) the date when any claim or defence was raised for the purpose of applying any limitation bar or any similar rule or provision.
- 28.8 The parties waive any objection, on the basis of HKIAC's decision to consolidate, to the validity and/or enforcement of any award made by the arbitral tribunal in the consolidated proceedings, in so far as such waiver can validly be made.
- 28.9 HKIAC may adjust its Administrative Fees and the arbitral tribunal's fees (where appropriate) after a Request for Consolidation has been submitted.

Article 29—Single Arbitration under Multiple Contracts

- 29.1 Claims arising out of or in connection with more than one contract may be made in a single arbitration, provided that:
- (a) all parties to the arbitration are bound by each arbitration agreement giving rise to the arbitration;
 - (b) a common question of law or fact arises under each arbitration agreement giving rise to the arbitration;
 - (c) the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions; and
 - (d) the arbitration agreements under which those claims are made are compatible.
- 29.2 The parties waive any objection, on the basis of the commencement of a single arbitration under Article 29, to the validity and/or enforcement of any award made by the arbitral tribunal in the arbitration, in so far as such waiver can validly be made.

Article 30—Closure of Proceedings

- 30.1 When it is satisfied that the parties have had a reasonable opportunity to present their case, the arbitral tribunal shall declare the proceedings closed. Thereafter, no further submission or argument may be made, or evidence produced, unless the tribunal reopens the proceedings in accordance with Article 30.2.
- 30.2 The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own initiative or upon application of a party, to reopen the proceedings at any time before the award is made.

Article 31—Waiver

A party who knows or ought reasonably to know that any provision of, or requirement arising under, these Rules (including the arbitration agreement(s)) has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be deemed to have waived its right to object.

SECTION V. AWARDS, DECISIONS AND ORDERS OF THE ARBITRAL TRIBUNAL

Article 32—Decisions

- 32.1 When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators. If there is no majority, the award shall be made by the presiding arbitrator alone.
- 32.2 With the prior agreement of all members of the arbitral tribunal, the presiding arbitrator may make procedural rulings alone.

Article 33—Costs of the Arbitration

- 33.1 The arbitral tribunal shall determine the costs of the arbitration in its award. The term "costs of the arbitration" includes only:
- (a) the fees of the arbitral tribunal, as determined in accordance with Article 10;
 - (b) the reasonable travel and other expenses incurred by the arbitral tribunal;

- (c) the reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
 - (d) the reasonable travel and other expenses of witnesses and experts;
 - (e) the reasonable costs for legal representation and assistance if such costs were claimed during the arbitration;
 - (f) the Registration Fee and Administrative Fees payable to HKIAC in accordance with Schedule 1.
- 33.2 The arbitral tribunal may apportion all or part of the costs of the arbitration referred to in Article 33.1 between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
- 33.3 With respect to the costs of legal representation and assistance referred to in Article 33.1(e), the arbitral tribunal, taking into account the circumstances of the case, may direct that the recoverable costs of the arbitration, or any part of the arbitration, shall be limited to a specified amount.
- 33.4 Where arbitrations are consolidated pursuant to Article 28, the arbitral tribunal in the consolidated arbitration shall allocate the costs of the arbitration in accordance with Article 33.2 and 33.3. Such costs shall include, but shall not be limited to, the fees of any arbitral tribunal designated or confirmed and any other costs incurred in an arbitration that was subsequently consolidated into another arbitration.
- 33.5 When the arbitral tribunal issues an order for the termination of the arbitration or makes an award on agreed terms, it or HKIAC shall determine the costs of the arbitration referred to in Article 33.1, in the text of that order or award.

Article 34—Form and Effect of the Award

- 34.1 The arbitral tribunal may make a single award or separate awards regarding different issues at different times and in respect of all parties involved in the arbitration in the form of interim, interlocutory, partial or final awards. If appropriate, the arbitral tribunal may also issue interim awards on costs.
- 34.2 Awards shall be made in writing and shall be final and binding on the parties and any person claiming through or under any of the parties. The parties and any such person shall be deemed to have waived their rights to any form of recourse or defence in respect of enforcement and execution of any award, in so far as such waiver can validly be made.
- 34.3 The parties undertake to comply without delay with any award or order made by the arbitral tribunal, including any award or order made in any consolidated proceedings under Article 28 or any arbitration under Article 29.
- 34.4 An award shall state the reasons upon which it is based unless the parties have agreed that no reasons are to be given.
- 34.5 An award shall be signed by the arbitral tribunal. It shall state the date on which it was made and the seat of arbitration as determined under Article 14 and shall be deemed to have been made at the seat of the arbitration. Where there are three arbitrators and any of them fails to sign, the award shall state the reason for the absence of the signature(s).
- 34.6 Subject to any lien, originals of the award signed by the arbitrators and affixed with the seal of HKIAC shall be communicated to the parties and HKIAC by the arbitral tribunal. HKIAC shall be supplied with an original copy of the award.

Article 35—Applicable Law, Amiable Compositeur

- 35.1 The arbitral tribunal shall decide the substance of the dispute in accordance with the rules of law agreed upon by the parties. Any designation of the law or legal system of a given jurisdiction shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction and not to its conflict of laws rules. Failing such designation by the parties, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.
- 35.2 The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly agreed that the arbitral tribunal should do so.
- 35.3 In all cases, the arbitral tribunal shall decide the case in accordance with the terms of the relevant contract(s) and may take into account the usages of the trade applicable to the transaction(s).

Article 40—Deposits for Costs

- 40.1 As soon as practicable after receipt of the Notice of Arbitration by the Respondent, HKIAC shall, in principle, request the Claimant and the Respondent each to deposit with HKIAC an equal amount as an advance for the costs referred to in Article 33.1, paragraphs (a), (b), (c) and (f). HKIAC shall provide a copy of such request to the arbitral tribunal.
- 40.2 Where a Respondent submits a counterclaim, or it otherwise appears appropriate in the circumstances, HKIAC may request separate deposits.
- 40.3 During the course of the arbitration HKIAC may request the parties to make supplementary deposits with HKIAC. HKIAC shall provide a copy of such request(s) to the arbitral tribunal.
- 40.4 If the required deposits are not paid in full to HKIAC within 30 days after receipt of the request, HKIAC shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitration or continue with the arbitration on such basis and in respect of such claim or counterclaim as the tribunal considers fit.
- 40.5 In its final award, the arbitral tribunal shall render an account to the parties of the deposits received by HKIAC. Any unexpended balance shall be returned to the parties by HKIAC.
- 40.6 HKIAC shall place the deposit(s) made by the parties in interest bearing deposit account(s) at a reputable licensed Hong Kong deposit-taking institution. In selecting the account(s), HKIAC shall have due regard to the possible need to make the deposited funds available immediately.

SECTION VI. OTHER PROVISIONS

Article 41—Expedited Procedure

- 41.1 Prior to the constitution of the arbitral tribunal, a party may apply to HKIAC in writing for the arbitration to be conducted in accordance with Article 41.2 where:
- (a) the amount in dispute representing the aggregate of any claim and counterclaim (or any set-off defence) does not exceed HKD 25,000,000 (twenty-five million Hong Kong Dollars); or
 - (b) the parties so agree; or
 - (c) in cases of exceptional urgency.
- 41.2 When HKIAC, after considering the views of the parties, grants an application made pursuant to Article 41.1, the arbitral proceedings shall be conducted in accordance with an Expedited Procedure based upon the foregoing provisions of these Rules, subject to the following changes:
- (a) the case shall be referred to a sole arbitrator, unless the arbitration agreement provides for three arbitrators;
 - (b) if the arbitration agreement provides for three arbitrators, HKIAC shall invite the parties to agree to refer the case to a sole arbitrator. If the parties do not agree, the case shall be referred to three arbitrators;
 - (c) HKIAC may shorten the time limits provided for in the Rules, as well as any time limits that it has set;
 - (d) after the submission of the Answer to the Notice of Arbitration, the parties shall in principle be entitled to submit one Statement of Claim and one Statement of Defence (and Counterclaim) and, where applicable, one Statement of Defence in reply to the Counterclaim;
 - (e) the arbitral tribunal shall decide the dispute on the basis of documentary evidence only, unless it decides that it is appropriate to hold one or more hearings;
 - (f) the award shall be made within six months from the date when HKIAC transmitted the file to the arbitral tribunal. In exceptional circumstances, HKIAC may extend this time limit;
 - (g) the arbitral tribunal shall state the reasons upon which the award is based in summary form, unless the parties have agreed that no reasons are to be given.
- 41.3 Unless the parties agree otherwise, the Expedited Procedure contained in Article 41 shall not apply to any consolidated proceedings under Article 28 or to any arbitration commenced under Article 29.

Article 42—Confidentiality

- 42.1 Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to:
- (a) the arbitration under the arbitration agreement(s); or
 - (b) an award made in the arbitration.
- 42.2 The provisions of Article 42.1 also apply to the arbitral tribunal, any Emergency Arbitrator appointed in accordance with Schedule 4, expert, witness, secretary of the arbitral tribunal and HKIAC.
- 42.3 The provisions in Article 42.1 do not prevent the publication, disclosure or communication of information referred to in Article 42.1 by a party:
- (a) (i) to protect or pursue a legal right or interest of the party; or
(ii) to enforce or challenge the award referred to in Article 42.1;
in legal proceedings before a court or other judicial authority;
 - (b) to any government body, regulatory body, court or tribunal where the party is obliged by law to make the publication, disclosure or communication; or
 - (c) to a professional or any other adviser of any of the parties, including any actual or potential witness or expert.
- 42.4 The deliberations of the arbitral tribunal are confidential.
- 42.5 An award may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:
- (a) a request for publication is addressed to HKIAC;
 - (b) all references to the parties' names are deleted; and
 - (c) no party objects to such publication within the time limit fixed for that purpose by HKIAC. In the case of an objection, the award shall not be published.

Article 43—Exclusion of Liability

- 43.1 None of the Council of HKIAC nor any committee, sub-committee or other body or person specifically designated by it to perform the functions referred to in these Rules, nor the Secretary General of HKIAC or other staff members of the Secretariat of HKIAC, the arbitral tribunal, any Emergency Arbitrator, tribunal-appointed expert or secretary of the arbitral tribunal shall be liable for any act or omission in connection with an arbitration conducted under these Rules, save where such act was done or omitted to be done dishonestly.
- 43.2 After the award has been made and the possibilities of correction, interpretation and additional awards referred to in Articles 37 to 39 have lapsed or been exhausted, neither HKIAC nor the arbitral tribunal, any Emergency Arbitrator, tribunal-appointed expert or secretary of the arbitral tribunal shall be under an obligation to make statements to any person about any matter concerning the arbitration, nor shall a party seek to make any of these persons a witness in any legal or other proceedings arising out of the arbitration.

SCHEDULE 1 REGISTRATION AND ADMINISTRATIVE FEES

(All amounts are in Hong Kong Dollars, hereinafter "HKD")

Effective 1 February 2015

1. Registration Fee

- 1.1 When submitting a Notice of Arbitration, the Claimant shall pay a Registration Fee in the amount set by HKIAC, as stated on HKIAC's website on the date the Notice of Arbitration is submitted.
- 1.2 If the Claimant fails to pay the Registration Fee, HKIAC shall not proceed with the arbitration subject to Article 4.7 of the Rules.
- 1.3 The Registration Fee is not refundable.

2. HKIAC's Administrative Fees

- 2.1 HKIAC's Administrative Fee shall be determined in accordance with the following table:

SUM IN DISPUTE (in HKD)		ADMINISTRATIVE FEE (in HKD)
Up to	400,000	19,800
From	400,001	19,800 + 1.300% of amt.
to	800,000	over 400,000
From	800,001	25,000 + 1.000% of amt.
to	4,000,000	over 800,000
From	4,000,001	57,000 + 0.545% of amt.
to	8,000,000	over 4,000,000
From	8,000,001	78,800 + 0.265% of amt.
to	16,000,000	over 8,000,000
From	16,000,001	100,000 + 0.200% of amt.
to	40,000,000	over 16,000,000
From	40,000,001	148,000 + 0.110% of amt.
to	80,000,000	over 40,000,000
From	80,000,001	192,000 + 0.071% of amt.
to	240,000,000	over 80,000,000
From	240,000,001	305,600 + 0.059% of amt.
to	400,000,000	over 240,000,000
Over	400,000,000	400,600

- 2.2 Claims and counterclaims are aggregated for the determination of the amount in dispute. The same rule applies to any set-off defence, unless the arbitral tribunal, after consulting with the parties, concludes that such set-off defence will not require significant additional work.
- 2.3 An interest claim shall not be taken into account for the calculation of the amount in dispute. However, when the interest claim exceeds the amounts claimed in principal, the interest claim alone shall be considered in calculating the amount in dispute.
- 2.4 Pursuant to Articles 18.2, 27.14 or 28.9 or where in the opinion of HKIAC there are exceptional circumstances, HKIAC's Administrative Fees may exceed the amounts calculated in accordance with paragraph 2.1.
- 2.5 If the amount in dispute is not quantified, HKIAC's Administrative Fees shall be fixed by HKIAC, taking into account the circumstances of the case.
- 2.6 Amounts in currencies other than Hong Kong Dollars shall be converted into Hong Kong Dollars at the rate of exchange published by HSBC Bank on the date the Notice of Arbitration is submitted or at the time any new claim, set-off defence or amendment to a claim or defence is filed.

SCHEDULE 2 ARBITRAL TRIBUNAL'S FEES, EXPENSES, TERMS AND CONDITIONS

Based on Hourly Rates
Effective 1 November 2013

1. Scope of Application and Interpretation

- 1.1 Subject to Article 9.2 of the Rules, this Schedule shall apply to arbitrations in which the arbitral tribunal's fees and expenses are to be determined in accordance with Article 10.1(a) of the Rules and to the appointment of an Emergency Arbitrator under Schedule 4.
- 1.2 HKIAC may interpret the terms of this Schedule as well as the scope of application of the Schedule as it considers appropriate.
- 1.3 This Schedule is supplemented by the Practice Note on Arbitral Tribunal's Fees, Expenses, Terms and Conditions Based on Schedule 2 and Hourly Rates in force on the date the Notice of Arbitration is submitted.

2. Payments to Arbitral Tribunal

- 2.1 Payments to the arbitral tribunal shall generally be made by HKIAC from funds deposited by the parties in accordance with Article 40 of the Rules. HKIAC may direct the parties, in such proportions as it considers appropriate, to make one or more interim or final payments to the arbitral tribunal.
- 2.2 If insufficient funds are held at the time a payment is required, the invoice for the payment may be submitted to the parties for settlement by them direct.
- 2.3 Payments to the arbitral tribunal shall be made in Hong Kong Dollars unless the tribunal directs otherwise.
- 2.4 The parties are jointly and severally liable for the fees and expenses of an arbitrator, irrespective of which party appointed the arbitrator.

3. Arbitral Tribunal's Expenses

- 3.1 The arbitral tribunal shall be reimbursed for its reasonable expenses in accordance with the Practice Note referred to at paragraph 1.3.
- 3.2 The expenses of the arbitral tribunal shall not be included in the arbitral tribunal's fees charged by reference to hourly rates under paragraph 9 of this Schedule.

4. Administrative Expenses

The parties shall be responsible for expenses reasonably incurred and relating to administrative and support services engaged for the purposes of the arbitration, including, but not limited to, the cost of hearing rooms, interpreters and transcription services. Such expenses may be paid directly from the deposits referred to in Article 40 of the Rules as and when they are incurred.

5. Fees and Expenses Payable to Replaced Arbitrators

Where an arbitrator is replaced pursuant to Article 12, 27 or 28 of the Rules, HKIAC shall decide the amount of fees and expenses to be paid for the replaced arbitrator's services (if any), having taken into account the circumstances of the case, including, but not limited to, the applicable method for determining the arbitrator's fees, work done by the arbitrator in connection with the arbitration, and the complexity of the subject-matter.

6. Fees and Expenses of Secretary to Arbitral Tribunal

Where the arbitral tribunal appoints a secretary in accordance with Article 13.4 of the Rules, such secretary shall be remunerated at a rate which shall not exceed the rate set by HKIAC, as stated on HKIAC's website on the date the Notice of Arbitration is submitted. The secretary's fees and expenses shall be charged separately. The arbitral tribunal shall determine the total fees and expenses of a secretary under Article 33.1(c) of the Rules.

7. Lien on Award

HKIAC and the arbitral tribunal shall have a lien over any awards issued by the tribunal to secure the payment of their outstanding fees and expenses, and may accordingly refuse to release any such awards to the parties until all such fees and expenses have been paid in full, whether jointly or by one or other of the parties.

8. Governing Law

The terms of this Schedule and any non-contractual obligation arising out of or in connection with them shall be governed by and construed in accordance with Hong Kong law.

9. Arbitral Tribunal's Fee Rates

- 9.1 An arbitrator shall be remunerated at an hourly rate for all work reasonably carried out in connection with the arbitration.
- 9.2 Subject to paragraphs 9.3 and 9.4 of this Schedule, the rate referred to in paragraph 9.1 is to be agreed in accordance with Article 10.2 of the Rules. An arbitrator shall agree in writing upon fee rates in accordance with paragraph 9 of this Schedule prior to the confirmation of his or her appointment by HKIAC in accordance with Article 9 of the Rules.

- 9.3 An arbitrator's agreed hourly rate shall not exceed a rate set by HKIAC, as stated on HKIAC's website on the date the Notice of Arbitration is submitted.
- 9.4 Subject to paragraph 9.3, an arbitrator may review and increase his or her agreed hourly rate by no more than 10% on each anniversary of the confirmation of his or her appointment by HKIAC.
- 9.5 Higher rates may be charged if expressly agreed in writing by all parties to the arbitration or if HKIAC so determines in exceptional circumstances.
- 9.6 If an arbitrator is required to travel for the purposes of fulfilling obligations as an arbitrator, the arbitrator shall be entitled to charge and to be reimbursed for:
- (a) time spent travelling but not working at a rate of 50% of the agreed hourly rate; and
 - (b) time spent working whilst travelling at the full agreed hourly rate.

10. Cancellation Fees

- 10.1 All hearings booked shall be paid for, subject to the following conditions:
- (a) if a booking is cancelled at the request of the arbitral tribunal, it will not be charged;
 - (b) if a booking is cancelled at the request of a party less than 30 days before the day booked it shall be paid at a daily rate of 75% of eight times the applicable hourly rate;
 - (c) if a booking is cancelled at the request of a party less than 60 days but more than 30 days before the day booked it shall be paid at a daily rate of 50% of eight times the applicable hourly rate;
 - (d) if a booking is cancelled at the request of a party more than 60 days before the day booked it will not be charged; and
 - (e) in all cases referred to above, credit will be given against all time spent on the case during the day(s) booked.
- 10.2 Where hearing days are cancelled or postponed other than by agreement of all parties, this may be taken into account when considering any subsequent allocation of costs.

SCHEDULE 3 ARBITRAL TRIBUNAL'S FEES, EXPENSES, TERMS AND CONDITIONS

Based on Sum in Dispute

(All amounts are in Hong Kong Dollars, hereinafter "HKD")

Effective 1 November 2013

1. Scope of Application and Interpretation

- 1.1 Subject to paragraph 1.2 below and Article 9.2 of the Rules, this Schedule applies to arbitrations in which the arbitral tribunal's fees and expenses are to be determined in accordance with Article 10.1(b) of the Rules.
- 1.2 This Schedule shall not apply to the appointment of an Emergency Arbitrator under Schedule 4.
- 1.3 HKIAC may interpret the terms of this Schedule as well as the scope of application of the Schedule as it considers appropriate.
- 1.4 This Schedule is supplemented by the Practice Note on Arbitral Tribunal's Fees, Expenses, Terms and Conditions Based on Schedule 3 and the Sum in Dispute in force on the date the Notice of Arbitration is submitted.

2. Payments to Arbitral Tribunal

- 2.1 Payments to the arbitral tribunal shall generally be made by HKIAC from funds deposited by the parties in accordance with Article 40 of the Rules. HKIAC may direct the parties, in such proportions as it considers appropriate, to make one or more interim or final payments to the arbitral tribunal.
- 2.2 If insufficient funds are held at the time a payment is required, the invoice for the payment may be submitted to the parties for settlement by them direct.
- 2.3 Payments to the arbitral tribunal shall be made in Hong Kong Dollars unless the tribunal directs otherwise.
- 2.4 The parties are jointly and severally liable for the fees and expenses of an arbitrator, irrespective of which party appointed the arbitrator.