2. Mediation

4.007 One thing that strikes one in the *Keeneye* case was that part of the case involved discussion and interpretation centred around what a "mediation" actually is, owing in part to the fact that the mediation session in China took place in an informal setting over dinner and concerns about the particular meaning given to some of the language used by the mediator.

4.008 The modern commercial mediation model used in international cases is primarily what is known as a "facilitative" process. Modern facilitative commercial mediation contains some key concepts which can be said to form the foundations of the whole mediation process.

4.009 In 2014, Justice Barnabus Fung stated very clearly that the courts and government have chosen the facilitative model of mediation as the primary model to be used in Hong Kong. Giving a keynote speech he said:

> "Hong Kong has adopted the facilitative model as the orthodox or dominant model of mediation. Facilitative mediation is focussed on providing a structure and agenda for discussions and to that end, helping the parties to find a resolution of the dispute on their own. Unlike an evaluative process, mediators adopting the facilitative model typically do not evaluate the merits of the parties' case notwithstanding that they may have expert knowledge of the subject matter in the dispute. They do not take an advisory role or make predictions about the outcome of litigation. They are not allowed to direct the parties to a particular settlement. Instead the mediator facilitates the communication and negotiation of the parties. They act as keepers of the process but not the contents or the outcome.
>
> He went on to say 'the established infrastructure for mediation training in Hong Kong is based on the facilitative approach. Candidates are assessed on various aspects including the proper role of the mediator (e.g. being impartial and neutral), confidentiality (distinguishing confidential information that cannot be disclosed…)'."[5]

3. Definitions of Facilitative Mediation

4.010 *"Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution."*[6]

[5] Barnabus Fung J, *Mediator's Qualifications and Skills* (Mediation Week Conference, Department of Justice, Hong Kong, 21 March 2014).

[6] The Centre for Effective Dispute Resolution, (the "CEDR") London, available at http://www.cedr.com (accessed 4 May 2017).

4.011 *"Mediation is a voluntary, non-binding, private dispute resolution process in which a neutral person, the mediator, helps the parties to reach their own negotiated settlement agreement. The mediator has no power to impose a settlement. His/her function is to overcome any impasse settlement and encourage the parties to reach an amicable settlement."*[7]

4.012 The above definitions of facilitative mediation share some key concepts:

- confidentiality;
- neutrality;
- solutions-based process and
- mutual acceptability.

4.013 Although these definitions are taken from different jurisdictions, in this case the United Kingdom and Singapore and allowing for the fact the wording is different it is relatively easy to see that they are derived from similar facilitative mediation models and they have a common approach to mediation including the emphasis on neutrality and confidentiality.[8] Justice Fung's description of facilitative mediation and both the above definitions emphasise that the mediator is not a decision maker. At no point will the mediator direct the parties as to how the dispute should be settled.[9] This of course is completely different from an arbitrator's role which is to do precisely that: advise or make a decision as to how the dispute should be decided.

4. Some Key Concepts

4.014 In order to understand the facilitative mediation model fully, it is useful to take a closer look at the some of the key concepts and claims for mediation which are contained in these definitions and elsewhere. It should be noted, however, that the majority of these concepts are not confined to the facilitative model only, but would be equally relevant, for example, for transformative models of mediation, which are used in non-commercial areas like family mediation.

(a) Confidentiality

4.015 All facilitative mediation rules or codes include guidelines about confidentiality, for example the Hong Kong Mediation Code says under the heading "Responsibilities to the Parties".

[7] Hong Kong Mediation Accreditation Association Limited (the "HKMAAL") www.hkmaal.org.hk (Accessed 20 April 2017). HKMAAL is an umbrella body supported by the Hong Kong government and comprising the leading mediation organizations in Hong Kong with the aim of setting standards for accredited mediators, trainers, and other professionals involved in mediation. It also sets standards for mediation training courses plus works to promote a culture of best practice and professionalism in mediation in Hong Kong.

[8] Danny McFadden, *Mediation in Greater China: The new Frontier for Commercial Mediation* (Hong Kong: Wolters Kluwer/ CCH, 2013).

[9] This will be discussed in more under "Neutrality" [5.015]–[5.017].

(3) Managing the mediator's own pre-conceived prejudices, assumptions and judgments; how to remain open minded, facilitate creativity and address parties' interests.

(4) Facilitation of discussions, negotiations, option development; reality testing and reaching workable mutual agreements.[18]

4.025 A mediator is expected to be both "non-directive" and must provide information "without" advising". A facilitative mediator will usually start from the premise that they will remain entirely neutral and not offer an opinion even if asked to do so.

(b) Evaluative mediation

4.026 In this type of mediation, the mediator often has some substantive expertise or as is often the case in China, is highly respected by the parties and uses that status to offer an opinion to the parties which can include suggesting outcomes that might occur should the case be heard by a judge or tribunal. The evaluative mediator will assume that the parties are seeking guidance either on the law or a proposed solution based on the mediator's own knowledge and expertise.

(c) The difference in practice

4.027 As the brief comparison above clearly shows the two models have very dissimilar characteristics and mediators are required to practice under distinctly different conditions of engagement. However for the legal practitioner in practice the differences may become somewhat blurred. Mediators practicing the facilitative model will often have very different styles, which can range from what appears to be a very "laid back" style to what the British call a very "robust" style. Some lawyers in the United States, for example, believe that effective mediation "almost always requires some analysis of the strengths and weaknesses of each parties position should the dispute be arbitrated or litigated".[19] Others will insist that the mediator remain strictly facilitative and not "tell us what to do". However it is very hard to draw clear cut lines between the different models and most mediators will adapt their style to suit the needs of the parties. So in practice mediators may use a range of different approaches within a single mediation.[20] Therefore lawyers need to be aware of the types of mediation practiced within the country their clients are likely to require dispute resolution and also understand that even if the predominant model used is facilitative or evaluative mediators will always have their own style of mediating which will often walk a fine line between the two models. Prior to selecting a mediator all lawyers should discuss with the mediator or the mediation provider the style of the mediator and if necessary some ground rules for mediator interventions.

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18 Guidelines for HKMAAL Stage 1 Mediation Course Providers, available at www.hkmaal.org.hk.

19 Gerald S Clay quoted in Leonard Riskin, "*Understanding Mediator's Orientations, Strategies and Techniques: A Guide for the Perplexed*" (1996) 1(7) *Harvard Law Review* 9.

20 Leonard Riskin, "*Decision Making in Mediation: The New Old Grid and the New Grid System*" (2003) 79(1) *Notre Dame Law Review* 1–53.

6. What is Arbitration?

4.028 Arbitration is a private and confidential process which can provide parties with a relatively fast, final and binding resolution of a dispute. Arbitration is normally conducted in accordance with the terms of an arbitration agreement between the Parties.

4.029 Arbitration is in many aspects similar to a court proceeding. The arbitrator is an umpire to decide the dispute based on the merits of each party's case. The arbitrator is independent and impartial and is usually an expert in the field in relation to the dispute. The decision of the arbitrator, known as the arbitral award, is final and binding and can only be appealed on a point of law.

(a) Advantages of arbitration

4.030

- Enforceability: Enforcement of foreign court judgments can be difficult in the absence of an appropriate bilateral treaty. Under the New York Convention signed by more than 140 jurisdictions, each of the Convention party undertakes to recognise and enforce arbitral awards made in other signatory members.
- Final and Binding: Arbitral Awards are usually final and binding and can only be appealed on point of law, which means prolonged court appeal procedures can be avoided.

7. Arbitration and Mediation Processes Compared

4.031 If we refresh our memories as to how the two processes are different, the key elements would be:

- Arbitration is a hearing process in which parties bring their dispute to someone for a decision. Mediation is a facilitated negotiation process in which a trained mediator works to bring the parties to agreement.
- Mediation is informal; arbitration although less formal than court is still formal.
- The goal of mediation is to resolve misunderstandings and help the parties achieve a mutually agreed settlement, while the goal of arbitration is to come to a decision in a dispute.
- The mediator has no power to force the parties to come to a decision; the arbitrator makes a mandatory and (usually) binding decision.
- Mediation is voluntary, either party can withdraw at any time; if the contract states that arbitration will be used should negotiations fail then, once it begins there is usually no possibility of withdrawal.

(a) Mediation in China

4.032 If the facilitative model is the "orthodox or dominant model of mediation" in Hong Kong, is this the case in mainland China? The answer is quite clearly "No". Legal

commentators in mainland China recognise this difference "中国的调解与西方有很大的不同"[21] ("Chinese and Western mediation are very different"). In China, the dominant and therefore orthodox model is actually an evaluative model. In traditional Chinese mediation sessions, the mediator was regarded as a "persuasive intermediary", based on the highly regarded Confucian principle of compromise, and he was expected to voice an opinion.[22]

4.033 After the Communist Party came to power, they established People's mediation Committees which saw the Mediators' duties as:

- acting as go-betweens for parties who refused to talk to one another;
- defining issues;
- deciding questions of fact and
- issuing tentative or advisory decisions.

4.034 The Mediation committees also exerted strong political, economic, social and moral pressure upon one or both parties to gain "voluntary" compliance with the decisions.

(b) Court-Performed mediation in China

4.035 In modern China, mediation performed in the courts 法庭出面调解 (Court Mediation) is part of the Civil Procedure of China's court system. In these cases, the Judge who is assigned to a case will also conduct the mediation. The Judge-Mediator may ask the parties to come to court for the mediation or the Judge-Mediator may go to a town or village to investigate and talk with the parties and witnesses. It is not a facilitative process, it has a much more evaluative element, in that the Judge-Mediator may point out weaknesses in a party's position and may apply certain cultural or legal values to facilitate settlement. The Judge may suggest settlement proposals, and emphasise the economic or social benefits of settlement. This type of mediation is considered a voluntary process; however, some believe there is a coercive element in this type of mediation. If settlement is reached, the court drafts a Mediation Statement that includes the claims, facts and settlement agreement. This document is then signed by all of the parties and will have the effect of a court judgment.[23]

4.036 Therefore, in the *Keeneye* case for the Chinese parties, it would have been considered fairly normal for a mediator to express a view or make a proposal as to how the case might be settled. This evaluative style of mediation and practice continues to this day in China, so in effect the style of mediation as practiced by the Xian "mediators" in the case is the orthodox one for mainland China. The mediator suggesting a proposal involving a sum of money would not have been seen as unusual by most Chinese parties. Although in the Xian Court the Respondents complained of bias, this allegation was not based on the fact that the mediator suggested a solution, what upset them so much was that the Respondent felt or at least claimed to feel that the mediator lacked impartiality and favoured the Appellant's case.

[21] Professor Fan Yu, Keynote speech at the 7th China Youth Forum of Law 2012, Southwest University of Political Science and Law.

[22] Jerome Cohen, "Chinese Mediation on the eve of modernization" 54 (1966) *Cal. L. Rev.* 1201, 1208.

[23] Linda Mealey-Lohmann China Insight published on Friday, 28 May 2010. www.chinainsight.info.

8. Med-Arb

4.037 Although not often used in common law countries, med arb is used in many jurisdictions, primarily in civil law countries such as China, Hong Kong, Japan, Germany, Switzerland and Singapore. Short for mediation-arbitration, this process gives the parties the opportunity to use mediation to reach a settlement, and then to rely on a decision by a neutral if there are issues on which no agreement can be reached. This process encourages parties to create their own best settlement in the knowledge that an arbitrator will, otherwise, impose a settlement.

4.038 Med-Arb offers parties the ability to participate in a mediation having agreed in advance that if unable to reach a settlement, the process will shift to arbitration.

4.039 The neutral:

- can serve as both mediator and arbitrator in an "integrated" process, acting to facilitate negotiations and also making binding decisions on stalemated issues along the way;
- in a "separate" process will attempt to achieve a mediated settlement before "switching hats" to decide any unresolved issues;
- acts as either the mediator or the arbitrator, if the local rules do not allow the same person to act in both roles and
- makes a binding settlement decision between the final offer or final demand given in a Final Offer.

4.040 Some parties will choose to have the same person act as both the mediator and the arbitrator, whilst others may prefer one person to be the mediator and another to be the arbitrator. However, knowledge that the mediator may eventually act as arbitrator may cause parties to be more restrained in revealing their real needs and positions. There are other potential difficulties if the same person acts in both roles; particularly challenging is the question of how to treat information obtained confidentially in private meetings. It is therefore often considered desirable for a different neutral to arbitrate on the outstanding issues, even though this will involve a further presentation of the parties' cases and some further costs.

(a) Med-Arb or Arb-Med during Chinese arbitration proceedings

4.041 Arbitration proceedings in China incorporate mediation into their hearings.[24] At the moment, only institutional arbitration is permitted in China, an *ad hoc* arbitration with its seat in China will not be recognised. So an arbitration agreement must contain a designated arbitration commission or body; otherwise the agreement will be held to be

[24] CIETAC, the Beijing Arbitration Centre and the HKIAC all have rules covering this situation.

- The mediator may put forward a mediation resolution plan for the parties' reference, and the parties may accept, refuse to accept or render some amendment(s) to the resolution plan set forth by the mediator.
- No written record of the specific process of that mediation shall be made, but the content of the mediation agreement shall be made as a written record.

4.051 After the first arbitration sitting, the members of the Tribunal decided to attempt mediation of the case. The Tribunal appointed Pan Junxin (XAC's Secretary General not acting as arbitrator on the Tribunal) and Zhou Jian (a member of the Tribunal arbitrator) to contact the parties with this suggestion. Pan and Zhou were appointed because they were based in Xian, whereas Jiang Ping and Liu Chuntian (the other two arbitrators) were based in Beijing.

4.052 Pan's office communicated the suggestion to a lawyer acting for the Applicants. Subsequently, Pan and Zhou contacted Zeng Wei, a shareholder, in one of the companies involved in the dispute to meet them at the Xian Shangri-La hotel over dinner. Zeng was contacted because he was regarded as friendly with the Respondents. Zeng had described himself at the arbitration stage as "a person related to" (关系人) the Respondents. Secretary General Pan had not however met with Zeng during the arbitration sittings. Therefore, present at the Shangri-La hotel dinner were Pan, Zeng and Zhou Jian. Pan told Zeng that the Tribunal proposed that Keeneye should offer Gao and Xie RMB250 million to settle the matter. Pan asked Zeng "to work on" the Respondents. The Respondents subsequently rejected the RMB250 million settlement proposal but made no specific complaints about the meeting in the hotel or the conduct of Pan and Zhou.

4.053 When the Award was published in June 2010, the actual outcome was different from that which the Respondents allege had been proposed to Zeng by Pan and Zhou at the Shangri-La hotel. The Award dismissed the Respondents' claim in its entirety and revoked the Agreements. The Tribunal "recommended" that the Respondents "shall take the initiative to pay RMB 50,000,000 as the economic compensation to [the Respondents] in order to end the disputes between the parties". However, they went on to say, this recommendation was "based on the fairness and reasonableness arbitration principles, it is not binding and not included in the arbitral matters".

4.054 In their appeal against the Award to the Xian Intermediate Court, the Respondents contended that this difference in outcome was because Pan had manipulated the outcome of the arbitration and the Tribunal had shown "favoritism and malpractice". The Respondents complained that Pan "was not one of the arbitrators of this case and he was not entitled to look into this case". "Pan Jun Xin's control and manipulation of this case has seriously contravened the law and arbitration rules".[30]

4.055 On 19 October 2010, the Xian Court dismissed the Respondents' appeal. The Court said there was no evidence of bias and no breach of the arbitral rules, and upheld the award. It stated that the private meeting was validly held as a part of an agreement to the med-arb process.

[30] *Ibid.*, [38].

4.056 With regard to Pan getting involved as a mediator, the court stated that under art.37 "Mediation may be chaired by the Arbitral Tribunal or the presiding arbitrator. Upon approval of the parties relevant units or persons may be invited to help the mediation or chair the mediation as a mediator".[31] Therefore, it complied with the XAC arbitration rules and they could see nothing wrong with this.

4.057 In the interim, Gao and Xie had applied to the Hong Kong courts to obtain enforcement of the Award. In August 2010, Justice Saunders of the Hong Kong High Court granted an *ex parte* order for the enforcement of the Award in Hong Kong. The Respondents Keeneye applied to set aside the order under s 40E(3) of the Arbitration Ordinance (Cap. 341) on the basis that the enforcement of the award would be contrary to public policy since the award was tainted by actual or apparent bias. Gao and Xie, the Applicants, argued that there was no bias and that the dinner on 27 March 2010 was an "abortive mediation" that was carried out pursuant to the Xian Arbitration Commission's Arbitration Rules.

10. Hearing in Court of First Instance before the Honourable Justice Reyes

4.058 Justice Reyes stated that:

> *"The question is whether I should set aside Saunders J's Order on the basis that "it would be contrary to public policy to enforce the Award" (AO s.40E (3)). The Respondents suggest that enforcement would be contrary to public policy because the Award is tainted by bias or apparent bias. In other words, the main issue before me is whether the Award was made in circumstances which would cause a fair-minded observer to apprehend a real possibility of bias on the part of the Arbitration Tribunal (Porter v. Magill [2002] AC 357 (HL)).*"

4.059 After hearing argument from both parties Justice Reyes set aside the *ex parte* order on grounds of public policy because he believed the Award was tainted with apparent bias. Although the Xi'an Court found the award to be perfectly valid by its standards, Reyes J held that Hong Kong courts could apply their own standards when deciding whether an award is to be refused enforcement under public policy grounds.

4.060 He said that a med-arb process may run into self-evident difficulties from the point of view of impartiality and the risk of apparent bias arising from an arbitrator also acting as mediator. "What happened at the Shangri-La would give the fair-minded observer a palpable sense of unease".[32] The Court held that there is nothing wrong in principle with med-arb but from the point of view of impartiality, the med-arb process runs into self-evident difficulties. "The risk of a mediator turned arbitrator appearing to be biased will always be great."

[31] *Gao Haiyan and Xie Heping v Keeneye Holdings Ltd* [2011] 3 HKC 157, [32] (CFI).
[32] *Ibid.*, [54] (Reyes J).

that justice would not be seen to be done. "Enforcement of such award would be an affront to the Court's sense of justice."

4.072 Reyes J held that:

> "*If a Hong Kong award were tainted by the appearance of bias, I have no doubt that, purely as a matter of justice and fairness, the Court should refuse enforcement of the same .... Otherwise, it would bring justice into disrepute if the Court were to allow an award with the appearance of bias to be enforced in the same way as a judgment of the Court. The Court's judgments (including awards enforced as such) must always be (and be seen to be) impartial.*"

4.073 He stated that it should not make any difference to this principle if an award is that of a foreign tribunal (whether of the Mainland or elsewhere).

11. The Court of Appeal Decision

4.074 The Court of Appeal said that it was not for the Court of First Instance (CFI) to express an opinion on the correctness of the arbitral tribunal and that such an award should only be blocked if it has been proven that enforcement of the award would be contrary to public policy under s.40E(3) of the Hong Kong Arbitration Ordinance. In reversing the decision of the lower court, the Court of Appeal held that the arbitration award could be enforced in Hong Kong based on two main grounds.

(a) The waiver

4.075 The Court of Appeal took the view that a party to an arbitration that wishes to complain of non-compliance with the rules governing the arbitration must do so promptly and must not proceed with the arbitration, keeping the point of non-compliance up its sleeve for later use. The latter point was also stated in the Xian Arbitration Commission Arbitration Rules, which indicate that failure to submit an objection initially will result in the party being deemed to have waived his or her right to object. Tang VP stated that Reyes J had correctly stated the principle from the Hebei Import case "a party to an arbitration who wishes to rely on non-compliance with the rules governing an arbitration shall do so promptly and shall not proceed with the arbitration as if they had been compliance with a relevant rule keeping the point of non-compliance up ones sleeve for later use".[34]

4.076 Tang VP observed that art 5 of the XAC Rules contained similar provisions as art 45 of the CIETAC Rules (which was under consideration in the *Hebei* case), and that failing to lodge an official complaint under art 5 showed a clear case of waiver of the right to complain.[35] The Respondents continued with the arbitration proceedings including submitting a Supplementary Submission which Tang VP held was behaviour

[34] *Hebei Import and Export Corp v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665, 690b (Sir Anthony Mason NJP) (CFA).

[35] [2012] 1 HKLRD 627, [38].

consistent with a waiver. Tang VP quoted from an ICC Arbitration Handbook which stated "Failure to raise an issue will result in waiver under many if not most national legal systems".[36]

4.077 The Court of Appeal took the view that Keeneye should have complained about impropriety or bias, real or apparent, against the arbitral tribunal or the Secretary General before the making of the award and that Keeneye's attack on Gao's integrity was not a substitute for a complaint.

4.078 The "clumsy compromise solution", which Reyes J described as the Respondents way of raising their concerns to the Xian court mentioned earlier, was not accepted by Tang VP as a substitute for a complaint about impropriety or bias, apparent or real, against the arbitral tribunal or the Secretary General. This in particular, since the Xian Rules, made express provision for waiver of the right to object. Accordingly, what the Respondents should have done was to object promptly, during the arbitration, to any events in the Shangri-La Hotel they considered irregular. Since they failed to do so, they were deemed to have waived their right to object to any irregularities at a later stage, whether in setting-aside or enforcement proceedings.[37] On this basis, the Court of Appeal allowed the appeal and set aside the order of the CFI.

4.079 Tang VP did not believe that the Respondents had an apprehension of bias or impropriety, real or apparent, before the making of the award. Instead of bringing a complaint, they had continued the arbitration, as if there had been compliance with the relevant rule, hoping for a satisfactory conclusion, even though it was their case that they feared it might antagonise the arbitral tribunal by complaining, which could result in an unfavourable or less favourable result.

(b) No apparent bias

4.080 The Court also disagreed with the CFI's ruling that apparent bias had been established. The CFI's ruling was based on the fact that the mediation was held in an informal manner during dinner at the Shangri-La hotel with "related parties" rather than with the parties themselves or their legal representatives. In addition, during the dinner the secretary general and the arbitrator appeared to propose that the award would be in Keeneye's favour if Keeneye was prepared to pay compensation of RMB250 million. Keeneye refused, and subsequently the award was issued in favour of Gao with a recommendation that Gao make a payment to Keeneye of RMB50 million. On these grounds, the CFI concluded that there was apparent bias and refused to enforce the award.

4.081 The Court of Appeal rejected the suggestion of bias on the following grounds:

- The Mainland court was better able to decide whether holding a mediation over dinner at a hotel is acceptable. There was no complaint to the Mainland court about the venue of the mediation when Keeneye unsuccessfully

[36] Paragraph 54 footnote in Thomas H Webster, *Handbook of ICC Arbitration Commentary Precedents and Materials* (London: Sweet & Maxwell, 2008).

[37] *Hebei Import and Export Corp v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665, 690b (Sir Anthony Mason NJP) (CFA).

seeks to submit new evidence after the deadline for submission of evidence has passed and without having made any application for an extension, the court is unlikely to be sympathetic to an allegation that it did not have an opportunity to present its case.[14]

10.010 These decisions reflect what the authors submit is the dominant purpose of art 18 of the Model Law, which is to protect the parties from egregious conduct by a tribunal, rather than from their own failures or strategic choices.[15] In practice, reconciling the duty to ensure equal treatment and afford a reasonable opportunity to the parties to present their case with arbitrators' other duties, such as the duty to respect party autonomy in determining procedural rules, may not always be straightforward.[16] For example, if the parties agree that the claimant may have two extra hours or two extra days to make oral submissions, should such an agreement be struck down by a tribunal as contrary to s 46?

10.011 Because art 18 is a mandatory provision "that limits both the powers of the parties and the arbitral tribunal to determine the arbitral procedure",[17] the parties' autonomy in agreeing to arbitral procedures and the tribunals' duty to give effect to such agreements is subject to the overriding objective that the parties must be treated with equality and be afforded a reasonable opportunity to present their case.[18] In *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd,* the parties agreed to adopt a chess-clock method of allocating time at the hearing, but additional time was subsequently allocated by the tribunal to the claimant. The respondents sought to set aside the award on various grounds, including on the basis that the arbitral procedure was not conducted in accordance with the agreement of the parties. The court concluded that "in a situation where the arbitrators discern a potential problem with the opportunity to a party presenting his case fairly arising from a procedure agreed by the parties, they are obliged to raise it with the parties instead of following blindly what has been agreed. After hearing submissions from the parties, if the arbitrators were of the view that the procedure agreed by the parties would result in a breach of art 18, they should take steps to conduct the arbitration in such a manner that could redress the problem instead of being constrained by an unworkable agreement of the parties … in this particular instance, the slavish application of the chess-clock arrangement is in conflict with art 18, as such the Tribunal was obliged to depart from it."[19] Accordingly the decision recognised the discretion which should be afforded to tribunals when making procedural decisions.[20]

[14] *Qinhuangdao Tongda Enterprise Development Co v Million Basic Co Ltd* [1993] 1 HKLR 173.

[15] *Corporacion Transnacional de Inversiones SA de CV v STET International SpA* 2001 45 OR (3d) 183, [73], affirmed (2000) 49 OR (3d) 414, OJ No. 34, leave to appeal to the Supreme Court of Canada sought but dismissed with costs May 3, S.C.C. File No. 28237. Subsequently followed in *Entes v. Kyrgyz Republic* 2016 ONSC 7221, [5] and *Consolidated v Ambatovy* 2016 ONSC 7171, [56].

[16] See art 19(1) of the Model Law, given effect by s 47(1) of the Arbitration Ordinance (Cap. 609).

[17] See para 10.004.

[18] *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd* [2011] 1 HKLRD 707, [84]–[86]. Note that the judgment refers to a "full opportunity" to present a party's case, which has been amended in the Arbitration Ordinance (Cap. 609) to a "reasonable opportunity" (see s 46(3)(b)).

[19] *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd* [2011] 1 HKLRD 707, [87]–[89].

[20] See Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 2021) pp.3513–3514: "Where an arbitral tribunal fails to provide a party an opportunity to present its argument or evidence, or to respond to its counter-party's evidence or argument, then the tribunal subsequent award is potentially subject to annulment … Nonetheless … a tribunal is generally afforded substantial discretion … in determining the need for and admissibility of evidence or argument on particular issues." Similarly Craig, Park and Paulsson, when addressing art 15(2) of the ICC Rules 1998 note that "Except in the most egregious cases, the wide discretion of arbitrators and the flexibility of the arbitral process have been confirmed by national courts which quite regularly reject the procedural arguments of disappointed parties" (*International Chamber of Commerce Arbitration*, 3rd ed, 2000) para 16.04. Webster and Buhler, in considering the interplay of art 22(4) of the ICC Rules 2012 (equivalent of art 15(2) of the 1998 Rules) with the New York Convention ground for refusing recognition and enforcement of an award (art V(b)), note that "Above all, courts are not called to disagree with Tribunals on procedural matters when assessing, for example, a party's inability to present its case" (*Handbook of ICC Arbitration*, 3rd ed, 2014) para 22-74.

[21] *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2011] 4 HKLRD 188, [106].

[22] *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* [2012] 4 HKLRD 1, [52]–[56].

[23] *Ibid.*, [68].

[24] *Ibid.*, [77]–[81].

10.012 However, a 2011 first instance decision (which was subsequently reversed — see below) served to undermine this principle, when the Hong Kong court set aside an award after the applicant argued that it was unable to present its case and/or the arbitral procedure was not in accordance with the agreement of the parties. In particular, the court concluded that the tribunal adopted a procedure that (1) was not in accordance with the agreement of the parties by permitting sequential rather than simultaneous exchange of pre-hearing submissions on Taiwanese law, (2) rendered the respondent in the arbitral proceedings unable to present its case by refusing to consider additional authorities on Taiwanese law (which were sought to be introduced shortly before the hearing) and (3) failed to give the respondent an opportunity to respond to the claimant's submissions on Hong Kong law (which was raised for the first time in post-hearing submissions). The court concluded that it was "unable to say" whether the outcome of the Award would have been different had the violations not occurred. In exercising its discretion in favour of setting aside the award, the court stated that "the denial of an opportunity to make a submission in reply on a matter of law will invariably constitute a serious violation. It is a matter of basic fairness".[21]

10.013 Subsequently the Court of Appeal in Hong Kong reversed the first instance decision in respect of all three elements outlined above. First, consistent with the decision in *Brunswick Bowling* the Court of Appeal concluded that, following a late amendment to one party's case, the tribunal was not obliged to slavishly follow the procedure reflected in the original timetable, and the court at first instance should not have questioned the merits of the tribunal's decision to grant leave to amend or the terms upon which such leave was granted.[22] Second, the tribunal's refusal to receive and consider the additional authorities on Taiwanese law was a case management decision which was fully within the discretion of the tribunal to make and did not render one party unable to present its case.[23] Third, the tribunal was entitled to take the view that the Hong Kong law issue was raised at a late stage of the proceedings and that the opposing party had already had two opportunities to make submissions on the Hong Kong law issue previously.[24]

10.014 Ultimately the Court of Appeal's decision restores the balance towards procedural discretion in favour of tribunals. In considering whether the parties were unable to present their case in terms of art 18 of the Model Law, the Court of Appeal held that "the conduct complained of must be sufficiently serious or egregious so that one could

(2) the HKIAC Administered Arbitration Rules require an arbitrator to be and remain at all times wholly independent and impartial;[35]

(3) the Arbitration Rules of the Singapore International Arbitration Centre provide that an arbitrator shall remain at all times independent and impartial;[36]

(4) the CIETAC Arbitration Rules require that the arbitrator shall not represent either party and shall be and remain independent of the parties and treat them equally;[37]

(5) the LCIA Rules also require independence and impartiality and that the arbitrator will not act as advocate for or representative of any party;[38] and

(6) the ICC Rules require an arbitrator to be and remain impartial and independent of the parties.[39]

(d) Remedies for failure to comply

10.020 What are the consequences of an arbitrator failing to comply with the general duties of impartiality and/or independence? A party in a Hong Kong seated arbitration has the following options:

(1) follow the challenge procedure laid down in the applicable institutional rules;

(2) pursue the procedures set out in art 13 of the Model Law, given effect by s 26(1) of the Arbitration Ordinance (Cap. 609) (discussed below), which lead ultimately to an application to the Court of First Instance in Hong Kong;[40]

(3) apply to the Hong Kong Court to set aside the award if the alleged breach of impartiality/independence comes to light after the award has been made.[41]

2. Bringing a Challenge

10.021 Under s 26(1) of the Arbitration Ordinance (Cap. 609), the following steps apply:

(1) within 15 days after becoming aware of the constitution of the tribunal or after becoming aware of grounds giving rise to justifiable doubts as to an arbitrator's impartiality or independence, the party must send a written statement of the reasons for its challenge to the tribunal;

35 HKIAC Administered Arbitration Rules (2018) art 11.1.
36 SIAC Rules (2016) r 13.1.
37 CIETAC Rules (2015) art 24.
38 Arbitration Rules, LCIA (2020) art 5.3.
39 ICC Rules (2021) art 11(1).
40 Arbitration Ordinance (Cap. 609) ss 13(4)(a) and 26(1).
41 *Ibid.*, s 26(5).

(2) the challenged arbitrator may choose to resign or the other party may agree to the challenge, failing which the tribunal decides on the challenge. In a three-member tribunal, it is usual for the challenged arbitrator to play no part in the tribunal's deliberations. If a sole arbitrator is challenged, this step allows the arbitrator to consider full reasons for the challenge before deciding whether or not to resign;[42]

(3) if unsuccessful, the challenging party may, within 30 days of notice of the tribunal's rejection of the challenge, apply to the Court of First Instance to decide on the challenge. Article 13(3) of the Model Law provides that the decision of the Court of First Instance shall be subject to no appeal;

(4) if at any stage the arbitrator resigns, the other party agrees to the challenge, or the Court removes him, the replacement shall be appointed according to the same rules as were applicable to the appointment of the arbitrator being replaced;[43]

(5) the above procedures are qualified by the parties' express right to agree on an alternative procedure, subject to the challenger's ultimate right to bring a challenge to the Court of First Instance[44] and the requirement of equal treatment of the parties.[45]

10.022 Many arbitration rules provide an alternative procedure for challenge. In most cases, if a challenged arbitrator refuses to resign, the institution itself will decide upon the challenge. For example:

(1) under the UNCITRAL Arbitration Rules, the duly designated appointing authority shall decide on the challenge.[46] If there is no duly designated appointing authority, the challenging party must first apply to the Permanent Court of Arbitration at the Hague to designate an appointing authority, who will then decide upon the challenge.[47] This can be a time-consuming process and emphasises the importance of ensuring that all clauses which incorporate the UNCITRAL Arbitration Rules also nominate an appointing authority;

(2) under the HKIAC Rules, the challenge must be dealt with by the HKIAC; and[48]

(3) under the ICC Rules, any challenge will be decided by the ICC Court.[49]

42 See Report of Committee on Hong Kong Arbitration Law, 30 April 2003, [20.3].
43 Model Law art 15, given effect by Arbitration Ordinance (Cap. 609) s 28.
44 The Court of First Instance is designated as the Court to decide on the challenge under Arbitration Ordinance (Cap. 609) s 13(4)(a).
45 See Report of Committee on Hong Kong Arbitration Law, 30 Apr 2003, [20.2].
46 UNCITRAL Arbitration Rules 2013, art 13.4.
47 *Ibid.*, art 6.
48 HKIAC Administered Arbitration Rules (2018) art 11.9.
49 ICC Rules (2017) art 14(1) and (3). See, e.g., *AT & T Corp v Saudi Cable Co* [2000] 2 All ER (Comm) 625 (Lord Woolf MR) 640d-f, where the English Court of Appeal found that notwithstanding the express provision of the ICC Rules which provided that a decision of the ICC Court should be final, the courts nonetheless retained their jurisdiction to determine whether the ICC Rules had been breached.

fully informed of all facts capable of being known to the general public in relation to the relevant decision-making process".[76]

10.037 In terms of how the "real possibility" or "fair-minded" test is applied in practice, subsequent English cases provide further guidance.[77] The courts emphasised three aspects: (1) the test is an objective one and not dependent upon the characteristics of the parties, e.g. the nationalities of the parties;[78] (2) the test assumes that the impartial observer is "fair-minded" and "informed", i.e. in possession of all the facts which bear on the question of whether there was a real possibility that the arbitrator was biased;[79] and (3) although the fair-minded and informed observer is not to be regarded as a lawyer, he or she is expected to be aware of the way in which the legal profession in England and Wales operates in practice (and to know that merely because an arbitrator acted as counsel for one of the firms of solicitors acting in the arbitration, does not give rise to a real possibility of apparent bias).[80] It is also noted that all factors which give rise to the possibility of apparent bias must be considered cumulatively, not merely individually.[81]

10.038 Below is a list of some of the circumstances which may give rise to the necessary implications. Potential challengers should however bear in mind that an exhaustive list of all disqualifying circumstances cannot be given. The courts tend to adopt a case-by-case approach to each situation that arises.

(a) Past or present links between the arbitrator and a party or counsel

10.039 There is no doubt that a previous or subsisting relationship between an arbitrator and a party can, in certain circumstances, give rise to the necessary apprehension of bias. However, each case will turn on its facts and evidence, as demonstrated by the examples below.

10.040 The Hong Kong Court of Appeal rejected an allegation of apparent bias against an arbitrator in a CIETAC arbitration who was a director of the Chinese government entity which issued an inspection certificate, which was then relied upon by the arbitrator in delivering his award. The court held that they could not infer a "real danger of bias" from the arbitrator's position as director of the government entity. As the applicant had not discharged the burden upon it to prove a "real danger of bias", the application was dismissed.[82] In another case, the court held that apparent bias was not made out where

[76] *PCCW-HKT Telephone Ltd v Telecommunications Authority* [2008] 2 HKLRD 282, [16], applying *Johnson v Johnson* (2000) 201 CLR 448.

[77] See, e.g., *A v B, X* [2011] EWHC 2345 (Comm) and *H v L* [2017] EWHC 137 (Comm). See also the UK Supreme Court decision in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 (discussed in detail below).

[78] *A v B, X* [2011] EWHC 2345 (Comm) [23], *H v L* [2017] EWHC 137 (Comm) [16(5)]–[16(6)].

[79] *A v B, X* [2011] EWHC 2345 (Comm) [25], *H v L* [2017] EWHC 137 (Comm) [16(4)]. See also *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416, [2].

[80] *A v B, X* [2011] EWHC 2345 (Comm), [28] and [60].

[81] *H v L* [2017] EWHC 137 (Comm), [16(8)]. See also *Cofely Ltd v Anthony Bingham* [2016] EWHC 240 (Comm), [115].

[82] *Logy Enterprises Ltd v Haikou City Bonded Area Wansen Products Trading Co* [1997] 2 HKC 481. The application was not made until after the award had been made against the applicant. It is possible that the Court would have viewed the application differently if it had been made in a timely fashion. There is also an implication from the judgment that the Court could have been convinced that the necessary apprehension of bias existed, but that the claimant had not presented sufficiently compelling evidence to discharge the burden. See also *Granton Natural Resources Co Ltd v Armco Metals International Ltd* (HCCT 5/2012, [2012] HKEC 1686) [22]–[28], in which the Court dismissed an allegation of apparent bias based on lack of evidence.

an arbitrator was ignorant of the fact that he previously advised the applicant party on the contracts in dispute some 40 months ago.[83]

10.041 In *AT&T Corp v Saudi Cable*, the English Court of Appeal rejected an application to remove a highly respected arbitrator because he was a non-executive director of a main competitor to one of the parties.[84] The court analysed all relevant circumstances and concluded that the non-executive directorship was simply an incidental part of the arbitrator's varied professional life, and therefore could not properly be said to have exerted any influence on him when acting in his capacity as arbitrator.[85] In *Taylor v Lawrence*, the English Court of Appeal found it "unthinkable" from an informed observer's point of view that a judge would be influenced to favour a party merely because that party happened to be represented by lawyers who were acting for the judge in a personal matter in connection with a will.[86]

10.042 In Hong Kong, the Court of First Instance dismissed a challenge against an arbitrator on the basis of his social and professional relationship with one of the defendants' lawyers, and in particular the fact that the arbitrator and the lawyer both sat on the HKIAC Council and spoke at several conferences together. Applying the "reasonable apprehension of bias" test, the court concluded that the circumstances did not give rise to a real possibility of bias. In support of the conclusion, the court reasoned that ordinary contacts between two highly regarded practitioners did not constitute a disqualifying relationship, given that the international arbitration circle in Hong Kong was small.[87]

10.043 More direct links between an arbitrator and a party, such as close and sustained personal relationships,[88] will likely give rise to removal. An arbitrator's appointment was terminated on the basis that he had been a close friend of the authorised representative and expert witness for the respondents for 25 years.[89] Similarly a judge was removed because of his close personal relationship over a period of 30 years with a witness.[90] An arbitrator was removed where a firm in which he was a salaried partner carried out a large amount of separate legal work for an associated company of one of the parties.[91] Note, however, that a similar argument was rejected by the English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd,* where the court found that the link between the large firm of solicitors in which the judge was a senior partner and one

[83] *Suen Wah Ling v China Harbour Engineering Co (Group)* (CACV 336/2006, [2007] HKEC 742) [14].

[84] The competitor had also been a disappointed bidder for the contract subject to arbitration in the case.

[85] Note also the similar decision of the Privy Council in relation to the Hong Kong Panel on Takeovers and Mergers, *Panel on Takeovers and Mergers v William Cheng Kai Man* [1995] 2 HKLR 302. The Privy Council dismissed an application relating to a member of the Panel on the basis that the member was a director and substantial shareholder in another company which would benefit if a company which the Panel was investigating was ordered by the Panel to take a particular step. The interest of the Panel member was found to be too remote and contingent to give rise to the necessary apprehension of bias.

[86] [2002] 3 WLR 640 [73].

[87] *Jung Science Information Technology Co Ltd v ZTE Corp* [2008] 4 HKLRD 776.

[88] See the *2004 IBA Guidelines on Conflicts of Interest*, para3.3.6, which defines a "close personal friendship" as "the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations".

[89] *Chan Man Yiu v Kiu Nam Investment Corp Ltd* (HCCT 110/2000, [2000] HKEC 1355).

[90] *Sir Alexander Morrison v AWG Group Ltd* [2006] 1 WLR 1163, [22].

[91] *Save & Prosper Pensions Ltd v Homebase Ltd* [2001] L&TR 11.

chambers does not, of itself, lead to doubts as to impartiality or apparent bias.[103] This has been confirmed in subsequent English and Hong Kong cases, including *Smith v Kvaerner Cementation Foundations Ltd*,[104] *Elijah Saatori v Raffles Medical Group (Hong Kong) Ltd*[105] and *Chan Fuk Tai v Chan Wai Ming*.[106]

10.049 Notably, there has been increasing criticism and scrutiny of this practice, particularly following some chambers' efforts in recent years to market themselves as a single unit possessing the same corporate identity.[107] In a survey of non-English lawyers from various countries, widespread concern was expressed about the practice of arbitrators and advocates from the same chambers participating in the same proceedings.[108] In this regard, it is relevant to note that the IBA Guidelines list a situation where an arbitrator and another arbitrator or counsel are members of the same chambers on the "orange list" of situations which require disclosure by prospective arbitrators (see para 10.054 below).[109] Consistent with this, and in the context of international arbitration which involves parties from different cultural backgrounds, the authors submit that it is desirable that counsel and arbitrators disclose the fact that they practice in the same chambers as soon as practically possible.[110]

10.050 Whether such circumstances give rise to a justifiable apprehension of partiality may depend on the nationality of the parties and their familiarity with the practice. In *Hrvatska Elektroprivreda dd v Republic of Slovenia*,[111] Slovenia's first-choice counsel was prevented from appearing at a hearing because he was a member of the same set of

[103] *Gary Albert Watts v Christine Deborah Watts* [2015] EWCA Civ 1297, [28]: "It is true that the judge [in Laker Airways] directed himself by reference to the then current standard for assessing an appearance of bias set out in R v Gough [1993] AC 646, which was adjusted in *Porter v Magill* to bring it into line with the test under Article 6, but I do not think that is significant for the analysis in the case".

[104] [2006] EWCA Civ 242: "Judges in this jurisdiction, whether full time or part time, frequently have present or past close professional connections with those who appear before them and it has long been recognised that this, of itself, creates no risk of bias nor, to those with experience of our system, any appearance of bias".

[105] [2017] HKEC 1982: "The fact that the Judge and the defendant's counsel know each other and used to work in the same set of chambers, and the fact that the Judge has a working relationship with the defendant's former counsel cannot satisfy the reasonable apprehension of bias test. A fair-minded and informed observer would not conclude from these circumstances that there was a real possibility that the Judge was biased against the plaintiff".

[106] [2020] HKCFI 1041: "I did not accept that the sharing of chambers between counsel and the presiding deputy judicial officer in itself would give rise to apparent bias, in the type of system the Bar operates in Hong Kong today. Indeed Mr Ching did not appear to quarrel with this. If an authority is required, see *Laker Airways Inc v FLS Aerospace Ltd & Burnton* [1999] 2 Lloyd's Rep 45 (Rix J) in the related context of arbitration".

[107] See the Explanation to General Standard 6, *IBA Guidelines on Conflicts of Interest in International Arbitration* (2014) para (a), which states, "Although barristers' chambers should not be equated with law firms for the purposes of conflicts, and no general standard is proffered for barristers' chambers, disclosure may be warranted in view of the relationships among barristers, parties or counsel."

[108] See Berwin Leighton Paisner, "*International Arbitration: Research based Report on Perceived Conflicts of Interest*", available at http://www.blplaw.com/media/pdfs/Publications/International_Arbitration_report_on_perceived_conflicts_of_interest.pdf. According to the survey, 78% of the respondents indicated that their clients would not be pleased with barristers from the same set of chambers appearing together in different roles in the same arbitration. Ninety four per cent felt that disclosure of such situation should be made and 65% took the view that a challenge under such circumstance was likely to succeed. The survey also showed that Asian clients may be most concerned about conflicts arising from arbitrators and counsel being members of the same chambers.

[109] IBA 2014 Guidelines para 3.3.2.

[110] As the court in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [21] noted, "[i]f, in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is or becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing".

[111] ICSID Case No ARB/05/24.

chambers as the Chairman of the Tribunal. The Tribunal found that "[t]he justifiability of an apprehension of partiality depends on all relevant circumstances. Here, those circumstances include … the fact that the London chambers system is wholly foreign to the Claimant….".[112] This was however an unusual case in which the involvement of said counsel was revealed only shortly before the hearing.[113]

(d) Infection of bias

10.051 Where one member of an arbitral tribunal is tainted by apparent bias, it does not necessarily follow that the other members of the tribunal are similarly affected. Therefore the remaining arbitrators should not be excluded from the proceedings.[114]

10.052 However, in certain circumstances, the apparent bias principle can extend to arbitrators not immediately involved in the act giving rise to apparent bias. This may occur when one arbitrator does something which gives rise to the necessary apprehension of bias and his fellow arbitrators discuss the matter in question with him or circumstances otherwise arise which suggest that they may be "infected" by the principal arbitrator's apparent bias. For example, in *Director General of Fair Trading v Proprietary Association of Great Britain*,[115] the English Court of Appeal decided that one member of a tribunal offended the apparent bias principle because she had applied for a job with the firm from whom an expert witness was a director. The court concluded that, as she must have discussed some of the relevant economic issues with the other members of the tribunal, they too should be made to stand down.[116]

(e) *Ex parte* communications

10.053 As a matter of public policy, an arbitrator must not only bring an impartial and independent mind to the resolution of a dispute, but also ensure that he is "not influenced, or seen to be influenced, by private communications".[117] This principle was endorsed

[112] Order Concerning the Participation of a Counsel, 6 May 2008, [31].

[113] Note further that in *The Rompetrol Group NV v Romania* ICSID Case No ARB/06/3, the tribunal in that case considered a similar application by Romania to exclude participation of counsel to Rompetrol after learning that counsel to Rompetrol and a member of the tribunal both worked at Debevoise and Plimpton LLP from 2004 to 2008 (the decision of the tribunal in the participation of a Counsel, 14 January 2010). Romania expressly relied upon the 2008 decision of the ICSID tribunal in *Hrvatska* in support of its position. In its decision the *Rompetrol* tribunal rejected Romania's position on the facts of the case (as the association between counsel and the tribunal member has now ceased) and that the tribunal should not interfere with Rompetrol's choice of legal counsel. In relation to the *Hrvatska* decision, the Rompetrol tribunal noted that the *Hrvatska* tribunal was influenced to a material degree by the late announcement of the new appointment as counsel, coupled with the light that had been cast on the surrounding circumstances by the adamant refusal of the appointing Party's representatives to make any disclosure until the very last minute" and so "[v]iewed from this perspective, the *Hrvatska* Decision might better be seen as an *ad hoc* sanction for the failure to make proper disclosure in good time than as a holding of more general scope," [25].

[114] *ASM Shipping Ltd v Harris* [2008] 1 Lloyd's Rep 61, [44].

[115] [2001] 1 WLR 700.

[116] See also the decision of the High Court of Australia in *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70.

[117] *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, [1999] 1 HKLRD 665, 692. See also the comments of the English High Court in *Jackson v Thomson Solicitors (A Firm)* [2015] EWHC 218 (QB), [115]–[119] which considered private communications between the judge and one of the parties as "odd" and the failure to inform the other party "a mistake, because it suggested that one party was telling the Judge

by the relevant rules) and the co-arbitrators (if any) prior to accepting appointment or as soon as possible afterwards.[183] This contrasts with the objective test for disclosure that can be found in most jurisdictions and in the UNCITRAL Model Law (also under r 11 of the UNCITRAL Rules). This change is due to the recognition by the Working Group of the parties' legitimate interest in being fully informed about matters that may only be relevant in their eyes. The Guidelines also clarify that an advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator's ongoing duty of disclosure.[184]

10.086 The Guidelines also suggest a specific time limit (30 days after any disclosure by the arbitrator or after a party learns of facts or circumstances that could constitute a potential conflict of interest) during which the parties should raise a specific objection or otherwise be deemed to have waived any potential conflict of interest subject to limited exceptions.[185]

10.087 The application of the 2004 version of the IBA Guidelines was dealt with in *ASM Shipping Ltd of India v TTMI Ltd of England*.[186] The court noted that the Guidelines were not intended to be comprehensive and were to be "applied with robust common sense and without pedantic and unduly formulaic interpretation".[187] Since the facts in the case could not fit into any of the situations listed in the Guidelines, the court concluded that "that says nothing about the true answer to the questions in this case".[188] The 2014 version of the Guidelines were analysed in *W Ltd v M SDN BHD*,[189] which concerned a challenge of a sole arbitrator for an alleged failure to disclose a circumstance listed in the non-waivable Red List. The court confirmed that the Guidelines are not legally binding, but that they can be of assistance and it would be valuable and appropriate to examine them. On examination, the court identified certain weaknesses in the Guidelines which may cause a party to "focus less on a case-specific judgment".[190] The court found on the facts that the fair minded and informed observer would not conclude that there was a real possibility that the arbitrator was biased and concluded that the Guidelines do not change the court's view in this case.

(i) Failing to possess qualifications agreed to by the parties

10.088 Article 12(2) of the Model Law, given effect by s 25 of the Arbitration Ordinance (Cap. 609), provides an additional ground for challenge, in circumstances where the

[183] General Standard 3(a).
[184] General Standard 3(b).
[185] General Standard 4(a). The most important of which is if the situation is one of those listed in the non-waivable Red List.
[186] [2006] 2 All ER (Comm) 122.
[187] *Ibid.*, [39(4)]. Introduction to the Guidelines, [6].
[188] *ASM Shipping Ltd of India v TTMI Ltd of England* [2006] 2 All ER (Comm) 122, para 39(4). See also *A v B, X* [2011] Lloyd's Rep 591, in which the English court confirmed that the Guidelines are not intended to override national law, so that, if applying the common law test leads to a conclusion that there is no apparent bias, the Guidelines cannot later that conclusion [72].
[189] [2016] EWHC 422 (Comm), [26], [33]–[41].
[190] *Ibid.*, [37]. The court identified the following weaknesses in the Guidelines: "First, in treating compendiously (a) the arbitrator and his or her firm, and (b) a party and any affiliate of the party, in the context of the provision of regular advice from which significant financial income is derived. Second, in this treatment occurring without reference to the question whether the particular facts could realistically have any effect on impartiality or independence (including where the facts were not known to the arbitrator)", [34].

arbitrator "does not possess qualifications agreed to by the parties". Challenges under this head are very rare, as the parties normally ensure that the arbitrator has the appropriate qualifications before or at the time of his or her appointment. Nonetheless, if an arbitrator holds himself or herself out as possessing qualifications which it transpired he or she did not possess, then this would be a ground for challenge under s 25 and for setting aside an award under s 26(5) of the Arbitration Ordinance if such a challenge is upheld.

10.089 Common qualifications include professional credentials or nationality. However, these qualifications are not always given effect by the applicable law or courts. For example, art 11(1) of the Model Law, given effect by s 24(1) of the Ordinance, provides that, unless the parties otherwise agree, no individual can be prohibited from acting as an arbitrator by reason of his nationality.[191]

10.090 In a high-profile case in 2011, the English Court of Appeal held that an arbitration agreement which provided that only persons of a certain religious belief could act as arbitrator was void, because arbitrators fall within the scope of English anti-discrimination legislation in relation to religion and belief[192] and the clause violated that legislation.[193] Consequently, the decision impacted on arbitration agreements which included, whether expressly or by way of incorporation of many of the commonly used institutional arbitration rules,[194] restrictions on the nationality of individuals who may be appointed as arbitrators. Following widespread criticism and an appeal, the English Supreme Court overturned the decision, concluding that arbitrators are not employees protected by anti-discrimination legislation. As a result, provisions restricting the nationality of arbitrators in arbitration agreements or procedural rules where the seat is London are permissible.[195]

(j) Failure or impossibility to act as an arbitrator

10.091 An arbitrator's mandate terminates when he or she is legally or physically unable to perform his or her designated functions or, for some other reason, he or she fails to act without undue delay. In determining whether an arbitrator has failed to act without undue delay, one commentator suggested that a level of reasonable expectation needs to be observed in light of the specific factual background and arbitration agreement.[196]

10.092 An arbitrator is removed if he or she voluntarily withdraws, and the parties agree on the removal or the Court of First Instance upholds the removal if a controversy remains as to any grounds in relation to the termination of the arbitrator's mandate.[197]

[191] Interestingly art 11(5) of the Model Law also requires an appointing authority to have due regard to nationality when appointing a sole or third arbitrator.
[192] Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660 which has been repealed since 1 October 2010 by the Equality Act 2010 c.15.
[193] *Jivraj v Hashwani* [2011] 1 All ER 50.
[194] Institutional rules which contain provisions on nationality restrictions include, for example, the LCIA Rules art 6.1, the ICC Rules art 13.5 and the HKIAC Rules art 11.2.
[195] *Jivraj v Hashwani* [2011] 1 WLR 1872.
[196] Seventh Secretariat Note Analytical Commentary on Draft Text, A/CN.9/264, 25 March 1985, art 14, [4].
[197] Arbitration Ordinance (Cap. 609) s 27. Note that the Court of First Instance is designated to decide on the termination of an arbitrator's mandate by virtue of s 13(4)(b) of the Ordinance and its decision is final.

1. Introduction

(a) Pro-enforcement approach in Hong Kong

18.002 Hong Kong is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention") by virtue of its being a Special Administrative Region of the People's Republic of China (the "PRC").[1] The New York Convention sets out a detailed legal framework for the recognition and enforcement of arbitration awards. Hong Kong has adopted a pro-enforcement attitude in enforcing arbitral awards, mirroring the principles and spirit of the New York Convention and has an excellent reputation for recognising and enforcing arbitral awards made in countries which are also signatories to the New York Convention.[2] As Hong Kong is a Special Administrative Region of the PRC, the New York Convention no longer applies to the enforcement in Hong Kong of arbitral awards made in the PRC or vice versa; such awards are subject to a different recognition and enforcement regime.[3]

18.003 The enforcement of arbitral awards made in the PRC and Macao (also a Special Administrative Region of the PRC) is not effected under the New York Convention but is governed by arrangements between Hong Kong and the PRC and Macao governments. These arrangements set out the legal framework for the mutual enforcement of arbitral awards between the PRC and its regions, albeit on a different legal basis to the New York Convention, and were incorporated into domestic legislation in Hong Kong, with respect to Awards the enforcement of PRC awards, in 2000, and with respect to enforcement of Macao awards, in 2013.[4] These modifications have resolved any

1 The Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 609A) lists the states and territories that are parties to the New York Convention. Updated lists of signatories to the New York Convention are also published annually in the Journal of International Arbitration and the Yearbook Commercial Arbitration. Prior to the handover of sovereignty of Hong Kong from the United Kingdom to the People's Republic of China in 1997 (the "Handover"), Hong Kong was a party to the New York Convention by virtue of its status as a colony of the United Kingdom, and therefore was not listed as a party in its own right. Its current status as a party to the New York Convention derives from that of the PRC, which is a signatory.

2 Article V of the New York Convention provides that the recognition and enforcement of the award may not be refused, unless the party opposing enforcement can establish one of the limited and exclusive grounds set out therein. For a good example, see *Hebei Peak Harvest Battery Co Ltd v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 11, in which an application to challenge enforcement was refused, with Sir Anthony Mason NPJ opining that "*the object of the Convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced*", at [139]. See also *KB v S* [2016] 2 HKC 325 "*The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards*," at para 1. In this case, the court summarised the principles to be applied on an application for enforcement of an arbitral award. See also *China Solar Power (Holdings) Ltd v Ulvac Inc* (unrep., HCMP 1191/2015, [2015] HKEC 2559) "*the same principles would apply to an application for setting aside an arbitral award, it being the other side of the coin*".

3 Prior to the Handover, a large number of awards made in the PRC were enforced in Hong Kong as Convention Awards, and Hong Kong arbitral awards were capable of enforcement in the PRC under the New York Convention as foreign awards.

4 The Repealed Ordinance was amended in January 2000 to give effect to the June 1999 arrangement made between PRC and Hong Kong. A further amendment was made in June 2000 in which s 2GG under Cap. 341 was amended. The Ordinance, which came into force on 1 June 2011, broadened the mutual enforcement of arbitral awards between the PRC and its regions and Hong Kong's pro-enforcement approach. The Ordinance was amended, effective from 16 December 2013, to introduce Pt 10 Div 4 to reflect the Macao Arrangement reached in January 2013. See Section 5 below.

perceived weaknesses with existing legislation brought about by reunification.[5] The complete legislative regime not only promotes the efficient enforcement of different types of awards,[6] but also adds further strength and confidence to Hong Kong as a dispute resolution centre. As a result, Hong Kong is one of the prime dispute resolution centres in the Asia Pacific region.

18.004 While the Arbitration Ordinance (Cap. 609) (the "Ordinance") largely incorporates the Model Law on International Commercial Arbitration recommended by the United Nations Commission on International Trade Law (the "UNCITRAL Model Law"),[7] it specifically excludes the enforcement regime under the Model Law, and sets out its own enforcement regime in Pt 10 of the Ordinance. The enforcement regime under the Ordinance consists of four divisions. The first covers the enforcement of arbitral awards made in or outside Hong Kong which are not Convention awards, Mainland awards or Macao awards. The second division concerns enforcement of an arbitral awards made in a foreign country which is a party to the New York Convention ("Convention Awards"). The third division addresses arbitral award made in the mainland of the PRC,[8] by a recognised PRC arbitral authority in accordance with the Arbitration Law of the PRC ("Mainland Awards"). The fourth newly introduced division sets out the regime for enforcement of an arbitral award made in the Macao Special Administrative Region ("Macao Awards"). The enforcement mechanism under each respective division is discussed below in this chapter.

(b) Contracts (Rights of Third Parties) Ordinance (Cap. 623)

18.005 The Contracts (Rights of Third Parties) Ordinance (Cap. 623) (the "Rights of Third Parties Ordinance"), enacted on 1 January 2016, has potentially wide-ranging implications for both parties to a contract and third parties to a contract (i.e. persons who are not parties to a contract). Before the Rights of Third Parties Ordinance was enacted, the doctrine of privity prevented third parties to a contract from enforcing any of the rights enshrined in that contract; only parties to the contract could enforce it. Under the Rights of Third Parties Ordinance, however, third parties are now able to enforce contractual terms of a contract, entered into on or after 1 January 2016, to which they are not a party, in the circumstances set out in s 4 of the Rights of Third Parties Ordinance.[9] If a third party's right to enforce a term of a contract is subject to an arbitration agreement,

5 After the Handover, since Hong Kong has become part of China and the New York Convention only applies to the enforcement of awards between two different contracting countries, the New York Convention does not apply to the enforcement of Hong Kong awards in China and vice versa. Concerns have therefore been raised as to whether the Chinese courts would regard Hong Kong awards as domestic awards and not foreign awards, thus enabling the party against whom enforcement was sought to invoke a wide range of grounds on which to challenge enforcement.

6 In June 2000, the Ordinance was further amended so that awards made in non-New York Convention states or territories (e.g. Iraq and Taiwan) are summarily enforceable in Hong Kong. The relevant provision has been retained in s 84 under the Ordinance.

7 Section 2 of the Ordinance defines the "UNCITRAL Model Law" as the UNCITRAL Model Law on International Commercial Arbitration as adopted by the Commission on 21 June 1985 and as amended by the Commission on 7 July 2006, the full text of which is set out in Sch 1.

8 "Mainland" is defined under s 2(1) of the Ordinance as any part of China other than Hong Kong, Macao and Taiwan.

9 Subject to s 3, which excludes certain types of contract, such as, bills of exchange and employment contracts.

the third party is treated as a party to the arbitration agreement for the purposes of enforcement of the term, unless on a proper construction of the contract, the third party is not intended to be so treated.[10] A third party will have a procedural right under a contract to submit disputes to arbitration if the contract term is enforceable by the third party, the term provides that the dispute between the third party and the promisor is to be submitted to arbitration and the term constitutes an arbitration agreement.[11] Where a contract does not have an arbitration agreement but merely includes a reference to another document which contains an arbitration agreement, the test in Hong Kong as to whether there is an arbitration agreement incorporated in the contract by reference appears to be whether there was an intention to incorporate the arbitration agreement in the contract, and there is no requirement that there be a specific reference to the arbitration agreement.[12] Parties to a contract may contract out of the provisions of the Rights of Third Parties Ordinance.[13] It also should be noted that commentators have observed that a third party receiving an award in his favour in reliance upon the provisions of the Rights of Third Parties Ordinance may face an uphill struggle when enforcing the award in a foreign jurisdiction under the New York Convention.[14]

(c) Enforcement of interim awards and emergency arbitrator awards

18.006 Enforcement of interim awards is discussed further in Chapter 17 above. In respect of emergency arbitrator awards, the Arbitration (Amendment) Ordinance 2013,[15] (the "Arbitration (Amendment) Ordinance") introduced Pt 3A of the Ordinance, which allows for the enforcement of urgent interim relief granted by an emergency arbitrator. For a detailed discussion of issues in relation to the enforcement of emergency arbitrator's awards/orders, see Chapter 12.

2. Enforcement of Arbitral Awards Made in Hong Kong Arbitral Awards Made in a Jurisdiction which is not a Party to the New York Convention and under the UNCITRAL Model Law

18.007 Hong Kong-made arbitral awards and non-Convention Awards including those made pursuant to the UNCITRAL Model Law, whether in or outside Hong Kong, are subject to the same enforcement regime under the Ordinance.

[10] Section 12 of the Rights of Third Parties Ordinance.

[11] *Ibid.*

[12] *In Parkson Holdings Ltd v Vincent Lai & Partners (HK) Ltd* (unrep., HCCT 27/2008, [2008] HKEC 2151), Burrell J stated "*The lack of specific discussion on the clause is not sufficient to remove it from the contract*". See also *Tsang Yuk Ching t/a Tsang Ching Kee Eng Co v Fu Shing Rush Door Joint Venture Co Ltd* (unrep., HCA 987/2003, [2003] HKEC 1366). In *Gay Construction Pty Ltd v Caledonian Techmore (Building) Ltd* [1994] 2 HKC 562, Kaplan J stated "*To require a specific reference to the arbitration clause would be far too restrictive and clearly was not intended by those drafting the Model Law*".

[13] Sections 4, 12(3), and 12(4)(b) of the Rights of Third Parties Ordinance.

[14] A Tweeddale, *Arbitration under the Contracts (Rights of Third Parties) Act 1999 and Enforcement of an Award*, LCIA Arbitration International, Vol. 27(2011) No.4.

[15] Arbitration (Amendment) Ordinance 2013, Ordinance No. 7 of 2013.

(a) Hong Kong awards

18.008 Formerly, under the repealed Arbitration Ordinance (Cap. 341) (the "Repealed Ordinance"), a Hong Kong-made arbitral award could be treated as either an international award or a domestic award depending upon the parties to the dispute; with each subject to a different set of grounds for refusing enforcement. The Ordinance has merged the two limbs, with the result that a Hong Kong-made arbitral award is no longer classified as an international award or a domestic award, and the same set of requirements for enforcement apply to all Hong Kong awards alike, which is either by the enforcement regime set out in Pt 10, Div 1 of the Ordinance (summary enforcement), or by an action on the award.

(b) Awards made in a jurisdiction which is not a party to the New York Convention and under the UNCITRAL Model Law

18.009 A non-Convention Award can be enforced in the same manner as awards in Hong Kong, that is under the enforcement regime set out in Pt 10, Div 1 of the Ordinance (summary enforcement) or by an action on the award. An arbitral award made in Taiwan (the common name for the Republic of China) can only be enforced in Hong Kong as a non-Convention Award as Taiwan is not a signatory to the New York Convention.

18.010 Sections 82 and 83 of the Ordinance specifically exclude ch VIII of the UNCITRAL Model Law regarding the recognition and enforcement of Awards; as a result, an award made in Hong Kong in an arbitration governed by the UNCITRAL Model Law has to be enforced in the same way as any other award made in Hong Kong, either by summary enforcement under s 84, or by an action on the award, which is based on the common law.[16]

(c) The methods for enforcement of Hong Kong awards, non-Convention awards, and UNCITRAL Model Law awards

18.011 The two methods for enforcement of Hong Kong awards, non-Convention Awards, and UNCITRAL Model Law awards are therefore summary enforcement and an action on the award.

(i) *Summary enforcement*

(a) Section 84 of the Ordinance[17]

18.012 Section 84(1) provides that an arbitral award is enforceable in the same manner as a judgment of the Hong Kong Court of First Instance that has the same effect, but only with the leave of the court. A party may appeal against a decision of the court to grant or refuse leave to enforce an arbitral award, but leave for the appeal is required from

[16] The procedure for enforcing in Hong Kong an award made in Hong Kong under the UNCITRAL Model Law is identical to that which applies to the enforcement of domestic awards. The principles applicable by the High Court to costs in relation to the enforcement of domestic awards also apply to enforcement in Hong Kong of international awards made in Hong Kong under the UNCITRAL Model Law.

[17] Section 2GG of the Repealed Ordinance.

manner as the award of an arbitrator enforceable by way of the summary enforcement procedure under s 84 of the Ordinance (see para 18.009).[60]

(ii) *Summary enforcement*

18.026 The procedure for enforcing a Convention Award is simple, straightforward and does not involve substantial costs. The procedure is essentially the same as that of enforcing an award made in Hong Kong or in a jurisdiction which is not party to the New York Convention and under the UNCITRAL Model Law, except there are only a limited number of exclusive defences against enforcement of Convention Awards, as considered below. Accordingly, an *ex parte* application can be made to the judge in charge of the Construction and Arbitration List[61] for leave to enforce the award in the same manner as a judgment or order of the court.[62] Despite the discretion to order that the other side be given notice and an opportunity to resist the application, the Hong Kong courts will often give leave to enforce the award if the application is supported by affidavit,[63] and exhibits the required documents under s 88 of the Ordinance. The documents include; (1) the duly authenticated original award or a duly certified copy of it;[64] (2) the original arbitration agreement or a duly certified copy of it;[65] and, (3) where the award or agreement is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.[66]

(iii) *Section 89 of the Ordinance and the discretion of the court*

18.027 The Hong Kong courts have an excellent record in enforcing foreign arbitral awards in accordance with the New York Convention with leave to enforce Convention Awards rarely being refused. The limited grounds for refusing enforcement are the same as those under the Repealed Ordinance and there is a strong presumption in favour of

[60] It should be noted that, pursuant to s 87(2), any Convention Award which "is enforceable" under subs (1) is to be treated as binding for all purposes on the persons between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings in Hong Kong. Accordingly, an arbitral award not yet enforced (but enforceable under s 87) stands as a valid cross-claim or set-off in a legal action.

[61] Practice Direction 6.1 High Court Construction and Arbitration List (12 February 2009).

[62] RHC O 73 r 10(1).

[63] *Ibid.*, O 73 r 10(3). It should be noted that the affidavit in support of the application does not come within the exception in O 41 r 5(2) under which affidavits for use in interlocutory proceedings may contain hearsay statements. The reason behind this is that the nature of an application to enforce an arbitral award is not, in substance, "interlocutory". The test of whether an application is "interlocutory" in nature was laid down in *Gilbert v Endean* (1878) LR 9 Ch D 259: "Those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in *status quo* till the rights can be decided, or for the purpose of obtaining some direction of the Court as to how the case is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the Court ultimately to decide upon the rights of the parties." As the nature of the application to enforce an arbitral award is to decide the rights of the parties (and hence is not interlocutory), the exception to the hearsay rule provided beyond O 41 r 5(2) does not apply.

[64] Section 88(a) of the Ordinance. It is sufficient for the purposes of this provision that the party seeking enforcement produces *prima facie* proof as to the authenticity of the award. For example, by producing a copy of the award under cover of an affirmation by his Hong Kong solicitors that the document is a true copy of the duly authenticated award: see *Guangdong New Technology Import & Export Corp Jiangmen Branch v Chiu Shing* [1991] 2 HKC 460. In *Medison Co Ltd v Victor (Far East) Ltd* [2000] 2 HKC 502, it was held that it is sufficient that a proper and genuine award be produced to the court at the *inter partes* stage, provided that it is prior to final adjudication of the application to enforce.

[65] Section 88(b) of the Ordinance.

[66] *Ibid.*, s 88(c).

enforcement. Section 89 of the Ordinance (which replicates with minor modifications art V of the New York Convention) provides that enforcement of a Convention Award should not be refused unless the party opposing the enforcement successfully establishes any of the following limited and exclusive grounds:

(1) A party to the arbitration agreement was (under the law applicable to him) under some incapacity;[67]

(2) The arbitration agreement was not valid under the law to which the parties subjected it or, if there was no indication of the law to which the arbitration agreement was subjected, under the law of the country where the award was made;

(3) The party against whom enforcement is sought was not given proper notice of the appointment of an arbitrator, of the arbitration proceedings, or was otherwise unable to present his case;[68]

(4) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or, contains decisions on matters beyond the scope of the submission to arbitration;[69]

[67] *Hebei Peak Harvest Battery Co Ltd v Polytek Engineering Co Ltd* (unrep., CACV 224/1997, [1998] HKEC 581), leave to appeal refused in (unrep., CACV 224/1997, 18 June 1998), here the Court of Appeal remitted the case to the High Court to consider the issue of incapacity following the attempted admission of fresh evidence. However, note the subsequent trail of the case to the Court of Final Appeal (reported at (1999) 2 HKCFAR 11), leading to the enforcement of the award despite the attempts to challenges under (*inter alia*) s 44.

[68] See e.g. *Guangdong New Technology Import & Export Corporation Jiangmen Branch v Chiu Shing* [1991] 2 HKC 460; *Qinhuangdao Tongda Enterprise Development Co v Million Basic Co Ltd* [1993] 1 HKLR 173; *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39; *Wah Sin Electronics Industrial Co Ltd Fujian v Tan Lok* (unrep., HCMP 2843/1993, [1995] HKLY 81); *Apex Tech Investment Ltd v Chuang's Development (China) Ltd* [1996] 2 HKLR 155; *Guangdong Overseas Shenzhen Company Ltd v Yao Shun Group International Ltd* (unrep., HCCT 13/1997, [1998] HKEC 904) (party not given the proper opportunity to present its case following unclear directions by the arbitral tribunal); *Sun Tian Gang v Hong Kong & China Gas (Jilian) Ltd* [2016] 5 HKLRD 221 (party not given proper notice of the arbitral proceedings and not able to present his case due to his incarceration in Mainland China); *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] (1999) 2 HKCFAR 111; 1 HKLRD 665; *Wuzhou Port Foreign Trade Development Corp v New Chemic Ltd* [2000] HKEC 1476; *Shandong Textiles Import and Export Corp v Da Hua Non-Ferrous Metals Co Ltd* [2002] 2 HKLRD 844; *Pride of Treasure Fund v Canadian Forest Natural Beverage Ltd* (unrep., HCCT 37/2011, [2011] HKEC 1497) (considering the similar provisions under Division I, s 86 of the Ordinance); *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* [2012] 4 HKLRD 1, (court refused to allow setting aside application on ground that the applicant lacked authority to enter into the arbitration agreement); *X Chartering v Y* (unrep., HCCT 13/2012, [2014] HKEC 477).

[69] This provision is subject to s 89(4), whereby decisions on matters not submitted to arbitration may be severed from the award, leaving the remainder to be enforced. However, where an award has been made entirely in excess of jurisdiction, i.e. the whole award deals with a dispute not falling within the terms of the arbitration agreement, leave to enforce the award will be refused: see *Wah-Chang International (China) Co Ltd v Tiong Huat Rubber Factory (Sdn) Bhd* [1991] 1 HKC 28, CA; *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (unrep., FACV 6/2008, [2008] HKEC 2063); *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd* [2011] 1 HKLRD 707. In *Grant Thornton International Ltd v JBPB & Co* (unrep., HCCT 13/2012, [2013] HKEC 477), it was held that the ground to refuse enforcement under s 89(2)(d)(ii) on the ground that "*the award contains decisions on matters beyond the scope of the submission to arbitration*" should be construed narrowly with the result that the court dismissed the respondent's attempt to challenge enforcement of an award on the ground that (*inter alia*) the tribunal lacked jurisdiction to consider certain issues in the award (see esp. at [43]–[47]).

the performance of Hong Kong's obligations under the New York Convention. However, although the New York Convention continues to apply in Hong Kong, it does not apply to inter-regional enforcement of Hong Kong awards in the PRC and vice versa. This is because the New York Convention only applies to the enforcement of awards between two different contracting countries. In order to deal with this problem with enforcement of Mainland Awards upon the basis of the principles of the New York Convention, which had arisen after Handover,[107] numerous discussions were held between various authorities in Hong Kong and the central government in Beijing with a view to putting in place a new mechanism for the reciprocal enforcement of awards between Hong Kong and China. This led, on 21 June 1999 to, the authorities in Hong Kong and the PRC signing a Memorandum of Understanding on the Arrangement between the Mainland and Hong Kong on the Mutual Enforcement of Arbitration Awards (the "Arrangement"), which amounts to a juridical assistance agreement under art 95 of the Hong Kong Basic Law. The Arrangement was recognised in Hong Kong by amending the Ordinance in 2000 (via the Arbitration (Amendment) Ordinance). In the PRC, the Arrangement was adopted directly into law by virtue of a Supreme People's Court Notice of 24 January 2000 titled "Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Mutual Enforcement of Arbitration Awards",[108] taking effect on 1 February 2000.

18.040 In October 2019, the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the "Interim Measures Arrangement") came into force. Unlike Hong Kong courts, Mainland courts did not have similar power to grant interim relief in aid of arbitrations seated outside the Mainland. Pursuant to the Interim Measures Arrangement, parties to Hong Kong arbitral proceeding administered by a prescribed list of six recognised arbitral institutions may apply for interim measures in the Mainland courts either before or during the arbitration proceeding,

[107] These problems exist in relation to decisions from the Handover on 1 July 1997 to the arrangement of 31 January 2000. Thus, in *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* [1998] 1 HKLRD 287 (CA), Chan CJHC considered, *obiter*, that Mainland Awards were still Convention Awards after 1 July 1997 and that, in light of the "one country, two systems" concept in Hong Kong, a purposive meaning should be given to the words "domestic awards" in art I(1) of the New York Convention. As a result an award made in Beijing was not considered to be a domestic award in Hong Kong, and the New York Convention would continue to apply. Such comments were mentioned without further discussion subsequently by the Court of Final Appeal in, *Hebei Import & Export Corporation v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111 (CFA), [1999] 1 HKLRD 665, 682. However, Chan CJHC concluded that the matter was not beyond doubt, therefore it was desirable that the relevant authority should consider appropriate amendments to the Ordinance. The outcome of this case has raised concerns over whether Hong Kong awards might be treated as domestic awards in the Mainland (and vice versa), thus potentially being subject to wider grounds for enforcement being refused than Convention Awards. In *Ng Fung Hong Ltd v ABC* [1998] 1 HKLRD 155, it was held that a Mainland Award being enforced after 1 July 1997 was not a Convention Award. However, it also was unenforceable under s 2GG of the Ordinance since Pt IA only applied to international or domestic arbitration agreements where the place of arbitration is Hong Kong. Thus, an award made in the Mainland, which was no longer viewed as a foreign award after the resumption of sovereignty, was not considered as a domestic award either. As such, the residue option was that the Mainland Award could, only be enforced in Hong Kong through an action on the award. See also *Shandong Textiles Import and Export Corporation v Da Hua Non-ferrous Metals Co Ltd* [2002] 2 HKLRD 844, which also held that Mainland Awards were not Convention Awards after July 1997 and before the Arrangement came into effect and which provides an illustration of the lack of jurisdiction of the Hong Kong courts to grant leave to enforce awards made in the Mainland as Convention Awards during the period between 1 July 1997 and 31 January 2000.

[108] Fa Shi [2000] No. 3, which took effect on 1 February 2000.

including asset preservation order, evidence preservation order and/or conduct preservation order either before the arbitration has commenced or during the course of the arbitration. The Mainland courts may require the applicant seeking interim measures to provide security.

18.041 To bring the enforcement process more in line with international arbitration practice, providing greater certainty and flexibility, and strengthen the regime between the PRC and Hong Kong, the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong (the "Supplemental Arrangement") was signed on 27 November 2020 to amend the Arrangement. The Hong Kong Government will also introduce legislative amendments to the Arbitration Ordinance to fully implement the Supplemental Arrangement.

(b) Effect of the legislative regime

18.042 Under the Arrangement, where a party fails to comply with an arbitral award, whether made in Hong Kong or in the Mainland, the other party can take action to enforce this award in the Mainland or in Hong Kong (as appropriate), by applying to the "relevant court" in the place where the party against whom the application is filed is domiciled, or in the place where the property of said party is situated, so as to enforce the award. "Relevant court", in the case of the Mainland, means the Intermediate People's Court of the place where the party against whom the application is filed is domiciled or the place in which the property of said party is situated. In Hong Kong, it means the Court of First Instance in Hong Kong.

18.043 The amended legislative regime in Hong Kong added Pt IIIA (ss 40A–40G) to the 2000 Ordinance to provide for the enforcement of Mainland Awards in Hong Kong. Part IIIA was made in accordance with the spirit of the New York Convention and it appears in Div 3 of Pt 10 (ss 92–98) of the Ordinance. Accordingly, Mainland Awards can be enforced in a similar manner to a Convention Award, with the same enforcement mechanism,[109] evidential requirements,[110] limited and exclusive grounds for refusing enforcement, and with a strong presumption in favour of enforcement.[111]

18.044 A "Mainland award" is defined in s 2(1) of the Ordinance (as amended) as "an arbitral award made in the Mainland by a *recognised Mainland arbitral authority* in accordance with the Arbitration Law of the People's Republic of China" (emphasis added). Accordingly, prior to the Supplemental Arrangement, not all arbitral awards made in China will be eligible for enforcement in Hong Kong. The Arrangement provides that it will apply to arbitral awards made by Chinese arbitration organisations designated by

[109] Similar to s 87 of the Ordinance, s 92 gives the plaintiff a choice of whether to enforce its award by way of summary procedure (by virtue of s 84) or by an action on the award on the basis that the award constitutes a debt due by the respondent to the claimant.

[110] Section 94 of the Ordinance. It provides the same evidential requirements as s 88.

[111] Section 95 of the Ordinance. It mirrors the grounds of refusing to enforce a Convention award as set out in s 89 of the Ordinance. It should be noted that a plaintiff who chooses to enforce a Mainland Award by way of an O 14 application will benefit from the strong pro-enforcement bias afforded by s 95 (formerly s 40E), since the court will consider Hong Kong law to be applicable to the enforcement of Mainland Awards. See *Shantou Zheng Ping Xu Yueli Shu Kuao Trading Co Ltd v Wesco Polymers Ltd* (unrep., HCCT 107/2000, [2002] HKEC 76).

the legislative affairs office of the State Council. The list[112] includes CIETAC, China Maritime Arbitration Commission (the "CMAC"), and most domestic Arbitration Commissions established pursuant to the PRC Arbitration Law.[113] Not included in the list are awards made following *ad hoc* arbitrations in China or awards made in China following arbitration using the rules of other bodies, for instance the International Chamber of Commerce. This restriction has now been lifted under the Supplemental Arrangement which provides that all arbitral awards made in the Mainland pursuant to the Arbitration Law of the People's Republic of China may now be enforced in Hong Kong, save such arbitral awards made pursuant to *ad-hoc* arbitrations. On the other hand, subject to art 7 of the Arrangement, an *ad hoc* arbitral award made in Hong Kong by the International Court of Arbitration or the International Chamber of Commerce or other foreign arbitration institutions may be enforced in the Mainland at the discretion of the relevant People's Court.[114]

(c) Practical considerations

18.045 Although the legislative regime generally retains the spirit of the New York Convention, there are notable differences, which are summarised below.

(i) *No more than one application to the PRC courts*

18.046 As set out above, in order to enforce a Hong Kong award in the Mainland, the applicant must make an application to the Intermediate People's Court of the place where the party subject to enforcement (the defendant) is domiciled, or where the defendant has property. However, if the defendant has property within the jurisdiction of more than one Intermediate People's Court, the applicant may apply to any one of the People's Courts to enforce the award, but cannot apply to more than one such court.[115] Instead, the court to which the application is made will handle the enforcement wherever the person or property is located, and for this purpose it may seek the assistance of another Intermediate People's Court within whose jurisdiction property is found.

(ii) *No simultaneous applications in both Hong Kong and the PRC*

18.047 A further limitation under the legislative regime is that the applicant is not entitled to file simultaneous applications in both Hong Kong and the PRC, even if the defendant has property in both regions.[116] Instead, the applicant must complete enforcement in

[112] This list is to be supplied by the Legislative Affairs Office of the State Council through the Hong Kong and Macao Affairs Office of the State Council. Pursuant to s 97 of the Ordinance, the Secretary of Justice shall from time to time publish in the Gazette a list of the recognised Mainland arbitral authorities. A list of recognised Mainland arbitral authorities published in the Gazette can be found at: http://www.gld.gov.hk/egazette/pdf/20111521/egn201115213248.pdf (viewed 23 May 2017).

[113] Generally, awards made by the Mainland's two international arbitration tribunals CIETAC and CMAC, consistently meet international standards. However, it remains to be seen whether the awards made by other Mainland authorities would meet such standards, as some of these arbitral authorities might have limited experience in handling complex arbitrations.

[114] "Supreme People's Court Notice of Relevant Issues on the Enforcement of Hong Kong Arbitral Awards in the Mainland" Fa [2009] No.415.

[115] See art 2 of the Arrangement.

[116] *Ibid.* Section 93 of the Ordinance also provides that a Mainland Award shall not be enforceable in Hong Kong if an application has already been made on the Mainland for enforcement of the award.

one jurisdiction before commencing another set of enforcement proceedings in another jurisdiction. For example, where an application has been made for enforcement in the Mainland, only where this award has been partially satisfied on the Mainland can an application be made in Hong Kong to enforce payment of the balance.[117] This restriction has now been removed in the Supplemental Arrangement which allows for an award creditor to apply for enforcement of an arbitral award in Hong Kong and the Mainland simultaneously.

18.048 The above restrictions prior to the Supplemental Agreement coming into force mean that the applicant has to decide very carefully where to commence enforcement, which in turn will depend on how much knowledge the applicant has at enforcement stage in respect of the whereabouts of the assets of the defendant. For instance, if the applicant commences enforcement in Hong Kong, only to discover months later that the defendant's assets are mainly located in the Mainland, the assets in the Mainland may have been dissipated by the time the applicant commences a second set of enforcement proceedings in the Mainland.[118] In addition, the limitation period for commencing enforcement may also have expired. As such, applicants should consider investigating the defendant's position as far as possible before the court proceedings. For example, the Ordinance provides mechanisms for the tribunal and the court to award interim measures for discovery during the course of the arbitration.[119]

(iii) *Limitation period*

18.049 Article 5 of the Arrangement provides that the time limit for an applicant to apply to the relevant court for enforcement of the arbitral award, whether made in the Mainland or in Hong Kong, shall be governed by the law on limitation periods in the place of enforcement. In the Mainland, the position depends on the status of the parties. If either or both parties are natural persons, the time limit is one year from the date of default. If both parties are legal persons, the time limit is six months.[120] In Hong Kong, an application to enforce will generally have to be submitted within six years from the date on which the award is dishonoured.[121]

18.050 For applicants, however, who obtained Hong Kong awards after 1 July 1997, but have not been able to enforce them due to the initial lack of reciprocal arrangements until 1999-2000, such claims may not be time barred under the PRC law, because the Arrangement restored the original six months/one-year limitation period by providing that the relevant period did not start to run until the date on which the Arrangement came into force, namely 1 February 2000. Clearly, such awards will now be time-barred, nonetheless we note this provision because any application for an extension of the limitation period would presumably run from the extended period under the Arrangement.

[117] Section 93(2) of the Ordinance.

[118] See Allen, C, "The Reciprocal Enforcement of Arbitration Awards between Hong Kong and Mainland China" [1999] Asia DR, vol.2, p.17. In view of the relatively short time limits in the PRC, it might be safer for the applicant to first enforce an award in the PRC before doing the same in Hong Kong.

[119] Sections 56 and 60–61 of the Ordinance.

[120] PRC Civil Procedure Law as amended on 31 August 2012.

[121] Section 4(1)(c) of the Limitation Ordinance (Cap. 347). Also see *Agromet Motoimport v Maulden Engineering Co (Beds) Ltd* [1985] 1 WLR 762.

information, and is not a determination of whether a *prima facie* case has been established. Upon the successful completion of the administrative review, the URS Provider will then send a Notice of Complaint to the registrar, which will "lock" or freeze the domain.

22.139 The registrar will notify the respondent of the complaint accordingly, and the latter has 14 days to respond.

Defence

22.140 Similar to the UDRP, the respondent can refute a claim of bad faith registration by showing that:

(1) it had used, or made demonstrable preparations to use, the domain name or name corresponding to the domain name in connection with a *bona fide* offering of goods or services before it had received notice of the dispute;

(2) it has been commonly known by the domain name; or

(3) it is making legitimate or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trade mark or service mark at issue.

(URS Procedure 5.7)

22.141 In addition, the respondent may assert the following defences available under the URS:

(1) the domain name is generic or descriptive and the respondent is making fair use of it;

(2) the domain name sites are operated solely in tribute to or in criticism of a person or business that is found by the examiner to be fair use;

(3) the respondent's holding of the domain name is consistent with an express term of a written agreement;

(4) the domain name is not part of a wider pattern or series of abusive registrations because the domain name is of a significantly different type or character to other domain names registered by the respondent.

(URS Procedure 5.8)

Burden of proof

22.142 Compared to the UDRP, a complainant under the URS bears a higher burden of proof and must provide the URS Provider with "clear and convincing evidence" (URS Procedure 8.2). The complaint will be rejected if the complainant fails to meet its burden or if there is a "genuine issue of material fact" (URS Procedure 8.4).

Determination

22.143 One examiner with relevant legal background will be selected by the URS Provider to preside over a URS proceeding. Examination will begin immediately upon the earlier of (1) the expiration of the 14 days available for the respondent to file its response (or any extension granted) or (2) the submission of the response. The appointed examiner will issue a determination within three to five business days thereafter. In the first URS complaint ever filed, Facebook took 37 days to obtain a favourable decision to suspend the domain name "facebok.pw".

Remedy

22.144 The only remedy available to a successful complainant in URS proceedings is suspension of the domain name for the remainder of the registration period. Unlike in the case of the UDRP, there is no option available for the transfer of the domain name to the complainant. In this regard, the complainant may extend the registration period for one additional year at commercial rates (URS Procedure 10.3).

22.145 If the URS provider finds in favour of the respondent, the domain name is unlocked and returned to the respondent. Repetitive findings of abusive complaints will result in a complainant being barred from using the URS for a period of time.

Appeals

22.146 Unlike the UDRP, the URS has a built-in appeal process. Either party may, within 14 days of the decision, seek a *de novo* appeal of the initial determination to an appeal panel selected by the URS provider. New admissible evidence will be allowed if it is material and clearly pre-dates the filing of the complaint. The fees for an appeal will be borne by the appellant.

(iii) *HKIRC process*

22.147 Under the HKIRC Domain Name Dispute Resolution Policy (HKIRC Policy), disputes involving abusive registrations of domain names in the ".hk" and ".香港" ccTLD space are required to be resolved by arbitration proceedings filed with appointed arbitration dispute providers. At present, the HKIRC's sole arbitration dispute provider for domain name disputes is the HKIAC.

22.148 Complaints filed with HKIAC must be in accordance with the HKIRC Policy, the HKIRC Domain Name Dispute Resolution Policy Rules of Procedure and the Supplemental Rules of HKIAC.

22.149 The HKIRC Policy mirrors the UDRP. In cases decided under the HKIRC Policy, panellists have largely followed past UDRP decisions. As such, the manner in which one would initiate or respond to a complaint involving a ".hk" or ".香港" domain name will essentially be the same as for a UDRP complaint, except that particular attention ought to be paid to the specific procedural requirements of HKIAC.

22.150 In addition, it is important to note two substantive differences between the HKIRC Policy and the UDRP:

(1) recourse to Hong Kong courts: Unlike the UDRP, decisions under the HKIRC Policy are arbitral awards and are subject to the laws of arbitration in Hong Kong. In particular, decisions under the HKIRC Policy are final and binding, and a party's recourse to Hong Kong courts is limited to circumstances provided for under the Arbitration Ordinance of Hong Kong.

(iv) *Negotiation*

22.184 It is also possible for the parties to negotiate amongst themselves (possibly, assisted by professionals) to arrive at a consensual solution that is in the interests of both parties. Negotiation would be suitable in the classic cybersquatting case, where the complainant is also willing to pay a sum of money to the domain name holder for transferring the domain name back to itself. The parties would need to negotiate and settle on a mutually agreeable sum.

22.185 Advantages of this method are its low cost (especially if no professionals are involved) and the possibility for the parties to negotiate and determine issues in addition to merely transferring the domain name. The process could be quick or protracted depending on the willingness of the parties to negotiate.

22.186 Drawbacks are similar to those for UDRP proceedings. The complainant could have difficulty locating the domain name holder. Even if the domain name holder is found, the negotiation process may be protracted. The negotiated result may lack legal force and the domain name holder could go back on its agreement. However, this could be solved by the parties drawing up a legal contract where the domain name holder agrees to transfer the domain name to the complainant.

(d) UDRP or URS proceedings?

(i) *Advantages of URS*

22.187 The greatest advantages of URS are cost and speed, at it is even faster and cheaper than the UDRP. URS proceedings are appropriate: (1) where the complainant wishes to obtain a low-cost and speedy resolution to stop the infringing activity but has no use for the domain name; and (2) for clear-cut cases of infringement where the respondent obviously has no sustainable defence.

(ii) *Disadvantages of URS*

22.188 Even in the event of a successful complaint, the complainant will still be unable to obtain possession of the domain name, either for its own use or for the purpose of preventing third parties from registering the same. The only remedy available is suspension of the domain name for the remainder of the registration period (extendable by the complainant for a further year). After the suspension period expires, the domain name would become publicly available, and a third party could register the domain name out of bad faith. In UDRP proceedings, the complainant may opt to have the domain name transferred to itself and prevent others from obtaining the same, albeit at a higher cost.

22.189 Moreover, a complainant in a URS does not have the opportunity to put forward supplemental submissions in response to the respondent's reply. Within the 500 word limit of the complaint, it is expectedly difficult for the complainant to anticipate all potential defences and satisfy the higher burden of proof to make its case. Therefore, the URS should be reserved for the most straight-forward cases.

(iii) *Combining UDRP with URS*

22.190 As the URS is a separate and independent process from the UDRP, it is theoretically possible to commence proceedings simultaneously via the UDRP and the URS. This could be a useful strategy in cases where there is an urgent need to suspend the infringing website. As the domain name complained of will be temporarily suspended until the URS complaint is determined (which could take up around one month's time), filing simultaneous complaints via both the UDRP and the URS may provide trade mark owners another bite at the cherry: even if the URS complaint fails due to the higher burden of proof, the infringing website would be temporarily suspended while the UDRP complaint takes place.

(e) Preventive measures

22.191 A trademark holder can take steps to avoid UDRP, URS or court proceedings. It can monitor the use of its domain name trademark by others by regularly checking the WhoIs system (see para 22.035) for domain names which are confusingly similar to its own. The trademark holder can maintain a portfolio of all such domain names and prioritise which ones to pursue. A domain name registrant registering several domain names incorporating the trademark holder's trademark is an obvious target to pursue first. Another preventive step a trademark holder can take is to pre-emptively register its trademark as a domain name(s).

(f) Conclusion

22.192 The leading organisations for the administration of domain name systems are ICANN, HKIRC and CNNIC. Any domain name registered with an ICANN-accredited registrar can be located on the WhoIs system.

22.193 Domain name disputes can be resolved by administrative proceedings that provide quick and inexpensive resolutions. ICANN has developed the UDRP and approved ADNDRC, NAF, WIPO and CACACID to adjudicate domain name disputes. It has also developed the URS as a cheaper and faster process for cases of clear-cut infringement. The HKIRC Policy mirrors the UDRP, and applies to domain name disputes involving ".hk" and ".香港" ccTLDs. Arbitration proceedings are filed with the HKIAC. The CNDRP, the CNDRP Rules and the CIETAC Supplemental Rules govern disputes involving ".cn" ccTLDs and complaints are filed with the DNDRC. In the United States the ACPA, if applicable, may also allow trademark owners to file *in rem* civil actions. The ACPA can also provide relief in the form of injunctions, costs and damages.

22.194 Other avenues of domain name dispute resolution include litigation and negotiation. Court proceedings could be pursued where the case is complex and where certainty and a broad range of remedies are sought. Negotiation would be suitable where the complainant is willing to pay the domain name holder to transfer the domain name. A trademark holder can also take preventive steps to avoid administrative or court proceedings by monitoring the use of its trademark on the WhoIs system.

5. Online Contracts

22.195 With the growth of the Internet, many businesses and individuals throughout the world are exploring the advantages of its use. In the beginning it was used as a communicating medium whereby individuals in different parts of the world would use text messages

(4) provision for hearings, in so far as they are required, to take place online, by video link or by telephone conference.

22.204 The Rules provide for the parties to agree for the HKIAC to act as arbitration administrator. It was considered that in an arbitration conducted online, where the parties may never meet the arbitrator, supervision/administration by a recognised arbitration centre was a necessity. The HKIAC, through the Secretary General, will discharge the following supervisory/administrative duties:

(1) appointing an arbitrator (in default of the agreement of the parties);

(2) facilitating delivery of all documentation to the arbitrator from the parties or vice versa;

(3) overseeing the interpretation and correction of awards and the making of additional awards;

(4) determining the fees and expenses of the arbitrator and the HKIAC; and

(5) holding sums paid by way of security for the arbitrator/HKIAC fees and expenses.

22.205 Enforceability of arbitral awards is a key issue in arbitrations where the parties may be domiciled in different states, neither of which is Hong Kong. The Rules preserve the position under the HKIAC Domestic Arbitration Rules in maintaining the seat of the arbitration and the place of the award as Hong Kong. This means that the Hong Kong courts will exercise a (limited) supervisory jurisdiction over the conduct of the reference and, importantly, that the award, being made in Hong Kong, will be enforceable under the New York Convention on Recognition and Enforcement of Arbitral Awards in all signatory states.

22.206 The Rules provide that the arbitrator must deliver his award within six months of the date of his appointment unless the Secretary General of the HKIAC extends this period. The Rules, with their emphasis on documents only/online methods will prove capable of delivering timely awards, in less than six months in appropriate cases.

22.207 Cost is one of the major disincentives of "going to law". The Rules attempt to address this in two ways. First, by ensuring that the most cost-effective method of determining the dispute is employed, avoiding in-person hearings where possible. Secondly, by making the costs and expenses of the arbitrator/HKIAC reasonably predictable by the parties. These costs and expenses shall be fixed by the HKIAC having regard to the fee schedule appended to the Rules.

22.208 Despite their name and genesis, the Rules are not limited in their application to disputes arising out of "electronic transactions". Parties who wish to arbitrate their disputes online could refer the dispute to be determined in accordance with these rules regardless of its origin.

22.209 These Rules have been developed with the view to preserving the strengths of the HKIAC Domestic Arbitration Rules whilst adapting them for use in a new environment to assist users in the efficient resolution of their disputes.

22.210 In this day and age, customers are concerned with the legitimacy of many website business, especially smaller sites without major brand recognition. WebTrust lends credibility to online businesses, levels the playing field for competition, provides the assurance that websites displaying the seal meet e-commerce best practice standards and, if disputes occur between customers and online merchants, a mechanism is in place for handling such disputes.

22.211 Given the significance of the Internet to our daily lives, it can only be imagined what possibilities this revolutionising technology will create next.

(a) The formation of online contracts

22.212 In the traditional sense the formation of a valid contract under Hong Kong law requires four elements to exist, namely:

(1) an offer;

(2) acceptance of that offer;

(3) consideration between the parties; and

(4) intention by the parties to create legal relations.

22.213 The complexity of contract law is a subject in itself and this section will not attempt to explain such elements.

(b) Electronic Transactions Ordinance

22.214 With the significance of electronic commerce, the Electronic Transactions Ordinance (Cap. 553) (ETO) was enacted on 5 January 2000. The purpose of the ETO is to provide a clear legal framework for the conduct of electronic transactions by giving electronic record and digital signature the same legal recognition as that of their paper-based counterparts.

22.215 Section 9 of the ETO provides some guidance in relation to admissibility of electronic records:

> "Without prejudice to any rules of evidence, an electronic record shall not be denied admissibility in evidence in any legal proceeding on the sole ground that it is an electronic record."

22.216 Section 6 of the ETO was amended in 2004 to draw a distinction, in relation to requirements for digital signatures, between transactions involving Hong Kong government entities and those not involving government entities. For transactions not involving government entities, a requirement for a signature under the law can be met by any form of electronic signature, provided that it is reliable, appropriate and agreed to by the recipient of the signature. For transactions involving government entities, a signature requirement under the law can be fulfilled by a digital signature supported by a recognised digital certificate issued by a certification authority recognised under the ETO.