HONG KONG INTERNATIONAL ARBITRATION CENTRE

REVISED GUIDE TO ARBITRATION

UNDER THE DOMESTIC ARBITRATION RULES 1993

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INTRODUCTION TO THE REVISED GUIDE

Arbitration is a flexible method of dispute resolution which can give a quick, inexpensive, confidential, fair and final solution to a dispute. It involves the determination of the dispute by one or more independent third parties rather than by a court. The third parties, called arbitrators, are appointed by or on behalf of the parties in dispute. The arbitration is conducted in accordance with the terms of the parties' arbitration agreement which is usually found in the provisions of a commercial contract between the parties.

Arbitration in Hong Kong is governed by the Arbitration Ordinance Chapter 341 of the Laws of Hong Kong (the Arbitration Ordinance). This statute has been internationally recognised as one of the best pieces of arbitration legislation in the world, combining the maximum of independence from the court system with a strong regime of court support in areas where this is required. The statute was further strengthened by amendments contained in the Arbitration (Amendment) Ordinance 1996 as amended by the Law Reform (Miscellaneous Provisions and Minor Amendments) Ordinance 1997. These amendments came into effect on 27 June 1997.

The Arbitration Ordinance is divided into two distinct regimes, the international regime and the domestic or non-international regime. The international regime incorporates the UNCITRAL Model Law a piece of model legislation developed by the United Nations and commended for international use. The domestic regime is based on the English Arbitration Acts 1950, 1975 and 1979 but includes many useful improvements on these Acts including some provisions based on Singapore's International Arbitration Act (Cap 143A) and the English Arbitration Act 1996.

The objective of the HKIAC Domestic Arbitration Rules is to provide a framework which is suitable for the widest possible range of domestic disputes. The Rules allow the procedure to be as short and as inexpensive as practicable.

This Guide does not form part of the Rules and is not intended to modify the Rules in any way. Its purpose is to direct parties and arbitrators towards achieving the maximum benefit from the Rules. The Guide also encourages timely consideration of ways in which procedures may be tailored to suit any particular dispute.

The Rules with the support of the Arbitration Ordinance give wide powers[1]

[1] **powers:** the arbitrator's authority to order the manner in which the arbitration shall be

and jurisdiction[2] to the arbitrator, and the Guide indicates ways in which an arbitrator may use his authority to avoid unnecessary expenditure of time and resources. Arbitrators are not bound to follow court procedure and should not slavishly do so. Indeed, section 2GA(1)(b) of the Ordinance places a duty on arbitrators, subject to any agreement made by the parties, to adopt appropriate procedures in each case, so as to avoid unnecessary delay and expense. An arbitrator is master of his own procedure and can be confident that the Hong Kong courts do not ordinarily attempt to control the procedure in an arbitration. Arbitrators should however be wary of imposing a procedure which is contrary to the common wishes of both parties, because the principal of party autonomy is enshrined as a governing principle of the Ordinance (see section 2AA(2)(a)). Arbitration arises from a contractual agreement between the parties and arbitrators should be sensitive to their joint expectations of the process. In any event, whether arbitrators are acting in accordance with a procedure agreed by the parties or a procedure which they have directed in the absence of agreement between the parties, arbitrators must act fairly and impartially (see 2GA(1)(a) of the Ordinance).

Normally the decision to enter into a contract is based on commercial considerations, and the written contract documents record the bargain. The resolution of commercial disputes equally involves commercial considerations. Arbitration and these Rules provide one legal framework for resolution of disputes. Legal advice can be invaluable in both entering a contract and in resolving a dispute. Parties should however always remember that the objectives are commercial and that the legal framework is intended to help parties to achieve their legitimate commercial objectives.

Decisions on procedure should thus always be held up to commercial scrutiny. The parties themselves should take an active part in every stage of arbitration. This will ensure that they always know what is happening, why it is happening, what it is costing, how long it will take and what the ultimate benefit is expected to be. The closer the party stays to the dispute, the easier it is to resolve. Technical and legal advisers are urged to encourage their clients to meet the arbitrator at the preliminary meeting to discuss ways in which the procedure can be simplified.

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conducted and the manner in which the dispute shall be determined.

[2] **jurisdiction:** the scope of the arbitrator's authority to determine a dispute referred to him.

Hong Kong International Arbitration Centre

Revised Commentary on the Domestic Arbitration Rules (1993 Edition)

Note on the Revised Commentary
This commentary was revised in the light of the Arbitration (Amendment) Ordinance 1996 which came into effect on 27 June 1997. It should be noted that only the commentary has been revised. The HKIAC Domestic Arbitration Rules (1993 Edition) have not been amended.

Preamble

These Rules apply to any arbitration commenced on or after 1 April 1993 if the arbitration agreement provides that the Hong Kong International Arbitration Centre Domestic Arbitration Rules apply. They apply even if the contract containing the arbitration agreement was signed before 1 April 1993.

Article 1 Commencement of Arbitration

Under some contracts an arbitration must be commenced within a very short period after the dispute has arisen. It is important to a prospective Claimant to avoid being time barred [3]. Section 31 of the Arbitration Ordinance details how an arbitration is deemed to commence. Claimants should ensure that the Notice of Arbitration given under this Article fully complies with that section.

The Domestic Rules do not require the Notice of Arbitration to be accompanied by a full Statement of Claim. The Statement of Claim (under Article 6.2) need not be sent until 28 days after the arbitrator's acceptance of his appointment. A Claimant wishing to expedite the proceedings may, however, attach his Statement of Claim to the Notice of Arbitration.

Article 1.1(b) requires the Notice of Arbitration to include "reference to

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[3] Under Section 2GD of the Arbitration Ordinance the arbitral tribunal is empowered to extend time limits only if it is satisfied that -

(a) the circumstances were such as to be outside the reasonable contemplation of the parties when they entered into the arbitration agreement, and that it would be just to extend the period; or

(b) the conduct of one party makes it unjust to hold the other party to the strict terms of the agreement. This Section applies to both domestic and international arbitrations.

the contractual documents in which the arbitration clause is contained or under which the arbitration arises". For simple contracts, the full contract should be sent. In complex contracts, such as many construction contracts, those parts of the contract documents which give general information about the contract should be included.[4] If the contract documents include an arbitration clause, this must be included. If the contract documents themselves do not contain an arbitration clause but refer to a document that does, this document must be included.

Article 1.2 requires a copy of the Notice of Arbitration to be sent to the Secretary-General of HKIAC.

Article 2 Appointing Authority

If the parties are unable to agree on a suitable arbitrator, HKIAC will make an appointment from its Panel of Arbitrators[5]. As mentioned below the Secretary-General of HKIAC will assist parties who wish to agree upon an arbitrator.

Article 3 Appointment of Arbitrator

Any arbitrator, if so requested by either party or the Appointing Authority, should sign a declaration that there are no circumstances likely to give rise to any justified doubts as to his impartiality or independence. He should also undertake that he will immediately disclose any such circumstances to the parties if they should arise during the arbitration. Parties and arbitrators should note the judgment of the House of Lords in Reg v Gough (1993) AC 646. The test of apparent bias is whether, considering all relevant circumstances, there is a real danger of bias on the part of the arbitrator in question in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.

Parties seeking a specialist arbitrator should avoid falling into the trap of rejecting all of the most experienced Hong Kong arbitrators in the field. If they do, they will be forced either to accept an inexperienced arbitrator or to bring in an arbitrator from overseas. Not infrequently the Claimant

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[4] e.g., articles of agreement, conditions of contract etc.

[5] HKIAC is given statutory power under sections 12 and 34C respectively to appoint arbitrators for both domestic and international arbitrations. In international cases, HKIAC decides whether there should be one or three arbitrators. These powers apply in cases where the parties have not agreed to give these powers to an appointing authority or the appointing authority chosen does not act.

proposes several eminent arbitrators. The Respondent rejects them for no other reason than that they are the Claimant's proposal. The Respondent then proposes several equally eminent arbitrators. The Claimant rejects them because they are the Respondent's choice. Neither Claimant nor Respondent benefits from this process of elimination. HKIAC can assist parties to overcome this problem by using the list system detailed in Appendix 2.

Article 4 Communication between Parties and the Arbitrator

It is very important that neither party should communicate with the arbitrator without the other party knowing the content of the communications. For this reason communications should be in writing and should always be copied to the other party. Direct telephone calls to the arbitrator (or even to a potential arbitrator before appointment) are to be avoided. Today urgent messages can normally be sent by fax and copied to the other party. In exceptional circumstances where telephone contact is thought to be essential, the Secretary-General of HKIAC can act as a neutral intermediary.

Where the Secretary-General of HKIAC is appointed as arbitration administrator, a charge will be made for the actual time spent on the arbitration and for expenses incurred. This service is most often useful in small disputes, where the parties are not legally represented, or where there is more than one arbitrator. The service is also very helpful where two or more arbitrations are consolidated[6] by the courts or by agreement. The arbitration administrator, having no jurisdiction or power, is free to talk to the parties separately and may be able to facilitate agreement on procedure.

HKIAC is also willing to assist parties in settling their dispute outside the arbitration and will help with the appointment of a mediator. A mediator may be appointed either before arbitration is commenced or at any time during the arbitration proceedings.

Article 5 Conduct of the Proceedings

Article 5 states that the arbitrator shall have the widest discretion in

[6] It is not unusual for two disputes to involve the same issues. This may occur for example where a trader buys and resells goods which are rejected by the final recipient. The buyer's complaint about the goods may be reflected by the trader's parallel claim against the party from whom he purchased the goods. It is sometimes desirable to consolidate the two disputes into a single arbitration. This may be done by agreement or, under the domestic regime of the Ordinance, it may be ordered by the court. (See Section 6B)

conducting the proceedings. This should be read in conjunction with Sections 2AA, 2GA and 2GB of the Arbitration Ordinance which state:

2AA. Objective and principles of Ordinance

(1) The object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense.

(2) This Ordinance is based on the principles that —

(a) subject to the observance of such safeguards as are necessary in the public interest, the parties to a dispute should be free to agree how the dispute should be resolved; and
(b) the Court should interfere in the arbitration of a dispute only as expressly provided by this Ordinance.

2GA. General responsibilities of arbitral tribunal

(1) When conducting arbitration proceedings or exercising any of the powers conferred on it by this Ordinance or by the parties to any such proceedings, an arbitral tribunal is required-

(a) to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents; and
(b) to use procedures that are appropriate to the particular case, avoiding unnecessary delay and expense, so as to provide a fair means for resolving the dispute to which the proceedings relate.

(2) When conducting arbitration proceedings, an arbitral tribunal is not bound by the rules of evidence and can receive any evidence that it considers relevant to the proceedings, but must give such weight to the evidence adduced in the proceedings as it considers appropriate.

2GB. General powers exercisable by arbitral tribunal

(1) When conducting arbitration proceedings, an arbitral tribunal may make orders or give directions dealing with any of the following matters —

(a) requiring a claimant to give security for the costs of the arbitration;
(b) requiring money in dispute to be secured;
(c) directing the discovery of documents or the delivery of interrogatories;
(d) directing evidence to be given by affidavit;
(e) in relation to relevant property —
(i) directing the inspection, photographing, preservation, custody,

detention or sale of the property by the tribunal, a party to the proceedings or an expert; or

(ii) directing samples to be taken from, observations to be made of, or experiments to be conducted on the property;

(f) granting interim injunctions or directing other interim measures to be taken.

(2) Property is relevant property for the purposes of subsection (1)(e) if —

(a) the property is owned by or is in the possession of a party to the proceedings; and

(b) the property is subject to the proceedings, or any question relating to the property arises in the proceedings.

(3) An arbitral tribunal must not make an order requiring a claimant to provide security for costs only on the ground that the claimant-

(a) is a natural person who is ordinarily resident outside Hong Kong; or

(a) is a body corporate that is incorporated, or an association that is formed, under a law of a place outside Hong Kong, or whose central management and control is exercised outside Hong Kong.

(4) An arbitral tribunal —

(a) must, when making an order to provide security for costs, specify a period within which the order is to be complied with; and

(b) may extend that period or an extended period.

(5) An arbitral tribunal may dismiss or stay a claim if it has made an order requiring the claimant to provide security for costs and the order has not been complied with within the period allowed under subsection (4).

(6) In conducting arbitration proceedings, an arbitral tribunal may decide whether and to what extent it should itself take the initiative in ascertaining the facts and the law relevant to those proceedings.

(7) An arbitral tribunal may —

(a) administer oaths to, or take the affirmations of, witnesses and parties; and

(b) examine witnesses and parties on oath or affirmation; and

(c) direct the attendance before the tribunal of witnesses in order to give evidence or to produce documents or other material evidence.

(8) A person cannot be required to produce in arbitration proceedings any document or other material evidence that the person could not be required to

produce in civil proceedings before a court.

(9) Subsections (6) and (7) are subject to any agreement to the contrary of the parties to the relevant arbitration proceedings.

Consideration should be given to ways in which the procedure can be simplified or expedited. In particular consideration should be given to conducting the arbitration on documents only or using a short hearing.

Article 5.2 requires the arbitrator to hold a preliminary meeting as soon as possible after accepting the appointment if he is requested to do so by any party. Arbitrators are encouraged to hold a preliminary meeting with the parties and their representatives to ensure that the parties are aware of what is expected of them in the arbitration. A preliminary meeting also provides an opportunity to review the possibility of using a simplified or expedited procedure or to consider requests for extensions of any time period. Appendix 1 to this Guide is a checklist of some matters to be considered at the preliminary meeting. The Rules do not fix a time for the preliminary meeting. It is essentially a matter for the arbitrator and the parties to consider. Timing will depend very much on the nature of the dispute and how detailed the respective claims and counter-claims (if any) are. There is little point in the arbitrator convening a very quick preliminary meeting shortly after his appointment if he does not know enough about the case to make a meeting worthwhile. On the other hand, in some disputes an early preliminary meeting will enable the arbitrator to assist the parties to define the claims and counterclaims.

Article 6 Submission of Written Statements and Documents

Written statements should describe in normal language the reasons why the party makes or denies a claim. The historical and factual background should be explained briefly as well as the legal basis of the party's contention. The objective is to convey the party's contention in simple language. Legal formula should be avoided as should the format of traditional court pleadings. Statements of Defence should fully explain the grounds on which the claim is challenged. An arbitrator having read the Statements should have a clear picture of the dispute and the issues to be decided.

The timetable detailed in Article 6 provides ample time for each stage of the proceedings in all but the largest arbitrations. It may however be unreasonable to expect parties to follow the timetable in very complex disputes such as some construction disputes. In such cases arbitrators should be willing to consider extending the time limits.

Article 6.6 requires Statements to be accompanied by copies of all essential documents. But the arbitrator may give leave to provide lists of documents if they are especially voluminous. Court style discovery of documents is not automatic or expected under these Rules. A Statement should refer to only those documents which are necessary to prove or defend a claim advanced in the arbitration. Documents should thus be limited to those referred to in the statement which they accompany. Article 6.7 empowers the arbitrator to order production of additional documents where he considers that it would be just to do so in order to determine a claim or defence.

The rules of evidence do not apply to arbitration (Section 2GA(2) of the Arbitration Ordinance). An arbitrator is at liberty to accept secondary evidence[7]. An arbitrator will be more inclined to receive secondary evidence when the effort involved in refuting it would be small but the effort of obtaining the primary evidence[8] would be considerably greater.

Article 7 Representation

Section 2F of the Arbitration Ordinance provides as follows:

> *"For the avoidance of doubt, it is hereby declared that sections 44, 45 and 47 of the Legal Practitioners Ordinance (Cap. 159) do not apply to-*
>
> *(a) arbitration proceedings;*
> *(b) the giving of advice and the preparation of documents for the purpose of arbitration proceedings;*
> *(c) any other thing done in relation to arbitration proceedings except where it is done in connection with court proceedings arising out of an arbitration agreement or arising in the course of, or resulting from, arbitration proceedings."*

Thus parties to arbitrations in Hong Kong are not required to retain qualified lawyers. Parties who wish to be represented can be represented by whoever they please. The following Section 2G enables parties to recover the costs of employing representatives who are not legal professionals, including foreign lawyers. These provisions apply to all arbitrations no matter when commenced or the date of the arbitration agreement.

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[7] **secondary evidence:** that by its nature suggests the existence of better evidence. (e.g. a copy of a document or a statement made outside the hearing)

[8] **primary evidence:** such as the original of a document, that by its nature does not suggest that better evidence is available.

It is essential that the name and address of the representative should be notified to the other party, the arbitrator and HKIAC. If representation is by a firm, it is very helpful to have the names of at least one, and preferably two, persons within the firm who are dealing with the matter. Changes of representative should be notified immediately.

Article 8 Hearings

Unless the parties have agreed to a documents-only arbitration, a party is entitled to request an oral hearing. Whilst in many cases the arbitrator will accede to such a request, he is not obliged to do so. He must, in the absence of party agreement, direct a procedure that is appropriate to the circumstances of the case, avoiding unnecessary delay and expense, subject to the parties being treated with equality.

It is advisable for the arbitrator to invite the parties to give some alternative dates on which they are available so that he can choose a reasonable date and time for the hearing (or any meeting). Sometimes a party may be difficult over dates. The arbitrator must be prepared to take a strong line with a party who tries to delay the arbitration. He should fix what appears to him to be a reasonable date and place. An arbitrator should however be wary of fixing a hearing with very short notice unless it is essential to do so or unless the parties agree.

Article 8.3 allows the arbitrator, having reviewed the papers, to give the parties advance notice of matters which he would like them to consider or on which he would like assistance prior to the hearing. It may save time if he does so. Some examples are listed in Appendix 1, but this list is not exhaustive, and much will depend upon the facts of any particular case.

Article 8.4 permits the arbitrator to order opening and closing statements in writing. Although not mandatory, in many cases, an arbitrator will be greatly assisted by having opening and closing statements in writing. Usually the Claimant submits his written statement first, and the Respondent replies, with any answer following shortly afterwards. Although this procedure may take some days, the opportunity for the parties and the arbitrator to consider them in advance of the hearing often ultimately saves time. It is often necessary and appropriate, however, to allow parties to amplify their written statements with a brief oral opening at the hearing. Indeed the arbitrator may request some oral amplification. Flexibility in approach is the key.

Parties and their legal representatives do not have an unlimited right to

address a tribunal for as long as they like on as many topics as they wish. The right of parties to do this in Court was questioned by Lord Templeman in Banque Keyser Ullman v Skandia (UK)[9] when he said this:

> "The present practice is to allow every litigant unlimited time and unlimited scope so that the litigant and his advisers are able to conduct their case in all respects in the way which seems best to them. The results not infrequently are torrents of words, written and oral, which are oppressive and which the Judge must examine in an attempt to eliminate everything which is not relevant, helpful and persuasive. The remedy lies in the Judge taking time to read in advance pleadings, documents certified by Counsel to be necessary, proofs of witnesses and short skeleton arguments of Counsel, and for the Judge, after a short discussion in open court, to limit the time and scope of oral evidence and the time and scope of oral arguments. The appellate courts should be unwilling to entertain complaints concerning the results of this practice."

Similar observations made by the House of Lords in Ashmore & Others v Corporation of Lloyd's[10] would apply to an arbitration. Provided his order is fair and reasonable and he treats both parties with equality, an arbitrator has nothing to fear from the courts if he limits oral submissions.

Besides opening and closing statements (and exchange of witness statements see Article 9) arbitrators may also find it helpful to consider requesting or ordering the following:

(a) an agreed chronology;
(b) an agreed list of issues or, if a list cannot be agreed a list from each side;
(c) an agreed list of facts not in dispute;
(d) a list of facts in dispute;
(e) exchange of memoranda of law either generally or limited to particular issues.

These matters can be addressed conveniently at the preliminary meeting; they represent items for consideration under point 19 of the checklist in Appendix 1.

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[9] [1990] 3WLR 364 page 380

[10] [1992] 1WLR 446

Article 9 Witnesses

This Article reflects the modern approach to the presentation of evidence by witnesses. The parties inform each other of the identity of the witnesses whom they intend to call to give evidence and they exchange written statements of that evidence prior to the hearing. When a party receives the written statement of evidence of a witness to be called by the other side he sometimes accepts that there is nothing controversial in it. In those circumstances the party receiving the witness statement should inform the other party that the statement can stand as that witness's evidence in the hearing without the need for him to attend the hearing.

An arbitrator should consider ordering that not only should witness statements be exchanged but that a witness's statements should stand as his examination-in-chief[11] (Article 9.4). That does not mean that the party calling that witness cannot ask him to clarify certain matters contained in his statement or to comment upon evidence already given in the hearing. This procedure is very time saving and cost effective. It is however a matter for the arbitrator's discretion and there may be cases where the arbitrator feels it unnecessary or inappropriate to make such an order.

Although witness statements have been exchanged witnesses may still be required to attend the hearing for cross-examination.[12]

Article 10 Assessor Appointed by the Arbitrator

Occasionally, an arbitrator may wish to appoint someone to help him decide a technical or legal issue. In that event, he should be careful to give the parties an opportunity to address him on any views expressed to him by the assessor. How this is done will be a matter for the arbitrator to decide. It is usually best for the arbitrator to commit the assessor's views to writing and then ask the parties to address him on those views. The arbitrator should be wary of allowing the parties to cross-examine the assessor on his views.

The arbitrator should bear in mind that the assessor's fees are recoverable as part of the arbitrator's expenses. It is thus wise to inform the parties of the proposed fees of the assessor before he is appointed.

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[11] **examination-in-chief:** The questioning of a witness by the party who called him to give evidence.

[12] **cross-examination:** The questioning of a witness by a party other than the party who called him to give evidence.

It should always be borne in mind that the strict rules of evidence do not apply to Arbitration (Section 2GB(6) of the Arbitration Ordinance).

Article 11 Powers and Jurisdiction of the Arbitrator

Under these Rules the arbitrator's powers and jurisdiction are very wide and should enable the arbitrator to decide disputes without reference to the Courts. Although he must apply the law, an arbitrator is not bound to follow the practice of the Hong Kong courts. Nevertheless, he may find it useful to have regard to the principles upon which the courts exercise such powers as the power to inspect property and the power to order security for costs. Arbitrators should also be aware of the extensive powers given to them by Sections 2GB, 2GD, 2GE, 2GF, 2GH, 2GL and 13B of the Arbitration Ordinance. These powers were introduced into the Ordinance by the Arbitration (Amendment) Ordinance 1996.

The specific power to award security for cost under Article 11(n) must be read in conjunction with Section 2GB(3), (4) and (5) of the Arbitration Ordinance.

Article 12 Default of Appearance by a Party

The power to proceed "ex-parte" to make an award should be exercised with great care. Arbitrators should bear in mind they have an overriding obligation of fairness and should ensure a defaulting party is clearly aware of the consequences of default. But the power to proceed in default is useful and entirely separate from any power given under Section 23C of the Arbitration Ordinance.

Article 13 Venue

The Rules provide that Hong Kong shall be the place of the arbitration but this Article gives the arbitrator some latitude to hear evidence or argument elsewhere. It recognises that in some cases, costs may be saved and an award made more quickly if there is some flexibility about the venue. It may be important however for reasons of enforcement and judicial challenge to the award that the arbitrator makes the award in Hong Kong. Parties and arbitrators should be aware of the decision of the House of Lords in Hiscox v Outhwaite[13].

Article 14 Language

[13] [1991] 3WLR 297

The arbitration will be conducted in the English language unless the parties agree otherwise which of course they are free to do. Whatever language is used for the arbitration, it is recognised that evidence may be available in other languages. Article 14.2 provides for translation of documents and Article 14.3 allows witnesses to give evidence in their mother tongue. In both provisions, the arbitrator must consider the situation and make the appropriate order. In deciding whether to allow evidence in another language, the arbitrator must balance the cost and inconvenience of a translation or interpretation against the possibility of putting one party at a disadvantage.

Article 15 Deposit and Security

To secure his fees and expenses, the arbitrator may require the parties to pay certain sums as deposits during the arbitration. The Article provides how the deposits and interest earned on them shall be held, and it also allows the arbitrator to draw upon such sums. Usually the parties will be required to contribute in equal shares and an adjustment will be made in the arbitrator's final award for costs. The general liability for the payment of fees is further reinforced under Section 2GK of the Arbitration Ordinance.

Article 16 The Award

By Section 2GF of the Arbitration Ordinance:

2GF. Decision of arbitral tribunal

In deciding a dispute, an arbitral tribunal may award any remedy or relief that could have been ordered by the Court if the dispute had been the subject of civil proceedings in the Court. This section is subject to section 17.

An award should normally be in writing, dated and signed, and reasons should be given for the arbitrator's conclusion. This will help with any enforcement proceedings that become necessary. The parties, however, may dispense with any requirement to give reasons.

Articles 16.2 imposes on the arbitrator a responsibility for delivering the award (or a certified copy) to the parties, subject to the usual provision that his fees and expenses have been paid. If a party considers those fees to be exorbitant, he may, in a domestic arbitration, apply to the court for relief under Section 21 of the Arbitration Ordinance as long as the fees were not agreed in writing.

Unless the parties have agreed otherwise the arbitrator is required by

Article 16.3 to provide a copy of the award to the Secretary-General of HKIAC. Awards provided to the Secretary-General will be kept strictly confidential but are of great assistance in monitoring the performance of arbitrations. As the Appointing Authority it is of great importance that this information is available to HKIAC.

Article 16.4 recognises that in some cases an interim award may be required and empowers the arbitrator to make separate awards on different issues at different times.

Article 16.5 also recognises that parties frequently settle their disputes before an award is made. The sub-article empowers the arbitrator either to issue an order for termination of the arbitration or alternatively, if requested by both parties, the arbitrator may record the settlement as a consent award. The latter may be desirable if some record of the terms of settlement is required that, if necessary, can be enforced. When either procedure is completed, the arbitrator will be discharged from his duty and the reference to arbitration will be concluded subject to payment of the arbitrator's fees and expenses.

Article 17 Interpretation of Awards, Correction of Awards and Additional Awards

These are useful provisions which enable the arbitrator to correct clerical errors in the award, give an interpretation of the award and make an additional award. Correction of awards is covered in Section 19 of the Arbitration Ordinance which is similar to Order 20 Rule 11 of the Rules of the Supreme Court. The notes in the Supreme Court Practice (White Book) may thus be helpful in ascertaining the scope of its application. Article 17 also enables an arbitrator, upon request, to interpret his award if he considers it to be unclear or ambiguous. If he is requested to do so, the arbitrator may also make an additional award where he has failed to deal with all the points submitted for his consideration. The time limits specified in Article 17 must be noted and followed.

Article 18 Payment into Court

The arbitrator must exercise his discretion under Article 19.2 to deal with the costs of the reference (see commentary on article 19(2) below). The normal order for costs is that they should 'follow the event' which means they should be paid by the losing party.

Sealed offers are often made, particularly in construction arbitrations. These offers are only reported to the arbitrator when the question of costs falls to be decided. An arbitrator under these Rules is permitted to

consider any such written offer even though a payment into court could have been made.

As an alternative to a sealed offer a cash payment may be deposited with a stakeholder or with the court. Order 73 Rule 11 of the Rules of the Supreme Court provide that:

> *"In any arbitration proceedings, any party to the reference may at any time pay into court a sum of money in satisfaction of any claim against him under the reference".*

A Claimant may refuse to accept the money offered or deposited in full and final satisfaction of his claim and continues with the arbitration. If he recovers more than the amount offered or paid into court, the arbitrator may ignore the offer or deposit when considering his costs order. In deciding whether a payment or offer has been beaten, it is permissible to take into account any interest which is added to the award up to the date of the offer.

If, on the other hand, the final award is equal to or less than the amount offered or deposited, the arbitrator may feel that the Claimant should not recover the costs incurred after he refused to accept the offer or deposit. Indeed the arbitrator may feel that the Claimant should pay the other party's costs from the moment when he refused to accept that sum offered or deposited.

Where there is a properly made deposit such as a payment into court an arbitrator should give to the deposit the same effect as if it had been paid into court in court proceedings. But, in determining whether to give the same effect to a sealed offer, an arbitrator must reach a view on the bona fides of the offer.

There have been some technical problems in the operation of the payment into court procedure in relation to arbitration. Parties should be familiar with the procedure and the potential pitfalls before making a payment into court.

It must be emphasized that the award of costs is a matter wholly within the discretion of the arbitrator. There could be unusual circumstances which might cause him to make an order which departs from the normal one. But, if an arbitrator does not order that costs follow the event, or does not make an order which reflects the failure of the amount deposited to exceed the amount offered or deposited, then he must give reasons.

Article 19 Costs

A distinction is made between the costs of the award and the costs of the reference as in the Arbitration Ordinance Section 2GJ. Article 19.1 deals with the former and provides that the arbitrator must specify the total amount of his fees and expenses (which should be stated separately). His expenses should include the fees and expenses of any assessor, administrator, transcriber or translator. Both parties are jointly and severally liable to the arbitrator for his fees and expenses under Article 19.3 as well as under Section 2GK of the Arbitration Ordinance.

Unless the parties have come to some agreement about cost-sharing after the dispute has arisen, the arbitrator must also decide the proportions in which the parties to the arbitration shall pay the costs of the award. It should be noted that parties cannot enter into an agreement about cost sharing before the dispute has arisen (see Section 2GJ(3) of the Arbitration Ordinance). Further, the arbitrator may also decide in his award that a party who has already paid money by way of deposit to the arbitrator may recover it from the other party.

Article 19.2 gives the arbitrator express power to order that one party bear all or part of the legal costs and expenses of the arbitration (the reference) unless the parties agreed otherwise after the dispute arose. The arbitrator has power to tax or settle the amount of the costs of the reference. The Rules indicate the basis (reasonable amount reasonably incurred) on which he should do so. An arbitrator must exercise the power to tax costs if requested by the parties. Otherwise, if the parties are unable to agree on the costs, the successful party will get the costs taxed by the Court.

Arbitrators should also be aware that Section 2GL of the Arbitration Ordinance empowers an arbitral tribunal to direct that the recoverable costs of arbitration proceedings before it be limited to a specified amount, unless the parties have agreed to the contrary.

Article 20 Interest

Arbitration Ordinance Sections 2GH and 2GI permit the arbitral tribunal to award simple or compound interest based on such dates and rates that the tribunal considers appropriate. In the absence of any specific provisions in the award, interest is payable from the date of the award and at the same rate as for a judgment debt. Interest may be awarded on any sum outstanding after the proceedings commenced, whether or not paid before the date of the award.

Article 21 Exclusion of Liability

Sections 2GM and 2GN of the Arbitration Ordinance state:

2GM. Arbitral tribunal to be liable for certain acts and omissions

(1) An arbitral tribunal is liable in law for an act done or omitted to be done by the tribunal, or by its employees or agents, in relation to the exercise or performance or the purported exercise or performance of the tribunal's arbitral functions only if it is proved that the act was done or omitted to be done dishonestly.

(2) An employee or agent of an arbitral tribunal is liable in law for an act done or omitted to be done by the employee or agent in relation to the exercise or performance or the purported exercise or performance of the tribunal's arbitral functions only if it is proved that the act was done or omitted to be done dishonestly.

2GN. Appointors and administrators to be liable only for certain acts and omissions

(1) A person—

(a) who appoints an arbitral tribunal; or
(b) who exercises or performs any other function of an administrative nature in connection with arbitration proceedings,

is liable in law for the consequences of doing or omitting to do an act in the exercise or performance or the purported exercise or performance of the function only if it is proved that the act was done or omitted to be done dishonestly.

(2) Subsection (1) does not apply to an act done or omitted to be done by the parties to the arbitration proceedings or to their legal representatives or advisers in the exercise or performance or the purported exercise or performance, of a function of an administrative nature in connection with those proceedings.

(3) An employee or agent of a person who has done or omitted to do an act referred to in subsection (1) is liable in law for the consequence of the act done or omission only if it is proved—

(a) that the act or omission was committed dishonestly; and
(b) that the employee or agent was a party to the dishonesty.

(4) Neither a person to whom subsection (1) applies nor an employee or agent of the person is liable in law for the consequences of any act or omission of the arbitral tribunal concerned, or by its employees or agents, in the exercise or performance or the purported exercise or performance of the tribunal's arbitral functions merely because the person, employee or agent has exercised or performed a function referred to in that subsection.

(5) In this section "appointing" includes nominating and designating.

Articles 21.1 and 21.2 are of similar effect to the above provisions of the Arbitration Ordinance which apply compulsorily to Hong Kong arbitrations.

Article 22 Waiver

By adopting the Rules, parties agree to their terms. Nevertheless, parties frequently agree expressly or tacitly to a variation of specific rules. For example, parties frequently agree to vary the time limits provided by the rules. This Article precludes one party from insisting upon strict compliance where he knew or ought to have known of non-compliance with the Rules and yet proceeded with the arbitration without making a prompt objection. Where there is doubt the arbitrator will decide.

Article 23 Destruction of Documents

This clause is self-explanatory.

Article 24 Interpretation and General Clauses Ordinance

The Interpretation and General Clauses Ordinance provides an extensive list of interpretation of words and expressions. It also includes various other parts dealing with such things as the interpretation of ordinances, powers of various statutory bodies, boards and committees and the meaning of various measures of time and distance. Reference should be made to the Ordinance itself for full details.

Article 25 Documents-Only Arbitration

Where the contemporary documents record the central facts, it is frequently unnecessary for the arbitrator to receive oral testimony of witnesses in a hearing. In these circumstances the documents-only procedure is highly economical and expeditious. Therefore it should be considered in appropriate cases. It is to be noted that, where these Rules apply, documents-only arbitration can only be used as a result of an

agreement by the parties.

Where the parties have agreed to conduct an arbitration on documents-only, the arbitrator will normally comply with their wishes. However, if it is clear to the arbitrator from the documents that he would be unable to arrive fairly at an award, this clause enables him to modify the procedure to the extent necessary for him to be able to adjudicate fairly. The arbitrator should be careful to ensure that, so far as he is aware, all relevant documents have been submitted to him. If any are missing, he should call for them before considering his award. This approach is necessary to ensure justice and fair play between the parties.

Article 26 Confidentiality

It is often asserted that arbitration proceedings are confidential. However, there are two stages when this falls to be considered. It seems clear that strangers to the arbitration are not permitted to attend without agreement of the parties. A recent decision of the Supreme Court of Victoria[14] holds that, apart from confidentiality which attaches to particular documents or classes of document, there is no implied term in an arbitration agreement that the parties must keep confidential any other information relating to or arising from an arbitration.

[14] Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals [1994] 1VR 1 (Supreme Court of Victoria, Appeal Division), affirmed by the High Court of Australia (1995) 128 ALR 391. This decision declined to follow observations of the English Court of Appeal in Dolling-Baker v Merrett ([1990] 1 WLR 1205)

APPENDIX 1

Checklist for Preliminary Meetings

1 Are the parties aware of the possibility of resolving the dispute by mediation or conciliation?

2 Do the parties want to opt-in to the UNCITRAL Model Law regime? (See Part IIA of the Fifth Schedule to the Arbitration Ordinance).

3 Have the parties entered into any exclusion agreements? Do they want to do so? (see Section 23B of the Arbitration Ordinance)

4 Is a simplified procedure or documents-only procedure to be adopted?

5 Do the parties seek further assistance from HKIAC arbitration administrator?

6 Is it desirable to determine any points preliminary to the main hearing of the arbitration?

7 Is it appropriate to decide issues of quantum with, or separate from, the issues of liability and, if appropriate, should the arbitrator make directions accordingly?

8 Is an assessor required to sit with the arbitrator in respect of any matter?

9 Are the parties aware of the procedure for payment into court and the provisions of Article 18 of the Rules?

10 Is the programme of submission of written Statements of Claim and Defence to follow the timetable set out in Article 6 or is a revised programme required?

11 Are any further and better particulars required?

12 Are documents to be submitted or is leave to submit lists sought under Article 6.6?

13 Is an order for the production of additional documents under Article 6.7 requested?

14 Will there be any witnesses? If so, will they be expert witnesses or witnesses of fact or both? In the case of any expert witnesses, is a without prejudice meeting desirable before or after the exchange of reports? In the case of any witnesses of fact will proofs of evidence be exchanged (when?) and should they stand as evidence in chief?

15 Who will represent the parties in the arbitration? If a hearing is required, what is the estimated duration, the expected commencement date and the place of the hearing?

16 Is a shorthand or tape recorded transcript required? Will all of the arbitration be conducted in English or will some other language be used? If so, what arrangements for translation are required?

17 Are any deposits for security to be ordered by the arbitrator under Article 15?

18 Do the parties expressly agree that no reasons shall be given for the award?

19 Are there any other matters which the arbitrator feels may contribute to an economical and expeditious resolution of the dispute?

APPENDIX 2

HKIAC LIST SYSTEM FOR THE APPOINTMENT OF ARBITRATORS

Where a party proposes to the other party under Article 1.1(e) of the Domestic Arbitration Rules that the list system of appointment of arbitrators be used and the other party concurs the following procedure will apply:

1 Particulars of any method or criteria for selection of the Arbitrator agreed by the parties shall forthwith be sent to HKIAC by the Claimant together with written confirmation that both parties have agreed to adopt the HKIAC list system for the appointment of arbitrators.

2 Each party shall, within 14 days of agreeing to adopt the HKIAC list system, send to HKIAC:

(a) the names and curriculum vitae of two persons;
(b) either of whom they would be prepared to accept as Arbitrator;
(c) who comply with any agreed criteria for selection; and
(d) who have indicated that they are prepared to accept appointment.

The names so submitted are not to be disclosed by the party sending them to the other party. Each party shall notify the other that they have complied with this procedure.

3 If the 2 lists of persons proposed by the parties contain one or more common names HKIAC shall in their absolute discretion appoint as Arbitrator one of the persons whose name appears on both lists.

4 In the event that there are no common names HKIAC shall within 7 days of receipt of the last list of names prepare a list of 6 names including any names provided by the parties. The persons whose names are added by HKIAC will comply with any agreed criteria for selection and will have indicated that they are prepared to accept appointment.

5 HKIAC shall then send the list of 6 names to the parties without reference to the source of such names.

6 The parties shall within 7 days of receipt of the list of 6 names return the same to HKIAC in order of preference.

7 On receipt of the parties' list of 6 names HKIAC shall allot 6 points to any name which appears at the top of any list and one less point for each succeeding position. HKIAC shall appoint as Arbitrator the person who receives the most points. In the event of a tie in the number of points HKIAC shall, in their absolute discretion, appoint as Arbitrator any one of the persons who has tied

with the highest number of points.

8 If a party shall fail to submit 2 names or to place them in order of preference HKIAC shall in their absolute discretion appoint the Arbitrator and shall not be precluded from appointing as Arbitrator one of the persons named by a party.

9 In the event that there are more than 2 parties to an arbitration the above procedures shall be adapted accordingly.

10 For the avoidance of doubt nothing contained in this procedure shall prevent the parties from making an appointment by consent in which case they shall immediately inform HKIAC.

APPENDIX 3

A Note about Arbitrators Acting as Conciliators

Section 2B of the Arbitration Ordinance details the procedure for an arbitrator to act as a conciliator. It is to be noted that this procedure is wholly consensual. The arbitrator's role as a conciliator may be brought to an end when one party withdraws his consent to the procedure. The confidentiality provision in section 2B(4) is of course pivotal to this procedure. The phrase at the end of Section 2B(4) of the Arbitration Ordinance "as much of that information as is material to the arbitration proceedings" enables the conciliator/arbitrator to identify whether the information disclosed to him during the conciliation is material to the arbitration proceedings. The success of this section will depend upon the respect and confidence that the parties have in the individual arbitrator/conciliator. No one is forced to use this procedure against their will but it is thought to be a useful addition to the armoury in dispute resolution. The rationale behind this section is best explained by the Law Reform Commission Report which suggested it. It reads as follows:

> "The [conciliation provisions] should . . . provide that the parties may agree in writing after the commencement of an arbitration that any arbitrator or umpire may act as a conciliator. During the time he acts as conciliator, he should be permitted to see the parties separately or together, and unless a party giving information agrees otherwise he should treat information given him by either party as confidential while he continues to act as conciliator. If the arbitration recommences after the completion of conciliation, the arbitrator should disclose any material information given him in confidence during the period of conciliation. The purpose of these proposals is to provide a statutory framework within which an arbitrator can conciliate without committing misconduct by breaching the rules of natural justice. He is permitted access to the parties alone subject to the two important safeguards of:
>
> (i) overt continuing consent, and
> (ii) post failure disclosure of material facts.
>
> We accept that (ii) may inhibit frankness, but we think this is better than compelling an arbitrator to try to ignore material information. We do not anticipate procedural difficulty. If the arbitrator were to send to each party a list of the information he regarded as material and disclosable, and then consider that party's views before acting, the chances of error should be slight. We therefore think that this framework should enable an arbitrator fairly and effectively to conciliate, if and so long as that is what the parties want, without misconduct, and without impairing his capacity to make an award thereafter. Finally an agreement reached under conciliation should be able to be treated as an award on the arbitration agreement. We have taken the opportunity to suggest some minor modifications to s.2A. These simplify the procedure, but

do not affect its substance."

Many people have reservations about the wisdom of an arbitrator acting first as a conciliator as they feel that people will be less frank with a conciliator knowing that he may subsequently have the authority to adjudicate on the issues. Others believe that no one is better qualified to sit as an arbitrator than a person who is already familiar with the issues having acted as a conciliator and that to appoint someone else, at this stage, would be an unnecessary waste of money. Parties and arbitrators must decide for themselves whether or not they feel the two processes should be kept separate or may be combined. This article merely makes provision for the combination if this is what the parties' wish. Michael Thomas CMG QC reports in Arbitration Vol 58 No. 1 on a case in which he acted under this provision.