IBA International Construction Projects Committee

ADR in Construction

Hong Kong

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Table of Abbreviations

HKIAC Rules (2013)	2013 HKIAC Administered Arbitration Rules
CA	Court of Appeal
CEDR	Centre for Effective Dispute Resolution
CFA	Court of Final Appeal
CFI	Court of First Instance
CIArb	Chartered Institute of Arbitrators
CIETAC	China International Economic Trade and Arbitration Commission
CJR	Hong Kong Civil Justice Reform (2008)
DAB	Dispute Adjudication Board
DRB	Dispute Review Board
FIDIC	Federation of Consulting Engineers
HKBA	Hong Kong Bar Association
HKC/NZ CEP Agreement	Hong Kong, China/New Zealand Closer Economic Partnership Agreement
HKIA	Hong Kong Institute of Architects
HKIAC	Hong Kong International Arbitration Centre
HKIArb	Hong Kong Institute of Arbitrators
HKICM	Hong Kong Institute of Construction managers
HKIS	Hong Kong Institute of Surveyors
HKMAA	Hong Kong Mediation Accreditation Association
HKMAC	Hong Kong Mediation and Arbitration Centre
HKMC	Hong Kong Mediation Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
ICP	International Construction Projects Committee of the IBA
Law Society	Law Society of Hong Kong

MTR	Mass Transit Railway Corporation
New York Convention (1958)	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
PRC	People's Republic of China
UNICTRAL Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration as amended in 2006
WTO/GPA	World Trade Organisation Government Procurement Agreement

Introduction – Setting the scene for ADR in Hong Kong

The ADR scene in Hong Kong is multi-faceted: it traditionally includes arbitration, which has witnessed a number of changes over the past few years. It also consists of binding and non-binding dispute resolution techniques, including negotiation, mediation, conciliation, adjudication, expert determination and dispute review boards. All these forms of ADR are discussed in more detail below.

There has also been much discussion in Hong Kong as to whether there should be a statutory adjudication scheme but to date no such scheme has been promulgated.

One issue that affects many contractors is that the dispute resolution provisions, in the Hong Kong Government contracts, currently state that the parties cannot refer a dispute to arbitration until completion of the project. This may leave the contractor without remedy for a number of years (save for terminating the contract). This particularly affects long running projects. As a result, many participants in the local construction industry believe there is a need for a temporarily binding adjudication scheme, although the practical set up, timeline and implications of a UK style adjudication process are yet to be addressed.

1 Background

1.1 Which type of dispute resolution is most often used in construction matters in your jurisdiction?

Arbitration has traditionally taken the lion's share of ADR in Hong Kong.

The next common method of dispute resolution is mediation. Occasionally Dispute Review Boards (DRB) are stipulated in the dispute resolution clause in the contract, but this is still relatively infrequent. DRBs were tried for the new airport core projects in the 1990s but since then they have been sporadic.

The specialist Construction and Arbitration List of the Court of First Instance (CFI) is a mechanism by which all construction litigation, or arbitration-related litigation (such as applications for interim measures, enforcement actions, etc) are directed to a dedicated judge in charge of that list. There is currently one dedicated judge.

In relation to arbitration organisations, the International Chamber of Commerce (ICC) Arbitration Rules are used for some private sector projects, but this is still rather uncommon (**www.iccwbo.org**). The vast majority of construction contracts contain arbitration provisions requiring arbitration under the procedural rules of the Hong Kong International Arbitration Centre (HKIAC) (**www.hkiac.org**), or alternatively ad hoc arbitrations where no specific arbitral institution is stipulated in the dispute resolution provision.

Mediation of construction disputes has gained substantial ground over the last few years, particularly since its introduction, under the Civil Justice Reform in 2008 (CJR), as a process ancillary to the court process in Hong Kong. In 2012, Hong Kong also passed the Mediation Ordinance (Cap. 620), the first piece of legislation in Hong Kong on

mediation. Mediation is an increasingly popular method for resolving construction disputes, even complex ones, particularly for large public sector contracts.

1.2 Can you give reasons why one type of dispute resolution is preferred above another?

Arbitration has always been popular in Hong Kong because of the enforceability of the award in jurisdictions that are signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention (1958)). This is more so in international disputes in which arbitration awards are easier to enforce abroad than domestic court decisions due to the enforcement regime under the New York Convention (1958).

On the other hand, mediation gives a 'short sharp summary' form of justice and can settle major disputes.

1.3 If there have been changes in preference in the past ten years, what has caused this?

Construction has long been a fertile ground for dispute resolution in Hong Kong, and with a flurry of new and substantial projects on the drawing board, both on-going or recently completed (to name but a few, extensions to the existing MTR network, Hong Kong-Zuhai-Macao bridge and other major highway projects, Ocean Cruise Terminal, Paediatrics Hospital, Third Runway at Chek Lap Kok International Airport), this trend is likely to continue. Yet, the situation with arbitration is far from satisfactory. Over the past decade, this mode of dispute resolution has gone from being viewed as inexpensive, efficient, prompt, private and informal to an emulation of the court process: lengthy, costly, with various levels of procedural complexity and corresponding frustration to both counsel and parties.

Hong Kong, perceived as a neutral and arbitration friendly venue, continues to be a popular choice for resolving China-related disputes. Arbitration is invariably found in the dispute resolution provisions of most, if not all, construction contracts in Hong Kong, whether one looks at the government forms of contract, MTR forms of contract or the Hong Kong Institute of Architects (HKIA)/Hong Kong Institute of Surveyors (HKIS)/Hong Kong Institute of Construction Managers (HKICM) private forms.

Although nowadays the majority of construction disputes are resolved through arbitration or mediation (or a combination of these procedures, such as med-arb), some cases find their way to the Hong Kong courts, be they disputes between contracting parties, with consultants, challenges to arbitral awards or applications to enforce awards.

The preference of arbitration as the means to resolve construction disputes has gained ground over the past decade due to the perceived benefits that made arbitration popular in the first place: the resolution of differences outside the court system, informal, fair and swift form of justice. The truth is that arbitration has now become the mirror image of court proceedings, involving substantial costs, senior counsels and experts.

Mediation gained considerable exposure in Hong Kong mainly as a result of the CJR.

Then, mostly seen as a way to lessen the burden of the courts' caseload, it has gained popularity over the last 5 years and one can even say that interest in mediation dramatically increased after its introduction in all civil cases through the CJR.

As to the rise of mediation over the past few years, it results from the combination of its increased attraction, the education around this ADR process and most importantly its introduction as a compulsory step in the litigation process. This development was recently crowned by statutory provisions for mediation procedure enacted into the Mediation Ordinance (Cap. 620), which came into effect on 1 January 2013.

Since 2009, when the Hong Kong civil procedure underwent a substantial reform, parties in litigation are required to consider mediation as an option to resolve their differences. If they refuse to do so, they have to explain why and the court may make a costs order against the recalcitrant party.

Expert determination is well established and often used in Hong Kong, particularly in relation to technical, construction and valuation matters. The legal position is, in essence, the same as that in England and the Hong Kong courts rely on English authority on expert determination, although post June 1997 English case law only has persuasive authority in Hong Kong. Classic features of expert determination adopted by the Hong Kong courts are that (i) the expert makes a final and binding decision, (ii) the decision can only be challenged in the most exceptional circumstances such as where the expert answers the wrong question, (iii) the expert can be sued for negligence in the absence of an agreed immunity and (iv) the expert's determination cannot be enforced as an arbitral award (*Mayers v Dlugash* [1994] 1 HKLR 442).

1.4 Are there special laws on resolving construction disputes in your jurisdiction (for example statutory adjudication)?

There is currently no such thing as statutory adjudication in HK but its introduction has been much debated over the last few years as Hong Kong has observed the success of adjudication in the UK, and its introduction has been considered as an additional dispute resolution mechanism or process alongside arbitration and mediation. There is a place for adjudication in Hong Kong as another dispute resolution process. Particularly since most contracts prevent parties from making use of the dispute resolution provision before completion of the project.

1.5 Are there provisions in the legislation concerning civil procedure or in the civil code (if your jurisdiction has one) or other legislation that would apply to binding decisions of non-statutory dispute adjudicators?

The Rules of the High Court (Cap. 4A) contains all rules applicable to civil proceedings before the Hong Kong courts. It does not have any provisions that are applicable to binding decisions of adjudicators.

Order 73 (Arbitral Proceedings) of the Rules of the High Court, however, does deal with court actions related to arbitration (but does not apply to the arbitrators themselves).

1.6 What type of binding decisions are known in your jurisdiction that are used for construction disputes (please state the names used in the language of your jurisdiction and describe the main characteristics)?

Hong Kong is a common law jurisdiction and relies on case law as part of the sources of its laws. Arbitrators may follow case law, which consists of judicial decisions binding on the courts of Hong Kong.

Case law from the English courts prior to the handover of Hong Kong back to China on 30 June 1997, are all binding on Hong Kong courts unless altered or overruled by subsequent decisions from the higher courts in Hong Kong. Post-handover, UK and Commonwealth judgments only have persuasive authority before the Hong Kong courts. This means that the Hong Kong courts are under no obligation to follow them.

1.7 What are the legal differences in your jurisdiction between arbitration and binding decisions (adjudication)?

Unlike decisions resulting from adjudications, awards obtained in arbitration are enforceable as if they were court decisions.

Decisions resulting from adjudications remain binding in Hong Kong unless and until they are overturned in the subsequent dispute resolution forum provided for by the contract or by law (including by arbitration).

1.8 Are there specific procedural rules for arbitration that do not apply to binding decisions/adjudication/expert determination decisions?

Each ADR mechanism has its own set of rules and procedures. Arbitrations are governed by the Arbitration Ordinance (Cap. 609), and related statutory instruments. The HKIAC Administered Arbitration Rules may also apply to arbitrations but do not apply to adjudications.

1.9 Does your country have special institutions (arbitral or otherwise) dealing with construction disputes?

The High Court has a Construction and Arbitration List, presided over by a dedicated judge. Otherwise, there is no specific institution dealing exclusively with construction disputes.

HKIAC is the usual administrator of construction arbitration and the ICC office in Hong Kong also handles a number of international construction disputes.

On 24 September 2012, the China International Economic Trade and Arbitration Commission (CIETAC) launched its first arbitration centre outside Mainland China, in Hong Kong, to cater for the increasing need for arbitration and dispute resolution facilities in the region. CIETAC had recently amended its rules in 2012 to provide, amongst other things, that parties can choose Hong Kong as the seat for CIETAC arbitrations and that all CIETAC disputes seated in Hong Kong shall be governed by the Arbitration Ordinance (Cap.609)

1.10 What is the role of these institutions, for example are they supervising the proper conduct of the proceedings or involved in appointments?

Hong Kong has user-friendly arbitration laws and institutions that give the arbitral tribunal the power to resolve the disputes in a final, binding and cost effective way. The Arbitration Ordinance (Cap. 609) has at its core a 'fundamental objective to facilitate fair and speedy resolution without unnecessary expense'.

HKIAC is usually the default administrator and appointing authority for arbitrations in Hong Kong. The HKIAC has a relatively hands off approach to administering the arbitration.

The ICC on the other hand is well known for its scrutiny of arbitral awards issued under its auspices.

1.11 How prevalent is mediation for construction disputes in your country? What other forms of non-binding dispute resolution for construction disputes are used in your country (for example dispute review boards)?

Mediation has become the contractual pre-requisite to binding arbitration in government contracts. The majority of disputes that arise with large public sector employers (Hong Kong government departments, MTR) are first referred to mediation with a success rate of over 90%.

Mediation was first introduced as an ADR mechanism in Hong Kong public sector/government contracts in 1984, before being implemented consistently in all large building and engineering contracts in 1989. All disputes were only referred to arbitration if attempts to mediate them failed. This was the introduction of a two-tier mechanism and of mediation as a contractual prerequisite to binding arbitration.

Mediation has since gained ground. Increasingly considered as a preferred strategy to reach a speedy resolution of disputes between the parties, at a fraction of the cost the parties would incur if they were to refer their differences to arbitration or bring it before the courts. This is particularly the case where the parties' intention is to continue doing business together. In a comparatively small market, contractors and subcontractors are likely to come across one another on many occasions in large projects.

Failure to reach a settlement in mediation results from the attitude of the parties who come to mediation with a lack of good faith (for instance, to use it as a fishing expedition), or without authority to settle, or because they refuse to actively participate in the process.

Other forms of non-binding dispute resolution mechanisms include expert adjudication. However, expert adjudication is rarely used except for disputes of a technical nature and in circumstances where the parties, although reluctant to refer their differences to arbitration, wish to have someone with a relevant expertise look into their dispute and make a binding decision on pre-determined issues put forward by the parties. A binding decision is one that is enforced upon the parties by the decision-maker, pursuant to the parties' agreement to satisfy such decision. By way of example, failure to satisfy a binding award made by an arbitrator may result in the aggrieved party commencing an

action in the CFI for breach of an implied promise to satisfy the award. A non-binding decision cannot be enforced upon the parties without their consent.

The reason for its limited use in Hong Kong is probably attributable to the fact that it can only be an appropriate mode of ADR where there are a limited number of technical issues involved and their determination goes to the root of the dispute between the parties. Alternatively, it can be used to resolve some of the issues between the parties, leaving the remainder to be determined by an arbitrator or a mediator.

1.12 Are hybrid forms of dispute resolution used for construction disputes (for example recommendations that become binding after some time if not contested)?

Hong Kong construction contracts (government contracts in particular) generally include dispute resolution provisions that are usually in the form of multi-tiered dispute resolution clauses, which often use one tier as a condition precedent to another. For instance, a party can only refer to arbitration a dispute that has not been resolved by way of negotiation, and it must do so within a certain period of time failing which that party will be time barred.

The nature of adjudication in Hong Kong is that any decision made is binding unless and until it is challenged in arbitrations.

The Arbitration Ordinance (Cap.609) addresses two hybrid forms of dispute resolution:

- section 32(3) provides for mediation-arbitration procedures whereby a mediator is appointed to try to resolve the dispute through mediation before referring it to arbitration. Parties agree that they will first attempt mediation to try and resolve their dispute. If mediation fails, the parties will refer the dispute to arbitration and the mediator may become the arbitrator;

- section 33 provides for mediation-arbitration procedures, whereby the arbitral tribunal assumes the role of mediator, part way through the arbitration proceedings, with a view to settle the dispute between the parties.

The purpose of section 32(3) is essentially to facilitate and encourage parties to make a greater use of this hybrid dispute resolution process in order to expedite the resolution of the dispute. It is also intended to remove any doubt and argument that would invalidate the appointment of the arbitrator solely on the basis that their independence has been compromised by previously acting as a mediator. This is on the basis that 'without prejudice' negotiations by themselves do not affect the legality of proceedings. This is particularly the case where all parties have agreed to the appointment of a mediator as the arbitrator.

A section 33 style mediation-arbitration, more commonly referred to as 'med-arb' is used less frequently than typical multi-tier dispute resolution processes/mechanisms as there is in Hong Kong a general distrust of these hybrid forms of dispute resolution procedures. This contrasts with the situation in Mainland China where such med-arb is very commonly used in domestic arbitration but also adopted in international arbitrations involving foreign and Chinese parties.

1.13 What are the possible challenges that an arbitrator taking on the role of a mediator (or the reverse) may face under the Arbitration Ordinance (Cap. 609)?

The following challenges are possible:

- On the basis that arbitrators are meant to remain impartial and independent of the parties at all times in the course of the arbitration proceedings, arbitrators are required to disclose promptly any circumstance likely to cast any doubt on his impartiality and/or independence. The duty of disclosure is a continuing duty. If new circumstances arise that might give rise to any doubt as to the arbitrator's independence and/or impartiality, these circumstances should be disclosed to the other arbitrators and the parties immediately. Doubt is considered not as in the mind of the parties involved, but rather as in the mind of a reasonable third party;

- Parties who appointed or participated in the appointment of an arbitrator (joint appointment by the parties and appointment made under a list procedure contained in the arbitration rules) cannot challenge his/her impartiality or independence if the invoking party before the appointment knew the ground invoked;

- Challenge for apparent, unconscious or imputed bias. The test for such bias was considered in *Jung Science Information Technology Co. Ltd v ZTE Corporation* [2008] 4 HKLRD 776. The test is whether an objective, fair minded and informed observer, having considered the relevant facts, would conclude that there is a real possibility that the arbitrator was biased. In relation to the link between an adjudicator and the legal representative for a litigant, 'there must be a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case before it can be concluded that the adjudicator might not bring an impartial and unprejudiced mind to the resolution of the dispute'. On the facts of that case, the challenge failed;

- Substantial direct pecuniary interest in one of the parties is a solid ground for disqualification (see: *AT&T Corporation and another v Saudi Cable Company* [2000] EWCA Civ 154);

- In exceptional cases, the past or present positions held or roles performed by the arbitrator outside of the particular arbitration case before him can give rise to a possibility of bias.

Factors that will not, at least ordinarily, provide a basis for an allegation of bias include gender, religion, background, family, friendships, club or association memberships, previous decisions, previous receipt of instructions to act for or against any party engaged on the case now before him, membership of the same chambers.

Parties and tribunals in international arbitrations in HK often refer to the IBA Guidelines on Conflicts of Interest in International Arbitration for guidance. It is open to debate the extent to which those guidelines represent Hong Kong law.

Med-arb came under scrutiny in the recent case of *Gao Haiyan v Keeneye Holdings Ltd* [2011] 3 HKC 157. Mr Justice Reyes granted Keeneye's application to set aside leave to enforce a Xian Arbitration Commission award that involved 'med-arb', on the basis that it was contrary to public policy as there was a potential for an appearance of bias in the med-arb process. This decision was reversed by the Court of Appeal that allowed the claimants' appeal and permitted enforcement of the award. The Court of Appeal held that although the holding of a med-arb over dinner at a Chinese hotel gave rise to an appearance of bias in Hong Kong, it would not justify refusal of enforcement. Enforcement could only be refused if it would be contrary to the fundamental conceptions of morality and justice in Hong Kong.

1.14 Would FIDIC Red Book type DAB decisions be considered valid evidence in subsequent arbitration or court proceedings in your jurisdiction?

Although Dispute Adjudication Board (DAB) decisions will not be considered as binding, they are likely to be considered valid evidence in the event that their existence is raised in subsequent arbitration or court proceedings in Hong Kong. To date, there has been no court decision on this issue.

The arbitral tribunal or the judge will take such decisions into account unless it can be established that there was fraud or collusion involved in the decision reached by the DAB or it can be shown that the DAB either departed from the parties instructions or that the DAB answered the wrong question.

The Airport Authority started using a DRB in their contract in relation to the construction of the Chek Lap Kok International Airport. Their contract also provided for the DRB decisions to be binding on the parties, and for the courts to have the power to enforce these decisions.

1.15 What would the role of these DAB decisions be for further proceedings?

DAB decisions may be followed in further proceedings to the extent that there is no fraud and that they amount to expert determination. If the contract provides for them to be binding on the parties, the courts may decide to recognise their validity and enforce them, for example by granting the applicant/claimant a mandatory injunction supporting the DAB decision. The English courts endorsed this course of action. Although such decisions would have persuasive authority in Hong Kong, it remains to be seen whether the Hong Kong courts would follow suit.

1.16 What form of ADR is considered to be cost effective for construction disputes in your jurisdiction?

All forms of ADR have their strengths and weaknesses.

The most cost effective remains mediation because it is quick and inexpensive and facilitates a consensual decision that the parties are prepared to follow.

Adjudication is also considered to be a reasonably inexpensive way of achieving a binding decision by an independent third party.

Expert determination is cheaper than arbitration in particular if the parties decide to go through the process without legal representation, although enforcement of the determination can create real difficulties.

1.17 Please explain what type of costs are usually allocated to which party and how this compares to court litigation.

The types of costs usually recoverable in arbitration, as well as in litigation, generally consist of what the UNCITRAL Arbitration Rules 2010 define as 'costs'. These are:

- legal and expert costs, to the extent that these are considered as reasonable by the arbitral tribunal;

- fees of the arbitral tribunal and their reasonable travel expenses if they come from overseas to Hong Kong for the purpose of the reference;

- reasonable travel costs and subsistence for factual witnesses if they are attending from overseas (this however excludes any management time of factual witnesses as they should not be paid to give evidence); and

- costs of the arbitration (including the fees and expenses of any appointing authority).

2 Dispute resolution agreements

2.1 What are the requirements for a valid arbitration agreement and a valid multi-party arbitration agreement?

The requirements for a valid arbitration agreement in Hong Kong can be found in section 19 of the Arbitration Ordinance (Cap. 609). Those requirements are based on Chapter II of the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006 (UNCITRAL Model Law). Section 19 sets out the definition of an arbitration agreement and the requirements as to the form it should take to be valid. Hong Kong has adopted option II of article 7 of the UNCITRAL Model Law;

To be valid, an arbitration agreement, whether domestic or international must be in writing. This requirement has recently been relaxed to be in line with modern contract practices and current means of communication. The writing requirement can be satisfied by:

- exchange of written communications;
- evidence in writing of the agreement;
- a reference to terms that are in writing and that provide for the parties to arbitrate their disputes;
- an agreement recorded by one of the parties to the agreement or by a third party with the authority of each of the parties to the agreement; and
- an exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement to arbitrate is alleged by one party and not denied by

the other(s).

In Hong Kong, most trades and industries have their own standard form of arbitration clause and the HKIAC also provides for some model clauses for reference.

2.2 Would clause 20.6 of the FIDIC Red Book be considered a valid arbitration clause?

The first paragraph of sub-clause 20.6 of the FIDIC Red Book provides as follows:

> 'Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:
> (a) The dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
> (b) The dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
> (c) The arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language]'.

Sub-clause 20.6 would be considered as a valid arbitration clause as long as it is in writing or in a form considered as evidencing an agreement in writing which submits disputes between the parties to arbitration.

2.3 Would this clause prevent a party from seeking interim measures from a competent court?

If the arbitration agreement between the parties provides for the law governing the dispute to be Hong Kong law and the seat of arbitration to be Hong Kong, then the Arbitration Ordinance (Cap. 609) will apply to the arbitration.

Consequently, a party can at all times seek interim measures (such as interim injunctions or interim protection measures) which fall within the powers given to the Hong Kong courts to support arbitral proceedings, as set out in sections 21, 35 to 38, 45, 56 and 60 of the Arbitration Ordinance (Cap. 609).

2.4 Are there any restrictions on enforceability or validity of arbitration clauses regarding standard forms of contracts, including consumer protection laws or similar laws?

Yes, sections 20(2) and (3) of the Arbitration Ordinance (Cap. 609) contain special provisions that specifically refer to labour and consumer disputes and clarify the extent to which these types of disputes may be referred to arbitration.

Also, a restriction often arises from the situation that arbitrators often have to meet the challenge that the arbitration clause in such contracts does not cover the dispute in question or the parties. In this regard, arbitrators in Hong Kong have the power to decide on their own jurisdiction and specifically, the scope of the clause.

2.5 Is this the same for other forms of ADR?

Mediation is consensual, therefore there is no risk of such challenge.

As to other forms of ADR, they are usually the result of a specific agreement between the parties thus challenges to the dispute resolution clause will be rare.

2.6 In the standard conditions that are mostly used for construction projects in your country, is there a clause on arbitration?

Yes, arbitration is referred to in the most commonly used standard forms in Hong Kong.

2.7 If so, is reference made to an arbitral institution and the rules of this institution?

Yes, reference is usually made to the HKIAC.

2.8 Are other forms of dispute resolution more common in these standard conditions?

No. Virtually all construction projects in Hong Kong are subject to arbitration provisions in the conditions of contract. The government's standard form requires arbitration in accordance with the HKIAC Domestic Arbitration Rules.

The Arbitration Ordinance (Cap. 609) has recently come into effect in Hong Kong, applying the UNCITRAL Model Law (with some local amendments) to all arbitrations both domestic and international. Although for construction disputes there is an opting out provision which allows for the previous domestic regime to continue to apply.

There are a few cases of domestic construction subcontracts where arbitration provisions are not to be found in the conditions of subcontract. In these cases, court litigation is often necessary. Usually, subcontracts do have arbitration provisions that mirror the main contract provisions.

Many dispute resolution clauses also contain mandatory mediation clauses as a pre-condition of arbitration being commenced. This is particularly the case for public sector contracts. Mediation is now also strongly encouraged by the courts for disputes that are brought before the court in the absence of arbitration provisions.

2.9 May arbitration agreements bind non-signatories (for example subcontractors)? If so, under what circumstances?

In general, no, arbitration agreements do not bind non-signatories. However, under a chain of construction contracts, there are very often provisions in sub-contracts that state that if there is any dispute between the parties, it must be referred to arbitration by reference to the provisions of the main contract.

Most of the time, in circumstances where reference to the main contract is made in the sub-contracts by way of back to back arrangements and also most importantly, parties to the various agreements all agree to opt in Schedule 2 to the Arbitration Ordinance

(Cap. 609) that enables the parties to consolidate several arbitration proceedings.

It is however possible for a non-signatory to have a recourse through 'name-borrowing'. This is a concept whereby a party to the arbitration agreement allows a non-signatory to that agreement to use his name in arbitration proceedings. The situation where name borrowing most commonly arises if that of a sub-contractor wishing to bring a claim against the employer, even though the sub-contractor only has a contract with the main contractor. For a clause containing 'name-borrowing' provisions to be enforceable and for the sub-contractor to be able to make use of it, such provision must be clearly set out in the sub-contract and provide for the sub-contractor to borrow the name of the contractor in order to obtain contractual privity and pursue its claim in that borrowed name.

'Name borrowing' is not without difficulties and English court decisions in relation to it have illustrated such difficulties in the past.

First of all, the remedy it offers the subcontractor is strictly limited to matters in dispute between the employer and the subcontractor.

Second, it may drag the main contractor into substantial costs arising out of an implied duty imposed on him and associated with 'name-borrowing', to cooperate with the sub-contractor (unless the 'name-borrowing' provision includes an indemnity by the sub-contractor in favour of the main contractor, in which case name borrowing may end up being costly for the sub-contractor).

Third, the main contractor's duty to cooperate may result in the disclosure of documents which the sub-contractor would not have normally seen. This may eventually antagonise the relationship between the employer and the main contractor.

Fourth, the employer's counterclaim to the sub-contractor's claim may end up dragging the main contractor into the dispute. This may result in tensions between the main contractor and the sub-contractor as their respective interests in the dispute may vary.

This list of risks and difficulties associated with name borrowing is by no means exhaustive.

2.10 Is this different for other forms of ADR?

Other forms of ADR can generally only bind signatories.

2.11 If expert determination is not supported by legislation and the binding nature of expert determination derives solely from the agreement of the parties to submit their dispute to the expert, is this process mandatory and is any resulting determination binding on the parties?

There is no legislation to support expert determination in Hong Kong. Expert determination is increasingly used in the context of large construction projects, as an ADR prior to seeking to resolve the dispute by way of arbitration.

The resulting determination may be stipulated in the contract to be final and binding on

the parties, unless such determination is reviewed and revised by way of an amicable settlement between the parties or in the course or as a result of ensuing arbitration proceedings. If and when it becomes final and binding on the parties, the courts will enforce the terms of the expert determination clause.

As to appealing against an expert determination, there are very limited grounds for doing so. They are (i) fraud or collusion, (ii) error of law and (iii) error of fact. It would take exceptional circumstances for the courts to decide that a challenge on one of these grounds is satisfied and set aside the determination that the parties sought from the appointed expert by special agreement.

2.12 What needs to be in the contract to ensure this?

In the contract, provisions for expert determination should make it clear if it is the intention of the parties that any determination made is final and binding on the parties, unless one of the parties is dissatisfied with the expert's determination and refers the determination to arbitration within a specified period of time.

2.13 Construction contracts may contain dispute resolution clauses requiring several tiers of dispute resolution processes typically culminating in arbitration or court litigation. In your jurisdiction, would a party be allowed to skip one or more tiers before starting litigation or arbitration?

No, generally the tiers that a party must exhaust before commencing arbitration or litigation are phrased as condition precedents to arbitration or litigation, thus it is not possible to skip them unless the other party consents.

2.14 How would a contractual multi-tiered dispute resolution process be characterised in your jurisdiction?

This process, which has become very common in most standard forms of contract in Hong Kong, provides for disputes between the parties to be resolved by way of:

- the project architect's decision on the issues in dispute (for government contracts), or negotiations between the parties over a specified period of time, immediately following the completion of the project. If either party is dissatisfied with the architect's decision (for government contracts) or if the outcome of the negotiations is negative, or if the period set out in the contract for those negotiations has expired without the parties reaching an agreement, the contract provides for the parties to refer their dispute to mediation;

- mediation is then resorted to pursuant to and in accordance with specific mediation rules (generally those of the HKIAC), again over a specified period of time which can be extended by mutual agreement between the parties. If the parties fail to settle their disputes within the specified period of time, they may within a specific period of time bring their dispute to arbitration;

- arbitration is then conducted, generally in accordance with the HKIAC rules.

2.15 Is the multi-tiered dispute resolution clause common in construction contracts and if so, are there problems with the use of this type of clause?

Yes it is common. There are no problems with the use of this type of clause and the parties usually adhere to the multi-tiered approach or, if they effectively skip one tier (sometimes by paying lip service to the negotiation phase or making weak attempts at resolving the dispute through mediation, particularly when communication has broken down between the parties, or there is a growing level of distrust between the parties) there is generally an implied agreement between the parties that the ultimate mode of resolution of their dispute is adopted without objection.

3 ADR and jurisdiction

3.1 Are there disputes that can only be decided by a court or by an administrative law tribunal/court?

In the context of construction, there is no dispute that can only be decided by a court unless the parties agreed that the courts of Hong Kong would have exclusive jurisdiction over any dispute between them in respect of a particular project or resulting from a specific agreement between them.

The subject matters that can be resolved by arbitration are broad – any dispute or difference in respect of a defined legal relationship may be referred to arbitration, or indeed other forms of ADR.

Outside the context of construction, a number of matters cannot be resolved by arbitration in Hong Kong. They include:

- criminal matters;
- intellectual property disputes;
- competition and anti-trust issues;
- family law related matters;
- actions in rem against vessels; and
- matters that are specifically reserved for resolution by Hong Kong state agencies (for example, taxation, development control, immigration, etc).

3.2 What type of disputes regarding construction projects cannot be subjected to ADR? (For example, are disputes relating to decennial liability arbitrable?)

On the basis of the above, all disputes regarding construction projects in or out of Hong Kong where the underlying contract between the parties contains provisions for arbitration or other forms of ADR to be conducted or heard in Hong Kong can be subjected to ADR.

There is no restriction on arbitrability save for specific provisions to the contrary that may be agreed between the parties.

3.3 Is there a restriction on the matters that may be the subject of a binding expert determination or other binding third party decision?

There is no restriction on the matters that may be the subject of a binding expert determination or other binding third party decision so long as this form of ADR is provided for in the contract under dispute, or if the parties to the dispute subsequently agree to refer their dispute to the determination of an expert, or to adjudication or other ad hoc dispute resolution board.

3.4 Are there any restrictions on the type of arbitral awards or binding decisions that may be issued (For example, may a FIDIC Red Book type DAB rule on questions of fact only or also on questions of law and are there any restrictions on the issues that this DAB may decide)?

There are no such restrictions on the nature of the decision that can be reached through ADR. This is entirely a matter of contract and the scope of and limitations to an arbitrator or other independent third party to be appointed to resolve a dispute will entirely depend on the contents of the dispute resolution provisions agreed between the parties.

3.5 Are public entities barred from settling disputes by ADR (arbitration, DAB/DRB and/or mediation)?

No, on the contrary, all contracts with government entities contain dispute resolution provisions that include one or several forms of ADR.

3.6 Do state parties enjoy immunities in your jurisdiction? Under what conditions?

State parties enjoy absolute immunity in Hong Kong. This is on the back of a recent Court of Final Appeal decision, subsequently confirmed by the National People's Congress of the People's Republic of China (PRC) that absolute immunity applies in Hong Kong. The issue of state immunity is a matter of state, to be decided by the Central People's Government. Hong Kong, being part of the PRC, is not at liberty to adopt any policy or decision that may be inconsistent with the Central government's stance (*Democratic Republic of the Congo and Others v FG Hemisphere Associates LLC* FACV 5,6,7 of 2010 (CFA) 2010).

Notably, only if PRC entities are sufficiently controlled by the PRC government will they enjoy immunity.

In the case of *Intraline Resources Sdn Bhd v the Owners of the Ship or Vessel 'Hua Tian Long'* [2010] 3 HKLRD 611, the High Court held that an entity of the PRC government being sued in the Hong Kong courts involved the exercise of jurisdiction by Hong Kong courts over its own sovereign state. There was no issue of state immunity as granted by a foreign state to decide. Since the handover, the Central People's Government of the PRC enjoys Crown immunity from suit and execution in the Hong Kong courts (which falls short of total immunity).

To determine whether a party has immunity, the courts have regard to whether the

entity concerned is capable of exercising independent powers of its own. This being said, crown immunity may be waived provided that such waiver is made expressly at the time of appearing before the Hong Kong court.

Again, state owned enterprises, commonly referred to as SOEs, are not deemed sufficiently controlled to enjoy immunity from proceedings before the Hong Kong courts.

3.7 Can procurement disputes be decided by ADR? If so, are there special requirements for this type of dispute or is only arbitration allowed?

In principle, yes.

Any supplier or contractor who feels aggrieved may lodge a complaint with the procuring department or the relevant tender board considering that particular tender.

As a party to the World Trade Organisation Government Procurement Agreement (WTO GPA) and the Hong Kong, China/New Zealand Closer Economic Partnership Agreement (HKC/NZ CEP Agreement), the government is required to provide a mechanism to deal with complaints from suppliers/contractors on alleged breaches of those two agreements. The Independent Review Body on Bid Challenges, was set up on 30 December 1998 to handle bid challenges. Enquiries on complaints against alleged breaches should be addressed to the Secretariat of the Independent Review Body on Bid Challenges under the Trade and Industry Department.

If there is any reason to suspect fraud or impropriety, suppliers/contractors/consulting firms who wish to make a complaint against an allegation of corruption should approach the Independent Commission Against Corruption.

3.8 In the FIDIC Red Book, Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8, it is stated 'The Employer and the Contractor empower the DAB, among other things to (b) decide upon the DAB's own jurisdiction and as to the scope of the dispute referred to it'. In your jurisdiction, in a situation where there are several interrelated contracts between the employer and the contractor (not all with a DAB clause), would the DAB be allowed to decide on issues outside the contract with the DAB clause?

Only provided that there are provisions to this extent enabling consolidation of referrals to DAB.

3.9 If the DAB purports to make a decision on a matter not referred to it, will that decision be deemed to have been made outside its jurisdiction?

It will certainly be open to challenge by any party dissatisfied with the DAB's decision. The challenged decision can be referred to arbitration or the courts. This being said, it is always possible for the parties to decide in the contract whether the DAB's decision is final and binding on the parties, and whether it is open to challenge or admissible in future arbitration proceedings.

Where DAB decisions amount to expert determination, the courts are unlikely to interfere with the decision made unless there is evidence of fraud or collusion, or in

situations where the DAB has clearly departed from the scope of its instructions or answered the wrong question.

4 Arbitrators, adjudicators, dispute board members, mediators

4.1 Are there special rules on arbitrator appointment or the appointment of tribunals or entities issuing binding decisions (for example, DABs) regarding construction disputes in your jurisdiction?

There are special rules on the appointment of arbitrators or arbitral tribunals. The main rules in that respect can be found on the HKIAC website (**www.hkiac.org**) although it is worth mentioning that the power and authority on the HKIAC's part to appoint arbitrators or arbitral tribunal is only triggered in default, for instance, in circumstances where the parties are unable to agree on such appointment. There are no specific rules for the appointment of adjudicators or experts for expert determination.

4.2 Do arbitrators, adjudicators, etc need to have special qualifications?

In Hong Kong, arbitrators are not required to acquire any special qualification. This being said, often the parties decide whether they wish to appoint an arbitrator with a technical expertise, or with a legal background who will take control of the procedure. More often than not, this will depend on the nature of the dispute between the parties, and this cannot be predicted at the time of the contract.

Arbitrators and mediators however do need to be accredited by local institutions in order to be listed on the panel of these organisations: for Arbitrators, this includes the HKIAC, the Hong Kong Mediation and Arbitration Centre (HKMAC), the Chartered Institute of Arbitrators (CIArb), and the Hong Kong Bar Association (HKBA). For mediators, the same institutions as well as the Centre for Effective Dispute Resolution (CEDR), the Law Society of Hong Kong and the Hong Kong Mediation Centre (HKMC). Those institutions have their own criteria for admitting professionals on their panel or including them on their list.

Invariably, for adjudication and expert determination, parties will seek advice from their respective solicitors who will usually chose candidates from lists maintained by organisations such as the HKIAC and the Academy of Experts. Both institutions also have their own requirements for professionals wishing to be on their lists. The HKIAC's requirements are also listed on their website (**http://www.hkiac.org/index.php/en/adjudication/adjudicators**).

In September 2008, the HKIAC also introduced HKIAC Administered Arbitration Rules. In 2013, the HKIAC published a revision to those Rules (HKIAC Rules (2013)). The HKIAC Rules (2013) are intended to come into force on 1 November 2013.

4.3 If there are special arbitral institutions for construction arbitrations, do these have a system of lists with names of arbitrators?

HKIAC, along with other institutions such as CIArb, the HKBA, the Law Society of Hong Kong, maintain a list of accredited arbitrators. These lists usually include details of each

arbitrator's specialist areas, as well as their usual place of residence where arbitrators on the list are not based in Hong Kong.

4.4 Do these institutions appoint the arbitrators or do the parties appoint the arbitrators?

This entirely depends on the parties' intention as reflected in the contract between them, as to whether they wish to have an institution administer the arbitration proceedings including the appointment of arbitrators. Even where they do not provide for institutional involvement, arbitration agreements will generally refer to arbitration rules, which themselves usually cater for the situation where the parties cannot agree on the appointment of an arbitrator or an arbitral tribunal. In Hong Kong, the default institution in charge of the appointment of arbitrators is the HKIAC.

If the HKIAC administers the arbitration, then the HKIAC may be required by the parties to appoint an arbitrator from their panel.

4.5 Do the parties have to choose from these lists or are they free to have arbitrators that are not on the list?

The choice of arbitrators essentially depends on the rules that the parties have agreed to follow for the purpose of resolving their dispute. If the arbitration agreement refers to an appointing institution, then it is for that institution to proceed with the appointment. If the rules provide for the appointment of an arbitral tribunal and the parties have the right to select one arbitrator, without there being a reference to any particular list of any arbitration institution, then the parties may select arbitrators that are not on the usual lists available in Hong Kong.

However, more often than not, parties will rely on their respective solicitors or legal advisers to suggest appropriate names of arbitrators for appointment, particularly on the basis of the nature of the issues in dispute.

4.6 How are these lists composed?

The HKIAC has the most user-friendly database. Both the HKIAC's panel and list of arbitrators enable a precise selection of appropriate arbitrators using an advanced search system by reference to: (i) the practice location or jurisdiction of the arbitrator, (ii) the expertise required, (iii) the arbitrator's nationality and (iv) language requirements.

The HKIAC has guidelines for the inclusion of additional arbitrators on the list it maintains:

1. having sufficient experience in arbitration whether as arbitrator, counsel, expert witness, instructing solicitor or otherwise. Without prejudice to the generality of the above, fellowship of Hong Kong Institute of Arbitrators (HKIArb) and CIArb may suffice for the purpose; and

2. good character and not having been removed as arbitrator in circumstances where moral probity or incompetence were an issue; and

3. provision of two references in support of the application.

The HKBA maintains a simple list of over 70 arbitrators but takes precautions to include a disclaimer with the proposed list as to the capabilities or suitability of any particular member to act as arbitrator in a particular dispute.

The CIArb (East Asia Branch) does not currently maintain a list of arbitrators.

By contrast, the HKIArb only has 12 names on its panel (some of which with attached curriculum vitae), and does not have any search system in place.

The HKMAC only has three names on its list, all with attached curriculum vitae.

Professional institutions such as the HKIA/HKIS have their own panels of arbitrators. For the HKIA, the list is limited to 5 names. Applicants have to comply with selection criteria which include:

- membership of their institution for a number of years;
- sufficient experience in arbitration whether as arbitrator, counsel, expert witness, instructing solicitor or otherwise;
- good character;
- two references in support of the application; and
- seven years post qualification experience of HKIA membership.

4.7 Is there a difference with other forms of ADR?

The HKIAC also provides a panel of proposed mediators with a search engine that enables users to select the area of practice concerned as well as a keyword to target the selection. The HKIAC imposes accreditation requirements before mediators can be listed on its panel.

The HKIAC also maintains a panel of adjudicators and imposes specific criteria for adjudicators to be admitted on its panel. An adjudicator who wishes to be considered for inclusion on HKIAC Panel of Adjudicators must demonstrate to the HKIAC Panel Selection Committee the following:

1. substantial adjudication/arbitration experience as adjudicator/arbitrator;
2. satisfactory completion of a 1-day Adjudication Training and Assessment Course conducted by HKIAC;
3. a substantial connection with East Asia;
4. not have been found guilty by a court or disciplinary tribunal of misconduct which in the opinion of HKIAC calls into question his or her ability to act as adjudicator;
5. be under 75 years of age.

Note:

1. Substantial Adjudication Experience: A Hong Kong resident candidate can qualify to join the Panel of Adjudicators on the basis of having acted as adjudicator on domestic or international cases. A non-Hong Kong resident

candidate can qualify to join the Panel of Adjudicators on the basis of having acted as adjudicator on international cases.

2. 1-day Adjudication Training and Assessment Course conducted by HKIAC: Non-Hong Kong resident candidates need not attend a 1-day Adjudication Training and Assessment Course conducted by HKIAC if they are able to demonstrate that they have attended a similar course elsewhere and that they are fully conversant with HKIAC Adjudication Rules. An assessment fee of HK$1,000.00 will be required from candidates seeking exemption from the HKIAC's course.
3. References may be requested at the discretion of HKIAC Panel Selection Committee.

For further details, please refer to the HKIAC's Form PA1(A). HKIAC reserves the right to include on the panel the names of adjudicators who, although not fully satisfying the above criteria 1, 2 and 3 above, do have language skills, technical skills or particular expertise not otherwise available.

As with arbitrators, professional institutions such HKIA/HKIS maintain a panel of mediators. HKIA has 15 mediators, 8 of which are also on the HKIS panel. To be on the panel, official accreditation is required, together with acceptance by the Contract and Dispute Resolution Committee of the HKIA.

The Law Society of Hong Kong maintains a panel of general accredited mediators. Names are sorted in alphabetical order, with contact details, date of admission as Hong Kong solicitors and date of accreditation as mediator.

4.8 In your jurisdiction, do arbitral tribunals and tribunals issuing binding decisions regarding construction disputes usually include a lawyer?

Not necessarily. Parties are free to choose technical arbitrators such as engineers, quantity surveyors or architects and often do so.

4.9 If not, are there requirements that the secretary added to the tribunal must be a lawyer?

No, unless the parties otherwise provide in the arbitration agreement provisions of their contract.

4.10 Would the presence of a lawyer, either as member of the tribunal or as secretary added to the tribunal, be required if these tribunals are to rule on issues of law?

No, unless as mentioned above. It is for the parties to decide beforehand or at the time of appointing an arbitrator or an arbitral tribunal whether the issues in dispute require the appointment of (at least) a lawyer as arbitrator.

This being said, it is common in situations where the arbitrator has a technical, rather than legal expertise that he appoints a legal assessor that will assist him in deciding on legal issues that may arise in the arbitration. This should however be expressly provided for in the arbitration agreement or consented to by the parties. This may give the parties the opportunity perhaps to decide on specific requirements they may wish to impose on

the arbitrator when appointing a legal assessor.

The Arbitration Ordinance (Cap. 609) (section 54(1)) gives the arbitral tribunal the prerogative, unless otherwise agreed between the parties, to appoint one or more experts to report to the tribunal on specific issues to be determined by the tribunal. The same prerogative is given to the tribunal in respect of assessors who may also attend the proceedings (section 54(2)). Parties are also given the opportunity to comment on any information, opinion or advice offered by any of the assessors appointed (section 54(2)).

4.11 In construction industry arbitrations, how often do arbitrators belong to the engineering/construction profession?

Quite often in Hong Kong, arbitrators come from an engineering or construction background, and there is a growing list of arbitrators that have either such background or relevant experience.

Arbitrators that are selected by the parties are usually chosen for their experience in an area that is pertinent to the issues at stake, for instance, with an engineering background if some of the issues require technical knowledge, with a QS qualification if there are substantial quantum or final account issues, with a legal background if there are important legal issues.

4.12 Are panels integrated both with lawyers and construction professionals possible/common?

Yes.

4.13 Is there a difference with other forms of ADR?

No, invariably one will find that most if not all panels (except those maintained by professional institutions) of mediators and experts include professionals.

4.14 Are arbitrators and tribunals issuing binding decisions allowed to use their own technical expertise without consulting the parties regarding the results of using this expertise?

Yes, particularly if this is the reason why arbitrators and arbitral tribunals were appointed. If parties are dissatisfied with the award and the reasons for it, they will have the right and opportunity to challenge it.

4.15 Do the most used rules for construction arbitrations contain a rule for the tribunal to apply the rules of law to the merits of a case or do these rules contain a rule that the tribunal decide *ex æquo et bono*, as *amiable compositeur*, or in equity?

In Hong Kong there is no specific rule that the tribunal must decide as '*amiable compositeur*'. It is nevertheless open to the parties to an arbitration to give the arbitral tribunal or the single arbitrator appointed a power to grant an award on that basis (section 64 of the Arbitration Ordinance (Cap. 609), replicating article 28 of the UNCITRAL Model Law). This necessitates an express agreement between the parties to

that effect.

The effect of such an unorthodox option, which is rarely adopted in Hong Kong, is to bring a more equitable approach to arbitration. However, this leaves the parties entirely in the hands of the arbitral tribunal. Parties will generally prefer to go through mediation if they are prepared to explore the resolution of their disputes through less formal means than litigation or 'classic' arbitration.

4.16 Is there a difference with other forms of ADR?

Other forms of ADR such as mediation obviously have a different focus or approach to resolve the disputes between the parties. Mediation is not meant to be 'legalistic' in its approach. Expert determination is likely to focus on the resolution of technical issues, whilst adjudication is meant to address problems between the parties before they transform into a full-blown arbitration.

5 ADR procedure

5.1 Are arbitrators and others making binding decisions required to follow any minimum due process rules?

For any arbitration with Hong Kong chosen as seat of arbitration, parties are first subject to the arbitration law of this jurisdiction –the Arbitration Ordinance (Cap. 609). This legislation is fundamental in the sense that it governs the interface between the arbitration proceedings and the Hong Kong courts, in the event that the parties need to seek their assistance during the arbitration process. Arbitrators, whether they are appointed by the parties or an institution, are also usually subject to the underlying framework of the Arbitration Ordinance (Cap. 609). The Ordinance provides a minimum number of procedures (particularly relating to due process) that every arbitration proceedings must follow, whilst giving the parties flexibility and autonomy in the process.

Over and above this framework, parties often choose to adopt a set of procedural rules that will give a procedural structure and finesse to the arbitration process. Parties are free to choose these rules and amend or adapt them as they see fit in order to suit their needs, and in particular the nature and complexity of the dispute between them.

5.2 Does a party usually have a right to have legal representation?

Yes, parties in arbitration and ADR are free to appoint or engage a legal representative.

5.3 Is the focus in the arbitral procedure and the procedure for tribunals issuing binding decisions on written submissions or on oral presentations?

Parties are usually free to agree on the procedure to be followed and the HKIAC even sets out a procedure for documents only arbitration where parties agree not to have a hearing.

In the arbitral procedure in Hong Kong, the focus tends to be increasingly on written

submissions and arbitrators often require counsel for the parties to prepare written submissions prior to and after the substantive hearing to assist them in their understanding of the issues at stake. There are also a number of techniques that are used in order to reduce the length of hearings and the amount of oral evidence in arbitrations:

- factual and expert evidence is in writing and both stand as evidence in chief;
- opening and closing submissions, if full rather than skeletal, may enable the tribunal to dispense with oral submissions;
- all documents upon which the parties intend to rely at the hearing are put together ahead of the hearing;
- 'hot tubbing' or hearing of experts' (and possibly factual witnesses) evidence concurrently – this is particularly facilitated by the fact that increasingly, experts are required to meet on a without prejudice basis and subsequently prepare a joint report on the issues in dispute. This unorthodox procedure, which originated in Australia, enables the tribunal to have a discussion with both experts at the same time on the issues in respect of which they prepared a joint report.

5.4 Are there rules on evidence in the laws of your country and/or the arbitration rules and/or the rules for tribunals issuing binding decisions most commonly used or is this left to the discretion of the tribunal?

There are rules on evidence although the arbitral tribunal has wide discretion over the admissibility, relevance and weight to attach to the evidence presented by the parties. This being said, the Arbitration Ordinance (Cap. 609) sets out a few limitations to the tribunal's discretion:

- it cannot compel a party to produce documents or material evidence which that party could not be required to produce before a court (section 56(9) Arbitration Ordinance (Cap. 609));
- when exercising its discretion, the arbitral tribunal must act fairly and impartially (section 46(3) Arbitration Ordinance (Cap. 609));
- when conducting arbitral proceedings, an arbitral tribunal is not bound by the rules of evidence and may receive any evidence that it considers relevant to the arbitral proceedings, but it must give the weight that it considers appropriate to the evidence adduced in the arbitral proceedings (section 47 Arbitration Ordinance (Cap. 609)).

5.5 Is a hearing mandatory for all forms of ADR?

No, a hearing is not mandatory.

However, a major drawback of mediation, where a hearing is required by the very nature of the process, is that often one party uses mediation as a delaying tactic without giving the process a chance of success. It is sometimes also used as a 'fishing expedition' or in order to ascertain the other party's bottom line position.

5.6 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8, it is stated '(c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules'. Under your jurisdiction, would the DAB still be bound to conduct a hearing according to rules of 'natural justice'?

Yes.

5.7 If so, what would this mean for conducting the hearing?

This means that:

- any information or document that is disclosed by one party to the tribunal should be disclosed to the other party;
- if one party puts any new document or evidence forward, the other(s) should be given the opportunity to consider and reply to this new document or evidence;
- both parties should attend the hearing;
- the DAB or its equivalent should not receive confidential information from either party that is not disclosed to the other side(s);
- each party should be given a chance to respond to any query or questions raised by the DAB.

5.8 What type of experts are mostly used in construction arbitrations (for example, technical experts, delay and disruption experts etc)?

Programming and quantum experts. Sometimes technical experts have to be appointed on issues of a highly technical nature, in particular to ascertain the source or origin of a defect in design and/or construction and establish where responsibility lies.

5.9 Is there a difference on this topic between arbitration and court litigation in your jurisdiction?

No.

5.10 Are experts used in the same manner in procedures for tribunals issuing binding decisions?

Yes.

5.11 Are these experts mostly party appointed or appointed by the tribunal?

Most experts are party appointed.

5.12 Is there a difference as to the evidential value?

There is no difference in evidential value. The difference is in relation to the procedure adopted. Rules of natural justice apply and parties have the opportunity to be heard on any view expressed by the expert.

5.13 How are the costs of experts allocated?

Each party that appointed an expert pays for the costs of that expert. If the tribunal appoints the expert, parties need to agree on the cost of the expert, which will form part of the tribunal's expenses.

At the end of the arbitration, costs can be considered as part of legal costs.

5.14 Is the expert supposed to be independent of the parties/counsel?

Yes, it is a fundamental rule that experts must act objectively and independently (*Ikarian Reefer (No.1)* [1995] 1 Lloyd's Rep 455).

5.15 Does the expert normally give written evidence or oral evidence?

Both, unless the parties decide otherwise.

5.16 Can the tribunal ignore the expert statements in its decision, even if the tribunal has appointed the expert?

Yes, it is not for the tribunal appointed expert to make a decision on the arbitration or any part of it. It will be for the tribunal to decide what weight, if any, it gives to the expert's evidence.

5.17 Does the tribunal need to give reasons for following or not following the statement of an expert?

No. The tribunal will often do so but remains free to determine how to mention the expert in the award. The role of the experts is to assist the arbitral tribunal. If particular experts are of no assistance, the tribunal may choose to explain why the evidence of one expert is preferred. There may be situations where the tribunal finds no assistance in the evidence of experts from both sides.

5.18 Can part of the decision by the tribunal be 'delegated' to the expert?

No.

5.19 Is 'hot tubbing' (this involves experts from the same discipline, or sometimes more than one discipline, giving evidence at the same time and in each other's presence) a feature in construction arbitrations or procedures of tribunals issuing binding decisions in your jurisdiction?

Yes, and it is increasingly favoured by arbitrators in Hong Kong.

5.20 Are site visits by the arbitral tribunal and tribunals issuing binding decisions regulated by the laws of your country and/or by the arbitration and other rules most used in your country?

No, they are not regulated, it is at the tribunal's discretion. But fundamental principles of due process would apply to the visit.

5.21 If not, are they allowed/mandatory?

Site visits by the arbitral tribunal are allowed and should most of the time be encouraged, particularly in complex arbitrations, so that the background to the disputes between the parties can be better understood. This may subsequently save the tribunal considerable time when deciding on certain aspects of the disputes.

5.22 Do all parties need to be present during the site visit and be given an opportunity to comment on the findings of the tribunal?

This would be recommended and it is usually the case in Hong Kong.

5.23 How common and how important are witness testimonies generally in construction arbitrations and other forms of ADR in your jurisdiction?

Very common and most of the time critical in arbitrations. Irrelevant most of the time in mediation, adjudication and expert determination.

5.24 Under the rules most often used in your jurisdiction for construction disputes, are there any restrictions on either not admitting testimony, or not giving value to the declaration of witnesses that are employees or consultants of the party presenting their testimony?

There are no restrictions. The arbitrator or arbitral tribunal maintains discretion over the admissibility of factual and expert evidence, and will assess written and oral evidence themselves whilst giving weight according to the type of evidence, within the limits of fairness and impartiality.

Further, arbitrators or arbitral tribunals are not bound by rules of evidence but often give due weight to evidence according to its type, to the extent that it is relevant to the reference. Arbitrators may, for instance, decide to give the category of hearsay evidence some weight, provided that such weight is less than that given to direct evidence.

5.25 Under the rules most often used in your jurisdiction for construction disputes, what degree of discretion do the arbitrator(s) or tribunals issuing binding decisions have in weighing evidence, including balancing potentially contradictory pieces of evidence or disregarding any piece of evidence?

Total discretion, subject to the rules of natural justice.

5.26 Are there any rules on valuation of evidence in the law or in such rules?

There are no specific rules on the valuation of evidence. As above-mentioned, the arbitrator or the arbitral tribunal is free to determine matters of admissibility, relevance, cogency and weight of evidence at its discretion but is subject to certain limitations to that discretion.

The arbitrator or the arbitral tribunal will generally consider all admissible evidence unless circumstances justify that admissible evidence be excluded or disregarded as

unnecessary (if other evidence was sufficient to establish or prove a fact; if the amount of evidence adduced is disproportionate to the nature or importance of the issue; or where the same evidence can benefit a number of related issues). Any decision to exclude evidence will need to be discussed with the parties, and will be a balancing act between the rules of natural justice and the underlying principles set out in the Arbitration Ordinance (Cap. 609).

6 Interim measures and interim awards

6.1 Are measures devoted to preserving a situation of fact or of law, to preserving evidence or ensuring that the ultimate award in a case will be capable of enforcement allowed in your jurisdiction?

Yes, in Hong Kong, the Arbitration Ordinance (Cap. 609) provides that parties to arbitration proceedings may seek the assistance of the Hong Kong courts for an interim measure of protection to be granted (section 21 of the Arbitration Ordinance (Cap. 609)).

A party can seek the courts' assistance either before or during the course of arbitral proceedings, and such request to the court for assistance will not be considered as a waiver of that party's right to go arbitration or continue existing arbitration proceedings.

Section 45 of the Arbitration Ordinance (Cap. 609) also grants the Hong Kong courts the power to grant interim measures in relation to any arbitral proceedings that have been or are to be commenced in or outside Hong Kong, subject to specific conditions (section 45(4) to (7)) of the Arbitration Ordinance (Cap. 609). One such condition is the fact that in the case of foreign arbitration proceedings, these are capable of giving rise to an arbitral award, whether interim or final, enforceable in Hong Kong.

However, one of the underlying objectives of the Arbitration Ordinance (Cap. 609) is to limit the courts' interference with the arbitral process. Arbitrators and arbitral tribunals appointed are empowered with the authority to order interim measures such as orders for the preservation of assets or of evidence, but also to order injunctions (section 35 of the Arbitration Ordinance (Cap. 609)).

6.2 Are these measures usually decided by the arbitral tribunal or by a judge?

Interim measures can either be decided by the arbitral tribunal or by the High Court of Hong Kong. Powers to do so are concurrent, although the Hong Kong courts will usually not intervene where arbitration proceedings have been commenced and an arbitrator or an arbitral tribunal has been appointed.

Arbitral tribunals are also empowered with the authority to grant preliminary orders that will prevent the parties from frustrating any interim measure previously ordered (section 37 of the Arbitration Ordinance (Cap. 609)).

However, the parties remain free to exclude from their arbitration agreement the right to apply to the courts for some or all interim measures.

6.3 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8, it is stated '(g) decide upon any provisional relief such as interim or conservatory measures'. The FIDIC Red Book has no explicit provisions for DAB decisions that have a provisional nature. It is not clear if, how and when these should be followed by decisions that are meant to be final and binding. Would this lead to problems in your jurisdiction?

In Hong Kong, provisional measures can come in any of the following two forms: (i) interim measures, (ii) preliminary orders. Interim measures can be handed down as an award or a form other than an award. If an interim measure is handed down as an award, it would be binding and enforceable in the same way as any other award would be. However, if it is handed down in a form other than an award, presumably it would not be enforceable as an award. Preliminary orders do not constitute an award – such measures are taken by the arbitrator or the arbitral tribunal with the aim of being provisional. Preliminary orders expire within 20 days, but may be replaced by interim measures (either as an award or otherwise), after the party against whom the preliminary order was sought has had an opportunity to present its case.

7 Awards, decisions, recommendations, negotiated agreement

7.1 Is a binding decision (for example the decision of a DAB) enforceable in your country? If not directly enforceable, what steps must be taken to get a binding decision enforced?

If the binding decision is an arbitral award from another jurisdiction, it is enforceable in Hong Kong on the basis of the provisions of the New York Convention (1958).

If mediation resulted in a binding agreement signed by all parties to it, it is enforceable before the Hong Kong courts in the same was as any other agreement between parties.

An adjudication decision delivered in Hong Kong may be upheld and enforced, or overturned by the Hong Kong courts. However, because of its nature and the fact that the courts will not consider it on an equal footing to an arbitration award, enforcement may be difficult unless the dispute resolution clause in the contract between the parties provides for any adjudication decision rendered pursuant to that clause to be enforceable by the Hong Kong courts. The same would apply to an expert determination.

A DRB decision is not enforceable as an arbitral award because it is not binding. This being said, the contract between the parties may provide for the enforcement by the courts (which would normally be unwilling to interfere with unless there was fraud or collusion or the DRB answered the wrong question(s)), although in practice, parties are most likely to accept the decision and follow its recommendations. Enforcement by the courts will be easier if the DRB decision takes the form of an agreement between the parties.

7.2 Would FIDIC Red Book clause 20.7 allow enforcing a DAB decision directly through court in your jurisdiction (skipping the arbitration)?

The situation is yet to be tested in Hong Kong, the way it was by the Singapore Court of Appeal in 2011 in the case of *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33.

7.3 Does the award or binding decision have to be reasoned?

Under section 67 of the Arbitration Ordinance (Cap.609), the arbitral award must:

1. be made in writing and signed by the arbitrator or arbitrators;

2. state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms;

3. state the date and place of the arbitration, since the award will be deemed to have been made at that place.

7.4 Are dissenting opinions in arbitral awards allowed in your jurisdiction and if so, can they be added as a separate opinion to the award?

In Hong Kong, section 67 of the Arbitration Ordinance (Cap. 609) adopted article 31 of the UNCITRAL Model Law without seeking to modify it. Pursuant to section 67, where an arbitral tribunal has been appointed and makes an award, it is to be signed by all members of the arbitral tribunal. If only the majority of the members sign, a reason must be given for any omitted signature. This will be of particular use and importance where the courts are to hear an appeal against the award.

The HKIAC Rules (2013) that are to come into effect on 1 November 2013 mirror the provision of the Arbitration Ordinance (Cap. 609) in this respect: article 34.5 of the HKIAC Rules (2013) states that 'an award shall be signed by the arbitral tribunal… Where there are three arbitrators and any of them fails to sign, the award shall state the reason for the absence of the signature(s)'.

In practice, it is recommended that the dissenting opinion be included in the majority award issued by the arbitral tribunal, otherwise there is a risk that a dissenting opinion given that is not contained in the award be considered as not forming part of the award. This contrasts with the ICC practice where the dissenting opinion does not form part of the award.

7.5 Are they allowed in other forms of ADR?

The situation of dissenting opinions, which is only likely to appear with DRBs is unlikely to arise as decisions are generally made unanimously.

7.6 Can an award or (binding) decision be corrected, clarified or reconsidered?

The Arbitration Ordinance (Cap. 609) provides for the correction and interpretation of an award within a period of 30 days from receipt of the award, at the request of a party, to the extent that (i) the correction is in respect of minor errors, (ii) the interpretation is on

a specific point or part of the award where there is an ambiguity or an omission (section 69 of the Arbitration Ordinance (Cap. 609). This does not extend to errors in awards.

This provision is mandatory and it is not open to the parties to contract out of this in principle, although the parties may well decide to reduce or extend the period within which such correction or interpretation can be applied for.

7.7 If so, can the tribunal do this on its own accord or only if parties request it to do so?

Pursuant to section 69 of the Arbitration Ordinance (Cap. 609), the arbitrator or the arbitral tribunal is empowered to make an additional award which rectifies, corrects or provides the requested interpretation, at the parties' request or on the arbitral tribunal's own motion.

8 Enforcement of and challenges to awards and decisions

8.1 What steps would a party have to take to get to the enforcement of binding third party decisions in your jurisdiction?

If the binding third party decision is an arbitration award made in or out of Hong Kong, it is enforceable in Hong Kong by way of summary enforcement, in the same manner as a judgment from the High Court, except for the fact that the party seeking to enforce it must obtain leave of the Court (section 84 of the Arbitration Ordinance (Cap. 609)). Once leave is granted, the court may enter judgment in terms of the award.

The party seeking to enforce an arbitration award must produce:

1. the authenticated original award or a duly certified copy of it;
2. the original arbitration agreement or a duly certified copy of it; and
3. if the award is not in English or Chinese, an officially certified or sworn translation of it into either English or Chinese.

Leave to enforce an arbitration award can only be obtained through an ex parte application made to the judge of the Construction and Arbitration List (Practice Direction 6.1). Failure to comply with the strict evidential requirements set out in Order 73 rule 10 of the Rules of the High Court (Cap. 4A) may result in an award of indemnity costs against the applicant. Leave is likely to be granted unless the validity of the award is in doubt or the award is in a form in which it cannot be enforced as a judgment.

Hong Kong has a long established policy of supporting the enforcement of arbitral awards and, as demonstrated in the Court of Appeal case of *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2012] HKCU 971, in which it was held that in order to justify the setting aside of an award, the tribunal's conduct would have to have been 'sufficiently serious or egregious so as to deny due process to a party'. In other words, in order for an award to be set aside, the arbitral tribunal's procedural error would have to be sufficiently serious so as to undermine the entire arbitral process.

Another method available to the successful party in the arbitration to enforce an arbitration award is to start a new action before the High Court on the basis of an implied promise that the parties will perform the award.

8.2 In your opinion, would the New York Convention allow recognition and enforcement of FIDIC Red Book DAB-type awards deemed to be the equivalent to arbitral awards through contractual arrangement?

Although the Arbitration Ordinance (Cap. 609) does not provide any definition of 'award', it is suggested that the following three conditions must be fulfilled for an award to qualify as such:

- the award must result from an agreement to arbitrate;
- the award must be in writing and represent the final decision of the arbitrator or arbitral tribunal on a substantive issue in dispute; and
- the award must resolve all issues in dispute or at least a substantive issue.

Although this has yet to be tested, to the extent that a DAB-type award is contractually deemed equivalent to an arbitral award and fulfils the above three conditions, there is an argument to be made that it should be afforded the same benefits as an arbitral award, specifically, that it can be enforced under the New York Convention (1958). However, in cases thus far, in order for a DAB award to be enforced as an arbitral award, an arbitration needs to be carried out based on that DAB award.

8.3 Would your country allow the enforceability of a foreign arbitration award which in turn enforces a FIDIC Red Book type DAB decision?

So long as the foreign arbitration award meets the requirements set out in paragraph 8.2, above, it can be enforced in the manners stated at paragraph 8.1 above.

8.4 Are there any remedies (which possibly cannot be waived) to challenge a FIDIC Red Book type DAB decision in case of fraud, failure to follow minimum due process or other serious irregularity?

Yes, in cases of fraud or breach of the rules of natural justice, or for a serious irregularity, any party aggrieved by a DAB decision or equivalent may apply to the Hong Kong courts to challenge the decision. As a matter of principle, save for fraud/collusion cases or where there is a manifest error of law or fact, the courts will be unwilling to interfere with the DAB decision.

8.5 Will these remedies make a DAB decision unenforceable in court without first having to go through arbitration (clause 20.6 FIDIC Red Book)?

Yes

8.6 Would a binding expert determination be subject to review on the merits by the law courts on your jurisdiction?

Yes, any party aggrieved by the expert determination may seek remedy before the Hong Kong courts on the basis of (i) fraud or collusion, (ii) error of law or (iii) error of fact.

9 Trends and developments

9.1 Revised HKIAC Administered Arbitration Rules

The HKIAC has conducted a revision of its Administered Arbitration Rules, the final version of which was published in June 2013 (HKIAC Rules (2013)). The new rules are set to come into effect on 1 November 2013.

The key amendments to the existing rules are the following:

1. Joinder: The HKIAC's power to allow an additional party to be joined to an existing arbitration, particularly when a request to do so is made before an arbitrator is appointed or the arbitral tribunal is constituted. The additional party will consequently be bound by the valid arbitration agreement that gave rise to the existing arbitration. If an additional party is joined before an arbitrator is appointed or the arbitral tribunal is constituted, the HKIAC will have the power to appoint all arbitrators and disregard any prior arbitrator appointment process (article 27 of HKIAC Rules (2013)), although any decision made and expense incurred by the arbitrator or arbitral tribunal appointed before the joinder will remain valid;
2. Consolidation: The HKIAC's power to consolidate two or more HKIAC arbitrations into the arbitration that was first initiated. As a result of the consolidation, the HKIAC will have the power to appoint the arbitral tribunal for all consolidated arbitrations, and revoke any prior appointment made in respect of these arbitrations before their consolidation. None of the prior arrangements in respect of decisions made by arbitrators or arbitral tribunals in place prior to the consolidation, fees to be paid to them or any claim or defence raised are invalidated by the consolidation (article 28 of the HKIAC Rules (2013));
3. Table of Fees: The HKIAC's new tables of arbitrator's fees, with a cap of HK$6,500 per hour (articles 9.2 and 10 and Schedules 2 and 3 to the of the HKIAC Rules (2013)) and the option that under the new Rules, the parties can choose between HKIAC's schedule of fees based on the sums in dispute between them and the schedule of hourly rates capped at HK$6,500 per hour, the latter of which shall apply where the arbitration agreement does not mention the issue of fees;
4. Emergency Arbitrator: The HKIAC has the power to appoint an emergency arbitrator if a party makes an application requesting for such appointment. If this application is granted, the HKIAC seeks to appoint an arbitrator within 2 days of that application. This is to deal with applications for urgent relief before an arbitrator is appointed or an arbitral tribunal is constituted. The emergency arbitrator will have 15 days from the date of his/her appointment to make a decision on the issues referred to him/her. The HKIAC Rules (2013) also deal with a number of aspects associated with and following the appointment of an emergency arbitrator (articles 23.1 and Schedule 4 to the HKIAC Rules (2013)); and
5. Jurisdiction: HKIAC's power to decide on the continuation of the arbitration, where there is an issue between the parties as to the existence, validity or scope of the arbitration or as to the HKIAC's own jurisdiction, and the arbitrator or arbitral tribunal is yet to be appointed (article 19.4 of the HKIAC Rules (2013)).

9.2 Hong Kong's Mediation Ordinance (Cap.620)

The Hong Kong Mediation Ordinance (Cap. 620) came into effect on 1 January 2013 and applies retroactively to pre-existing agreements to mediate and past mediations. It was enacted with three main purposes:

1. promoting and facilitating the resolution of disputes through mediation (section 3 of the Mediation Ordinance (Cap. 620)), and by extension promoting Hong Kong as a prominent dispute resolution centre in the region. The promotion of mediation in Hong Kong is nothing new – since 2009, the CJR started encouraging its use and sanctioning, through adverse costs orders, parties to a court action who unreasonably refused to consider mediation to resolve their differences. What is new, however, is its institutionalisation in line with Practice Direction 31 which came into effect on 1 January 2010;

2. providing a regulatory framework for the conduct of mediation, for example, by setting out definitions such as of 'mediation', 'agreement to mediate' and 'mediation communications' (section 2 of the Mediation Ordinance (Cap. 620)), and setting out the extent of the Mediation Ordinance's application (including within that extent, the government) (section 5, 6 and Schedule 1 of the Mediation Ordinance (Cap. 620)); and

3. giving the confidentiality of mediation communications throughout the mediation process the full protection of the law, subject to limited exceptions.

Traditionally one of the pillars of mediation, confidentiality is the centrepiece of the Ordinance (sections 8-10 of the Mediation Ordinance (Cap. 620)). As a matter of principle, mediation communications are strictly confidential and must not be disclosed.

Exceptions to the principle are limited and are generally to reinforce the mediation practice. The exceptions essentially fall into two categories: circumstances that do not necessitate the courts' intervention and circumstances that require leave of the courts.

Seven circumstances do not require the courts' intervention:

1. the parties' agree to the disclosure;
2. the necessity to protect someone from danger;
3. where the content of the intended communication is already in the public domain through lawful means;
4. where the law requires it;
5. where the content of the mediation communication is information that is otherwise subject to discovery in civil proceedings or to other similar procedures in which parties are required to disclose documents in their possession, custody or power;
6. where the communication is used for research, evaluation or educational purposes without revealing the identity of persons to the communication; and
7. for the purpose of seeking legal advice.

Three circumstances require leave of the court:

1. challenge to a mediated settlement agreement;
2. a claim against a mediator for professional misconduct; and
3. a catchall provision at the court's discretion 'for any other purpose' (sections 8(3) and 10 of the Mediation Ordinance (Cap. 620)).

As part of the institutionalisation of mediation in Hong Kong, the Hong Kong Mediation Accreditation Association Ltd (HKMAA) was set up on 28 August 2012. The HKMAA is meant to become, in due course, the only official accreditation body for mediators in Hong Kong. The HKMAA also aims to be the appointing body of reference in situations where the parties cannot agree on the appointment of a mediator.

At present, there are a few centres offering accreditation schemes, including, the HKIAC, the Law Society of Hong Kong, the CEDR, the HKMC, the HKIS, the Royal Institution of Chartered Surveyors Hong Kong, the HKIA, and the HKMAC.

It took less than three weeks following the coming into effect of the Ordinance for the courts to expressly refer to it. In *Lincoln Air Conditioning & Engineering Co Ltd and another v Chan Ping Fai Ricky and Others* [2013] HKCFI 91, the CFI decided to strike out parts of a defence and evidence contained in an affidavit because they contained information exchanged in the course of a mediation, in breach of section 9 of the Mediation Ordinance (Cap. 620).

9.3 Amendments to the Arbitration Ordinance (Cap.609)

The Arbitration (Amendment) Bill 2013, which was gazetted on 28 March 2013 and is likely to come into effect in August 2013, essentially provides for:

1. the enforcement of emergency relief granted by an emergency arbitrator;
2. taxation of costs on a 'party and party' basis, if the parties have agreed to have costs taxed at all; and
3. the implementation of the agreement between Hong Kong and Macao on mutual enforcement of awards, signed in January 2013 and consequential amendments to the rules on enforcement of arbitral awards (note that a similar agreement is already in place between Hong Kong and China).

The amendments are to be made to the Arbitration Ordinance (Cap. 609), which itself was only recently enacted into law in 2011.

Under the proposed amendments, there are provisions for enforcing in Hong Kong an order, award or decision made by an emergency arbitrator appointed by the parties before an arbitral tribunal is constituted. Such procedures allow a party seeking urgent relief before the tribunal is constituted to appoint an emergency arbitrator, who will make a decision on an urgent basis and such decision is enforceable.

The HKIAC Rules (2013) introduce an emergency arbitration procedure.

The Bill also amends section 75 of the Arbitration Ordinance (Cap. 609), which regulates taxation of the costs of an arbitration by a Hong Kong court. The Bill proposes that

taxation should be on the 'party and party' basis (on which the successful party is indemnified against the necessary expense to which he has been put in prosecuting or defending the action). Currently, section 75(1) of the Arbitration Ordinance (Cap. 609) allows the court to order payment 'on any basis on which the court can award costs in civil proceedings before the court'.

A Macao award will be enforceable in Hong Kong either by action in the CFI, or in the same manner as a Hong Kong award (with leave of the court).

9.4 Recent case law confirming arbitration-friendly status of Hong Kong

There have been several recent decisions which serve to illustrate the reluctance of the Hong Kong courts to interfere with arbitration, except in unusual circumstances, and the jurisdiction's stance as arbitration friendly.

In *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2012] HKCU 971, the Court of Appeal reaffirmed that only 'serious or egregious' procedural irregularities by the arbitral tribunal would merit setting aside an award. This was a case where the applicant had alleged that it had been prejudiced in conducting its case by decisions and orders made by the tribunal on interlocutory matters.

In *Lin Ming & Anor v Chen Shu Quan & Ors* [2012] 2 HKLRD 547, the Court refused to grant an anti-arbitration injunction, following the approach of English courts that such relief is warranted only in exceptional cases. Nevertheless, the Court in *Lee Cheong Construction Buildings Materials Limited v The Incorporated Owners of the Arcadia* [2012] 2 HKLRD 975 confirmed that although Hong Kong maintains an arbitration-friendly status, the primary tool for determining whether there is a valid arbitration agreement is the textual and legal context of the agreement, and not legislative policy.

9.5 New York Convention developments: China/Hong Kong and India

In recent years the volume of Sino-Indian trade has increased and so has the need for effective enforcement of arbitral awards between the two countries. However, until recently, arbitration awards from Hong Kong and Mainland China were not recognized as New York Convention awards in India despite the fact that India and China (and by extension Hong Kong and Macao) are both signatories to the New York Convention (1958).

The India Arbitration and Conciliation Act 1996 requires a territory to be published in its Official Gazette in order for the New York Convention (1958) to be applied to that territory for the purposes of enforcement in India. China (and by extension, Hong Kong) was not in India's Official Gazette and as a result the enforcement of Chinese and Hong Kong arbitration awards was usually a difficult and time-consuming exercise. This encouraged parties to Indian-related contracts to select a seat of arbitration other than Hong Kong, such as Singapore, which did have the benefit of being on India's Official Gazette.

On 19 March 2012, India declared that the People's Republic of China is to be recognised as a territory to which the benefits of the New York Convention (1958) are to be granted in India. As a result, arbitration awards rendered in the PRC and by

extension in Hong Kong and Macao are now all enforceable in India in the same way as if they were Indian judgments. This is likely to result in Hong Kong being seen as a reliable alternative to Singapore as neutral venue for arbitrations of agreements involving an Indian party.

9.6 ADR to be employed in a new class action regime?

On 28 May 2012, the Law Reform Commission of Hong Kong recommended the introduction of a class action regime in Hong Kong. The Report on Class Actions proposes to implement the new procedure on an incremental basis, starting with 'consumer actions', in relation to goods, services and immovable property. Cases would only be heard before the High Court for the first five years before extending class actions to the District Court, if appropriate.

The Report also suggested that ADR, including arbitration, could be a cost-effective dispute resolution process for class actions provided that this is implemented in a controlled manner. At the present stage, further study is necessary to draft the necessary legislation in detail and it may take months before a Class Action Bill is presented before the Legislative Council.