Hong Kong

Arbitration law

Arbitration in Hong Kong is governed by the Arbitration Ordinance (Cap 609) which came into effect on 1 June 2011. It replaces the split regime of domestic and international arbitrations under the previous Arbitration Ordinance (Cap 341).

The new Arbitration Ordinance adopts the UNCITRAL Model Law (which is a set of internationally recognised uniform arbitration rules published by the United Nations Commission on International Trade Law) and places more emphasis on party autonomy and non-interference by Hong Kong Courts.

As a transitional measure, and largely in response to conservatism of the construction industry in Hong Kong, the Arbitration Ordinance (s 99) allows the parties to an arbitration agreement to contract into some of the provisions previously in force under the old domestic regime (such as appointment of single arbitrator, determination of preliminary question of law by the High Court of Hong Kong and appeal against an award on question of law etc), which are not featured in the UNCITRAL Model Law and the Ordinance. These provisions are set out in Schedule 2 to the Ordinance.

The Arbitration Ordinance (s 100) also provides an automatic opt in to the above provisions for those arbitration agreements governed by Hong Kong law which are signed up to and including 31 May 2017 and which expressly provide for a ‘domestic’ arbitration.

References: Arbitration Ordinance

Arbitration institutions and rules

The Hong Kong International Arbitration Centre (HKIAC) was established in 1985 and is the sole arbitration institution in Hong Kong. The HKIAC has a panel of eminent arbitrators. Some of the arbitrators are local or overseas lawyers, engineers and quantity surveyors who are experienced in arbitrating construction disputes.

 Parties to an ad hoc arbitration may adopt the UNCITRAL Rules of Arbitration or other rules agreed or drawn up by themselves. In ad hoc arbitrations, the HKIAC has a limited role in the proceedings (such as appointment of arbitrators and determination of the appropriate number of arbitrators) and will only be involved if requested by the parties.

References: AA 1996

References: Hong Kong International Arbitration Centre (HKIAC)

References: HKIAC Arbitration Rules & Guidelines
The HKIAC may also administer arbitrations according to its Administered Arbitration Rules, in which case it will manage the proceedings until a tribunal is formed. The overall approach of the Administered Arbitration Rules is to provide a ‘light touch’ administered arbitration modelled on the Swiss Rules and may be used in either domestic or international arbitrations.

An alternative option to the HKIAC’s Administered Arbitration Rules is the Rules of Arbitration of the ICC International Court of Arbitration (ICC Rules). Pursuant to the latest version of the ICC Rules which took effect on 1 January 2012, the ICC has become the only body authorised to administer ICC arbitrations (art 1(2)). In 2008, the ICC established a Secretariat’s office in Hong Kong which is the first ICC branch outside Paris. Under the ICC Rules, a claimant may now send a Request for Arbitration to the Secretariat’s office in Hong Kong rather than to Paris (art 4(1)).

References: HKIAC Administered Arbitration Rules

Fees chargeable by the arbitration institution

For ad hoc arbitrations, the fees applicable for enlisting the assistance of the HKIAC (if requested by the parties) are:

References: Hong Kong International Arbitration Centre fees

- HKD 4,000 for the appointment of one arbitrator
- HKD 4,000 for the determination of the number of arbitrators

For administered arbitrations, the fees chargeable by the HKIAC include:

- a registration fee of USD1,000 payable by the claimant; and
- Administrative fee based on a percentage (varies from 0.03% to 0.7%) of the claim amount, with a minimum of USD 1,500 and a cap of USD 26,850 being applied

Enforcement of awards

Hong Kong adopts the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) through the United Kingdom’s ratification in 1977 and subsequently through China after the handover in 1997. Hong Kong awards can generally be enforced through the courts of other signatory countries, subject to any qualifications made by the member states. Likewise, Hong Kong Courts recognise and will readily enforce awards made in countries which are signatories to the New York Convention.

The New York Convention, however, does not apply between Hong Kong, the Mainland China, Taiwan and Macao as they each form part of the People’s Republic of China (PRC).

The enforcement of Hong Kong awards in the Mainland China (and vice versa) can be achieved through the Arrangement concerning Mutual Enforcement of Arbitration Awards between the Mainland and Hong Kong signed between the Mainland China and Hong Kong on 21 June 1999. This arrangement is modelled on the New York Convention and is implemented in Hong Kong under the Arbitration Ordinance (ss 92 to 95).

There are no special arrangements for the enforcement of Hong Kong awards in Taiwan, Macao and other countries which are not a member state of the New York Convention (and vice versa), but enforcement can be achieved through the Arbitration Ordinance (ss 82 to 86).


References: Arrangement concerning mutual enforcement of arbitral awards between the Mainland and the Hong Kong Special Administrative Region
Mainland China

Arbitration law

Arbitration in the People’s Republic of China (‘PRC’) is governed by the Arbitration Law 1995 and Civil Procedure Law 2007 which divides arbitrations in the PRC into domestic arbitrations (ie arbitrations without any foreign element) and arbitrations with a foreign element.

Civil Procedure Law of the People’s Republic of China

An arbitration with a foreign element is generally taken to mean an arbitration:

- (i) involving one or more non-PRC parties
- (ii) where the subject matter of the dispute is located outside the PRC, or
- (iii) where the facts that establish, change or terminate the rights and obligations between the parties occur outside the PRC.

(Paragraph 304, Opinions of the Supreme People’s Court on Some Issues Concerning the Application of the Civil Procedure Law of the People’s Republic of China)

In distinction between domestic arbitrations and arbitrations with a foreign element, a wholly foreign owned enterprise is regarded as a domestic party for the purpose of the PRC Arbitration Law (art 8, Law of the People’s Republic of China on Foreign-Capital Enterprises; art 41, General Principles of the Civil Law of the PRC).

General Principles of the Civil Law of the People’s Republic of China, art 41

On the other hand, arbitrations involving Hong Kong, Macau and Taiwan elements are treated as arbitrations with a foreign element (Circular of the Supreme People’s Court on Issues in the People’s Courts’ Handling of Foreign-related Arbitrations and Foreign Arbitrations).

Chapter VII of the Arbitration Law and Chapter XXVIII of the Civil Procedure Law set out the special provisions on arbitrations involving a foreign element. Domestic arbitrations and arbitrations with a foreign element are different in the following key aspects:

References: Arbitration Law of the People’s Republic of China

References: Law of the People’s Republic of China on Foreign-Capital Enterprises, art 8
## Choice of law of arbitration agreements

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<td>The PRC Contract Law does not expressly give the parties a right to choose the governing law in the absence of a foreign element. It follows that a domestic arbitration agreement must be governed by the PRC law.</td>
<td>Parties may choose the governing law of the arbitration agreement (art 126, PRC Contract Law)</td>
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## Choice of arbitration commission

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<th>Domestic</th>
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<td>The Arbitration Law does not recognise ad hoc arbitrations in the PRC and requires all PRC arbitrations to be administered by an arbitration commission to be agreed by the parties in writing. The wording of art 10 and Chapter II of the Arbitration Law suggests that domestic arbitrations can be administered by PRC arbitration commissions only.</td>
<td>In the case of Duferco S.A. v Ningbo Arts &amp; Crafts Import &amp; Export Co. Ltd. (22 April 2009, ICC award 14006/MS/ JB/JEM), the Ningbo Intermediate People’s Court ruled that a ‘non-domestic’ ICC award made in Beijing was not subject to art 10 and could be enforced in the PRC. It follows that parties to an arbitration with a foreign element could, arguably, choose a non-PRC arbitration institution for the administration of the arbitration. However, it should noted that decisions of the PRC courts do not set a precedent, which means the Ningbo Court’s decision is not binding on subsequent court decisions or on other PRC courts.</td>
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## Nationality of arbitrators

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<td>Chinese nationals only (as a matter of interpretation of art 67, Arbitration Law)</td>
<td>Foreign nationals with specialised knowledge in law, economy and trade, science and technology may be appointed (art 67, Arbitration Law)</td>
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## Grounds for setting aside PRC arbitral awards

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<td>Broader grounds for setting aside an award, including forgery of evidence and concealment of facts affecting impartiality of the tribunal which are not applicable to awards with a foreign element (art 58, Arbitration Law)</td>
<td>More limited grounds for setting aside an award (art 70, Arbitration Law and art 260, Civil Procedure Law)</td>
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## Grounds for challenging the enforcement of arbitral awards

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<th>Domestic</th>
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<td>The grounds for challenging the enforcement of a domestic award are slightly different from the grounds for setting aside a domestic award, which include errors in the cited law and the insufficiency of evidence to substantiate the facts (art 63, Arbitration Law and art 217, Civil Procedure Law)</td>
<td>The grounds for setting aside and for challenging the enforcement of an award with a foreign element are the same and are more limited compared to the domestic regime (art 71, Arbitration Law and art 260, Civil Procedure Law)</td>
</tr>
</tbody>
</table>
The main arbitral institution is the China International Economic and Trade Arbitration Commission (CIETAC), which was established in 1956. CIETAC has its headquarters in Beijing with sub-commissions in Shanghai, Chongqing, Shenzhen and Tianjin and twenty-one liaison offices in different regions.

The 2012 Edition of the CIETAC Arbitration Rules came into effect on 1 May 2012. The major changes contained in the new rules include:

- the parties may request the CIETAC to administer arbitrations under non-CIETAC rules (art 4(3));
- CIETAC is given a power to consolidate arbitrations at the request of a party or where it considers necessary (art 17);
- the arbitral tribunal is given additional power to grant interim measures under the applicable law in case the governing law of the arbitration is not PRC law (art 21(2));
- the parties may apply for a temporary stay of the arbitration proceedings where necessary (art 43);
- the parties may agree to mediate during the course of the arbitration proceedings with the presence of the tribunal, or with the assistance of CIETAC in the absence of the tribunal (art. 45).

Notwithstanding the above changes, one of the major differences between the 2012 CIETAC Rules and other institutional rules in Hong Kong or Singapore is the CIETAC adopt a fully administered system of arbitration and the CIETAC Secretariat takes an active role in the proceedings.

CIETAC has a panel of foreign arbitrators, with over 200 arbitrators from over 30 countries specialising in all major areas of law including construction disputes.

In May 2012, the Shanghai Sub-commission of CIETAC publicly announced its independence from CIETAC. It has published its own rules and established its own panel of arbitrators. It alleged that the new CIETAC Rules 2012 were invalid and illegal and refused to adopt them. Similar challenge is being raised by the Shenzhen Sub-commission.

CIETAC published an announcement on 1 May 2012 challenging the Shanghai Sub-commission’s independence, rules and panel of arbitrators.

Pending the resolution of dispute over the legal status of the 2012 CIETAC Rules and the Shanghai Sub-commission’s own rules, parties to an arbitration agreement seated in the PRC may wish to choose other administered rules to avoid the potential risk that the arbitration clause may not be enforceable.

The following fees are chargeable by the CIETAC under 2012 CIETAC Arbitration Rules:

- a registration fee of RMB 10,000 for international or foreign-related arbitrations, including arbitrations involving Hong Kong, Macau and Taiwan region.
- administrative fee based on a percentage (varies from 0.45% to 4%) of the claim amount, with a minimum of RMB 10,000 and a maximum of RMB 15,000,000 being applied.

China is a signatory to the New York Convention and PRC awards can generally be enforced in other signatory countries, subject to any qualifications made by the member states.
With regard to the enforcement of arbitral awards in the PRC, the PRC Courts have more extensive powers to review or refuse enforcement of a domestic award than an award with a foreign element. The powers of the PRC Courts to review an award with a foreign element (art 70) are limited and are broadly similar to the grounds of refusal for enforcement under the New York Convention.

Notwithstanding the general prohibition to ad hoc arbitrations in the PRC (art 16, Arbitration Law), the PRC Supreme Court has confirmed in the Notice of Relevant Issues on the Enforcement of Hong Kong Arbitral Awards in the Mainland (30 December 2009) that the arrangement between the Mainland China and Hong Kong on mutual enforcement of awards also applies to ad hoc arbitral awards in Hong Kong. It could be argued that ad hoc arbitral awards made in Hong Kong and other places outside the PRC might be enforceable in the PRC notwithstanding the prohibition to ad hoc arbitrations under PRC law.

Singapore

Singapore has a split regime of domestic and international arbitrations.

The Arbitration Act governs all domestic arbitrations. It also applies to any arbitration where the place or seat of arbitration is Singapore and where Part II of the International Arbitration Act (concerning international commercial arbitrations) does not apply. The Arbitration Act was enacted to align the laws applicable to domestic arbitration with the UNCITRAL Model Law on international commercial arbitrations.

The International Arbitration Act gives the Model Law (with the exception of its Chapter VIII) the force of law in Singapore. It applies to all international arbitrations in Singapore and non-international arbitrations where the parties have a written agreement for Part II of the International Arbitration Act and the Model Law to apply.

Although the Model Law has been adopted in International Arbitration Act, parties to an arbitration agreement are free to opt for any set of arbitral rules other than the Model Law by agreement (s 15, International Arbitration Act; s 3, Arbitration Act).

The amendments to the Arbitration Act and International Arbitration Act came into effect on 1 June 2012. The changes to the Acts deal with four principal issues:

References: Public Consultation on Proposed Amendments to the International Arbitration Act and Proposed Enactment of the Foreign Limitation Periods Act

- relax the current requirement that arbitration agreements be in writing and allow arbitration agreements to be recorded in any form
- allow Singapore courts to review rulings by arbitral tribunals that they have no jurisdiction to hear the dispute
- clarify the scope of the tribunals’ powers to award interest, and
- provide legislative support for the appointment of ‘emergency arbitrators’ before the arbitral tribunal hearing the dispute is properly constituted
Arbitration institution and rule

The main arbitration institution is the Singapore International Arbitration Centre (SIAC) which was established in 1991. The SIAC maintains panels of international and domestically accredited arbitrators.

Arbitrations administered by the SIAC are generally conducted under the SIAC Rules, the latest version of which came into effect on 1 July 2010.

As an alternative to SIAC, the parties may also choose other institutions, such as the ICC which maintains a regional office in Singapore.

Arbitration costs

The following fees are chargeable by the SIAC:

- a case filing fee of SGD 1,000 payable by an overseas claimant
- administrative fee based on a percentage (varies from 0.075% to 2%) of the claim amount, with a minimum of SGD 3,250 and a maximum of SGD 66,500 being applied

Singapore is a signatory to the New York Convention which has been incorporated into the International Arbitration Act (s 3).

Singapore awards are generally enforceable in other signatory countries and New York Convention awards are readily recognised and enforced in Singapore, subject to any qualifications made by the member states and the limited defence available under the New York Convention.

At present, Singapore is one of the few Asian countries (alongside with Japan and South Korea) which has been notified in India’s Official Gazette as being a country to which the New York Convention applies. Pursuant to s 44 of the Indian Arbitration and Conciliation Act 1996, only foreign arbitral awards made in signatory countries to the New York Convention that have been notified in India’s Official Gazette are enforceable in India. The Indian Government has announced that China (including Hong Kong and Macau) will soon be another Asian country under the New York Convention to be notified for mutual enforcement of awards.

References: Singapore International Arbitration Centre (SIAC)

References: Arbitration rules of the SIAC (4th edition, 1 July 2010)
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