Law and Practice of Maritime Arbitration in Hong Kong

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Part I. Introduction

Hong Kong positions itself as one of the ideal locations for arbitration. The arbitral awards made in Hong Kong are generally enforceable through the Courts of most other recognised jurisdictions. Moreover, the transparency of both legislature and judiciary, the efficiency of its administration, its advantageous geographic location, and the multilingual nature of the city, are all attractive features that make Hong Kong a desirable international arbitration centre. In addition, due to its close and unique relationship with Mainland China, Hong Kong is perceived as a particularly important arbitration venue in providing assistance for trading disputes within Mainland China's economy. Statistics show that, from 2010 to 2014, China, Hong Kong, Singapore, Korea and British Virgin Islands are the top five most frequent users of maritime arbitration service in Hong Kong. During the same period, the total amount in dispute regarding maritime arbitration was as large as USD 393,333,157.72, and more than 336 maritime disputes were handled by the Hong Kong International Arbitration Centre (HKIAC).

This article aims to discuss the current status of maritime arbitration law and practice in Hong Kong and is divided into five parts. After this introduction, Part II explores the significance of the New Ordinance, in particular the improvements made in comparison with the Repealed Ordinance. Both the New and Repealed Ordinance have a similar number of Articles; however, the new Ordinance provides far more exhaustive details, and is therefore almost 50 per cent larger in volume compared to the Repealed Ordinance. Part II also assesses whether such reform is successful in keeping up with the times, in the following ways: By preserving the essence of the English common law system; by mirroring the UNCITRAL Model Law in the legislation; by adopting the New York Convention for enforcement; and by adding in specific elements such as the opt-in provisions in the legislations. Part III of the article presents an overview of the primary arbitration institution in Hong Kong, i.e., the HKIAC. Part IV analyses specific arbitration issues in Hong Kong, by making general references to and comparisons with the English law in a maritime context. While recent Hong Kong scholarships do not broadly cover the theoretical basis of maritime arbitration issues, such as arbitrability, it is appropriate to evaluate the New Ordinance by drawing from the English academic analysis. Such syntheses of approach enable a most comprehensive presentation and clear view of both practical and theoretical perspectives on maritime arbitration in Hong Kong. The adoption of such an approach is also advantageous when scrutinizing third party issues on arbitration, since the forthcoming Contracts (Rights of Third Parties) Ordinance in Hong Kong, originates from the English Contracts (Rights of Third Parties) Act, and it is thus possible to hypothesize about the possible impacts of this new Ordinance on the maritime sector by analysing the experience of the United Kingdom (UK). Moreover, issues such as initiation of arbitration, jurisdiction, and other procedural matters, are analysed in an analogous manner. In addition, the highlight of the discussion on enforcement matters lays on the unique and

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interesting situation that parties may encounter during arbitration proceedings in Hong Kong due to its exclusive relationship with Mainland China.

Part II. Arbitration Legislation in Hong Kong

The fundamental arbitration legislation in Hong Kong, which made reference to the English Arbitration Act 1950, was first enacted in 1963.[3] Since 1990, the Repealed Ordinance in Hong Kong began to provide two routes for arbitration, namely "domestic" and "international", for which they possessed two different sets of rules. The domestic route was governed by the arbitration laws in the UK, and the international route was governed by the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law").[4] At that time, maritime arbitrations in Hong Kong were mostly cross-border disputes, and therefore they usually fell under the "international category", adopting the Model Law regulations.

The introduction of the new Arbitration Ordinance is believed to be one of the most significant and major reforms Hong Kong has undertaken with regards to its arbitration mechanism. The Arbitration Ordinance (Cap.609)[5] ("the New Ordinance"), which replaces Cap.341 [6] ("the Repealed Ordinance"), came into effect in June 2011. Its enactment is fundamentally based on the provisions of the UNCITRAL Model Law, along with various amendments and additional provisions that catering for the particular characteristics of the arbitration mechanism in Hong Kong. Since one of the major intentions of introducing the New Ordinance is to align Hong Kong's arbitration mechanism more closely to international standard practices, the New Ordinance thus also forewent the dual routes to arbitration, namely domestic and international, and thereafter adopted a unified and single regime.

There are various new features in the New Ordinance in comparison with the Repealed Ordinance. For example, section 16 underscores that the confidentiality of the parties in arbitration is protected, because proceedings are not to be heard in open court, although the Court may make such an order in accord with the parties' interests or when the Court considers an open court hearing as necessary.[7] Moreover, the New Ordinance confers more precise powers on arbitral tribunals for

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[3] Department of Justice, Government of HKSAR, 'Consultation Paper: Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill (Dec. 2007)', http://www.doj.gov.hk/eng/public/pdf/2007/arbitration.pdf, at 1, l.

[4] The UNCITRAL Model Law adopted by the United Nations Commission on International Trade Law on 21 June 1985, with amendments made in 2006, is designed to assist State members in improving their laws on arbitration practice so as to take into account the distinct elements of international commercial arbitration. The UNCITRAL Model Law encompasses every stage of the arbitration procedure, including the drafting of arbitration agreements, the structural formation and jurisdiction of the tribunals, and the 'degree of court intervention through to the recognition and enforcement of the arbitral award'. State members are free to 'pick and choose' from among the provisions in the Model Law for adoption in their own jurisdictions, but so far the adopted States have not strayed too far away from the primary Model in order to protect the coherence of the Law: Anselmo Reyes, *How to be an Arbitrator: A Personal View*, HKMLA, 2012, at 12.

[5] Legislative Council of the HKSAR, 'Arbitration Ordinance 2011 Cap.609', http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075?OpenDocument&bt=0.

[6] Legislative Council of the HKSAR, 'Arbitration Ordinance Cap.341', http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/0F986658E40FB1B6482575EE006E0200?OpenDocument&bt=0.

[7] Section 2D of the Repealed Ordinance (Cap.341) states that, "proceedings under this Ordinance in the Court or Court of Appeal shall on the application of any party to the proceedings be heard otherwise than in open court".

injunction relief, maintenance or restoration of the status quo, prevention of harm of prejudice to the arbitral process, and preservation of assets and evidence,[8] which the Repealed Ordinance does not address. It is also worth mentioning that the opt-in provisions in sections 1 to 5 of Schedule 2 encompass features such as arbitration by a sole arbitrator, consolidation of arbitration, a decision on a preliminary question of law by a Court, challenging an arbitral award on the grounds of serious irregularity, and appeal against an arbitral award on a question of law. The intention of having these opt-in provisions is mainly to suit the interests of the construction industry in Hong Kong, as they wish to preserve some features of the domestic regime in the New Ordinance.[9] However, the provisions in this Schedule will only be in effect for six years from the date of enforcement of the New Ordinance. Therefore, they will automatically expire in 2017. Hong Kong has chosen to follow the New York Convention in terms of enforcement, based on the principle of reciprocity, which privilege is not encompassed within the Model Law.[10] The New York Convention and relevant enforcement issues will be scrutinised in other parts of this article.

The New Ordinance is certainly having a momentous impact on the arbitration practice and development of Hong Kong. It is an undisputed fact that the enforcement of the unified regime based on the Model Law aligns the arbitration regime in Hong Kong more closely to global practice. Overall, therefore, the introduction of the New Ordinance should be able to at least help sustain Hong Kong's reputation as a major arbitration centre. However, the opt-in provisions underline the fact that Hong Kong has still retained certain domestic features with regard to arbitration, making it not fully consistent with the Model Law. Also, the feature of 'automatic application to domestic arbitrations for six years from the enforcement date of the New Ordinance' within the opt-in provisions hints at the increased likeliness of judicial intervention. For this reason, it is advised that practitioners and professionals must be cautious when drafting arbitration agreements in contracts and should take into account their intended outcomes.

Part III. The Arbitration Institution in Hong Kong

The principal arbitration institution in Hong Kong is the HKIAC. It was established in 1985 by a group of leading business and professional pioneers in Hong Kong, and was aimed at providing a legitimate and reliable platform for disputed parties to reach a settlement through alternative dispute resolutions. The HKIAC is an independent institution, free from the Hong Kong government's intervention. HKIAC emphasises that parties are given the choice to apply their preferred set of arbitration rules, and they are also free to elect "locally-qualified or foreign legal advisors or non-legal representatives" as their arbitrators.[11] Meanwhile, the HKIAC Administered Arbitration Rules 2013 ("The HKIAC Rules")[12] are available for parties to adopt for governing the arbitration proceeding. The content of the Rules are in comparatively greater detail than the London

[8] Arbitration Ordinance 2011 (Cap.609), s 35 (1) (1) and (2).
[9] Legislative Council of the HKSAR, 'Arbitration Bill Gazette in June 2009 ("Arbitration Bill") Automatic Opt-in for Subcontracts, Administration for the Bills Committee on Arbitration Bill LC Paper No. CB(2) 1477/09-10(03) (June, 2009)', http://legco.gov.hk/yr08-09/english/bc/bc59/papers/bc590512cb2-1477-3-e.pdf , at 2.
[10] John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotation,* 1st edition, Sweet and Maxwell, 2011, at 440.
[11] Hong Kong International Arbitration Centre, 'Hong Kong Arbitration 100 Questions & Answers', http://www.hkiac.org/en/arbitration/why-hkiac.
[12] Hong Kong International Arbitration Centre, 'Administered Arbitration Rules 2013', http://www.hkiac.org/images/stories/arbitration/2013_hkiac_rules.pdf.

Maritime Arbitrators Association Rules ("LMAA Rules"),[13] in that the HKIAC Rules provide more precise definitions and limitations of each selected issue.

HKIAC has adopted a considerably more flexible scheme in order to suit the different needs and requirements of potential clients from all over the world. In particular, the Maritime Arbitration Group ("MAG"), a division of the HKIAC, was established in 2000 in order to explicitly support and promote the use of maritime arbitration in Hong Kong.[14] One specific objective of the MAG is to provide an official platform to unite members from the different professional institutions in exchanging information and knowledge regarding maritime arbitration and mediation.[15] The MAG provides a list of maritime arbitrators with relevant experience in maritime arbitrations in Hong Kong which could be useful for parties who are involved in a maritime dispute. It is, however, interesting to note that the MAG emphasises that the list provided is merely a reference and is absolutely not authoritative and conclusive.[16] From 2009 to 2013, the total number of maritime arbitration appointments received by the MAG members in Hong Kong is 646 (see Table 1).

Table 1. The total number of maritime arbitration appointments received by the MAG members

Year	Total number
2009	97
2010	131
2011	98
2012	163
2013	157

Part IV. Specific Issues in Hong Kong Maritime Arbitration Law and Practice

Arbitrability

Before the commencement of any action, it is crucial to check upon the arbitrability within the case facts. The notion of arbitrability emerged at the same time as the regime of arbitration was developed.[17] The UNCITRAL Model Law defines arbitrability as a dispute or claim that is "legally capable of being arbitrated".[18] Bermann construes the underlying meaning of "non-arbitrability" as a dispute or claim whose "adjudication is reserved" by the court or legislature within a jurisdiction. This is also known as arbitrability stricto sensu.

In this respect, precedents in Hong Kong imply that the arbitrability of a particular issue is determined by its contract construction.[19] Courts have displayed a stringent attitude when

[13] London Maritime Arbitrators Association, 'LMAA Rules 2012', http://www.lmaa.org.uk/uploads/documents/2012Terms.pdf.
[14] Hong Kong Shipowners Association, 'Maritime Arbitration Group', http://www.hksoa.org/links/maritime_arbitation.html.
[15] Id.
[16] Hong Kong Shipowners Association, 'Hong Kong Maritime Arbitration Group: List of Members', http://www.hksoa.org/pdf/MAG_Arbitrators.pdf, last updated April 1, 2015.
[17] George A. Bermann, 'Arbitrability Trouble', *23 AM. Rev. Int'l Arb 367, 367*.
[18] UNCITRAL Model Law Art. 34(2)(b)(i), 36(b)(1) in id.
[19] Newmark Capital Corporation Ltd v Coffee Partners Ltd [2007] 1 HKLRD 718: John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations*, 1st edition, Sweet and Maxwell, 2011, at 113.

determining the subject of an arbitration agreement, in which the matter of dispute "must be covered by the arbitration agreement", not just being "related to" or "involved in".[20] In other words, if the matter of dispute is not covered by the arbitration agreement, then the dispute shall not be "legally capable of being arbitrated". In *Newmark Capital Corporation Ltd v Coffee Partners Ltd*,[21] the Hong Kong Court of First Instance refused to grant a stay of court proceedings because it was held that the plaintiffs' claim did not fall within the scope of the arbitration agreement. The arbitration clause in the case was mainly concerned with the affairs of the Company, whereas the Judge considered that the plaintiffs' claim about being induced to enter into a share purchase contract by misrepresentation had no relation to the arbitration clause. This was not a maritime arbitration case; however, the rule of law principle reasoned on by the judge in this case applies equally to maritime arbitration cases. Therefore, maritime arbitration agreements must be carefully drafted in order to preserve arbitrability.

Initiating the Arbitration

In general practice, the process of arbitration begins with the claimant sending a written notice to the respondent to "request for that dispute to be referred to arbitration".[22] Zeko considers the initiation of commercial arbitration as a "consensual process", because it is in the claimant's interest that the respondent accepts the written communication.[23] Although neither section 10 or 49 of the New Ordinance in Hong Kong explicitly sets out criteria for the content of a written notice, it is in general practice that a proper notice should include the particulars of the dispute, the claim, recommendation of arbitrators and the number of arbitrators.[24] Interpretations of the aforementioned provisions are underscored in related case law. In *Fustar Chemicals Ltd v Sinochem Liaoning Hong Kong Ltd*,[25] the defendant did not reply to a letter from the plaintiff which contained the statement that they would ask the Court to appoint an arbitrator for the defendant if he did not submit their dispute to arbitration within five days. The Court pointed out that since the plaintiff, in his letter, did not request the defendant to appoint an arbitrator, Article 11(3)(a) of the Model Law was still in effect, under which the Court would not need to make an arbitrator appointment on behalf of the defendant.[26] The Court accordingly granted a stay of proceedings, and ordered the parties to continue with the original mode of arbitration.

Appointment of Arbitrators and Tribunals

As in most other jurisdictions, the widely accepted mechanism in Hong Kong for appointing a tribunal is to have each party first choose their preferred arbitrator, and then the two nominated arbitrators appoint a third person to act as the chairman or umpire.[27] The chairman is on an equal footing with the other two selected arbitrators, but merely acts as leader of the tribunal to assist

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[20] Id.

[21] [2007] 1 HKLRD 718 in id, at 114.

[22] Arbitration Ordinance 2011 Cap.609 s 49 (1).

[23] Georgios I. Zekos, *International Commercial and Marine Arbitration*, 1st edition, Routledge-Cavendish, 2008, at 94.

[24] John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations,* 1st edition, Sweet and Maxwell, 2011, at 258.

[25] Fustar Chemicals Ltd v Sinochem Liaoning Hong Kong Ltd [1996] 2 HKC 407 in id, at 257.

[26]UNCITRAL Model Law Article 11 (3) (a)/ Arbitration Ordinance 2011 Cap.609 s (1) (3) (a) provides that if a party fails to appoint the arbitrator within thirty days of receipt of a request, the court shall appoint an arbitrator on behalf of a party by request or within the court's jurisdiction.

[27] Anselmo Reyes, *How to be an Arbitrator: A Personal View*, HKMLA, 2012, at 44.

with the smooth running of the arbitral proceeding.[28] On the other hand, an umpire has no authority to make a decision until, if ever, the two party-nominated arbitrators disagree with each other.[29] However, the arbitrators' jurisdiction is determined by the respective arbitration agreement which bound the parties to arbitrate to resolve the dispute.[30]

Section 24 of the New Ordinance gives effect, without any amendments, to Article 11 of UNCITRAL Model Law, and provides guidance on the appointment of arbitrators in Hong Kong.[31] This section sets out the standard procedure of appointment, and emphasises that an arbitrator can be from any country, and that the parties are free to utilise any preferred appointment procedure within the scope of section 24.[32] Such freedom is quite broad, to the extent that the parties may authorise a third party or an institution to appoint an arbitrator on their behalf.[33]

Furthermore, Section 24(5) of the New Ordinance[34] stipulates that the appointment of an arbitrator made by the HKIAC shall be deemed to have been agreed upon by both parties, and that there is no provision for appeal. Therefore, when choosing the arbitral tribunal, parties can also require that it must have certain special features that cater to the smooth running of the proceedings.[35] For example, some practicing maritime arbitrators in Hong Kong are not legal professionals, they are simply "commercial shipping men",[36] who have a wide range and many years of experience in different areas of shipping, such as port agencies, chartering management, seagoing work, shipbuilding, ship finance, and ship sale and purchase.[37] Some parties may feel it necessary to appoint arbitrators who also have expertise in the maritime industry, because they will tend to understand more thoroughly the operations involved in maritime transportation and related matters if specialized knowledge is frequently involved when handling the dispute. However, it is difficult to make a comparison as to whether parties generally favor arbitrators who are legal professionals or experienced personnel in the maritime industry. It can be said that individual reputation is one crucial factor when deciding on the appointment of an arbitrator.

Section 24(4) of the New Ordinance, provides the answer to the question that arises if the agreed arbitrator appointment procedure has failed to execute. Such deadlock, according to the Ordinance, is usually resolved by employing the HKIAC as an agent to seek for the best solution, unless alternative measures are indicated in the agreement as to how to resolve such an impasse.[38] An

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[28] The London Maritime Arbitrators Association, 'FAQ: What is the Difference Between a Third Arbitrator and an Umpire?', http://www.lmaa.org.uk/faq.aspx?pkFaqCatID=96642705-2081-4f6f-a6d4-68517454d2ec.

[29] The London Maritime Arbitrators Association states that nowadays parties are more likely to invite the third arbitrator to be the chairperson and that umpiring is less common in arbitration cases, the reason being to have all members of the tribunal fully engaged in the course of decision making: id.

[30] Francis Dennis Rose, *International Commercial and Maritime Arbitration*, Sweet & Maxwell London, 1988, at 15.

[31] Arbitration Ordinance 2011 Cap.609 s 24.

[32] Arbitration Ordinance 2011 Cap.609 s 24 (1) (1) and (1) (2).

[33] Arbitration Ordinance 2011 Cap.609 s 24 (1) (2).

[34] Arbitration Ordinance 2011 Cap.609 s 24 (5): John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations,* 1st edition, Sweet and Maxwell, 2011, at 142.

[35] Mary Thomson, 'Maritime Arbitration in Hong Kong', http://info.hktdc.com/shippers/vol30_1/vol30_1_legalbrief.htm,

[36] Choice of Arbitrators, id.

[37] Hong Kong Shipowners Association, 'Hong Kong Maritime Arbitration Group: List of Members', http://www.hksoa.org/pdf/MAG_Arbitrators.pdf, (last updated April 1, 2015).

[38] Arbitration Ordinance 2011 Cap.609 s 24 (4).

example of a maritime dispute that relates to this situation is addressed in *Pacific International Lines (Pte) Ltd v Tsinlien Metals and Minerals Co (HK) Ltd*,[39] where the defendant claimed that the Hong Kong High Court[40] should not appoint an arbitrator on their behalf because there was no charterparty entered into between them and the claimant, and hence no arbitration agreement existed either. Such a claim was rejected by the Court, based on plainly arguable facts. However, instead of appointing an arbitrator on behalf of the defendant straight away, the decision on the existence and effectiveness of the arbitration agreement led the Court to rule that the defendant should appoint an arbitrator themselves in accordance with the agreement, failing which the Court would take the next step.[41]

Jurisdiction

The Competence-Competence principle, also known as the Kompetenz-Kompetenz, is a jurisprudential doctrine, which means that an arbitration tribunal is empowered to decide on whether it has sufficient jurisdiction to rule on the particular question.[42] The competence-competence principle is also preserved in the arbitration practice in Hong Kong; section 34 of the Ordinance[43] states that "the arbitral tribunal may rule on its own jurisdiction". Section 34 further provides that a plea on the tribunal having no jurisdiction shall be entered at an early stage, and be no later than the submission of the statement of defence.[44] A plea on the tribunal's having excessive scope of authority shall also be entered as soon as the issue is discovered.[45]

Article 19 of the HKIAC Rules on Jurisdiction of the Arbitral Tribunal has a similar framework. The Rules also preserves the competence-competence principle, under which the tribunal may rule on its own jurisdiction, including any "objections with respect to the existence, validity or scope of the arbitration agreement(s)".[46] As for the tribunal's competence, Article 19.4 of the Rules intentionally reinforces the idea that the HKIAC has the final decision-making power to determine whether or not to continue with the proceedings if questions have emerged about the arbitral agreement or competence of the tribunal.[47] This supplementary clause has the effect of strengthening the HKIAC's competence to rule on its own jurisdiction. In comparison, The London Maritime Arbitrators Association Terms 2012 ("LMMA Terms") fails to place any emphasis on

[39] Pacific International Lines (Pte) Ltd v Tsinlien Metals and Minerals Co (HK) Ltd [1993] 2 HKLR 49.
[40] At the time when this case was heard, the Hong Kong High Court was the designated Court for hearing arbitration cases via the 'international route' that relates to Article 11 of the UNCITRAL Model Law/ Arbitration Ordinance (Cap.341) s 34C (1), which today is the Arbitration Ordinance 2011 (Cap.609) s 24 (1) (4).
[41] John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations*, 1st edition, Sweet and Maxwell, 2011, at 143.
[42] Simon Baughen, Shipping Law, 5th edition, Routledge, 2012, at 374.
[43] Arbitration Ordinance 2011 (Cap. 609) s 34(1)(1).
[44] Arbitration Ordinance 2011 (Cap. 609) s 34(1)(2).
[45] Arbitration Ordinance 2011 (Cap. 609) s 34(1)(2).
[46] Hong King International Arbitration Centre, 'Article 19 of Arbitration Rules 2013', http://www.hkiac.org/images/stories/arbitration/2013_hkiac_rules.pdf, at 25.
[47] Article 19.4 and 19.5, id.

the competence issues;[48] the position of the tribunal's power to rule on its own jurisdiction remains to be regulated by section 30 of the Arbitration Act 1996 of the UK.[49]

Interim Measures

Interim measures of relief, also known as conservatory and provisional remedies, are one of the essential elements in the world of international arbitration.[50] The objective of this doctrine is to provide arbitral parties temporary and immediate security measures for the preservation of their rights while they are waiting for the decision of the tribunal.[51] Interim measures are imperative, especially if an award is going to be effectively enforced. The Courts, as well as arbitrators, can exercise their authority to grant different kinds of interim relief, the most common ones including injunctions, orders and attachments of assets.[52]

Section 21 of the New Ordinance,[53] provides for the compatibility of an arbitration agreement and interim measures. Accordingly, a requested interim measure by either party does not waive an arbitration agreement; also, the arbitration agreement does not waive the Court's authority to grant an interim measure. This provision is a secured two-way approach, and ensures that parties will not by any means lose the protection from interim measures. This underlines the ineffectiveness of waiving interim measures in the contractual agreements for arbitration. Hong Kong's legislation is seen to be in line with Higgins's standpoint, by which a "complementary and supportive relationship"[54] between courts and arbitration tribunals may actually increase the legitimacy and validity of arbitration proceedings, whereas scholars tend to focus only on the advantage of minimizing judicial intervention in arbitration.

Besides section 21, the other major laws governing interim measures in Hong Kong are sections 35 and 56 of the New Ordinance[55]. Section 35 is new, and it mirrors Article 17 of the UNCITRAL Model Law,[56] whereas section 56 stems from the Repealed Ordinance[57] and does not correspond to the Model Law.[58] Reyes points out that the legal profession is concerned about the application

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[48] The London Maritime Arbitrators Association ("LMAA"), an institution founded in 1960, has a similar function to that of the Hong Kong International Arbitration Centre, which provides arbitration services, specializing, however in Maritime disputes. The LMAA is conducted under the Arbitration Act 1996 of the UK, the arbitrators of the Association usually accepting the LMAA Terms in arbitration appointments: The London Maritime Arbitrators Association, 'Introduction', http://www.lmaa.org.uk/about-us-Introduction.aspx.

[49] Clare Ambrose, Karen Maxwell, Angharad Parry, *London Maritime Arbitration*, 3rd edition, Informa Law from Routledge, 2009, at 79. Section 30 of the Arbitration Act 1996 of the UK states that "unless otherwise agreed by parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement."

[50] Gregoire Marchac, 'Note & Comment: Interim Measures in International Commercial Arbitration Under the Icc, Aaa, Lcia and Uncitral Rules', 10 Am. Rev. Int'l Arb. 123, 123.

[51] Id.

[52] William Wang, 'International Arbitration: the Need for Uniform Interim Measures of Relief', 28 Brook. J. Int'l L. 1059, 1.

[53] Arbitration Ordinance 2011 Cap.609 s 21.

[54] Coleen C. Higgins, 'Interim Measures in Transitional Maritime Arbitration', 65 Tul. L. Rev. 1519, 2.

[55] Arbitration Ordinance 2011 Cap.609 s 35 and s 56.

[56] Article 17 is about the 'power of an arbitral tribunal to order interim measures'.

[57] Arbitration Ordinance Cap.341.

[58] Christopher To and Damon So, *Arbitration Law Handbook*, 1st edition, Butterworths Hong Kong, 2012, at 160.

of section 35, because the provision grants an arbitrator the power to issue Anton Piller orders[59] or Mareva injunctions.[60] Their worry is not hard to comprehend, because it is seen as rather dicey to grant such powerful authority to arbitrators, who may not necessarily possess substantial legal knowledge. The competence of arbitrators in exercising such great powers is therefore questionable.

Small Claims Procedure and Documents-only Procedure

There are two simplified arbitration procedures, besides the normal standard procedures of arbitration. The first is the small claims procedure (SCP) and the second is a documents-only procedure. The two procedures share some similarities, the objectives of both being to provide parties a faster and more cost-efficient method for resolving simpler disputes. The frameworks of both procedures are simple and straightforward in order to cater for the characteristics of non-complex issues, and only involve five stages of action: appointment of an arbitrator; delivery of a statement of claim; delivery of the respondent's defense and counterclaim; delivery of the claimant's reply and defense to counterclaim; and delivery of the respondent's reply to defense to counterclaim.[61] The structure of the two procedures is almost identical, except that the documents-only procedure allows a longer time limit for each stage of action. The most apparent difference between the two procedures is that parties choosing the SCP are entitled to witness examination, whereas the documents-only procedure is specially designed for disputes where it is unnecessary to order a hearing, because there is only a single and very simple issue at stake. For this reason, it can be said that the theoretical constructs of the documents-only procedure lay on providing a mechanism for ultimately plain and crystal clear disputes.

Small Claims Procedure

The SCP, introduced by the London Maritime Arbitrators Association (LMAA), is regarded as "very popular", since the high cost of dispute resolution has been a major worry for the maritime sector.[62] Hong Kong has its own set of small claim procedures provided by the MAG. However, the SCP of the MAG, compared to the LMMA rules, are less favored and rarely adopted in maritime arbitration.[63] Yang and Lau consider that the reason behind this is that a contractual clause agreeing to use the SCP of the MAG must be entered into before the dispute actually arises.[64] They further suggest that parties are encouraged to include a term such as, "for any sums in dispute not exceeding US$50,000, HKIAC MAG's SCP should be adopted".[65] However, the question remains as to why the parties prefer not to refer the dispute to the MAG's SCP if the prerequisite is only as simple as including a brief contractual term. It is believed that, in comparison, the LMAA has a more developed and mature regime than the MAG in assisting arbitrations.

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[59] With an Anton Order, a claimant is entitled to perform a search on a person's premises to obtain evidence: Anselmo Reyes, *How to be an Arbitrator*: A Personal View, HKMLA, 2012, at 54.

[60] A Mareva Injunction is an order that can be used in arbitration to freeze a party's assets, such as estate property and bank deposits pending trial: id.

[61] *Maritime Arbitration in Hong Kong: A Practical Guide*, Hong Kong International Arbitration Centre and Hong Kong Maritime Arbitration Group, 2000, at 12-14.

[62] Geoffrey Ma GBM QC SC (Editor-in-Chief) and Denis Brock (General Editor), *Arbitration in Hong Kong: A Practical Guide*, 3rd edition, Sweet and Maxwell, 2014, at 873.

[63] Id.

[64] Id, at 873.

[65] Id.

Documents-only Procedure

The documents-only procedure has a similar objective to the SCP, that of encouraging a speedy and economic arbitration method.[66] In Hong Kong, section 52 of the New Ordinance[67] governs hearings and written proceedings in arbitration. This provision underscores that whether or not to adopt a documents-only arbitration primarily depends on the wish of the disputing parties. The tribunal has no jurisdiction to make such an order except on the basis of the parties' agreement. In contrast, section 34 of the English Arbitration Act[68] grants greater authority to the tribunal on this aspect, leaving it up to the arbitrators to decide whether an oral or written submission is more appropriate, based on the facts of each case.[69] The New Ordinance grants the disputing parties flexibility to make their own decisions as to which arbitration method to adopt.

Effect of Arbitration on Third Parties and Issues of Multi-Party Disputes

Although the arbitration practice attaches importance to the impartiality of third parties, there are exceptions in which an arbitral award may affect a non-party to the agreement under the Court's jurisdiction. Section 73 of the New Ordinance provides that an arbitration agreement is final and binding on "the parties and any person claiming through or under any of the parties".[70] This provision underscores the possibility that by a Court's execution, an award may have a binding impact on third parties, given their relationship to the parties of the dispute. Therefore, the Court, in comparison with the arbitrators, doubtless enjoys a more extensive scope of authority, under which its inherent and statutory jurisdiction may be extended to third parties.[71]

The Contracts (Rights of Third Parties) Ordinance in Hong Kong[72] is forthcoming, but it is still not certain whether it will have any significant impact on the practice of maritime arbitration in Hong Kong. Learning from the UK, its Contracts (Rights of Third Parties) Act 1999 has had a considerable impact on maritime practices; for instance, independent contractors such as stevedores can now rely on exclusion or limitation clauses laid down in charterparties or bills of lading in order to exercise their third party rights.[73] However, the Law Commission of the UK admitted that the controversy over how far third parties should be bound by an arbitration agreement was "one of the most difficult issues" they have ever encountered, because there is an inevitable conflict between the acknowledgment of third parties' rights and the impartial position

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[66] *Maritime Arbitration in Hong Kong: A Practical Guide*, Hong Kong International Arbitration Centre and Hong Kong Maritime Arbitration Group, 2000, at 14.

[67] Arbitration Ordinance 2011 Cap.609 s 52 (1) provides that "…unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party".

[68] Arbitration Act 1996 s 34 (2) (h).

[69] Geoffrey Ma GBM QC SC (Editor-in-Chief) and Denis Brock (General Editor), *Arbitration in Hong Kong: A Practical Guide*, 3rd edition, Sweet and Maxwell, 2014, 870.

[70] Arbitration Ordinance 2011 Cap.609 s 73 (1) (a) (b).

[71] Clare Ambrose, Karen Maxwell, Angharad Parry, *London Maritime Arbitration*, 3rd edition, Informa Law from Routledge, 2009, at 219.

[72] The Legislative Council of the HKSAR, 'Chapter 623: Contracts (Rights of Third Parties) Ordinance (2014)', http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/9699BD595A42909948257DA4005F3B0D/$FILE/CAP_623_e_b5.pdf. The Contracts (Rights of Third Parties) Ordinance became law late in 2014, but is not yet in operation, as it is still awaiting an announcement in the Gazette for its commencement.

[73] Also known as Himalaya clauses: Clare Ambrose, Karen Maxwell, Angharad Parry, *London Maritime Arbitration*, 3rd edition, Informa Law from Routledge, 2009, at 233.

of third parties in an arbitration agreement.[74] The Law Commission finally adopted the "conditional benefit approach", which means that if the contractual parties agreed to refer the dispute about third parties' benefits to arbitration, then that third party would also be automatically bound by such arbitration clause because he ought to accept the obligation to arbitrate if he wished to receive such benefit.[75] Moreover, it should also be mentioned that in English practice, contractual parties are allowed to expressly waive the effect of the 1999 Act.[76] Although this approach is rarely seen in the English shipping industry, it is not certain whether legal professionals in Hong Kong will follow such tradition, or will actively advise their clients to contract out of the operation of the Contracts (Rights of Third Parties) Ordinance as a means of all-around preservation of interests.

On many occasions, a third party is also perceived as a party in a multi-party dispute. String contracts are frequently seen in the practice of international and even domestic shipping, e.g., there may be several sale contracts or charterparties prior to the direct contract between the shipowner and end-charterer.[77] The complexity of international shipping string-contracts have placed arbitrators and disputing parties in a burdensome situation, because it is often very difficult to conduct investigation, obtain evidence and claim against parties in the middle of the string, where the Hague Convention 1970 on obtaining evidence abroad does not apply to arbitral matters.[78] Yang and Lau once suggested that a possible solution to the tangle is to re-enact the law on "consolidation on arbitrations"[79] from the Repealed Arbitration Ordinance.[80] It is a seemingly optimal solution, which could drastically increase the attractiveness of Hong Kong as an international maritime arbitration platform if the Court was granted the jurisdiction to consolidate different arbitrations — given that renowned maritime arbitration hubs, such as London in the UK, do not have statutory powers to make such an order. However, this approach may seem to be over-idealistic, neglecting all the possible and practical burdens such as the consequences of consolidating arbitrations in all the other non-maritime sectors. Also, any enactment of new legislation often takes into account current public policy and opinion of the time. Therefore, the opting in of provisions on "court-compelled consolidation in arbitration" requires further scrutiny and in-depth analysis. It would also be a wise option to wait and observe the effect of the forthcoming Contracts (Rights of Third Parties) Ordinance in the matter of maritime arbitration.

Enforcement of Arbitral Awards

In general

In Hong Kong, out of the 107 applications to enforce arbitral awards granted[81], there were a total number of 16 arbitral awards made specifically to the maritime sector from 2010 till July 2015.

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[74] Privity of Contract: Contracts for the Benefit of Third Parties: Law Com No 242, paragraph 14.14 in Clare Ambrose, Karen Maxwell, Angharad Parry, *London Maritime Arbitration*, 3rd edition, Informa Law from Routledge, 2009, at 233.

[75] Id.

[76] Id, at 234.

[77] Geoffrey Ma GBM QC SC (Editor-in-Chief) and Denis Brock (General Editor), *Arbitration in Hong Kong: A Practical Guide*, 3rd edition, Sweet and Maxwell, 2014, at 860.

[78] Id.

[79] Arbitration Ordinance Cap.341 s 6B.

[80] Geoffrey Ma GBM QC SC (Editor-in-Chief) and Denis Brock (General Editor), *Arbitration in Hong Kong: A Practical Guide*, 3rd edition, Sweet and Maxwell, 2014, at 860-861.

[81] Hong Kong International Arbitration Centre, 'Statistics- Enforcement of Awards (2010-2014)', http://www.hkiac.org/en/hkiac/statistics/enforcement-of-awards.

Therefore, since there is a significant proportion, around 15% of arbitral awards made in Hong Kong are related to maritime disputes, it is important to learn about this matter in particular because enforcement of awards is a vital element when considering the choice of arbitration venue.

There are four main types of arbitral awards included in Part 10 of the New Ordinance, namely, Hong Kong awards, Mainland China awards,[82] foreign Convention awards,[83] and foreign Non-convention awards.[84] The New Ordinance does not give a precise definition of what constitutes an "award"; Born, however, underlines three requirements of an award, which include: 1) it must be the result of an arbitration agreement; 2) it should have some formal component to prove its finality; and 3) it should deal with substantive but not procedural matters.[85]

An award is usually formed in two parts. The first part consists of identifying the arbitral agreement and recording the informative, procedural and administrative matters of the dispute.[86] The second part, according to Reyes, is the integral part of an award, which consists of a detailed discussion of the decision made by the tribunal.[87] Section 73 of the New Ordinance provides that an award made by a tribunal is final and binding and has effect on both the disputing parties and on any person claiming through any of the parties.[88] However, an award is also subject to appeal or review.[89]

The rules concerning the enforcement of arbitration awards include those for general application and those for enforcing Mainland China awards. It is necessary to mention again that, in the aspect of enforcement of arbitral awards, Hong Kong is a member of the New York Convention, which is widely accepted in cross-border enforcements. Section 84(1) of the New Ordinance provides that both domestic and foreign arbitral awards are enforceable in the same manner as a Court's judgment if a leave of the Court is obtained.[90]

The court may also exercise its jurisdiction to refuse to enforce an arbitral award for reasons of public policy.[91] The stance of the Hong Kong Courts is that although it has the discretion to refuse an award, it can also enforce an award even if a ground for non-enforcement was satisfied under Article V of the New York Convention.[92]

Problems of Enforcement of Awards against China

Nowadays, the Court must act in accordance with Article III of the New York Convention when enforcing a Mainland award, under which the conditions and charges involved, as addressed in

[82] Arbitration Ordinance 2011 Cap.609 s 92.
[83] Arbitration Ordinance 2011 Cap.609 s 87.
[84] Arbitration Ordinance 2011 Cap.609 s 86.
[85] Born in John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations*, 1st edition, Sweet and Maxwell, 2011, at 442.
[86] Anselmo Reyes, *How to be an Arbitrator: A Personal View*, KMLA, 2012, at 99.
[87] Id, at 100.
[88] Arbitration Ordinance 2011 Cap.609 s 73 (1).
[89] Arbitration Ordinance 2011 Cap.609 s 73 (2) (b).
[90] Arbitration Ordinance 2011 Cap. 609 s 84 (1): John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations*, 1st edition, Sweet and Maxwell, 2011, at 441.
[91] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Art V (2).
[92] Nadia Darwaszeh and Friven Yeoh in Anton G. Maurer, *The Public Policy Expectation Under the New York Convention*, revised edition, JurisNet of LCC, 2013, at 114.

section 92 of the New Ordinance, must be in line with the Convention rules imposed on "domestic" arbitral awards.[93] However, only awards made by "a recognised Mainland arbitral authority" are enforceable and treated as binding in Hong Kong.[94]

The "Hua Tian Long" case[95] underlines the unique situation that disputing parties may possibly encounter when choosing Hong Kong as the platform of dispute resolution. The "Hua Tian Long" case arose out of an admiralty action against a vessel belonging to the defendants, Guangzhou Salvage Bureau (GSB) of the Ministry of Communications of the People's Republic of China ("PRC").The plaintiffs, Intraline Resources SDN BHD ("Intraline") claimed that there was a breach of contract and/or fraudulent misrepresentation because GSB failed to make the vessel "Hua Tian Long" ("the Vessel") available to work for projects on pipeline installation and oil platforms in offshore Malaysia and Vietnam ("the Newfield and Talisman projects"). Consequently, as a security for the claim, the plaintiffs arrested the Vessel when it entered into Hong Kong waters. GSB subsequently applied for a stay and/or a dismissal of the plaintiff's action, based on the ground that GSB enjoyed immunity from suit due to the fact that the Vessel was ultimately controlled by the PRC State. This concept was analogous to the Crown immunity enjoyed by the British government before the handover of sovereignty on 1 July 1997. As a matter of general principle, the Crown enjoys immunity from being sued in courts of its own jurisdiction. Accordingly, Stone J held that GSB was an entity of the Ministry of Communications and also part of the Central People's Government (CPG) of the PRC. Therefore, prima facie, GSB is entitled to claim immunity from suit in Hong Kong jurisdictions. Nevertheless, Stone J held that GSB waived its own right by failing to claim immunity as soon as reasonably possible and practical. Stone J's decision further defines that only entities bearing direct emanations of and commands from the CPG are entitled to rely on the immunity doctrine.

Although there is a lack of guidance from the Court of Appeal on the implication of the principle of Crown immunity in Hong Kong after the handover of sovereignty in 1997, the decision of this maritime dispute provides some insight into the scope of the enforcement of arbitral awards. Crown immunity does not actually apply directly to the jurisdiction of a Hong Kong arbitral tribunal; however, the enforcement of foreign and local arbitral awards is undertaken through the Hong Kong Courts. As a result, the decision of "Hua Tian Long" may impact the enforceability of arbitral awards in Hong Kong. Although the "Hua Tian Long" situation would not arise in most of the arbitration cases in Hong Kong, Reyes posits that there would be problems if one of the disputing parties to an arbitral agreement is an unequivocal and direct emanation of the CPG which has no presence, in other words, has no office branch in Hong Kong.[96] If that were the case, it would become difficult to enforce such an arbitral award in Hong Kong in light of the doctrine of Crown immunity. Therefore, drawing from the rationale of the decision in this case, it seems prudent and sensible in a practical context to negotiate with any PRC entity to waive its right to invoke the doctrine of Crown immunity when entering into a contract, notwithstanding that the doctrine may remain effective. An alternative to the aforementioned measure is to enforce the arbitral award

[93] Christopher To and Damon So, *Arbitration Law Handbook*, 1st edition, Butterworths Hong Kong, 2012, at 368.
[94] Arbitration Ordinance 2011 Cap.609 s 92 (1); John Choong and Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations*, 1st edition, Sweet and Maxwell, 2011, at 479.
[95] Intraline Resources SDN BHD v The Owners of the Ship or Vessel "Hua Tian Long" HCAJ 59/2008.
[96] Anselmo Reyes, *How to be an Arbitrator: A Personal View*, HKMLA, 2012, at 166-167.

against the defendant's other financial assets in another jurisdiction, one that adopts the enforcement of foreign arbitral awards with restrictive immunity.

Part V. Conclusion

The introduction of the New Ordinance enhances and consolidates Hong Kong's position as an international arbitration centre. Stringent requirements are in place to decide an appropriate degree of arbitrability. In the maritime business in particular, for instance, a specific reference should be made when referring to an arbitration clause in a charterparty when incorporating it into a bill of lading. When initiating arbitration, parties should bear in mind that it is important to fulfill the required steps addressed in the Ordinance in order to avoid undesirable and unexpected outcomes. On the other hand, the arbitration practice in Hong Kong upholds the competence-competence principle, and therefore the arbitrators' power to make final and binding decisions is retained. It should also be noted that Hong Kong Courts are not allowed to set aside foreign awards. With regard to arbitrators, it is assured that there are no restrictions as to whom the parties would like to appoint. Apart from legal professionals, there is also a robust community of experienced personnel in the Hong Kong maritime industry who are active in the arbitration circle. Although arbitrators in Hong Kong are granted broad powers in hearing cases and making decisions, the Court still upholds its authority to grant interim measures, which should not, however, be regarded as judicial intervention; it simply ensures a sufficient capacity of protection to both claimants and respondents in the arbitration proceedings. Other than the traditional arbitration mechanism, Hong Kong also provides the SCP and the Documents-Only Procedure. In addition, the forthcoming Contracts (Rights of Third Parties) Ordinance in Hong Kong sheds new light on the protection of the rights of third parties. In accordance with the experiences of the UK, in the aftermath of this new law a series of consequences is expected, in that third parties to maritime contracts, such as brokers and stevedores, will be able to rely on such law for claiming their interests. On the other hand, while Hong Kong has adopted the New York Convention for the enforcement of arbitral awards, it should be mentioned again that professionals should take extra care when drafting arbitration clauses if the other party is an institute of CPG of the PRC.

The Hong Kong government and HKIAC show unswerving determination to strengthen the dispute resolution service, and are striving to become the leading arbitration centre in Asia. In early 2015, Hong Kong became a legitimate host for dispute settlement by means of the Permanent Court of Arbitration (PAC).[97] This new agreement will certainly enable Hong Kong to reinforce its pro-arbitration position, and to enhance its role and involvement in the World's arbitration activities. Such a pro-arbitration attitude is also shown by the minimal judicial interference in arbitration

[97] The PCA is based in The Hague, Netherlands, mainly to facilitate dispute settlements amongst states, such as the well-known maritime dispute between China and the Philippines. China signed the Host Country Agreement with the PCA in early 2015, and soon after that, Hong Kong signed a related memorandum so as to let the city handle such disputes: The Government Information Centre of the HKSAR, 'Press Release: Permanent Court of Arbitration Provides Arbitration Services in Hong Kong dated January 4, 2015', http://www.info.gov.hk/gia/general/201501/04/P201501040801.htm.

proceedings, as a result of which there has been no refusal on the enforcement of arbitral awards[98] by the Court since 2011.[99]

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[98] There were altogether 5 refused enforcements during the ten-year period from 2001-2010 out of 191 cases where enforcement was sought: See Enforcement of Awards: Statistics, Hong Kong International Arbitration Centre (1997-2014), http://www.hkiac.org/en/hkiac/statistics/enforcement-of-awards.

[99] Hong Kong International Arbitration Centre, 'Why Arbitrate in Hong Kong?', http://www.hkiac.org/en/arbitration/why-hong-kong.