HONG KONG DISPUTE SOLUTIONS

HONG KONG INTERNATIONAL ARBITRATION CENTRE

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Hong Kong International Arbitration Centre (HKIAC) was formed in 1985 to provide an independent forum for dispute resolution. An ever increasing volume of international trade and business has a connection with at least one Asian country. This in turn has led to a growing need for the speedy and reliable resolution of commercial disputes. Since it was founded HKIAC has developed over the years to meet that growing need and is now recognised as one of the world's leading dispute resolution centres.
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In Hong Kong there are a variety of ways of resolving disputes and Hong Kong International Arbitration Centre (HKIAC) is available to assist parties to choose the best available for their particular disputes. Some of the options are described below.

A Negotiation
The most common form of dispute resolution is negotiation. By this means alone nearly all disputes are solved. If negotiations fail, it is necessary to seek the assistance of a neutral third party or several neutral third parties to facilitate a solution.

B Mediation
Mediation and conciliation are often terms used interchangeably and they are together referred to as mediation. Mediation involves the appointment of a third party to assist disputing parties to reach a
settlement of their differences. The mediator is not given any power to impose a settlement. His function is to try to break any impasse and encourage the parties to reach an amicable settlement. In commercial disputes an impasse most often arises from either a lack of trust in the integrity of the other party or a genuine good faith difference of opinion on the facts underlying the dispute or on the probable outcome of the case were it to go to court. The mediator may act as a shuttle diplomat acting as a channel for communication filtering out the emotional elements and allowing the parties to focus on the underlying objectives. He or she will encourage the parties to reach an agreement themselves as opposed to having it imposed upon them. Mediation has proven an outstandingly successful management tool for resolving difficult disputes and should always be considered when negotiations fail before proceeding to arbitration or litigation. It is a means by which the parties can re-learn the basis of communication with which they can then resolve future disputes. This is particularly important in family disputes where invariably there are on going issues to be resolved e.g. arrangements for children. The procedures are very flexible and can be tailored to suit the particular needs of the dispute and the parties involved. The process must be very quick otherwise it may simply be used as a delaying tactic.

**Arbitration**

For an arbitration to take place, the disputing parties must agree to take their dispute to arbitration. In practice, this agreement is often made before the dispute arises and is included as a clause in the commercial contract. In signing a contract with an arbitration clause, the parties are agreeing that their dispute will not be heard by a court but by a private individual or a panel of several private individuals. If parties have agreed to arbitration, they will generally have to go to arbitration rather than court as the courts will normally refuse to hear their case by staying it to force the reluctant party to honour their agreement to arbitrate.
Arbitration is a legal process which results in an award being issued by the arbitrator or arbitrators. Arbitration awards are final and binding on the parties and can only be challenged in very exceptional circumstances. An award has a status very like a court judgment and is enforceable in a very similar manner. Arbitration awards made in Hong Kong are enforceable through the courts of most of the world’s trading nations. More details about enforcement are contained later in this booklet.

Litigation

In the absence of an arbitration agreement or other consensual means of dispute resolution, the parties may commence proceedings in the courts. Litigation in Hong Kong courts is handled very competently. The decision of the Court of First Instance is not, however, final as an aggrieved party has an automatic right of appeal to the Court of Appeal and if the amount in dispute exceeds HK$1,000,000, they have an automatic right of appeal from the Court of Appeal to the Hong Kong Court of Final Appeal.
Hong Kong is uniquely placed to provide dispute resolution services. Its empathy with the Asian traditions of mediation and its skill at blending the best of east and west have created the prime centre in Asia for the resolution of disputes.

**Facilities**
Geographically convenient, superbly well served in communications, transport and accommodation, Hong Kong has for some time been the international financial and commercial capital of Asia.

**Expertise**
Hong Kong is a world centre of expertise in commerce, finance, shipping and construction with a large pool of experienced professionals available to support dispute settlement. As well as accountants, architects, bankers, engineers, insurance experts and lawyers, there are thousands of other specialists who may be called on...
to assist in particular disputes. In addition to lawyers qualified to advise on Hong Kong law, there are many experienced lawyers from most major international trading nations who are qualified to advise on the laws of their respective jurisdictions. When necessary to supplement its own arbitral experience, Hong Kong can draw on the international reservoir of specialist knowledge.

**Law**

Hong Kong law is based closely on English law and its continuance in its present form until the middle of the next century is guaranteed by the People's Republic of China notwithstanding the change of Hong Kong’s sovereignty which took place in 1997.

The Hong Kong Arbitration Ordinance (Chapter 341 of the Laws of Hong Kong) provides the legislative support to mediation and arbitration in Hong Kong. Under this law, there are two distinct arbitration regimes. One regime applies to domestic arbitration and the other to international arbitration. Since April 1990 the UNCTRAL Model Law has applied to international arbitrations held in Hong Kong.

**Enforcement**

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards lays down a detailed framework for the recognition and enforcement of arbitration awards. Over 100 countries are signatories to this Convention. Hong Kong adopted the New York Convention on 21 April 1977 by virtue of the United Kingdom having acceded on Hong Kong's behalf. China is also a signatory to the New York Convention and applied the Convention to Hong Kong after 1 July 1997.

Hong Kong courts recognise and enforce arbitration awards made in countries which are signatories to the New York Convention in accordance with the terms of that Convention. There is also provision in the Arbitration Ordinance for the Hong Kong courts to enforce domestic awards and awards made in non-Convention countries. Similarly Hong Kong awards can generally be enforced through the courts of other signatory countries.
HONG KONG INTERNATIONAL ARBITRATION CENTRE (HKIAC)

History
HKIAC was established in 1985 to assist disputing parties to solve their disputes by arbitration and by other means of dispute resolution. It was established by a group of the leading business and professional people in Hong Kong to be the focus for Asia of dispute resolution. It has been generously funded by the business community and by the Hong Kong Government but it is totally independent of both and it is financially self-sufficient.

Structure
HKIAC is a non-profit making company limited by guarantee. It operates under a Council composed of business and professional people of many different nationalities and with a wide diversity of skills and experience. Administration of HKIAC is conducted by the Council through the Centre's Secretary-General who is its chief executive and registrar.
Information Service

The Centre provides a free information service on dispute resolution and through its council of leading local experts and its international network of contacts is able to provide a very wide range of literature and data relating to arbitration and other means of dispute resolution. The Centre maintains a growing library of books and publications which are available for reference to interested members of the public.

HKIAC's free information service covers the following areas:

- Furnishing general information and assistance in connection with both international and domestic dispute resolution.
- Answering enquiries concerning any proposed conciliation, mediation or arbitration in Hong Kong.
- Providing information on arbitration law and procedure relating to international arbitrations in Hong Kong.
- Giving information on appropriate forms of arbitration clauses.
- Advising on arbitrators' fees.
- Making any relevant enquiries of and arrangements with arbitration centres elsewhere in the world.

Parties should nevertheless obtain separate legal advice when necessary.

Selecting Mediators and Arbitrators

HKIAC operates panels of international and local arbitrators of experience and distinction and is happy to make their names available to potential arbitrants. HKIAC also holds lists of mediators and can assist the parties with recommendations for suitable persons. HKIAC administers the mediation service for Hong Kong Government contracts.

Failing agreement by the parties on the appointment of an arbitrator, HKIAC may be named in an arbitration agreement as appointing authority.

Since 27 June 1997 HKIAC has had statutory authority to appoint arbitrators under both the domestic and international regimes of the Arbitration Ordinance where the parties have not agreed on a mechanism for making appointments or the agreed mechanism has broken down.
If the parties fail to agree on the number of arbitrators that should decide their case, HKIAC also has the power, under the international regimes of the Arbitration Ordinance, to decide whether a tribunal of one or three arbitrators should be constituted. This service is not available under the domestic regime where, in the absence of agreement there shall be a single arbitrator.

For detailed advice on these services see HKIAC's booklet 'A Guide to Applying for the Appointment of an Arbitrator or for a Decision as to the Number of Arbitrators'.

**Mediation and Arbitration Procedure**

For domestic arbitration, HKIAC has its own set of arbitration rules and an accompanying guide for the assistance of parties and arbitrators. For international arbitration, HKIAC recommends the use of its Procedure for Arbitration (including the UNCITRAL Rules). The UNCITRAL Rules were promulgated by the United Nations Commission on International Trade Law in 1976. The General Assembly of the United Nations by its Resolution 31/98 recommended the use of the UNCITRAL Arbitration Rules in the settlement of international commercial disputes.

If the parties wish to use the rules of the ICC, LCIA, AAA or any other arbitral institution, they may also agree that any dispute under these rules, although administered by the institution whose rules govern the arbitration, will be heard at Hong Kong International Arbitration Centre.

The Centre has its own set of Mediation Rules based on the Hong Kong Government's Mediation Service Rules but also has available a wide variety of other rules which may be adopted for particular disputes. Recommended Mediation and Arbitration Clauses are included later in this booklet.
Administration and Support of Dispute Resolution

When disputes do arise, the Centre is able to offer extensive administrative assistance to the parties acting as a channel of communication between them and, where required, as an appointing authority to appoint mediators or arbitrators.

Languages

The normal working languages of HKIAC are English and Chinese (Cantonese and Mandarin). Disputes may, however, be resolved in any language or languages which the parties choose. The Centre is equipped with excellent facilities for simultaneous translation and can arrange for simultaneous translators and translation of documents and transcripts.

Arbitration awards may be rendered in any language chosen by the parties. HKIAC's panels of arbitrators and mediators include persons with fluency in many languages.

Facilities of HKIAC

HKIAC is centrally located in spacious facilities in one of the prime office buildings in Hong Kong. The facilities are broadly of two kinds, physical and service. The physical facilities include:

- Ten custom built, comfortable, rooms, which can be configured in a variety of ways to suit the parties' requirements. Up to 180 people can be accommodated in the largest room.
- Secure storage provision for documents and other exhibits.
- Stenographers' room for production of transcripts.
- CCTV facilities for viewing drawings and other documents.
- A full range of telecommunication and other support services.

Services relating to a particular hearing that are available at, or can be arranged by HKIAC include:

- Transcription
- Translation
- Video Conferencing
- Catering - Meals and snacks are available.
- Hotel and airline bookings.
- Transportation between hotels and the Centre.
- The speedy dispatch of documents for delivery overseas.
RECOMMENDED MEDIATION AND ARBITRATION CLAUSES

A number of model clauses which may be used to site a mediation or arbitration in Hong Kong are set out below. Legal advice should, however, be sought on the choice of suitable clause and applicable law.

**A**

**Mediation Clause for Domestic Mediation**

"Any dispute or difference arising out of or in connection with this contract shall first be referred to mediation at Hong Kong International Arbitration Centre (HKIAC) and in accordance with its Mediation Rules. If the mediation is abandoned by the mediator or is otherwise concluded without the dispute or difference being resolved, then such dispute or difference shall be referred to and determined by arbitration at HKIAC and in accordance with its Domestic Arbitration Rules."

**B**

**Arbitration Clause for Domestic Arbitration**

"Any dispute or difference arising out of or in connection with this contract shall be referred to and determined by arbitration at Hong Kong International Arbitration Centre and in accordance with its Domestic Arbitration Rules."
Arbitration Clause for International Arbitration

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force and as may be amended by the rest of this clause.

The appointing authority shall be Hong Kong International Arbitration Centre.

The place of arbitration shall be in Hong Kong at Hong Kong International Arbitration Centre (HKIAC).

There shall be only one arbitrator. *

Any such arbitration shall be administered by HKIAC in accordance with HKIAC Procedures for Arbitration in force at the date of this contract including such additions to the UNCITRAL Arbitration Rules as are therein contained." *

* This sentence must be amended if a panel of three arbitrators is required.

"This sentence may be deleted if administration by HKIAC is not required. If it is retained the Centre will then act as a clearing house for communications between the parties and the arbitral tribunal and will liaise with the arbitral tribunal and the parties on timing of meetings etc, will hold deposits from the parties and assist the tribunal with any other matters required.

If the language to be used in arbitration proceedings is likely to be in question, it may also be useful to include in contracts:

"The language(s) to be used in the arbitral proceedings shall be...".

Opting-Out of Model Law” and Exclusion Agreement Clauses

As Hong Kong has adopted the UNCITRAL Model Law for international arbitrations, parties not wishing to arbitrate under that law can opt out of it and into the domestic regime which is set out in Part II of the Arbitration Ordinance (see section 2M of the Arbitration Ordinance). Parties who have done this can, if they wish, also opt out of any judicial review of the award pursuant to the terms of section 23B of the Arbitration Ordinance.

Clauses to cover both situations are set out on the next page.
“Opting-Out of Model Law” Clause

“The parties to this agreement hereby agree that this agreement is or is to be treated as a domestic arbitration agreement notwithstanding the provisions of the Arbitration Ordinance Chapter 341 of the Laws of Hong Kong. The parties further agree that all or any dispute that may arise under the terms of this agreement are to be arbitrated as a domestic arbitration.”

Note: This clause could be adapted for use by parties to domestic arbitrations for opting-in to the Model Law.

Exclusion Agreement

“In relation to all matters referred to arbitration by this agreement, the right of appeal under section 23 of the Arbitration Ordinance Chapter 341 of the Laws of Hong Kong and the right to make an application under section 23A thereof are hereby excluded.”

Other Arbitration Clauses for International Arbitration in Hong Kong

Arbitration Under the London Court of International Arbitration Rules

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration (LCIA), which Rules are deemed to be incorporated by reference into this clause. The place of arbitration shall be in Hong Kong at Hong Kong International Arbitration Centre.”
Parties are also reminded by the LCIA that difficulties and expense may be avoided if they expressly specify the law governing their contract. The parties may if they wish also specify the number of arbitrators, and the language of the arbitration. The following provisions may be suitable:

“The governing law of the contract shall be the substantive law of...
The number of arbitrators shall be (one/three).
The language to be used in the arbitral proceedings shall be...”

**Arbitration under the International Chamber of Commerce (ICC) Rules of Conciliation & Arbitration**

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The place of arbitration shall be in Hong Kong at Hong Kong International Arbitration Centre.”

**Arbitration under the International Arbitration Rules of the American Arbitration Association**

“Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Arbitration Rules of the American Arbitration Association.

The place of arbitration shall be in Hong Kong at Hong Kong International Arbitration Centre.”

The American Arbitration Association also recommends that among other things parties agree in advance whether to use one or three arbitrators and that they specify the language of the arbitration.
FURTHER READING

Laws of Hong Kong Arbitration Ordinance (Chapter 341)
- (Government Printer, Hong Kong)

Hong Kong Arbitration, Cases and Materials
- Kaplan, Spruce & Cheng (Butterworths Asia)

Hong Kong and China Arbitration, Cases and Materials
- Kaplan, Spruce and Moser (Butterworths Asia)

The Arbitration Ordinance of Hong Kong: A Commentary
- Robert Morgan (Butterworths Asia)

The Law Reform Commission of Hong Kong - Report on the Adoption of the UNCITRAL Model Law of Arbitration (Topic 17)
- (Government Printer, Hong Kong)
For further information relating to dispute resolution in Hong Kong, please contact:

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