

A Guide to Maritime Arbitration in Hong Kong





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Hong Kong at a glance

Hong Kong, officially the Hong Kong Special Administrative Region of the People's Republic of China ("**PRC**"), is located on China's south coast on the Pearl River Delta, bordering Guangdong province to the north and facing the South China Sea to the east, west and south.

Beginning as a trading port, Hong Kong became a British colony in 1842, and remained so until the return of its sovereignty to the PRC in 1997. Under the "One Country, Two Systems" policy, Hong Kong retains a high degree of autonomy and maintains a highly capitalist economy.

Hong Kong is one of the world's leading financial capitals and a major business and cultural hub. It is also recognised as one of Asia's greatest trading and shipping centres. In 2015, the UNCTAD ranked Hong Kong as the seventh largest maritime centre in terms of vessel tonnage it controls. As such, it is a natural venue for international arbitrations involving maritime disputes.

Fact Sheet

Official languages Chinese, English

Geographic coordinates 22 15 N, 114 10 E

Area Total 1,104 km²

Population 7 million

Currency Hong Kong Dollar (HKD)

Time zone HKT (UTC+8)

Calling code 852

Economy Free market economy

Climate Sub-tropical with long, hot summer



Legal system in Hong Kong

The Basic Law, which is the “mini-constitution” of Hong Kong, provides the constitutional framework for its legal system. The Basic Law guarantees a high degree of autonomy from the Central Government of the PRC. Hong Kong enjoys its own executive, legislative and independent judicial power, including that of final adjudication.



Under the principle of ‘One Country, Two Systems’, Hong Kong retains the English common law system, supplemented by local legislations. The laws in force immediately prior to the resumption of sovereignty by the PRC have been maintained. National laws of the PRC are not applied in Hong Kong, except for those relating to defence and foreign affairs.

Strict adherence to the principles of the rule of law and judicial independence is widely recognised as the most important attributes of Hong Kong.

Maritime arbitration

Reference to arbitration to resolve maritime disputes has long been the conventional practice in most maritime nations. Given its informal and confidential nature, arbitration is relatively less damaging to the business reputation of the parties in dispute.

In addition, arbitration has a number of inherent advantages over litigation, e.g.

- Free choice of Arbitrator(s) – as maritime disputes may involve technical issues , the parties may wish to appoint someone with sufficient experience and expertise to determine their disputes
- Privacy - the entire arbitration process including the hearing is held privately and is confidential; irrespective of the nature of the dispute, media attention is most unlikely
- Finality – unlike a court judgment, an arbitral award is subject to very limited rights of review by the Court
- Cost-effectiveness – parties may themselves agree to reduce the costs of arbitration, e.g. appoint a sole arbitrator and proceed with “documents only” arbitration
- Enforceability - easily enforceable in foreign courts through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**New York Convention**”); this is particularly important in the context of resolving disputes in Hong Kong; as compared to a judgment grant by the courts of Hong Kong, which is enforceable in only a handful of foreign

countries, an arbitral award can be enforced in all the Convention countries, including the PRC¹.



Why arbitrate in Hong Kong?

Geographically convenient

Lying at the centre of Asia Pacific, the fastest growing region in the world, Hong Kong is within five hours' flying time of half of the world's population. Communications, transport, financial services and accommodation are all well served.

Expertise

Hong Kong is a world centre of expertise in all aspects of the maritime industry, supported by an enormous pool of experienced professionals. In fact, the largest branch membership of the Chartered Institute of Arbitrators, whose headquarter is in London, is contributed by Hong Kong, with

¹ Hong Kong arbitral awards are enforceable in the PRC in accordance with the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region enacted in 1999

members standing at 1364 out of 12714 as at 3 November 2016.

Culture

Hong Kong is often described as a place where East meets West, reflecting the cultural mix brought to it during its time as a British colony. Because of the retention of its English common law-based legal system, Hong Kong is generally regarded as a fair and familiar forum with sufficient neutrality for resolving commercial disputes. At the same time, with its proximity in location, language and culture, parties from the PRC regard Hong Kong as a culturally-friendly venue for dispute resolution.

Law

The Arbitration Ordinance (Chapter 609 of the Laws of Hong Kong) provides the legal framework for arbitration in Hong Kong. It maximizes the authority of arbitral tribunals and minimizes opportunities for court intervention.

The Arbitration Ordinance has recently undergone a substantial overhaul to incorporate the latest international practice. The previous statute (Arbitration Ordinance Cap 341) was based on a split regime - international arbitration (modelled on the UNCITRAL Model Law) and domestic arbitration. The new Arbitration Ordinance (Cap 609) unifies the two regimes. It is more user-friendly as it effectively extends the application of the UNCITRAL Model Law to all types of arbitration in Hong Kong. Meanwhile, most of the amendments to the UNCITRAL Model Law in 2006 have been adopted in the new Arbitration Ordinance. It is anticipated that the new Arbitration Ordinance will further

enhance Hong Kong's position as the international dispute resolution centre.

Hong Kong International Arbitration Centre (“HKIAC”)

The HKIAC was established in 1985 by a consortium of leading businessmen and professionals in



Hong Kong. Being one of the busiest centres in the world, it is equipped with world-class facilities for dispute resolutions. In 2015, the HKIAC received a total of 214 international arbitration cases², which make HKIAC rank third in the Asia Pacific region. In the same year, HKIAC was also ranked the third most preferred and used arbitral institution worldwide and the most favoured institution outside of Europe.

Independence of HKIAC

Being the world's freest economy³, Hong Kong is blessed with a clean government with minimal intervention in commercial activities.

Initially funded by the business community and by the Hong Kong Government, the HKIAC is now independent of both and financially self-sufficient.

Language

The normal working languages of the HKIAC are English and Chinese (including Cantonese and Mandarin). Hong Kong has been benefited from a wealth of legal practitioners and internationally renowned arbitrators who

² Source: Website of the Hong Kong International Arbitration Centre www.hkiac.org.

³ 2016 Index of Economic Freedom, The Heritage Foundation

speaking these languages fluently.

Parties may also arbitrate in any other language or languages which they choose. The HKIAC is equipped with excellent facilities for simultaneous translation and can arrange for simultaneous translators and translation of documents and transcripts. Arbitral awards may be rendered in any language chosen by the parties.

Ad hoc arbitration

In an institutional arbitration, parties are normally charged upfront a certain percentage of the amount in dispute. This may not be an attractive option in disputes involving a huge amount of money. The HKIAC provides facilities for “ad hoc” arbitrations upon request and charges only HK\$8,000 or about US\$1,026 for appointment of an arbitrator.

Open legal representation

While some countries still place restrictions on legal personnel coming to conduct arbitration, Hong Kong allows open legal representation. Anyone from another jurisdiction – who is qualified there – can act as an advocate or arbitrator in Hong Kong.

Enforcement

The New York Convention was adopted by Hong Kong on 21 April 1977, by virtue of the United Kingdom’s accession on Hong Kong’s behalf. The PRC is also a signatory to the Convention, and applied it to Hong Kong with effect from 1 July 1997. As such, Hong Kong arbitral awards are enforceable in all countries that are members of the New York Convention.

As Hong Kong is now part of the PRC, there used to be some uncertainty over mutual enforcement after 1997. In 1999, the PRC and Hong Kong signed the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region, by virtue of which it is now established that Hong Kong arbitral awards can be enforced in the PRC and vice versa.

Hong Kong Maritime Arbitration Group (“HKMAG”)



In response to demands from the shipping industry, the HKMAG was formed in February 2000 as a division of the HKIAC. Maintaining a list of arbitrators with commercial or legal experience in maritime fields, it has the specific aim of promoting the use of maritime arbitration in Hong Kong.

Hong Kong maritime arbitration procedures

Parties may agree, either before or after the dispute has arisen, that the dispute will be heard under the rules of an arbitral institution, e.g. the rules of the London Maritime Arbitrators Association (“**LMAA**”), HKIAC Administered Arbitration Rules or the UNCITRAL arbitration rules. In addition, parties may also designate the HKIAC to hear and/or administer the arbitration. “Ad-hoc” arbitrations, which follow no particular rules leaving the parties or tribunals to agree on the procedures, are also permissible.

Broadly speaking, there are two categories of maritime arbitrations in Hong Kong: documents-only arbitration and the oral hearing arbitration. The documents-only arbitration is generally cheaper, faster and more suited to small claims or where there is a single issue at stake.

International Arbitration in Hong Kong under HKIAC Administered Arbitration Rules 2013

Appointment of Arbitrators

Under HKIAC Administered Arbitration Rules, the parties are free to determine the number of arbitrators. Where the parties fail to agree on the number arbitrators, HKIAC will decide whether one or three will be appointed.

HKIAC Administered Arbitration Rules impose minimal restrictions on who may be appointed as arbitrator⁴. The parties are normally free to appoint an arbitrator of their choice. Any special requirement in the arbitration agreement between the parties, e.g. a requirement that the arbitrator must have some special qualifications, should be observed.

The parties are also free to agree on the procedure for appointing the arbitrator(s). Should the parties fail to reach an agreement:-

⁴ Note: There is a restriction under Article 11.2 that where the parties are of different nationalities, a sole arbitrator shall not have the same nationality as any party unless agreed in writing by the parties.

- in an arbitration with three arbitrators, each party will appoint one and the two arbitrators thus appointed will appoint the third
- in an arbitration with a sole arbitrator, the HKIAC will appoint one upon the request of either party

If a party fails to appoint an arbitrator within 30 days of a request to do so from the other party, the HKIAC will appoint one upon the request of the other party.

Challenge to jurisdiction of tribunal

Pursuant to Article 19 of HKIAC Administered Arbitration Rules, the tribunal may rule on its own jurisdiction, including any objections with respect to the existence, validity or scope of the arbitration agreement(s).

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence or reply to counterclaim. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator.

Rules of procedures, place and language of arbitration

The tribunal will adopt suitable procedures for the conduct of the arbitration, but the parties are free to agree on the place and language of arbitration. Failing such agreement, these issues will be determined by the tribunal.

Exchange of submissions or pleadings

HKIAC Administered Arbitration Rules do not impose strict time limits for the exchange of submissions or pleadings. Parties may agree upon the sequence of pleadings and

time limits or the tribunal may exercise its wide discretion to set the time periods.

The claimant has to communicate a statement of claim stating his case and the relief sought to the respondent first. Failing to do so without sufficient cause may entitle the tribunal to terminate the proceedings. The respondent would then be required to communicate a statement of defence and any counterclaim to the claimant. Default of the respondent may allow the tribunal to continue the proceedings and proceed to make an award on the evidence before it.

Interim measures

Pursuant to Article 23 of HKIAC Administered Arbitration Rules, the tribunal may make orders for interim measures and also require any party to provide security in connection with such measure.

Hearings and written proceedings

Subject to any contrary agreement between the parties, the tribunal will decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the tribunal must hold such hearings at an appropriate stage of the proceedings, if so requested by a party or if it considers fit.

The tribunal is free to determine whether further submissions are required from the parties and the manner in which a witness or expert is examined.

Award

The award will be in writing, stating the reasons upon which it is based, unless the parties have agreed that no reasons are to be given. An arbitral award will be final and binding on the parties and the parties will be deemed to have waived their rights to any form of recourse or defence in respect of enforcement and execution of the award.

Appeals

Arbitrations under HKIAC Administered Arbitration Rules reserve no right of appeal to the Court on a point of law. As such, unless the right to appeal on a point of law is expressly stated in the arbitration agreement, the Court can only set aside an award on very limited grounds, e.g. party not given proper notice of the appointment of the arbitrator or arbitrators having exceeded their jurisdiction, etc.



New HKIAC practice notes on consolidation and costs of arbitration

In view of the increasing number of complex international disputes that involve multiple parties, and to enhance transparency and certainty of costs in arbitration, the HKIAC has newly published a Practice Note on Consolidation of Arbitrations, effective from 1st January 2016, and recently updated two Practice Notes on Costs of Arbitration, effective from 1st June 2016.

Practice note on consolidation

Under Article 28 of HKIAC Administered Arbitration Rules, the HKIAC has the power to combine arbitrations if they involve a common question of law or fact, claims arising out of the same transaction or series of transactions, and compatible arbitration agreements, even if the parties to each arbitration are different. To request consolidation, a party shall submit a Request for Consolidation.

The Practice Note on Consolidation supplements Article 28 by setting out the particulars to be included in a Request for Consolidation and any response thereto. The Request needs to include, for example, the following:

- case references of the arbitrations requested to be consolidated
- copy of the arbitration agreement(s) giving rise to the arbitrations
- nature of the claims and remedy sought in each arbitration, such as the amounts of the claims
- legal arguments supporting the Request

Updated practice notes on costs

The updated Practice Notes on costs supplement the original provisions on costs of arbitration under HKIAC Administered Arbitration Rules, with one dealing with the case where the fees of the arbitral tribunal are based on hourly rates and the other based on the sum in dispute. These updated Practice Notes further clarify HKIAC's practice of paying fees and expenses of arbitrators, tribunal secretaries and HKIAC under HKIAC Administered Arbitration Rules.

Under the updated Practice Notes, parties are jointly and severally liable for the HKIAC's administrative fees, and the amount of HKIAC administrative fees payable will vary with the stages of the arbitral proceedings at which parties settle or terminate their case. Also, if a party has paid deposits for costs on behalf of the other party, that party is now allowed to seek reimbursement for the same from the other party by seeking a separate award from the arbitral tribunal.

Small claims procedure

The Small Claims procedure of the HKIAC has been designed primarily to deal with low value disputes of no more than US\$50,000 in a timely and cost efficient manner. It is an attractive option where there are no complex issues and where there is only a single issue in dispute.

Similar to LMAA procedure, the Small Claims procedure is simple and straightforward:

- The parties appoint a sole arbitrator. In default, the HKIAC may make an appointment
- Strict time limits are imposed on exchange of submissions and pleadings. The tribunal reserves limited power to extend time for service of pleadings
 - The claimant sends out a statement of claim and relevant documents, e.g. witness statements, expert's report, legal submissions, etc. within 14 days
 - The respondent delivers its defence and counterclaim within 28 days thereafter
 - The claimant delivers its reply and defence to counterclaim in 21 days thereafter
 - The respondent delivers reply to defence to counterclaim within 14 days thereafter
- The arbitrator makes an award within one month from any hearing, or from receiving all relevant documents and submissions

Costs of small claims procedure

The Small Claims procedure radically limits the fees payable to the arbitrator:

- The claimant must pay the arbitrator a fixed fee of HK\$15,000, which covers the arbitrator's appointment fee, the costs of dealing with interlocutory exchanges, a hearing limited to one day, the preparation of the award, and the assessment of any costs. Expenses are charged extra
- If there is a counterclaim, and it exceeds the amount of the claim, the respondent must pay an additional fee of

HK\$7,500

- HKIAC charges HK\$1,500 to appoint an arbitrator.
- The arbitrator has power to direct which party must bear the ultimate responsibility for the small claims fee and the tribunal's expenses, and for the legal costs incurred by the successful party. The assessment of recoverable costs is to be done on a "commercial basis", but the amount may not exceed HK\$30,000

“Documents only” procedure

Where there is no need for an oral hearing, the parties may choose the “Documents Only” Procedure, which is similar to that of LMAA. The Document Only Procedure has proven to be a popular option for shipping disputes.

Similar to Small Claims procedure, strict time limits are imposed on the exchange of submissions and pleadings:

- The claimant delivers written claim submissions and supporting documents within 28 days of agreeing to adopt this procedure or of the order of the tribunal.
- The respondent delivers defence and counterclaim submissions within 28 days thereafter.
- The claimant delivers reply to defence and counterclaim submissions within 28 days (21 days if the respondent has no counterclaim) thereafter.
- The respondent delivers its final submissions on the counterclaim within 21 days thereafter.

- The tribunal will then proceed to issue an award within one month from receiving all relevant documents and submissions.

Hong Kong arbitration clause

To submit a maritime dispute or any dispute to arbitration at the HKIAC, the HKIAC recommends the incorporation of the following arbitration clause into a contract. Legal advice should, however, be sought where there is doubt as to the suitability of any of the recommended clause.

Recommended clause

“Any dispute, controversy or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre under the Hong Kong International Arbitration Centre Administered Arbitration rules in force when the Notice of Arbitration is submitted.

The seat of arbitration shall be ... (*Hong Kong*).

*The number of arbitrators shall be ... (*one or three*). The arbitration proceedings shall be conducted in ... (*insert language*).”

* optional

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Examples of the matters which we regularly deal with are:

- Handling disputes, whether by way of arbitration or litigation, arising from charterparties, shipbuilding contracts, ship collision, international sale of goods, sale and purchase of vessels, cargo claims, bills of lading, letters of credit and related insurance issues
- Drafting, reviewing and advising on the terms of charterparties, shipbuilding contracts, GAFTA and FOSFA contracts, memorandum of agreements and ship mortgage documents
- Assisting shipowners and charterers in both arresting vessels and securing their release

Our clients include shipowners, P&I Clubs, charterers, ship and chartering brokers, cargo insurers, tug companies, ship-repairers, banks, marine engineering companies, oil companies, bunker suppliers, government agencies and multinational conglomerates.

About us

ONC Lawyers is a professional and dynamic legal practice based in Hong Kong. We have been growing continuously since our establishment in 1992, and have now become one of the largest local law firms with more than 40 lawyers and a total staff of over 130.

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Prior to joining **ONC** Lawyers, Sherman practised with an international law firm in its Hong Kong office, handling a wide range of shipping and logistics related cases including rendering advice on bills of lading; advising insurers on cargo policies; handling cargo claims, mortgagee actions, collision cases, bunkering disputes and charter party disputes. At **ONC** Lawyers, Sherman is the Head of Litigation & Dispute Resolution Department handling a wide range of commercial disputes especially disputes among shareholders and contentious matters concerning the Securities and Futures Ordinance, in addition to his shipping and logistics practice.



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Prior to joining the legal profession, Nelson worked in various managerial positions in the banking and finance industry. Capitalizing on this background Nelson mainly practises banking, finance and commercial laws, which he has built admirable experience.

Since his admission and in less than 6 years' time, he has handled the documentation work in English and Chinese languages of over 160 secured / unsecured bilateral / syndicated loan cases with total value of HK\$190 billion and 1 cross-border Rmb70 billion interbank deposit agreement. The loan transactions handled by Nelson include asset-based financings such as ship mortgage financing. One such asset-based financings is that he has acted for one major Mainland bank in the preparation of loan documentation of a US\$37 million financing for the acquisition of 2 new-build timber carriers for a major shipping group in the Mainland.



Eric Woo | Partner

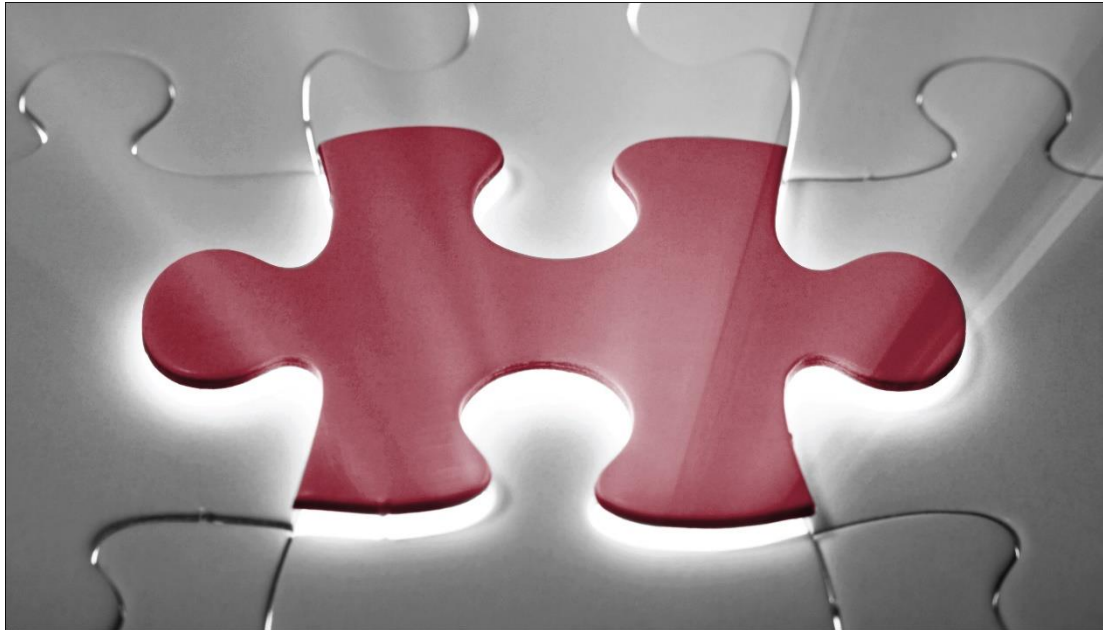
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