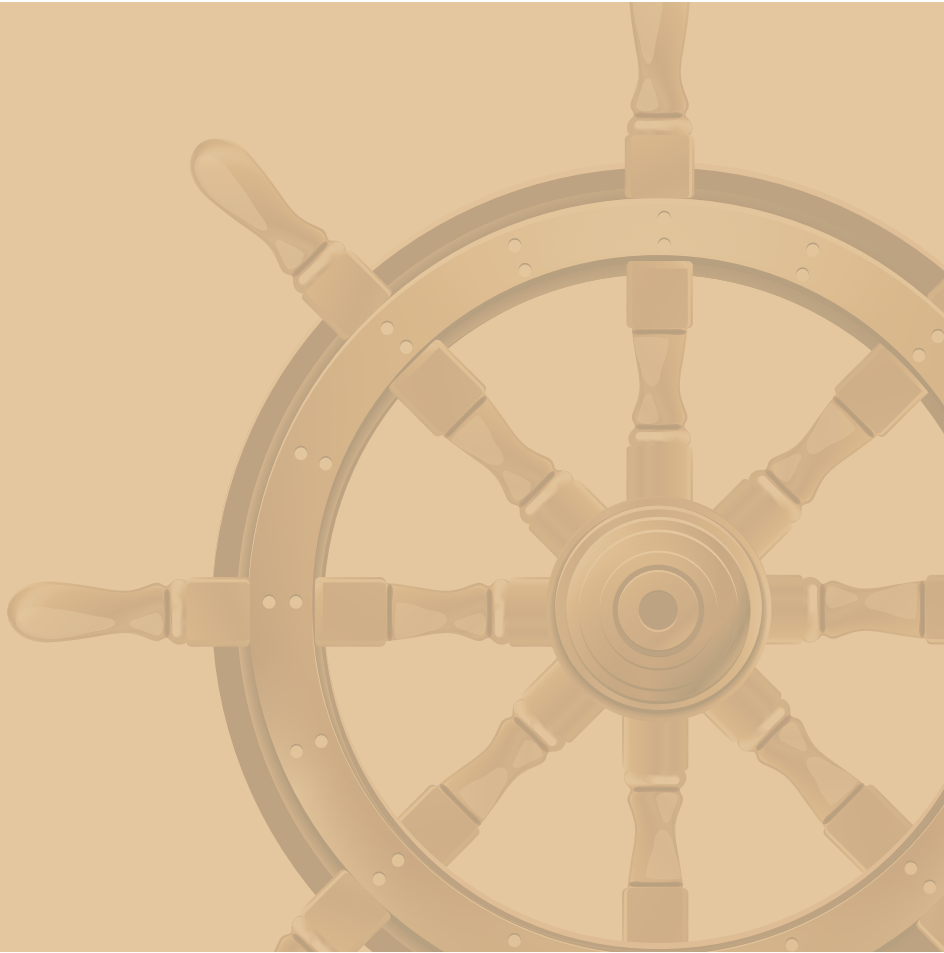


Maritime Dispute Resolution in Hong Kong A Practical Guide



香港國際仲裁中心
Hong Kong International
Arbitration Centre



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Maritime Dispute Resolution in Hong Kong

Hong Kong is uniquely situated in Asia, being within easy reach of more than 50% of the world's population, and being an essential region of the People's Republic of China. Hong Kong's location and its business friendly policies give the maritime sector in Hong Kong an advantage that is hard to replicate. The breadth of international maritime expertise in Hong Kong provides the maritime industry with a multilingual dispute resolution center that easily fits between East and West. Its empathy with the Asian traditions of mediation and its skill at blending the best of East and West have created the prime center in Asia for the resolution of disputes.

There are several techniques that may be used to resolve maritime disputes:

Litigation

Litigation is the act or process of bringing or contesting a legal action in court. For the purposes of maritime dispute resolution, the relevant courts of justice in Hong Kong are the Court of Final Appeal and the High Court (which comprises the Court of Appeal and the Court of First Instance).

Arbitration

Arbitration is the referral of a dispute to one or more impartial persons for final and binding determination. It is private and informal, designed for quick, practical and inexpensive resolution of disputes. However, arbitration is at the same time an orderly proceeding, whether supervised by an arbitral institution in accordance with its rules or formed as an 'ad hoc' arbitration, in which there is no supervising institution and the parties are free to initiate and agree their own governing procedures. In any case, the conduct of the arbitration will be governed by standards prescribed by law.

Mediation

Mediation is a voluntary, non-binding, private dispute resolution process in which a neutral person, the mediator, helps the parties to reach their own negotiated settlement agreement. 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 or understanding on the facts underlying the dispute. The mediator may act as a shuttle diplomat and a channel for communication, by filtering out the emotional elements and allowing the parties to concentrate on the underlying commercial objectives. The mediator has no power to impose a settlement. His/her function is to overcome any impasse and encourage the parties to reach a sensible amicable settlement.

The Rule of Law

The principal meaning of the “rule of law” is that the power of the government and all of its servants shall be derived from law as expressed in legislation and the judicial decisions made by independent courts. At the heart of Hong Kong's system of government lies the principle that no one, including the Chief Executive, can do an act that would otherwise constitute a legal wrong or affect a person's liberty unless he can point to a legal justification for that action.

It is thus fundamental that all persons, regardless of race, rank, politics or religion, are subject to the laws of the land. Further, the rule of law requires that the courts are independent of the executive. This independence is crucial if impartial rulings are to be given when the legality of acts of government falls to be decided.

To restrict discretionary power, the courts have developed a set of guidelines aimed at ensuring that statutory powers are not used in ways that the legislature did not intend. These guidelines relate to both the substance and the procedures relating to the exercise of executive power.

Sources of Law in Hong Kong

National Law

Several national laws of the People's Republic of China apply in Hong Kong by virtue of Article 18 of the Basic Law. Under Article 158 of the Basic Law, an interpretation of a provision of the Basic Law by the Standing Committee of the National People's Congress is to be followed by the courts of Hong Kong in applying the relevant provision.

The Basic Law

Nature of the Basic Law

The Basic Law of the HKSAR was enacted by the National People's Congress in accordance with the Constitution of the People's Republic of China. It is akin to a mini-constitution for the HKSAR. It was promulgated on 4 April 1990 and took effect on 1 July 1997 on the establishment of the HKSAR. All the systems and

policies practised in the HKSAR must be based on the provisions of the Basic Law. These include the social and economic systems; the system for safeguarding the fundamental rights and freedoms of its residents; the executive, legislative and judicial systems; and the relevant policies. Furthermore, no law enacted by the legislature of the HKSAR may contravene the Basic Law.

The most prominent feature of the Basic Law is the underlying principle of "one country, two systems" whereby the socialist system and policies shall not be practised in the HKSAR, and the previous capitalist system and way of life is to remain unchanged for 50 years.

Under the Basic Law, all the laws previously in force in Hong Kong (that is, the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, except for any that contravene the Basic Law and subject to any amendment by the HKSAR legislature. National laws of the People's Republic of China shall not be applied in the HKSAR except for a number of such laws relating to defence and foreign affairs, which are listed in Annex III to the Basic Law.

Relationship between the Central Authorities and the HKSAR

The National People's Congress through the Basic Law authorises the HKSAR to exercise a high degree of autonomy directly under the Central People's Government. The HKSAR enjoys executive, legislative and independent judicial power, including that of final adjudication, in accordance with provisions of the Basic Law. Although foreign affairs relating to the HKSAR are the responsibility of the Central People's Government, the HKSAR is authorised to conduct relevant external affairs on its own in accordance with the Basic Law. The Central People's Government is also responsible for the defence of the HKSAR, but the responsibility of maintaining public order in the HKSAR is a matter for its government.

Fundamental rights protected by the Basic Law

The Basic Law details the fundamental rights, freedoms and duties of the residents of the HKSAR. These rights include the right to equality before the law; freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike; freedom of movement; freedom of conscience; and freedom of religious belief. The Basic Law also guarantees that the provisions of the International Covenant on Civil and Political Rights; of the International Covenant on Economic, Social and Cultural Rights; and of the International Labour Conventions as applied to Hong Kong will remain in force.

The common law and the rules of equity

Common law and the rules of equity are to be found primarily in the judgments of the superior courts in Hong Kong and other common law jurisdictions. The common law's most distinguishing hallmark is reliance on a system of case precedent, not restricted to judicial decisions generated within any single jurisdiction, but case law from all jurisdictions throughout the common law world. Article 84 of the Basic Law provides that the courts of the HKSAR may refer to the precedents of other common law jurisdictions. In addition, the Court of Final Appeal and the Judiciary of the HKSAR are given power to invite judges from other common law jurisdictions to participate in the judicial processes.

International law

Over 200 international treaties and agreements have been applied to Hong Kong. A treaty does not constitute part of Hong Kong's domestic law until given effect by legislation. Nonetheless, it may affect the development of the common law. It may, for example, be resorted to by a court as an aid to interpretation. The rapidly developing rules of customary international law can also become absorbed into the common law.

Shipping and the Basic Law

The Basic Law contains some specific provisions dealing with shipping in Hong Kong. As a result of cooperation between the Governments of PRC and the UK, the autonomous register was set up in 1990, just after the enactment of the Basic Law and well before reunification. Articles 124 to 127 of the Basic Law give authority to Hong Kong to maintain the shipping register, issue related certificates under its legislation and regulate the conditions of seamen, guarantee access to the port for all merchant ships, and guarantee that private interests in shipping fields may continue to operate freely.

Litigation

The judicial system in Hong Kong is adversarial. The parties should present their case to the court for its determination. The judge will act as an umpire and make decisions after considering the evidence and hearing the arguments from the parties. The losing party will normally be ordered to pay the costs to the winning party. The costs are the expenses that the winning party has to spend on the preparation and hearing of the matter, including the expenses for the solicitors and barristers representing them. The amount of the costs can be substantial, depending on factors including the complexity of the case, the work required for preparation of hearing and the length of the hearing.

Court of Final Appeal

The Joint Declaration and the Basic Law specifically guarantee the establishment on 1 July 1997 of a Hong Kong based Court of Final Appeal, and this replaced the Judicial Committee of the Privy Council in London as the final appellate court for Hong Kong. It has jurisdiction conferred on it by the Hong Kong Court of Final Appeal Ordinance (Cap 484).

Under the provisions in the Basic Law and the Hong Kong Court of Final Appeal Ordinance (Cap 484), the judges of the Court of Final Appeal are appointed by the Chief Executive, in accordance with the recommendations of an independent commission, and those appointments must be endorsed by the legislature.

The Hong Kong Court of Final Appeal Ordinance provides that an appeal shall be heard and determined by the Court constituting the Chief Justice, three permanent judges and one non-permanent Hong Kong judge or one judge from another common law jurisdiction. The Court of Final Appeal sits with leading jurists from the common law world.

High Court

The High Court comprises the Court of Appeal and the Court of First Instance. The Court of Appeal hears appeals on all matters, civil and criminal from the Court of First Instance. It also makes rulings on questions of law referred to it by the lower courts. The jurisdiction of the Court of First Instance is unlimited in both criminal and civil matters. There is a designated specialist Admiralty Judge and an Admiralty List in the Court of First Instance.

Advantages of Litigation

- Courts have the power to make orders affecting non-parties to the dispute, and to compel witnesses to testify or produce documents.
- Courts have the power to give declaratory relief.
- Court proceedings are not confidential, and the outcome of the dispute is published. This may be ideal where a party hopes to set a precedent in one case that it can use against other parties in the future.

Arbitration

There is a long tradition of using arbitration to resolve shipping disputes. It is well recognized that the informal and less litigious nature of arbitration has the result that contract partners are more likely to keep their business relationship during and after the dispute resolution process.

The Agreement to Arbitrate

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 their commercial contract. But it may also be made after the contract is negotiated or after the dispute has arisen. In agreeing to arbitration, the parties are agreeing that their dispute will not be heard by a court but by a private individual or a panel or tribunal of several private individuals. If the parties have agreed to arbitration, the courts will generally refuse to hear their case by staying the court proceedings in order to force the reluctant party to honour its agreement to arbitrate.

There are essentially two laws that govern the conduct of arbitrations; the Procedural Law, which determines the rules of procedure and is generally set by the choice of place or “seat” of the arbitration, and the Substantive Law, which determines which statute law governs the legal relationship between the parties.

The Procedural Law in Hong Kong is set out under the Arbitration Ordinance, Cap.609, which mirrors the UNCITRAL Model Law on International Commercial Arbitration. The legislation incorporates detailed provisions drawn from the 2006 additions to the Model Law regarding interim measures and preliminary orders. In addition, the Ordinance also provides for opt-in provisions on appeals on points of law, consolidation of arbitrations and challenging an arbitral award.

While it is common that Hong Kong Substantive Law is chosen by parties who have agreed to arbitrate in Hong Kong, parties may instead choose the Substantive Law of another jurisdiction, such as the laws of England.

The Hong Kong Maritime Arbitration Clause has been developed, and is included in this booklet.

Arbitration Rules

The arbitration may be supervised by an Arbitral Institution in accordance with its rules, or formed as 'ad hoc' arbitration.

Institutional Arbitration

Institutional arbitration proceedings are administered by an arbitration institute, such as the Hong Kong International Arbitration Centre (HKIAC), the International Chamber of Commerce (ICC), the China International Economic and Trade Arbitration Commission (CIETAC) or the London Court of International Arbitration (LCA).

Institutional arbitration has the benefit of ensuring that the proceedings are administered in an orderly and regular manner. Arbitration institutes may also exercise a degree of 'quality control' over arbitrators and the awards. Adopting an established set of arbitration rules has the benefit of avoiding arbitrators constantly having to 'reinvent the wheel' in applying appropriate procedures.

HKIAC Arbitration Rules and Guidelines may be downloaded from:
www.hkiac.org/en/arbitration/arbitration-rules-guidelines

Ad Hoc Arbitration

Ad hoc arbitrations, the most common method of resolving maritime disputes, are arranged solely between the arbitrators and the parties. The parties may adopt a ready-made set of arbitration rules or the arbitration may be conducted under rules drawn up by the parties. Ad hoc arbitrations may be cheaper than institutional arbitrations insofar as no fees are payable to the arbitration institute. It may also provide the parties with flexibility to devise rules and procedures appropriate to their disputes.

Enforcement of Arbitral Awards

An arbitral award made in Hong Kong may be enforced in Hong Kong in the same manner as a court judgment, once the court has given leave to enforce the award. The applications for leave to enforce is made on paper without notice to the party against whom the enforcement is being made.

Awards made in Hong Kong may be enforced internationally under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention). There are over 140 parties to the Convention, each of whom undertakes to recognize and enforce in their local courts arbitral awards made in other member States.

China is a party to the New York Convention, but as the Convention only applies to the enforcement of awards made in a different State, this requirement was no longer satisfied on Hong Kong's return to Chinese sovereignty. In 1999, the central and Hong Kong's governments enacted laws to permit reciprocal enforcement of arbitral awards on conditions similar to those provided in the New York Convention.

Advantages of Arbitration

Arbitration has a number of inherent advantages:

- Parties from different countries can choose to appoint a panel of neutral arbitrators, who may be experts in the relevant area, and hold the arbitration in a neutral place.
- Arbitration is conducted in private and is generally confidential, unless the parties agree otherwise.
- The arbitration procedure is flexible and less formal, which can lead to disputes being resolved more quickly and cheaply than in courts, and there are no restrictions on who may represent the parties.
- Arbitration awards are easily enforceable in foreign courts through the provisions of the New York Convention.

Mediation

Mediation is a voluntary process in which a trained and impartial third person, the mediator, helps the parties in dispute to reach an amicable settlement that is responsive to their needs and acceptable to all sides.

During the process, each party to the dispute has a chance to explain his/her point of view and to hear what the other side has to say. The mediator's job is not to make a decision for the parties. Instead, the mediator will assist the parties in exploring the strengths and weaknesses of their positions and will help identify possible solutions, so as to facilitate them reaching a settlement agreement. The mediator will express no view as to who is right or wrong and has no authority to impose a settlement on the parties. The decision-making power rests in the hands of the parties alone. The mediator is skilled in unlocking negotiations that have become deadlocked and in keeping everyone focused on finding a solution.

The Mediation process

The mediator is appointed when all parties (including the Mediator) sign an Agreement to Mediate. The parties will usually provide the mediator with copies of the documents which they feel are important. The mediator will often conduct a pre-mediation individual interview with each party outside a court setting, usually in a private office. Then the mediator starts the mediation with a joint session to explain the mediation process and ground rules. In the joint session the parties will make opening presentations to share their views on the disputes and clearly define the issues that need to be discussed. These issues do not necessarily need to be restricted to matters that have been raised in the formal court or arbitration documentation.

Private meetings/caucusing: if agreement is unable to be reached at the joint session, the mediator will usually suggest that the parties retire to separate rooms and he/she will pass between parties assisting them to assess the feasibility of their negotiation terms. All matters discussed with the mediator at private meetings are confidential, and will not be disclosed by the mediator to the other party without explicit consent.

Throughout the process the mediator helps the parties evaluate the case, identify their fundamental interests, explore and consider possible consequences if the dispute is not settled, develop alternatives to deal with various issues in the dispute, and formulate proposals that would help move the process towards mutual agreement.

The parties may terminate the mediation sessions anytime during the process. If agreement is reached, the parties will sign the agreement which will be binding on the parties and which (if appropriate) may later be embodied in a court order. When an agreement cannot be reached, but the outlook is positive, the mediator may suggest that parties take some time to think over the outcome of the meeting. After that the mediator may contact them regarding unresolved matters. Even if an agreement is not reached by the parties at the end of the meeting, the mediation process is usually still considered to be helpful as each party will have acquired a better understanding of the point of view of the other parties.

Lawyers may accompany the parties, but it is essential that each party at the mediation has a representative with full knowledge of the dispute who has decision-making authority to agree a settlement without having to seek authority from others not present at the meeting.

Mediation in Hong Kong

The Courts in Hong Kong have the duty, as part of active case management, to facilitate the settlement of disputes. A new Practice Direction (PD31) came into effect on 1 January 2010 to assist the courts in discharging that duty by encouraging the parties to use mediation as an alternative dispute resolution procedure. It is not compulsory in Hong Kong to engage in mediation. The courts will not make any adverse costs orders against a party on the ground of unreasonable failure to engage in mediation where the party has engaged in mediation, at least to the minimum extent as agreed by the parties or determined by the court, or a party has a reasonable explanation for not engaging in mediation.

Various organizations in Hong Kong maintain their own list of mediators covering many areas and professional disciplines appropriate to the dispute in question. Parties can select from the lists and agree on a suitable mediator. In case of difficulty, they can consider contacting a mediation provider/organization for assistance.

The Hong Kong International Arbitration Centre (HKIAC) maintains a list of accredited mediators (www.hkiac.org). The Hong Kong Maritime Arbitration Group (HK MAG) also maintains a list of accredited mediators with maritime experience (www.hksoa.org). Accreditation of mediators in Hong Kong is now carried out by the Hong Kong Mediation Accreditation Association Ltd (HKMAAL).

Advantages of Mediation

- Cost efficient – If parties can resolve their dispute through mediation, they will save the substantial legal fees involved in litigation.
- Time efficient – Mediation can be organised and conducted promptly with some flexibility compared with the constraints of the court system. This allows the parties to settle disputes in a timely manner.
- Maintains decision-making authority - parties can make important decisions.
- Appropriate solutions – Agreements are made on a case-by-case basis to meet the needs of the parties and are not limited by the options that would be available to the court or arbitration tribunal. Third parties can participate and also sign a settlement agreement.
- Cooperation and avoidance of emotional diversion – Mediation improves communication and gives the parties more effective ways of resolving future differences.
- Relaxed atmosphere – unlike in the court, mediation is conducted in a less formal manner.
- Privacy – mediation proceedings are confidential and the parties are not usually able to reveal matters discussed and agreed on the mediation.

Hong Kong Maritime Arbitration Clause

This Contract shall be governed by and construed in accordance with English/Hong Kong* law and any dispute arising out of or in connection with this Contract shall be referred to arbitration in Hong Kong in accordance with the Arbitration Ordinance Cap. 609 or any statutory reenactment or modification thereof save to the extent necessary to give effect to the provisions of this clause.

The arbitration reference shall be to three arbitrators:

- (i) A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice, and stating it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified.

If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he/she had been appointed by agreement.

- (ii) Where each party appoints its own arbitrator, then the two arbitrators so appointed may proceed with the arbitration and at any time thereafter appoint a third arbitrator so long as they do so before any substantive hearing or forthwith in the event that they cannot agree on any matter relating to the arbitration. If the said two arbitrators do not appoint a third within 14 days of one calling upon the other to do so, or if they are in disagreement as to the third arbitrator, either arbitrator or a party shall apply to the Hong Kong International Arbitration Centre (HKIAC) for the appointment of the third arbitrator.

The language used in the arbitration shall be English.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator and, if necessary, for the HKIAC to exercise its statutory power to appoint the sole arbitrator if the parties cannot agree on the appointment.

This arbitration shall be conducted in accordance with the HKIAC Small Claims Procedure current at the time when the arbitration proceedings are commenced provided that neither the claim nor any counterclaim exceeds the limit provided for in such procedure.

* - Delete as appropriate. If no deletion is made, Hong Kong law shall apply.

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Maritime Industry Council and



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



The **Hong Kong Maritime Arbitration Group (HKMAG)** is a group of professionals resident in Hong Kong that are prepared to sit as arbitrators or mediators of maritime disputes. The full list of HKMAG can be found on the Hong Kong Shipowners Association website at www.hksoa.org