

# Hong Kong: Your Risk Manager - Practical Advice on Professional and Trade Related Services

How to settle international business disputes

*The Smart Way*

The Hong Kong Advantage



Hong Kong International Arbitration Centre  
(HKIAC)

# Business Disputes

- Should commercial disputes be a hindrance to your company's success.
- How should you prepare for the worst.
- What advice and guidance is available.
- How can you proactively manage your disputes that could substantially save you in unnecessary costs and time.

*— Understanding the various dispute resolution mechanisms that are available in market place can assist you in managing your potential disputes in an effective and efficient manner while at the same time minimising your exposure to potential risks.*

# Ways to Resolve Disputes

- Negotiation
- Mediation and Conciliation
- Adjudication
- Arbitration
- Litigation
- Avoidance
- Violence



# What is Mediation ?

Mediation is a **voluntary, non-binding,** private dispute resolution process in which a **neutral person** helps the parties try to reach a **negotiated settlement.**

# Advantages of Mediation

- It can take place quickly and often with relatively little expense in contrast to taking the dispute to a court or a tribunal
- It focuses on the parties' real commercial, emotional and psychological needs and not just on their legal rights
- It gives the parties an opportunity to participate directly and informally in resolving their own dispute
- It gives the parties control over the process itself and the outcome
- It produces outcomes which are likely to endure because the parties themselves have chosen them
- It eliminates the conflict and hostility that nearly always accompany the compulsory decision of the dispute by a court or tribunal
- It can improve understandings between parties with an ongoing relationship

# Mediation is Not

- Mediation is **not** toothless
- Mediation is **not** just compromise
- Mediation is **not** a bar to litigation or arbitration
- Mediation is **not** what lawyers or managers do ‘all the time’
- Mediations is **not** a waste of time and money if it fails
- Mediation is **not** yet another cost to the unfortunate parties
- Mediation is **not** a sign of weakness or for wimps
- Mediation need **not** prevent parties having their day in Court
- Mediation need **not** disclose your hand
- Mediation need **not** be risky
- Mediation is **not** counseling

# What is Arbitration ?

**Arbitration** is a **legal** process whereby a neutral third party (arbitrator) hears the dispute and issues an award. Arbitration awards are **final and binding** on the parties and can only be challenged in very exceptional circumstances. An arbitration award has a status similar to a judgment and arbitration awards made in Hong Kong are **enforceable** through the courts of 130 or more trading nations including the **Mainland of China**.

# Agreement

An agreement in writing by the parties to submit a dispute between them to arbitration is essential (Article 2 of the New York Convention).

In an international commercial arbitration the arbitration agreement fulfils several important functions. The most vital of these in the present context is that it shows that the parties have **consented** to resolve their disputes by arbitration. This element of consent is essential. Without it, there can be no valid Arbitration.

# Types of Arbitration Proceedings

## *Institutionalized*

An institutional arbitration is one which is administered by one of the many specialist arbitral institutions under its own rules of Arbitration.

## *Ad-hoc*

Ad-hoc arbitrations often take place under the provisions of a submission agreement which itself often establishes the arbitral tribunal and sets out the procedural rules upon which the parties have agreed. An ad-hoc arbitration arises under an arbitration clause.

# The Advantages of Arbitration

- Flexibility of Proceedings
- Confidentiality of Proceedings
- The Speed of Resolution
- Low Cost relative to Litigation
- Legally Binding Nature
- International Enforceability
- Expertise of Arbitrator



# Disadvantages of Arbitration

- A major weakness of the arbitral process is the **limited powers** which the arbitral tribunal may exercise.
- Another perceived drawback of the arbitral process lies in the fact that, in general, it is not possible to bring **multi-party disputes** together before the same arbitral tribunal. Unlike a Court of Law, an arbitral tribunal generally has no power to order **consolidation** of actions.
- If the Arbitrator is an expert within a specified field, he/she may not have the **requisite expertise** when the dispute hinges on difficult points of law.
- The **doctrine of precedent** does not apply. Each case is decided on its merits; and is therefore no guide to future similar cases.

# 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 **130 countries** are signatories to this convention.
- Hong Kong adopted the convention on 21 April 1977 by virtue of the United Kingdom's accession on Hong Kong's behalf. China is also a signatory to the convention and applied it to Hong Kong with effect from 1 July 1997.
- Hong Kong Courts recognize and enforce arbitration awards made in countries which are signatories to the Convention in accordance with the terms of the Convention.
  - Arbitration awards are enforceable in the **Mainland of China** and **vice versa**.

# Why Arbitrate in Hong Kong

- **The World's Freest Economy**
- **The Rule of Law**
- **A Free and Open Society**
- **Accountable Government**
- **International Business Hub**
- **International Financial Centre**
- **International Arbitration and Dispute Resolution Centre**
- **Update Arbitration Law**
- **Available Expertise**
  - including 4 Universities offering Postgraduate studies in Arbitration and Alternative Dispute Resolution courses
- **There is no restriction on Lawyers and anyone else from other jurisdictions acting in Hong Kong as representatives or arbitrators in arbitration.**

# Statistics

## International Arbitration Cases Received

	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
<b>AAA</b>	204	207	187	180	226	320	387	453	510	649	672	N/A	N/A
<b>CIETAC</b>	267	486	829	902	778	723	645	609	543	731*	684*	709*	850*
<b>HKIAC</b>	185	139	150	184	197	218	240	257	298	307	320	287**	280
<b>ICC</b>	337	352	384	427	433	452	466	529	541	566*	593*	580*	561*
<b>JCAA</b>	5	3	4	7	8	13	14	12	10	17	9	14	21
<b>KCAB</b>	30	28	33	18	36	51	59	40	40	65	47	38	46
<b>KLRC</b>	4	3	8	12	6	8	15	19	12	4	N/A	N/A	N/A
<b>LCIA*</b>	21	29	39	49	37	52	70	56	81	71	88	104	87
<b>SIAC</b>	7	15	22	37	25	43	67	67	55	56	46	41	51
<b>STOCKHOLM</b>	44	78	74	70	75	82	92	104	73	74	55	82	N/A
<b>VANCOUVER*</b>	44	52	54	40	57	41	49	60	88	88	71	76	84
<b>VIENNA</b>	100	100	100	100	100	100	100	100	100	100	33	45	50

# HKIAC Statistics

## Arbitration in Hong Kong & Mainland China since September 1985

Year	CIETAC	HKIAC	Totals
1985	37	9	46
1986	78	20	98
1987	143	43	186
1988	174	24	198
1989	189	45	234
1990	238	54	292
1991	274	94	368
1992	267	185	452
1993	486	139	625
1994	829	150	979
1995	902	184	1,086
1996	778	197	975
1997	723	218	941
1998	645	240	885
1999	609	257	866
2000	543	298	841
2001	731	307	1,038
2002	684	320	1,004
2003	709	287	996
2004	850	280	1130

# HKIAC Statistics

Disputes involving Hong Kong International Arbitration Centre since the Centre opened in September 1985

	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
<b>Commercial</b>	1	3	7	5	5	5	16	33	23	17
<b>Construction</b>	5	9	13	5	6	10	19	31	50	53
<b>Joint Venture</b>	0	1	3	1	0	3	2	4	1	5
<b>Shipping</b>	0	0	2	1	14	8	8	74	42	33
<b>Others/Unclassified</b>	3	7	18	12	20	28	49	43	23	42
<b>Totals</b>	<b>9</b>	<b>20</b>	<b>43</b>	<b>24</b>	<b>45</b>	<b>54</b>	<b>94</b>	<b>185</b>	<b>139</b>	<b>150</b>

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	Total
<b>Commercial</b>	24	35	54	76	64	60	71	190	80	87	856
<b>Construction</b>	101	86	94	109	154	204	195	90	137	127	1498
<b>Joint Venture</b>	1	0	3	1	6	1	7	6	7	0	52
<b>Shipping</b>	41	21	30	31	13	18	11	9	28	23	411
<b>Others/Unclassified</b>	17	55	37	23	20	15	23	25	35	41	536
<b>Totals</b>	<b>184</b>	<b>197</b>	<b>218</b>	<b>240</b>	<b>257</b>	<b>298</b>	<b>307</b>	<b>320</b>	<b>287</b>	<b>280</b>	<b>3351</b>

# HKIAC 2004 Statistics

	Arbitration	Mediation
■ Construction	127	8
■ Commercial	87	3
■ Shipping	25	0
■ Joint Venture	0	0
■ Others	0	0
■ <u>Community</u>	<u>0</u>	<u>1</u>
Total	239	12
■ Domain Names	41	0

# HKIAC 2004 Statistics

- Of **239 Arbitrations** (excluding Domain Names)
  - **169 cases** involve **Hong Kong** and **other Countries**
  - **40 cases** involve **non- Hong Kong** parties
  - **30 cases** involve **Hong Kong Parties**
- Disputed amounts range from HK\$20,000 to over HK\$460 million

# HKIAC 2004 Statistics

- Of the 169 cases involving Hong Kong Parties
  - 32 cases from Hong Kong and Mainland of China
  - 137 cases from Hong Kong and other countries
  - 140 cases involve contracts performed in Hong Kong
  - 29 cases involve contracts performed elsewhere

# HKIAC 2004 Statistics

- Of the 40 cases involving non-Hong Kong Parties
  - 20 Mainland of China/Mainland of China
  - 3 United Kingdom/Mainland of China
  - 1 Australia/Mainland of China
  - 3 Singapore/Mainland of China
  - 6 United States of America/Mainland of China
  - 3 Korea/Japan
  - 1 Thai/Indonesian
  - 1 Philippines/Mainland of China
  - 1 Malaysian/Singapore
  - 1 Singapore/Indonesia

# Hong Kong International Arbitration Centre

- The Hong Kong International Arbitration Centre an independent non-profit making limited by guarantee was established in 1985 to provide advisory and support services for the resolution of local and international disputes by mediation and arbitration.
- Twenty-four Council Members – Board of Directors.
- Seven Full-time staff.
- 300 international and local arbitrators of experience and distinction.
- An active mediation body – Hong Kong Mediation Council, a division of the HKIAC.
- Superb facilities to conduct Arbitrations and other forms of dispute resolution procedures.
- Publication of various rules and procedures for arbitrations in Hong Kong including the Securities Arbitration Rules and Small-Claims/Documents-Only Procedures.



# HKIAC Services

- **Information Services**

- *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, adjudication 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 and alternative dispute resolution clauses.
    - Advising on arbitrators' fees.
    - Making any relevant enquiries of and arrangements with arbitration centres elsewhere in the world.

# HKIAC Services

- **Mediation and Arbitration Services**
  - Operates panels of international and local arbitrators of experience and distinction and is happy to make their names available to potential arbitants.
  - Holds lists of accredited mediators in the category of Family and General, and can assist the parties with recommendations for suitable persons.
  - Accredits mediators for use on the Court Annexed Family Mediation Scheme.
  - Administers the mediation service for Hong Kong Government contracts.
  - Authority to appoint arbitrators under both the domestic and international regimes of the Arbitration Ordinance.
  - Authority to decide on the number of arbitrators under the international regime of the Arbitration Ordinance.

# HKIAC Services

- **Online Disputes Resolution Services**

- Domain Name Disputes Resolution Services*

- HKIAC administers the Generic Top Level Domain Name (gTLD, .com, .net .org, etc) Disputes as approved by Internet Corporation for Assigned Names and Numbers (ICANN) under the organisation of Asian Domain Name Dispute Resolution Centre (ADNDRC) (a joint-venture between CIETAC and HKIAC);
    - HKIAC has been approved to handle the following Country Code Top Level Domain Name Disputes: - .hk (Hong Kong), .cn (the Mainland of China), .pw (Palau), .ph (Philippines).

- Registrar Transfer Disputes Resolution Services*

- HKIAC also handles the Registrar Transfer Dispute Resolution Disputes under the organisation of ADNDRC.

- Internet Keyword Disputes Resolution Services*

- HKIAC was approved by China Internet Information Centre (CNNIC) to handle Internet Keyword Disputes.

- HKIAC Webtrust Programme*

- Webtrust Programme is a third party arbitration framework for the use and adoption by on-line merchants to handle consumer disputes on-line. It was jointly promulgated by the HKIAC and the Hong Kong Institute of Certified Public Accounts (HKICPA) in January 2002. The HKIAC is the administrative organisation of the programme, responsible for appointment of arbitrator, cost assessment, documents forwarding and supervision of the award. The HKIAC Electronic Transaction Arbitration Rules was adopted as the rules for the arbitration process of that programme.

# ***Hong Kong the City of Life***

The City where East greets West that offers  
you a truly “**Can-do**” attitude which  
ultimately leads you towards success year  
after year

**Your Partner in Asia**

## ***A Quote***

*World Peace, like community peace, does not require that each man love his neighbor – it requires only that they live together with mutual tolerance, submitting their disputes to a just and peaceful settlement.*

*By John F. Kennedy*



# Thank you

Should you have any questions please feel free to discuss them now or refer to the HKIAC website at

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