

The International Comparative Legal Guide to:

International Arbitration 2008

A practical insight to cross-border International Arbitration work



Published by Global Legal Group with contributions from:

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Paulo Fohlin



Introductory Notes

In the 2007 issue of *International Arbitration*, I dealt with Swedish and mainland Chinese arbitrations as Swedish institutional arbitration under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”) and Chinese institutional arbitration under mainly the China International Economic and Trade Arbitration Commission (“CIETAC”) Arbitration Rules play important roles in China-related international arbitration. In addition, there are reasons to believe that Hong Kong will continue to play a lead role in this respect, and that Hong Kong’s importance in general as a venue for international arbitration will increase.

In March 2008, the International Court of Arbitration of the International Chamber of Commerce (“ICC”) announced that the Court and its Secretariat have decided to open a branch of the Secretariat in Hong Kong with a case management team to administer cases in the Asia Pacific Region under the ICC Rules of Arbitration. This was made in the recognition of the growing importance of the region to ICC dispute resolution services. In addition, ICC will open a liaison office in Singapore dedicated to ICC dispute resolution services, where a Director of ICC Arbitration and Amicable Dispute Resolution Asia will be located (ICC press release 12 March 2008). Welcoming the ICC announcement, Hong Kong’s Secretary of Justice stated that it is Hong Kong’s policy objective to strengthen Hong Kong as a centre for arbitration (Secretary of Justice press release 12 March 2008).

At a conference on “*Resolving Business Disputes in Today’s China*” in Stockholm, in April 2008, presented by Juris Conferences in co-operation with SCC and the Hong Kong International Arbitration Centre (“HKIAC”), and supported by CIETAC, the Beijing Arbitration Commission and the Singapore International Arbitration Centre, the two institutions SCC and HKIAC signed a co-operation agreement to promote arbitration by joint seminars, conferences and educational programmes. SCC and HKIAC also agreed to provide assistance to each other with respect to, *inter alia*, recommendations of arbitrators and advice on arbitration developments. In addition, where parties to arbitrations under the SCC Rules or under HKIAC proceedings in Hong Kong wish to conduct hearings or meetings in Hong Kong or Stockholm, respectively, HKIAC and SCC undertook to assist in arranging facilities and support. Interestingly, the co-operation agreement provides that the parties shall explore ways in which they may jointly assist in the administration of investor-state arbitrations relating to Chinese parties.

Briefly on Hong Kong’s Legal System and Relation to Mainland China

Since the handover of Hong Kong’s sovereignty to China in 1997, Hong Kong’s “constitution” is contained in The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (“the Basic Law”). The Basic Law provides for a separate legal system in Hong Kong, as part of the “one country, two systems” principle, which safeguards the continued observance of the rule of law in Hong Kong. Under the Basic Law, Hong Kong is an inalienable part of the People’s Republic of China, but the National People’s Congress authorises Hong Kong to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions laid down in the Basic Law. The laws previously in force in Hong Kong, *i.e.*, the common law, rules of equity, ordinances, subordinate legislation and customary law, are maintained, except for any contravening the Basic Law, and subject to any amendment by the Hong Kong legislature. Hong Kong courts may also refer to precedents of other common law jurisdictions (Articles 1, 2, 8, 18, 19 and 84 of the Basic Law).

As for the important question on independence of the judiciary, Hong Kong courts shall exercise judicial power free from any interference, and members of the judiciary shall be immune from legal action in the performance of their judicial functions (Article 85 of the Basic Law). The judges are appointed by Hong Kong’s Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors, and a judge of a Hong Kong court may only be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal (*i.e.*, Hong Kong’s highest court). The Chief Justice of the Court of Final Appeal may be investigated only for inability to discharge his or her duties, or for misbehaviour, by a tribunal appointed by the Chief Executive, and may be removed by the Chief Justice on the recommendation of the tribunal and in accordance with the procedures prescribed in the Basic Law. In addition, in case of appointment or removal of judges of the Court of Final Appeal and the Chief Judge of the High Court (which comprises the Court of First Instance and the Court of Appeal), the Chief Executive shall obtain the endorsement of the Legislative Council (*i.e.*, Hong Kong’s legislature), and report the appointment or removal to the Standing Committee of the National People’s Congress for the record (Articles 48 (6), 88 - 90 of the Basic Law). The Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court shall be Chinese citizens who are permanent Hong Kong residents. Otherwise judges may be recruited from

other common law jurisdictions, and the Court of Final Appeal may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal (Articles 82, 90 and 92).

In General on Arbitration in Hong Kong

As a former British colony Hong Kong has long experience in arbitration. A couple of years after the establishment of Hong Kong as a colony, the Governor initiated the passage of the Arbitration Ordinance of 1844. However, with the arrival of the first Chief Justice in the same year and the subsequent establishment of the Supreme Court, the Ordinance was annulled. Then, the Civil Administration of Justice (Amendment) Ordinance 1855 attempted to address arbitration in a comprehensive manner. After other changes, Hong Kong adopted its Arbitration Ordinance in 1963, generally based on the English Arbitration Act 1950, and which formed the foundation for Hong Kong's current Arbitration Ordinance (Chapter 341 of the Laws of Hong Kong) ("the Ordinance"). Contrary to the current Ordinance, it provided for a unitary regime applicable to both domestic and international arbitration (David Sandborg, *Arbitration in Hong Kong*, p. 62 *et seq.*, in *International Commercial Arbitration in Asia*, Second Edition, 2006).

Different from mainland China, Hong Kong recognises not only institutional arbitration on its territory but also *ad hoc* arbitration. As just mentioned, the current Ordinance provides for two different arbitration regimes concerning domestic and international arbitration. As for international arbitrations, the Ordinance refers to the UNCITRAL Model Law on International Commercial Arbitration 1985 ("the Model Law"), which became effective in Hong Kong in 1990, as modified or supplemented. Section 34C(1) of the Ordinance, providing for rules applicable to international arbitration in "Part IIA" of the Ordinance, refers to Chapters I to VII of the Model Law. Chapter VIII of the Model Law on "Recognition and enforcement of awards" is thus not part of the Ordinance as recognition and enforcement is governed by rules with the same substantial contents, with some supplementations, distinguishing between Chinese "Mainland awards" (Section 40) and New York "Convention awards" (Sections 41 - 46). There is also a "Memorandum of Understanding on the Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Mutual Enforcement of Arbitration Awards", and, subsequently to a clarification sought by Hong Kong's Secretary of Justice, China's Supreme People's Court has declared in a letter in October 2007 that awards made in *ad hoc* arbitrations in Hong Kong are enforceable in China. In addition to Part IIA of the Ordinance (*i.e.*, substantially the Model Law), "Part IA", containing provisions not found in the Model Law, is applicable to international as well as domestic arbitration (Section 2AD of the Ordinance). Interestingly, the Hong Kong High Court has established a "Construction and Arbitration list" of judges which deal with, *inter alia*, matters related to international arbitrations in, for instance, challenges of arbitral awards.

To make the law on arbitration in Hong Kong more user-friendly to practitioners from civil law as well as common law jurisdictions, there is a proposal, *inter alia*, to abolish the distinction between domestic and international arbitration in a new Arbitration Ordinance (Section 5 (1) of the draft Ordinance, *Consultation Paper, Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill, Department of Justice, December 2007*, p. ix, p. 3, www.doj.gov.hk/eng/public/pdf/2007/arbitration.pdf). The draft Ordinance clearly follows, in a more user-friendly way, each of the Articles of the Model Law, providing for supplements or modifications where appropriate, making it easy to distinguish the

standard Model Law contents from the rather extensive additional contents introduced by the Hong Kong legislature. Under the proposal, the revisions on interim measures to Article 17 of the Model Law as adopted by UNCITRAL on its 39th session in 2006, and the additions of the new Articles 17A to 17J to the Model Law thereon, are substantially included or otherwise provided for (Consultation Paper, p. 35 - 39). It is not possible for me to cover the proposed amendments to what follows from the Model Law exhaustively here on, *inter alia*, the reference of interpleader issues to arbitration, the use of an even number of arbitrators and of umpires, the appointment of Hong Kong judges as arbitrators, the appointment of mediators, settlement agreements to be treated as enforceable awards, arbitrators' review of awards of costs, and taxation of costs, etc. Certain provisions in the current Ordinance only applicable to domestic arbitration are retained in the proposal as opt-in provisions for parties wishing to be bound thereby, and in some circumstances related to domestic disputes those provisions will automatically apply for six years after the commencement of the new Ordinance (Consultation Paper, p. xiv, p. 69).

In General on Arbitration in Sweden

As I touched upon in the 2007 issue, already the Law from the 1300s of the City of Visby, then a hub of Hanseatic trade over the Baltic Sea, contained provisions on contracts in which the parties agreed that a dispute arisen between them would be determined by entrusted persons (Finn Madsen, *Commercial Arbitration in Sweden*, Second Edition, 2006, p. 14). Following other Swedish acts also containing provisions on arbitration, the first Swedish complete stand-alone Arbitration Act was adopted in 1887. It was replaced in 1929 by two acts; the Arbitration Act, and the Foreign Arbitration Agreements and Awards Act. The current Swedish Arbitration Act entered into force in 1999, substantially based on the previous two acts and uncodified law. The Swedish legislature carefully considered the Model Law when drafting the Act, which does not differ much from the Model Law, as I described in the 2007 issue when comparing also with the Chinese Arbitration Law. However, there are some differences, and the Swedish Act does not follow the layout of the Model Law. In addition, like the Hong Kong Ordinance, the Swedish Act provides for many issues not covered by the Model Law.

In Sweden, *ad hoc* arbitration is more common than institutional arbitration, at least as regards domestic arbitration. There are also many international *ad hoc* arbitrations taking place in Sweden, including investment treaty arbitrations.

Briefly on HKIAC

HKIAC, a non-profit company incorporated in Hong Kong and limited by guarantee (cf. Section 2 of the Ordinance, and www.hkiac.org), was established in 1985 by business and professional people in Hong Kong. It has been funded by the business community and the Hong Kong Government, but it is independent and financially self sufficient. The administration of HKIAC's arbitration activities is conducted by its Council of about 20 members of different nationalities, and through its Secretary-General.

HKIAC has adopted its own complete arbitration rules for domestic arbitrations, only, and its recommended arbitration clause for domestic arbitration accordingly provides that disputes shall be referred to arbitration at HKIAC in accordance with its Domestic Arbitration Rules. There is also a guide for the assistance of parties and arbitrators in domestic arbitrations. For international arbitrations HKIAC's recommended arbitration clause provides, *inter alia*, that disputes shall be settled in accordance with the

UNCITRAL Arbitration Rules 1976, and that the arbitration shall be administered by HKIAC in accordance with its Procedures for the Administration of International Arbitration. Those Procedures provide, *inter alia*, that the UNCITRAL Arbitration Rules will apply, with such (few) modifications as noted in the Procedures.

As presented by HKIAC's Secretary-General at the above mentioned Stockholm conference, there are now also draft "Hong Kong International Arbitration Centre Administered Arbitration Rules" intended to apply to both domestic and international arbitration, and substantially based on the UNCITRAL Arbitration Rules. The draft, which is to be approved by the HKIAC Council, probably in September 2008, is intended to supersede the HKIAC Procedures.

In addition, there are other HKIAC rules and recommended clauses, such as, *inter alia*, the Mediation Clause for Domestic Mediation, the HKIAC Challenge Rules on challenges of arbitrators, the Hong Kong Maritime Arbitration Clause, and the HKIAC Securities Arbitration Rules. Then, there are the Short Form Arbitration Rules, the HKIAC Electronic Transaction Arbitration Rules, the Semiconductor Intellectual Property Arbitration Procedure Rules, the HKIAC Adjudication Rules, and the Documents Only and Small Claims Procedures. HKIAC further provides online dispute resolution services in a wide variety of areas and for, *inter alia*, various domain names.

Briefly on the SCC Arbitration Institute

The Stockholm Chamber of Commerce was established in 1902, as one of the Swedish chambers of commerce, to promote the development of a good business climate (www.sccinstitute.se). It is a private organisation with 2,400 member corporations from the Stockholm and Uppsala regions. SCC founded the Arbitration Institute in 1917, as an independent entity within SCC. The Arbitration Institute operates through a board of 12 members (six Swedes and six foreigners), and through its secretariat with a staff of nine members, including the Secretary-General.

Over time, the SCC Institute received also international arbitrations, and in 1976, in connection with the conclusion of the US-USSR Optional Clause Agreement (which I described in the 2007 issue), the Institute adopted its first arbitration rules especially adapted to international arbitration. Under the SCC Model Arbitration Clause, disputes shall be settled in accordance with the Arbitration Rules of the Arbitration Institute of the SCC. The current Arbitration Rules, available in English, Chinese, Russian, French, German, and Swedish, which, like the previous rules, apply to both domestic and international arbitration, became effective in January 2007.

Like HKIAC, SCC has other additional model clauses and rules, such as the Rules of the Mediation Institute of the SCC, the Rules for Expedited Arbitrations, the Insurance Arbitration Rules, the Procedures and Services under the UNCITRAL Arbitration Rules, the Combined Expedited Rules and SCC Rules, the Combined Mediation Rules, Expedited Rules and SCC Rules, and the Arbitrator's Guidelines, including an SCC Model Award.

Some Comparisons Between International Arbitrations in Hong Kong and Sweden

I will not go into the well known contents of the Model Law in general as both Sweden and Hong Kong, both bound by the New York Convention, provide for the modern fundamental rules of international arbitration found in the Model Law, such as, *inter alia*, the rules on competence-competence, and on separability of the arbitration agreement from the main agreement, and the rules to the effect that an arbitral award is not subject to court review on its

merits. The following is of course not an exhaustive comparison or list of differences between *ad hoc* arbitrations in the two jurisdictions, and between HKIAC and SCC institutional arbitrations. As regards domestic arbitration, which I will not deal with at all, there are some substantial differences following mainly from the previous English Arbitration Acts' influence on Hong Kong's domestic arbitration regime.

Number and appointment of arbitrators

Under Article 10 (2) of the Model Law, which is not adopted by Hong Kong, failing a party agreement, there shall be three arbitrators. In Hong Kong, if the parties do not agree, in international arbitrations, the number is to be "either 1 or 3 as decided by *HKIAC*" (Section 34C(5) of the Ordinance). Further, where the agreed mechanism for appointing an arbitrator is not followed by a party, or a party designated appointing authority fails to act, *HKIAC* has the authority to appoint arbitrators, and *HKIAC* may make rules to facilitate the performance of these functions, which take effect when the Chief Justice has approved them. *HKIAC* is thus the authority competent by law to perform the functions referred to in Article 11 (3) and (4) of the Model Law (Section 34C(3) of the Ordinance). These rules are proposed to remain in the new Ordinance (Section 13 (2) and (3), and Section 23 (1) and (3), Consultation Paper, p. 14 *et seq.*, p. 25 *et seq.*).

In *HKIAC* arbitrations, the UNCITRAL Arbitration Rules referred to in the *HKIAC* Procedures, however, provide that three arbitrators shall be appointed, unless the parties agree that there shall be only one (Article 5). Under the Procedures, *HKIAC* shall as appointing authority follow the list procedure described in Article 6 of the UNCITRAL Arbitration Rules, and shall draw the names from the *HKIAC* Panel of Arbitrators. Under the draft *HKIAC* Rules, *HKIAC* shall, like in the Ordinance, decide whether there shall be one arbitrator or three arbitrators. The draft Rules introduce that all designations of arbitrators shall be subject to confirmation by *HKIAC*. Under the draft Rules, there is no list procedure.

HKIAC has adopted the Arbitration Rules (Appointment of an Arbitrator or an Umpire) to be followed when *HKIAC* carries out the relevant functions. Under those rules an Appointment Advisory Board oversees the operation of the rules. *HKIAC* has established a panel of presently about 270 international and local arbitrators (and also holds a list of accredited mediators). Inclusion in the panel is subject to certain publicly available criteria. There is also a list of presently about 50 arbitrators resident in Hong Kong who satisfy certain qualifications while not (yet) possessing such experience as arbitrators as to enable them for inclusion in the panel.

Under the Swedish Arbitration Act, absent a party agreement, the arbitrators shall be three (Sections 12 and 13 of the Act). The court of first instance shall appoint arbitrators when necessary, unless the parties have agreed otherwise (Sections 12, 14 - 16). Also in SCC arbitrations, absent a party agreement, the tribunal shall consist of three arbitrators, unless the SCC Board decides that there shall be a sole arbitrator (Article 12 of the SCC Rules). Further, the SCC Board carries out the functions on appointment of arbitrators when necessary (Article 13). SCC has no formal panel or list of arbitrators when SCC appoints arbitrators under the SCC Rules, or the Procedures and Services under the UNCITRAL Arbitration Rules, or otherwise.

Foreign counsel

The Hong Kong Ordinance provides, "for the avoidance of doubt", that restrictions in the Hong Kong Legal Practitioners Ordinance do

not apply to arbitration proceedings, the giving of advice and the preparation of documents for the purpose of arbitration proceedings or any other thing done in relation to arbitration proceedings, except in connection with court proceedings relating to an arbitration agreement or arbitration (Section 2F). This is also provided for in the draft Ordinance (Section 64). Thus, local as well as overseas counsel (whether qualified or not) are allowed to act without any restrictions in arbitrations in Hong Kong (Consultation Paper, p. 48 *et seq.*), but not, for instance, in a challenge brought to the court of an arbitral award made.

There are no such restrictions concerning counsel in arbitration in Sweden, either. In Swedish court proceedings, if counsel is engaged, he or she must speak Swedish and reside in Sweden or in another state within the European Economic Area, or in Switzerland, *unless the court finds in the circumstances that other counsel may be appropriately engaged*. A party, but not counsel, not able to speak or understand Swedish, has a right to an interpreter. Counsel in court proceedings need not be a member of the Swedish Bar Association, or indeed any Bar Association, foreign or domestic. (There is no distinction in Sweden between barristers and solicitors.) However, any counsel in court proceedings must be “suitable”, and the court may dismiss any counsel it finds unsuitable (Code of Judicial Procedure, Chapter 12, Sections 2 and 5).

Confidentiality

Under the draft Hong Kong Ordinance, unless otherwise agreed, a party shall not disclose any information relating to the arbitral proceedings or the award, unless the disclosure is contemplated by the Ordinance, or made under a legal obligation to any government or regulatory body, court or tribunal, or the disclosure is made to a professional or any other adviser (Section 18). Likewise, under the draft HKIAC Rules, the parties (as well as the arbitrators and HKIAC) undertake to keep all matters relating to the arbitration confidential.

There is no provision on confidentiality in the Swedish Arbitration Act, and the SCC Rules’ provision on confidentiality (Article 46) applies to the SCC Institute and the arbitrators only, not to the parties, although it was discussed when the current SCC Rules were adopted whether the scope of the confidentiality provision ought to be extended to the parties. (However, in circumstances, under uncodified Swedish law, a party’s breach of confidentiality may amount to a breach of the general duty of loyalty between contracting parties, including parties to an arbitration agreement.)

Closed court proceedings

Proceedings in the Hong Kong Court of First Instance and the Court of Appeal concerning an arbitration shall be heard otherwise than in open court, on the application of a party (Section 2D of the Ordinance). The court shall, on a party application, give directions as to what information, if any, relating to the proceedings that may be published. Further, the court shall not, absent a party agreement, permit information to be published unless the information would not reveal any matter, including the identity of any party, which a party reasonably wishes to remain confidential. If a judgment in such a case is of major legal interest, the court shall direct that reports of the judgment may be published in law reports. However, if a party reasonably wishes to conceal any matter, including the fact that he was a party, directions shall be given on an action to be taken to conceal that matter, and if a report would likely reveal that matter the court shall direct that no report shall be published until after an appropriate time not exceeding ten years (Section 2E). The draft Ordinance does not make it mandatory to hold closed

proceedings on a party application. It provides that the court, upon a party application, shall order the proceedings to be heard otherwise than in open court unless the proceedings ought to be heard in open court (Section 16). The new provision on closed court proceedings is intended to apply also to proceedings in the Court of Final Appeal (Consultation Paper, p. 17 *et seq.*) The provision on restrictions on reporting of closed court proceedings remains the same under the draft (Section 17, Consultation Paper, p. 18).

There is no similar exception in Sweden concerning arbitration related matters to the main rule under Chapter 5 of the Swedish Code of Judicial Procedure according to which court proceedings are public.

Costs

The Hong Kong Ordinance provides that a tribunal may include in an award directions with respect to the “costs of the arbitration proceedings (including the fees and expenses of the tribunal)” (Section 2GJ). This is also provided for in the draft Ordinance, which in addition provides that the tribunal may order costs to be paid forthwith or at another specified time where a party makes or opposes a request for any order or direction and the request is without merit (Section 75).

As for HKIAC arbitrations, the UNCITRAL Arbitration Rules provide that the term “costs” includes “only” the arbitrators’ fees and expenses, the costs of expert advice and other assistance required by the tribunal, the expenses of witnesses, and the reasonable costs for “*legal representation and assistance*” of a party (Articles 38 and 40 (2)). The HKIAC Procedures state that the fees for the arbitrators appointed by HKIAC are generally calculated by reference to work done and charged at hourly/daily rates (Article 8). The draft HKIAC Rules keep the current definition of the term “costs”. However, under the proposed Rules, the arbitrators’ fees will be determined, at the option of the parties, either in conformity with a Schedule of Fees or in accordance with fee arrangements agreed with the arbitrators. Failing the parties’ choice, the fees shall be determined in accordance with arrangements agreed with the arbitrators.

Under the Swedish Arbitration Act, the arbitrators are entitled to reasonable compensation for work and expenses (Section 37), and the arbitrators may order a party to compensate the other party’s costs (Section 42). Thus, as there is no limitation under the Swedish Act to a party’s costs for legal representation and assistance, the right to compensation includes compensation for work spent by the party itself (*i.e.*, its directors and employees if the party is a juridical person) by reason of the arbitration. In an SCC arbitration, absent agreement otherwise, the fees of the arbitrators are determined in accordance with a Schedule of Costs (Article 43 of the SCC Rules). As regards the costs incurred by the parties, it is expressly provided that the tribunal may order a party to pay “*any reasonable costs incurred by another party, including costs for legal representation*” (Article 44). At www.sccinstitute.com/uk/Calculator there is a “Calculator” for the estimation of the costs for a potential tribunal in SCC arbitrations.

Further, a Hong Kong arbitral tribunal may, absent a party agreement, direct that the recoverable costs of the arbitration are limited to a specific amount. Such a direction can be varied during the arbitration if the variation can be made sufficiently in advance so that the limit can be taken into account by the parties (Section 2GL of the Ordinance). A provision thereon is found also in the draft Ordinance (Section 58, Consultation Paper, p. 44 *et seq.*) No such provision is contained in the Swedish Arbitration Act or the SCC Rules.

Ascertaining the facts

Under the Hong Kong Ordinance, the tribunal may decide whether and to what extent it should itself take the initiative in ascertaining the facts (and the law) relevant to the arbitration, subject to any party agreement to the contrary (Section 2GB(6) and (9)). Such a provision is kept in the proposed new Ordinance (Section 57 (7), Consultation Paper, p. 44). In HKIAC arbitrations, the UNCITRAL Arbitration Rules provide that the tribunal may require the parties to produce evidence (Article 24.3), thus without (explicitly) stating that there has to be a party request thereon. The tribunal may further appoint experts to report to it on specific issues (Article 27.1). This is substantially kept in the draft HKIAC Rules, modified to the effect that the tribunal, after consulting with the parties, may appoint experts to assist it in the assessment of evidence.

The Swedish Arbitration Act provides that the parties shall supply the evidence, and that the arbitrators may however appoint experts unless both parties object (Section 25). The SCC Rules provide that the tribunal, *at the request of a party*, may order a party to produce evidence which may be relevant to the outcome of the case (Article 26 (3)). Similar to the HKIAC draft Rules, the SCC Rules provide that the tribunal, after consultation with the parties, may appoint experts to report to it on specific issues (Article 29 (1)).

Oaths and affirmations, and production of evidence

Absent a party agreement to the contrary, arbitrators sitting in Hong Kong may administer oaths to or take the affirmations of witnesses and parties, and direct the attendance before the arbitrators of witnesses in order to give or produce evidence, to the extent that such production could be required in civil court proceedings (Section 2GB(7 - 9 of the Ordinance). This is provided for in the draft Ordinance as well (Section 57 (8) and (9), Consultation Paper, p. 44). Also the Hong Kong Court of First Instance may order a person to attend proceedings before an arbitral tribunal to give or produce evidence (Section 2GC(3) and (5)). The Court of First Instance may issue such an order under the draft Ordinance as well (Section 56 (2) and (4), Consultation Paper, p. 44).

In Sweden, arbitrators may not administer oaths or take the affirmations of witnesses or parties. Nor may arbitrators impose conditional fines or otherwise use compulsory measures to obtain requested evidence (Section 25 of the Arbitration Act). If a party wants a witness, expert or a party to be heard under oath or affirmation, the party, after permission from the arbitrators, may submit an application to the court of first instance. This applies also when a party wants a party or another person to be directed under an enforceable order to present documents or objects as evidence. If the arbitrators find that the party request is justified, they shall grant permission to the party to apply to the court. The court shall then approve the application, if it is legally sound. The Code of Judicial Procedure applies to such approved measures, which means, *inter alia*, that the examination under oath or affirmation takes place before the court. The arbitrators are called upon by the court to attend the examination, and they shall be given an opportunity to put questions to the heard person. If an arbitrator does not attend, this does not prevent the examination from taking place (Section 26 of the Arbitration Act). It is, however, extremely unusual in practice that a party to arbitrations in Sweden requests this kind of court assistance.

Decisions and awards

Under the Hong Kong Ordinance, not only an award but also an order or direction made by an arbitral tribunal is enforceable, with the leave of the Court of First Instance, in the same way as an order or direction of the court (Section 2GG). A similar provision is found in the draft Ordinance (Section 62, Consultation Paper, p. 47 *et seq.*) In Sweden, contrary to court “decisions” (and of course court “judgments”), arbitral tribunals’ decisions not made in an award are not enforceable. This follows, *inter alia*, from Chapter 3 of the Swedish Enforcement Code.

Under the Swedish Arbitration Act (like in the Model Law and the Hong Kong Ordinance), the substantive issues submitted to the arbitrators are (of course) determined in an “award”. However, under the Swedish Act and the SCC Rules, if the arbitration is terminated without any determination of the substantive issues, this is also made in an “award” (Section 27 of the Act and Article 39 (2) of the SCC Rules). In the Model Law, Article 32 (2), and the Ordinance, it is implied that the arbitration is terminated by an “order” - not an “award” - when the substantive issues are not dealt with by the arbitrators.

Consolidation

In SCC arbitrations, the SCC Board may, upon a party request, decide to consolidate arbitrations if a Request for Arbitration concerns a “*legal relationship*” in respect of which an SCC arbitration between “*the same parties*” is already pending (Article 11 of the SCC Rules). This, although it is restricted to the same parties, is thus intended to be more extensive than the SCC Rules’ provision on amendments of claims, under which the case, as amended, must be comprised by the arbitration agreement on which the pending arbitration is based (Article 25). The Swedish Arbitration Act has no provision on consolidation other than what follows from its substantially identical provision on amendments of claims (Section 23).

Although, under the Ordinance, the Hong Kong Court of First Instance has wide powers to consolidate domestic arbitrations (Section 6B), there is no provision in the Ordinance (or the Model Law), or the draft Ordinance, or the draft HKIAC Rules, or in the UNCITRAL Arbitration Rules applicable to international HKIAC arbitrations, on consolidation of international arbitrations, and Article 20 of the UNCITRAL Arbitration Rules also provide that a case, as amended, must not fall outside the scope of the arbitration agreement.

Negative rulings on jurisdiction

Pursuant to the Model Law, the Hong Kong Ordinance, and the draft Ordinance, the arbitral tribunal may rule on a plea that it does not have jurisdiction either as a preliminary question or in an award on the merits, and if the tribunal rules as a *preliminary question* that it *has* jurisdiction, any party may request the court to decide the matter (Article 16 (3) of the Model Law, Section 35 (1) of the draft). Thus, the respondent (and the claimant) has the right to appeal from that positive ruling as a preliminary question on jurisdiction. Further, under Article 34 of the Model Law, the current Ordinance, and Section 82 (1) of the draft Ordinance, an *arbitral award* may be set aside by the court if the party making the application furnishes proof that the arbitration agreement was *not* valid, or that the award deals with a dispute *not* contemplated by or *not* falling within the terms of the submission to arbitration, or contains decisions on matters *beyond* the scope of the submission to arbitration. Thus, again, the respondent has the right to challenge a positive ruling made in the award on jurisdiction. Section 35 (4) of the draft

Ordinance contains an addition to Article 16 of the Model Law to the effect that a ruling of the tribunal that it does *not* have jurisdiction to decide a dispute shall be subject to no appeal. The draft also adds that, if the tribunal rules that it does not have jurisdiction to decide a dispute, the court shall, “if it has jurisdiction”, decide that dispute (Section 35 (5)).

Contrary to the above, in Sweden, arbitrators’ negative (as well as positive) rulings on jurisdiction are subject to appeal (Sections 27 and 36 of the Arbitration Act). I believe this to be more attractive to potential claimants than a regime not providing for such court review. Not to allow court review of negative rulings on jurisdiction in international arbitration risks frustrating one of the main typical purposes of the arbitration agreement. A typical purpose of an international arbitration agreement is that none of the parties shall be able to bring the dispute to its national courts. Therefore, typically, the parties choose to arbitrate in a neutral third state. That state frequently has no connection with the merits of the dispute. If the arbitrators wrongly find that they have no jurisdiction, and there is no way to challenge that determination, the claimant is denied access to the agreed justice through an international arbitration in the third neutral state administered by a panel of international arbitrators. Typically, only a national court of the home state of one of the parties would then have jurisdiction to try the dispute, which was what the parties tried to avoid by concluding their arbitration agreement. Further, in investment treaty arbitrations, the harm done to the claimant investor if there is no right to attack an incorrect finding of the arbitrators that they lack jurisdiction is even greater. If the arbitrators wrongly dismiss the alleged investor’s treaty claim for lack of jurisdiction there is no national court at all before which the claimant can bring his treaty claim against the respondent host state in order to uphold the substantive protection provided for in the treaty. It is another question - not very comforting to the typical claimant - whether the claimant can bring another kind of claim than a treaty claim against the respondent state in, for instance, the respondent state’s own courts based on that state’s national laws or a contract, if any, with that state. When a potential claimant investor has the ability to influence where an investment treaty arbitration will take place, I would probably not recommend any seat that does not provide for court review of arbitrators’ negative determinations on jurisdiction, if there is any risk that the respondent state would object to the jurisdiction of the arbitral tribunal.

To add to Hong Kong’s attractiveness, I therefore think that Hong Kong ought to provide for court review of negative rulings on jurisdiction in its new Ordinance, like the Model Law countries Scotland and New Zealand have done by deleting the four words “*that it has jurisdiction*” from the second sentence of Article 16 (3) of the Model Law. As a negative ruling on jurisdiction *included in an award* is not covered by Article 16 (3), an addition would also have to be made to Article 34 of the Model Law (Section 82 of the draft Ordinance) to the effect that, if a part of the award contains a ruling that the tribunal does *not* have jurisdiction to decide a matter, that ruling may be changed by the court, if a party furnishes proof that the tribunal had jurisdiction to decide the matter.

The law applicable to the arbitration agreement

The Model Law, the Hong Kong Ordinance and the draft Ordinance are silent on the law applicable to the arbitration agreement, whereas the Swedish Act (Section 48) provides that, in the absence of a party agreement thereon, which shall be upheld, the law of the state where the arbitration has been conducted or shall be conducted according to the parties’ agreement shall apply to the arbitration agreement.

Dismissal and prohibition due to claimant’s delay

An arbitral tribunal in Hong Kong, or the Court of First Instance if no tribunal has been constituted, may dismiss a party’s claim and prohibit the party from commencing further arbitration proceedings on the claim, if the party has unreasonably delayed in bringing or prosecuting the claim. This requires that the delay gives rise to, or is likely to give rise to, a substantial risk that the issue in the claim will not be resolved fairly, or that the delay has caused, or is likely to cause, serious prejudice to the other party/parties (Section 2GE of the Ordinance). This is also kept, but narrowed down, in the draft Ordinance, to the effect that the provision is applicable when a party, *after the commencement of arbitral proceedings*, delays in pursuing the claim (Section 60, Consultation Paper, p. 45 *et seq.*) There is no similar provision in the Swedish Arbitration Act or the SCC Rules.

Arbitrators’ supplementation of the contract

The Swedish Arbitration act provides that the parties may let the arbitrators supplement contracts in addition to what follows from contract interpretation (Section 1, second paragraph). No such provision is found in the Model Law, the Hong Kong Ordinance or the draft Ordinance, although such a provision was discussed when the Model Law was drafted. According to the Swedish preparatory works, such a mandate of the arbitrators ought to include the supplementation of the contract, *irrespective of whether or not this may be regarded as administration of justice*, and the parties ought to be able to give the arbitrators, for instance, the right to determine the price or other contractual terms in a long term contract (Government Bill 1998/99:35 New Arbitration Act, p. 62). Thus, the provision is applicable, for instance, when parties to a long term contract have the right under their contract to have the price or another contractual term amended under a renegotiation clause, and, absent a party agreement reached in such a negotiation, the right to let a neutral person make a determination on the amendment. Accordingly, provided that the parties have given a third person the mandate to amend the contract, beyond what follows from an application of the contract and the applicable substantive law, that amendment of the third person shall be recognised as an arbitral award (if it satisfies the other ordinary requirements on an award), irrespective of whether or not the activity resulting in the amendment would otherwise qualify as judicial.

Exclusion agreement on grounds for challenge

Under the Swedish Arbitration Act, if none of the parties is domiciled or has a place of business in Sweden, they are allowed to enter into an express exclusion agreement regarding the grounds for setting aside an award contained in Section 34 of the Act (Section 51). Section 34 has substantially the same contents as Article 34 of the Model Law applicable under the Hong Kong Ordinance, except for that Section 34 does not cover non-arbitrability, ordre public, and the formal requirements on an award, which grounds are dealt with in the invalidity provision in Section 33 of the Act. There is no such exclusion provision regarding grounds for challenge in the Model Law, the Hong Kong Ordinance or the draft Ordinance.

Conclusion

In general, as one would expect considering Sweden’s and Hong Kong’s positions as venues for international arbitrations, there are only minor differences between their modern international

arbitration regimes in respect of *ad hoc* as well as SCC and HKIAC administered arbitrations, and there are good reasons to rely on the capability of SCC as well as HKIAC, and of the courts in both jurisdictions, in arbitration related matters. The difference on court review of negative rulings on jurisdiction, which is available only in Sweden, may in some circumstances give the claimant, when the dispute has arisen, especially an investor in an investment treaty dispute, or potential claimant, when the contract is negotiated, reasons to try to locate the arbitration or potential arbitration, if possible, to Sweden. The rules on closed court proceedings in Hong Kong in arbitration related matters, and the draft Hong Kong rules on confidentiality applicable to the parties, are on the other hand probably more attractive to the typical parties to international arbitrations than what follows from the Swedish Act and the SCC Rules thereon.



Paulo Fohlin

Vinge
2003 Hutchison House
10 Harcourt Road, Central
Hong Kong

Tel: +852 2523 6149
Fax: +852 2810 5343
Email: paulo.fohlin@vinge.se
URL: www.vinge.se

Education: LL M 1988, Uppsala University, Sweden. Studies in, *inter alia*, contracts and torts 1985 at University of Minnesota Law School, USA.

Career/Positions: Teacher in, *inter alia*, contracts and sales law at Uppsala University 1987 - 1988. Associate Vinge 1988. Partner Vinge 1997. Fellow of the Chartered Institute of Arbitrators (FCIArb). Diploma in International Commercial Arbitration with the Chartered Institute of Arbitrators (DiplCARb). Member ICC Hong Kong Standing Commission of Arbitration, CIArb East Asia Branch Committee (co-opted), Editorial Board of Asian Dispute Review, ICC Swedish Arbitration Committee, International Bar Association (Arbitration and Litigation Committees), Swedish Arbitration Association, Arbitration Club of Gothenburg, Swedish Bar Association. Foreign lawyer Hong Kong Law Society.

Recent Experience: Counsel to a Chinese client in a pre-arbitration dispute against a European supplier of machinery under a contract governed by CISG providing for SCC arbitration in Stockholm. Adviser concerning the enforcement of an ICC award made in France against a third party sovereign state. Counsel in two pre-arbitration disputes against a European supplier and an Asian buyer, respectively, concerning the purchase and sale of aircraft governed by Swedish law providing for SCC arbitration. Adviser to an international law firm acting for a group of investors in an SCC investment treaty arbitration against a sovereign state. Adviser to an international law firm acting in a pre-arbitration dispute concerning the sale, construction and delivery of ships against, *inter alia*, a sovereign state, governed by Swedish law providing for *ad hoc* arbitration in Sweden. Counsel in an international *ad hoc* shipping arbitration in Sweden against a Swedish respondent. Adviser to an international law firm acting in an SCC multi party investment arbitration in Stockholm against, *inter alia*, a sovereign state (*Newmont Mining v. the Republic of Uzbekistan et al.*), *Global Arbitration Review briefing 3 August 2007*. Counsel in a multi party LCIA international arbitration in London concerning contracts concluded and businesses run in the Asia Pacific Region. Counsel to a UK investor bringing a challenge in the Swedish courts to an award made under the UK-Czech bilateral investment treaty (*Nagel v. the Czech Republic*), *Stockholm International Arbitration Review 2006:2*. Counsel in an international ICC arbitration in Sweden regarding rolling stock construction contracts. Counsel to a Dutch investor resisting a challenge in the Swedish courts to an award made under the Dutch-Czech bilateral investment treaty and the UNCITRAL Arbitration Rules (*CME v. the Czech Republic*), *Stockholm Arbitration Report 2003:2*. Sole arbitrator in a domestic *ad hoc* arbitration in Sweden regarding software co-operation contracts. Party appointed arbitrator in a domestic *ad hoc* arbitration concerning the sale of a hotel business. Party appointed arbitrator in a domestic *ad hoc* arbitration concerning the sale of a business within the manufacturing industry.

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