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Hong Kong

INTERNATIONAL ARBITRATION

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This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in Hong Kong.

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HONG KONG INTERNATIONAL ARBITRATION



1. What legislation applies to arbitration in your country? Are there any mandatory laws?

The Arbitration Ordinance (Cap. 609) (the “Ordinance”) applies.

There are limited mandatory rules and examples include:

- Provisions of the Limitation Ordinance (Cap. 347) (“LO”) or any other limitation enactments;
- Competence of the tribunal to rule on its own jurisdiction;
- Requirement that the tribunal must treat parties equally;
- Court’s power to order recovery of tribunal’s fees; and
- Court’s power to set aside an award.

This list is not exhaustive.

2. Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?

Hong Kong is treated as a Contracting State to the New York Convention (“Convention”). Hong Kong is subject to the same reservations as the PRC, which has made two reservations, namely the reciprocity reservation and commercial reservation.

3. What other arbitration-related treaties and conventions is your country a party to?

The Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”) applies to Hong Kong.

Hong Kong has also entered into 22 Bilateral Investment Agreements. The list can be found at: <https://www.tid.gov.hk/english/ita/ipa/index.html>.

4. Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?

The Ordinance is based on the UNCITRAL Model Law (the “Model Law”) as amended on 7 July 2006, with certain Hong Kong specific provisions, such as provisions on consolidation and confidentiality. The Ordinance also includes certain optional provisions that can be included by agreement; these provisions include sections on consolidation and permit appeal on a point of law or serious irregularity.

5. Are there any impending plans to reform the arbitration laws in your country?

significant reforms have been made in recent years. In 2019, third party funding provisions were introduced to the Ordinance and the Arrangement Concerning Mutual Assistance in court-ordered Interim Measures in Aid of Arbitral Proceedings by the courts of the Mainland and of the HKSAR (the “Arrangement”) was signed, allowing parties to arbitral proceedings in Hong Kong to apply for interim measures from Mainland Chinese courts.

Following on from this the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between Hong Kong and Mainland China (the “Supplemental Arrangement”) was signed on 27 November 2020; the following aspects of the Arrangement have been amended:

- the procedures for recognition and enforcement of arbitral awards are equally applicable in Hong Kong and Mainland China; and
- the courts may grant interim measures either before or after applications for enforcements of an arbitral awards are made.

On 19 May 2021, Arbitration (Amendment) Ordinance 2021 came into effect to further give effect of other

aspects of the Supplemental Arrangement:

- all arbitral awards made in Mainland China will be enforceable in Hong Kong; and
- concurrent applications can be made to both the courts of Mainland China and Hong Kong to enforce an arbitral award.

6. What arbitral institutions (if any) exist in your country? When were their rules last amended? Are any amendments being considered?

Arbitral institutions in Hong Kong include:

- Hong Kong International Arbitration Centre (the “HKIAC”). Its Administered Arbitrations Rules (“HKIAC Rules”) were last amended in 2018.
- China International Economic and Trade Arbitration Commission (“CIETAC”) Hong Kong Arbitration Centre. The CIETAC Arbitration Rules were last amended in 2015.
- The International Chamber of Commerce;
- The Hong Kong Maritime Arbitrators’ Group (HKMAG). This is a body that has been in existence for some time, however, is now recognised as an institution (this is important in respect of the availability of interim measures in Mainland China).

No amendments to the above rules are known to be under consideration.

7. Is there a specialist arbitration court in your country?

There is a specialist arbitration list within the Hong Kong High Court.

8. What are the validity requirements for an arbitration agreement under the laws of your country?

The key requirement is that an arbitration agreement must be in writing. This requirement is construed broadly and may be satisfied by an exchange of emails or by reference to another document (such as a main contract).

9. Are arbitration clauses considered separable from the main contract?

Yes, under Hong Kong law an arbitration clause is considered to be a separate agreement which survives the termination of the main agreement. Further disputes as to the existence of a putative contract that contained an arbitration clause would usually be subject to arbitration.

10. Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?

N/A

11. Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?

Schedule 2 of the Ordinance sets out that the court has the power to order consolidation of 2 or more arbitral proceedings. The HKIAC Rules also contain provisions on the joining of third parties.

12. In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?

A third party who has the right to enforce a contract will be treated as a party to the arbitration agreement according to the Contracts (Rights of Third Parties) Ordinance. Also in a recent decision of the Hong Kong court it was held that there may be circumstances where the arbitration clause is sufficiently widely drafted to bind third parties (*X v ZPRC* [2020] HKCFI 631).

13. Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?

Yes. Non-arbitrable disputes include:

- Criminal charges;
- Competition disputes;
- Divorce proceedings; and
- Actions in rem against vessels.

The above list is non-exhaustive.

Unlike in mainland China, for example, the issue of patent validity remains an administrative matter that cannot be submitted to arbitration; in Hong Kong SAR, all types of Intellectual Property Rights (IPRs) disputes, including those relating to the subsistence, scope, ownership, validity and infringement of IPRs, are arbitrable (see Sections 103C and 103D of the AO).

- act fairly and impartially towards the parties, giving them a reasonable opportunity to present their case and to deal with their opponent's case; and
- use procedures that are appropriate to the particular case and avoid unnecessary delay or expense.

14. Are there any recent court decisions in your country concerning the choice of law applicable to an arbitration agreement where no such law has been specified by the Parties?

No recent decisions.

15. How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?

For contractual disputes, the law applicable to the substance is the governing law of the contract as agreed by the parties. If the contract does not state its governing law, the tribunal will determine this issue in accordance with the Hong Kong rules on private international law.

For a tort dispute, the Hong Kong choice of law rules will apply to determine the law applicable to the substance.

16. Have the courts in your country applied the UNIDROIT or any other transnational principles as the substantive law? If so, in what circumstances have such principles been applied?

N/A

17. In your country, are there any restrictions in the appointment of arbitrators?

No, subject to the arbitration agreement.

18. Are there any default requirements as to the selection of a tribunal?

Under section 46 of the Ordinance, an arbitrator must:

- treat the parties equally;
- be independent;

19. Can the local courts intervene in the selection of arbitrators? If so, how?

The power of the Hong Kong court to intervene in the selection of arbitrators is very limited, and may only be on application from one of the parties.

In accordance with section 26 of the Ordinance the parties are free to agree the procedure for challenging an arbitrator. However, in the absence of agreement a party may, within 15 days of becoming aware of grounds of challenge, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws, or the other party agreed, the arbitral tribunal shall decide the challenge.

Only if the challenge is unsuccessful can a party apply to the court (NB although the Hong Kong International Arbitration Centre is the designated authority under article 6 of the Model Law, the function of deciding challenges to arbitrators is reserved to the High Court) to determine a challenge to the appointment of an arbitrator. The request to challenge the arbitrator must be made within 30 days of receipt of notice of the rejection of challenge. There is no appeal from this court decision.

While the challenge is taking place the arbitral proceedings may continue. (*Fenn v So* [2021] HKDC 719)

The court may remove an arbitrator if (and only if) they have failed to comply with the duties set out in question 18 above.

20. Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?

Yes, please see question 19 above for the procedure.

The grounds for such challenge are set out in section 25 of the Ordinance:

- There are circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence; or

- The arbitrator does not possess the qualifications agreed to by the parties.

21. Have there been any recent developments concerning the duty of independence and impartiality of the arbitrators

There are no new legal developments regarding impartiality. However, in *Vitaly Orlov v Magnus Leonard Roth* [2020] HKCU the tests for deciding whether to remove an arbitrator on the grounds of impartiality was set out again. The test is the 'reasonable apprehension of bias' test. The court must ascertain and consider the circumstances which relate to the allegation that the arbitrator was biased. On that basis the court must decide whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the arbitrator was biased.

As to independence see question 22 below.

22. Have there been any recent decisions in your concerning arbitrators' duties of disclosure, e.g., similar to the UK Supreme Court Judgment in *Halliburton v Chubb*?

As yet no cases in Hong Kong have cited the judgment in *Halliburton v Chubb*. However, in *W v AW* [2021] HKCU 3020, arguments were run in respect of an alleged failure in the continuing duties of the arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. The court held that non-disclosure cannot by itself make an arbitrator partial or lacking in independence.

23. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?

A substituted arbitrator should be appointed in the case of a truncated tribunal (see section 28 of the Ordinance).

24. Are arbitrators immune from liability?

Arbitrators are liable for acts that are done or omitted to be done dishonestly (see section 104 of the Ordinance).

25. Is the principle of competence-

competence recognized in your country?

It is recognised in section 34(1) of the Ordinance.

26. What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?

The court will order a stay of court proceedings.

27. How are arbitral proceedings commenced in your country? Are there any key provisions under the arbitration laws relating to limitation periods or time bars of which the parties should be aware?

In the absence of agreement to the contrary, arbitration must be commenced by sending a request for the dispute to be referred to arbitration (see section 49 of the Ordinance)

The Limitation Ordinance (cap. 347) applies in relation to limitation periods. For contractual claims, the limitation period is six years from the date of breach and for tort claims, six years from the date on which damage occurs.

28. In what circumstances is it possible for a state or state entity to invoke state immunity in connection with the commencement of arbitration proceedings?

Absolute sovereign immunity applies in Hong Kong. Unless the State party expressly waives immunity before the court, it has no jurisdiction in relation to claims against a State party, including commercial claims. However, if the State has agreed to arbitration in Hong Kong, the Hong Kong tribunal will have jurisdiction.

29. What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?

The tribunal can make a peremptory order or continue the proceedings and may proceed to make an award (see section 53 of the Ordinance). The court does not have the power to compel participation.

30. Can third parties voluntarily join

arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the tribunal allow for it?

A third party can only be joined to arbitration proceedings by consent of all parties.

31. Can local courts order third parties to participate in arbitration proceedings in your country?

A third party can only be joined to arbitration proceedings by consent of all parties.

32. What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?

Under section 35 of the Ordinance, interim measures are available to:

- Maintain or restore the status quo pending determination of the dispute;
- Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice the arbitral process itself;
- Provide a means or preserving assets out of which a subsequent award may be satisfied; or
- Preserve evidence that may be relevant and material to the resolution of the dispute.

The court has power to grant such relief and will usually do so in emergencies such as the dissipation of assets, destruction of documents when the tribunal is not yet constituted or when an order of the tribunal may not be complied with.

33. Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?

The Hong Kong court has extensive power to provide interim relief in support of arbitration proceedings including anti-suit and anti-arbitration injunctions.

34. Are there particular rules governing evidentiary matters in arbitration? Will the

local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?

A tribunal is not bound by the strict rules of evidence other than the rules relating to privilege. A tribunal will have the powers conferred by the arbitration agreement and the applicable arbitration rules agreed by the parties.

Under section 56 of the Ordinance, arbitrators have general powers to:

- direct the discovery of documents or the delivery of interrogatories;
- direct the inspection, photographing, preservation, custody, detention or sale of any relevant property; and
- direct samples be taken from, observations to be made of, or experiments to be conducted on of any relevant property.

Under section 55 of the Arbitration Ordinance, the court may provide such assistance upon the application of the tribunal or a party with the approval of the arbitral tribunal and may compel a person to attend proceedings before an arbitral tribunal to give evidence or to produce documents or other evidence.

35. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?

There are no particular rules that govern who may represent a party as counsel in arbitration in Hong Kong.

However, if Hong Kong lawyers are appointed as counsel they are expected to comply with the rules of professional conduct of their professional bodies (i.e. the Law Society of Hong Kong or the Hong Kong Bar Council). If overseas professionals are appointed they are expected to comply with the rules of professional conduct of their professional body of the jurisdiction in which they are admitted.

As to arbitrators, there are a number of professional bodies to which arbitrators may belong such as the Hong Kong Institute of Arbitrators or the Chartered Institute of Arbitrators. Arbitrators who are members of such bodies are required to adhere to the professional and ethical standards of those bodies. Otherwise, the only prescribed duties are those set out in question 18 above.

36. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

Arbitral proceedings in Hong Kong are confidential. Unless agreed by the parties, no party may publish, disclose or communicate any information relating to the arbitral proceedings or an award.

However, there are certain exceptions to this. One of such exceptions is the publication, disclosure or communication in legal proceedings before a court in, or outside, Hong Kong:

- to protect or pursue a legal right or interest of the party; or
- to enforce or challenge an award.

Publication, disclosure or communication is also allowed to:

- parties' professional or any other adviser; or
- any government or regulatory body, court or tribunal where the party is obliged by law.

37. Are there any recent decisions in your country regarding the use of evidence acquired illegally in arbitration proceedings (e.g. 'hacked evidence' obtained through unauthorized access to an electronic system)?

There are no recent decisions on this subject.

38. How are the costs of arbitration proceedings estimated and allocated?

Costs include the fees and expenses of the tribunal and the costs of parties' professional advisors and experts. Only costs that are reasonable having regard to all the circumstances are allowed under section 74 of the Ordinance.

Generally the successful party is entitled to recover its costs, unless otherwise agreed or limited by institutional rules. The HKIAC carries a useful calculation tool on its website to calculate the cost of an arbitration by reference to the amount in dispute.

39. Can pre- and post-award interest be

included on the principal claim and costs incurred?

The tribunal can award interest unless otherwise agreed by the parties or limited by the applicable institutional rules, and has the discretion to determine the rates, rests and dates of interest (ending no later than date of payment).

Section 80 of the Ordinance provides that post-award interest may be awarded at judgment rate – which in Hong Kong is 8% per annum as of 1 July 2022.

40. What legal requirements are there in your country for the recognition and enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?

An arbitration award can be enforceable in Hong Kong in the same manner as a judgment of the court, but leave of the court must be obtained (see section 84 of the Ordinance). The enforcing party can apply for recognition and enforcement of an award by filing an originating summons supported by an affidavit stating the required particulars, together with a draft order.

According to section 85 of the Ordinance, the enforcing party must produce:

- the duly authenticated original award or a duly certified copy of it;
- the original arbitration agreement or a duly certified copy of it; and
- if the award or agreement is not in English and/or Chinese, a translation of it in either language certified by an official or sworn translator or by a diplomatic or consular agent.

An award shall state the reasons upon which it is based unless agreed by the parties otherwise or if the award is an award on agreed terms (see section 67 of the Ordinance).

41. What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?

If the application for recognition and enforcement of an award is granted, the court will make an order. However, the order cannot be enforced until 14 days have passed

from the date of service or if the defendant applies during that period to set aside the order, until the application is finally disposed of. The award can then be enforced as a judgment of the court.

Such application can be made without notice to the enforcement target.

42. Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?

The Ordinance provides for mechanisms for the enforcement of Convention Awards, Mainland China Awards, Macao SAR Awards and non-Convention Awards. They can all be enforced in the same manner as a domestic award or by action in court.

43. Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts

Section 70 of the Ordinance empowers a tribunal to award any remedy that could have been ordered by the court in civil proceedings. Unless otherwise agreed by the parties, such award includes specific performance of any contract other than a contract relating to land or any interest in land.

44. Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?

If the parties have opted into Schedule 2 of the Ordinance, they will have the ability to appeal on the grounds of serious irregularity and/or a question of law. Otherwise, parties will be confined to challenging an arbitration award on the limited procedural grounds set out in section 81 of the Ordinance.

An arbitration award can be challenged by filing and serving an originating summons but the success rate of such applications is low. The finality of arbitration awards is a key guiding principle.

45. Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?

The parties cannot appeal or challenge an award on ground of serious irregularity or on a question of law unless such right is expressly provided for in the arbitration agreement (see section 99 of the Ordinance).

46. To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

States enjoy absolute immunity from the jurisdiction in Hong Kong. Therefore states can rely on a defence of state or sovereign immunity at the enforcement stage even if they have participated in an arbitration. This is the case unless the enforcing party can show that the state has waived its immunity at this stage. Such waiver must be express and unequivocal both in respect of immunity from suit and immunity of its property from execution (*DR Congo v FG Hemisphere Associates LLC* [2012] HKCFA 2). An agreement to arbitrate is not sufficient to constitute a waiver of immunity before the Hong Kong courts. However, there is a suggestion in the Court of Appeal decision of the DR Congo case that the position may be different if the state is a signatory to the New York Convention.

47. In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?

A person claiming through or under any of the parties may be bound by the award (see section 73 of the Ordinance). Such person can challenge the award in the same manner as the parties (please see question 42 above).

48. Have there been any recent court decisions in your jurisdiction considering third party funding in connection with arbitration proceedings?

The Ordinance was amended in 2019 to allow third party funding. A third party who does not have an interest recognised by law in the arbitration other than under the funding agreement is allowed to fund.

Third party funding in arbitration has been mentioned *Re A* [2020] HKCFI 493, where the Court of First Instance discussed the rationale for and the statutory framework of third party funding in arbitration to contrast it with third party funding in general litigation, which is not allowed in Hong Kong.

49. Is emergency arbitrator relief available in your country? Are decisions made by emergency arbitrators readily enforceable?

Emergency arbitrator relief may be available under the relevant rules (Schedule 4 of the HKIAC Rules for example) and awards made by emergency arbitrators are enforceable with the leave of the court pursuant to section 22B of the Ordinance. One such order was held enforceable by the Hong Kong court in *Company A v Company D* [2019] HKCU 741.

Although the emergency arbitrator procedures are used infrequently they are gaining popularity with 14 applications being made to the HKIAC in 2020, the urgent relief given by the court in support of arbitration is relied on frequently. However, in relation to the Hong Kong-Mainland Arrangement on Interim Measures, between October 2019 and August 2021 there have been 50 applications to HKIAC.

50. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

A "Small Claims" procedure is available at the HKIAC for claims of no more than US\$50,000, whereas a "Documents Only" procedure is available where oral hearing is not required.

Expedited procedure is available where the claim does not exceed HK\$25,000,000 (over US \$3 million). 28 applications for the expedited procedure were submitted to HKIAC in 2020. 24 were granted and four were rejected.

HKMAG also has a small claims procedure on documents alone for disputes under US\$100,000.

51. Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?

The HKIAC is part of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings. HKIAC made 149 appointments in 2020 from arbitrators from 17 different jurisdictions, 34 (22.8%) were female arbitrators and 74 (49.7%) were arbitrators not previously appointed by HKIAC over the last three years.

52. Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?

Generally speaking, the Hong Kong courts take a pro-enforcement approach. It was held in *Dana Shipping and Trading SA v Sino Channel Asia Ltd* [2016] 4 HKLRD 345, that the Hong Kong court retains discretion to enforce an arbitral award even if the award has been set aside by a competent authority of the country where the award was made.

In *Astro Nusantara v PT First Media* [2018] HKCFA 12, the Court of Final Appeal set aside the enforcement orders of the lower courts and permitted First Media to contest enforcement in Hong Kong out of time on the grounds that enforcement of the arbitration award had been refused in the supervising jurisdiction.

53. Have there been any recent court decisions in your country considering the issue of corruption? What standard do local courts apply for proving of corruption? Which party bears the burden of proving corruption?

Corruption is not an issue that is regularly raised. The Independent Commission Against Corruption is very active in pursuing corruption.

Under the Prevention of Bribery Ordinance (Cap. 201):

- In the private sector, an agent is guilty of an offence if he solicits or accepts any advantage without the permission of his principal when conducting his principal's affairs or business. The provisions on public officers are more expansive and covers the solicitation or acceptance of advantage as an inducement to or reward for performing duties or for giving assistance or using influence in matters relating to a contract.
- The offeror of the advantage is also guilty of an offence.

"Advantage" includes any gift, loan, fee, reward or commission, office, employment or contract and service or favour (other than entertainment). "Entertainment" means the provision of food or drink for consumption on the occasion when it is provided and of other entertainment provided at the same time.

According to section 24 of the Prevention of Bribery Ordinance (Cap. 201), in any proceedings against a person for an offence under this Ordinance, the burden of proving a defence of lawful authority or reasonable excuse shall lie upon the accused.

54. Have there been any recent court decisions in your country considering the judgment of the Court of Justice of the European Union in *Slovak Republic v Achmea BV (Case C-284/16)* with respect to intra-European Union bilateral investment treaties or the Energy Charter Treaty? Are there any pending decisions?

There is no reported case on this judgment.

55. Have there been any recent decisions in your country considering the General Court of the European Union's decision *Micula & Ors (Joined Cases T-624/15, T-694/15 and T-694.15)*, ECLI:EU:T:2019:423, dated 18 June 2019? Are there any pending decisions?

There is no reported case on this judgment.

56. What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?

While COVID-19 has limited the appetite for conducting face to face hearings, remote hearings with the aid of technology have been embraced by many participants and institutions in Hong Kong.

Other procedures in the arbitration proceedings such as exchange of pleadings/evidence, etc, can be done by email.

57. Have arbitral institutions in your country implemented reforms towards greater use of technology and a more cost-effective conduct of arbitrations? Have there been any recent developments regarding virtual hearings?

The use of technology in conducting cost-effective arbitrations is highly encouraged.

58. In your country, does the insolvency of a party affect the enforceability of an arbitration agreement?

N/A

59. Is your country a Contracting Party to the Energy Charter Treaty? If so, has it expressed any specific views as to the current negotiations on the modernization of the Treaty?

N/A

60. Have there been any recent developments in your jurisdiction with regard to disputes on climate change and/or human rights?

N/A

61. Has your country expressed any specific views concerning the work of the UNCITRAL Working Group III on the future of ISDS?

The Hong Kong government has expressed its commitment to capacity building on investment mediation.

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