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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?

In Hong Kong, the key legislation applicable to arbitration is the Arbitration Ordinance (Cap. 609) (the “**Ordinance**”). The domestic and international arbitral regimes have been unified under the Ordinance.

Before the Ordinance came into effect in 2011, Hong Kong used to have rules for two distinct regimes – one for international arbitration and one for domestic arbitration. Since the Ordinance came into effect, parties may choose between application of provisions in the main body of the Ordinance or application of Schedule 2. The provisions in the main body of the Ordinance do not distinguish between international and domestic arbitrations, whereas Schedule 2 of the Ordinance allows parties to opt in certain provisions from the former domestic arbitration regime.

While parties are usually free to agree on the applicable rules and to contract out certain provisions in the Ordinance, there are certain mandatory rules that cannot be excluded, including competence of the tribunal to rule on its own jurisdiction, requirement that the tribunal must treat parties equally, court’s power to order interim measures of protection, and court’s power to set aside an award. Also, there are certain mandatory provisions of the Limitation Ordinance (Cap. 347) (“**LO**”) or any other limitation enactments.

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**”) by extension of territorial application by the Undated Kingdom (from 21 April 1977 and prior to 1 July 1997) and People’s Republic of China (“**PRC**”) (after 1 July 1997). Hong Kong is subject to the same reservations as the PRC, namely

the reciprocity reservation and commercial reservation.

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

Other arbitration-related treaties and conventions applicable in Hong Kong include (non-exhaustive):

- the Hague Convention for the Pacific Settlement of International Disputes 1899;
- the Hague Convention for the Pacific Settlement of International Disputes 1907;
- the Statute of the Hague Conference on Private International Law 1951 (as amended 2007);
- the Vienna Convention on the Law of Treaties 1969;
- the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965;
- the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970

Up to end of September 2023, Hong Kong has also entered into 22 Bilateral Investment Agreements. The list can be found at:

<https://www.tid.gov.hk/english/ita/ipppa/index.html>.

Full list of multilateral agreements that are in force and applicable to Hong Kong can be found at Department of Justice’s website (www.doj.gov.hk/eng/laws/interlaw.html).

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

Yes, the Ordinance is based on the UNCITRAL Model Law (the “**Model Law**”), with minor amendments compared with the Model Law. There is no significant difference between the two sets of laws.

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

Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Ordinance 2022 was gazetted on 30 June 2022. On 16 December 2022, the operative sections of Part 10B of the said Ordinance came into force, pursuant to which Hong Kong lawyers are able to agree with clients on broad success fee regimes for arbitration and related proceedings now.

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

Major arbitral institutions in Hong Kong and their latest administered rules are set out as follows:

- 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 Center. The CIETAC Arbitration Rules were last amended in 2015.
- Hong Kong Maritime Arbitration Group (“**HKMAG**”). HKMAG’s latest terms came into effect from 1 September 2021, which was based on the Terms of the London Maritime Arbitrators Association (LMAA). While the majority of maritime disputes are resolved through ad-hoc arbitration procedures, HKMAG also has its Procedures for the Administration of Arbitration for administered cases (effective from 1 May 2017).

In addition, the International Chamber of Commerce – Hong Kong (ICC-HK), South China International Arbitration Center HK) and eBRAM International Online Dispute Resolution Centre (eBRAM) are other arbitration institutions in Hong Kong and they are also qualifying institutions for the purposes of applying interim measures in PRC pursuant to Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region.

A list of major arbitration institutions in Hong Kong can be retrieved from DOJ’s website (https://www.doj.gov.hk/en/legal_dispute/arbitration.html). No amendments to the above rules are known to be under consideration.

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

There is no specific arbitration court in Hong Kong. But there is a specialist arbitration list within the Hong Kong High Court and the relevant cases are usually heard by a judge specialized in arbitral proceedings.

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. For instance, if an oral settlement agreement has been reached without a writing arbitration agreement, the parties can rely on the written arbitration agreement in the main contract.

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

Yes.

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?

Hong Kong courts usually adopt a pro-arbitration stance when the issue of validity of the arbitration agreement arises. But whether Hong Kong courts will directly adopt a validation principle is still pending judicial clarification.

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 2018 HKIAC Rules also contain provisions on the joining of third parties and allowing single arbitration under multiple contracts.

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 pursuant to Section 12 of the Contracts (Rights of Third Parties) Ordinance may enjoy a right to enforce contract through arbitration proceedings, and Section 12(2) of which provides that as regards a dispute between the third party and the promisor relating to the enforcement of the term by the third party, the third party is treated as a party to the arbitration agreement for the purposes of the Ordinance.

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

Non-arbitrable disputes in Hong Kong include:

- Criminal charges;
- Competition and antitrust disputes;
- Matrimonial and family proceedings; and
- Actions in rem against vessels.

Also, matters reserved for resolution by state and regulatory or disciplinary tribunals, such as taxation, development control, immigration, nationality and social welfare entitlements are also non-arbitral disputes. The above list is non-exhaustive.

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?

In *X & Anor v ZPRC & Anor* [2020] HKCFI 631, Mimmie Chan J held that the governing law of the arbitration agreement is a question of construction, a matter of interpretation of the relevant clauses of the underlying contract, and of the arbitration agreement. The governing law of the underlying contract, and the law with the closest and most real connection with the agreement to arbitrate, such as the chosen seat of the arbitration, are all matters to be taken into consideration in the process of construing and interpreting the parties' agreements (¶14).

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, according to Section 64 of the Ordinance, 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 applicable rules on conflict of laws.

For a tort dispute, the rules on conflict of law will apply to determine the law applicable to the substance.

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

There is no limit to parties' autonomy to section of arbitrator(s). No person shall be precluded by reason of nationality from acting as an arbitrator, unless otherwise agreed by the parties (Section 24(1) of the Ordinance).

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

Pursuant to Section 24(1) of the Ordinance, where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in Article 6 of Model Law (Section 13 of the Ordinance, being HKIAC or the Court as the case may be) to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

18. 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 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's decision.

While the challenge is taking place the arbitral proceedings may continue (Section 26(3)).

The court may remove an arbitrator if they have failed to comply with the duties set out in Section 46 of the Ordinance as to equal treatment of the parties.

19. 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 18 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.

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

There are no new legal developments regarding independence and impartiality. The tests for deciding whether to remove an arbitrator on the grounds of impartiality 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.

If the arbitrator is seen to make unfair decisions time after time, uses unfair expressions, receives or hears evidence from one party in secret, or makes regular contact with one party and not the other, the reasonable

person would infer bias.

In *W v AW* [2021] HKCFI 1707, 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.

21. 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).

22. 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). There are sections in the HKIAC administered rules excluding liability of arbitrators save where such act was done or omitted to be done dishonestly.

23. Is the principle of competence-competence recognized in your country?

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

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

The court will usually order a stay of court proceedings.

25. 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.

26. 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?

Usually, a third party can be joined to arbitration proceedings by consent of all parties. The tribunal may also allow the joinder of a third party upon the request of any of the existing party or the third party.

27. 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 (see Section 21 of the Ordinance).

28. 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 (see Section 45 of the Ordinance).

29. 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. 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 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.

30. 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 Association). 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 Section 46 of the Ordinance as to equal treatment of the parties.

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

Arbitral proceedings and awards 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 (Section 18(1) of the Ordinance).

However, there are certain exceptions to this (Section

18(2) of the Ordinance). 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.

32. 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. In practice, for administered arbitrations, entitled costs usually include arbitration institution's admissible fee. The HKIAC provides a useful calculation tool on its website to calculate the administrative fee by reference to the amount in dispute.

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 79 of Ordinance).

Section 80 of the Ordinance provides that interest is payable on costs awarded by tribunal and post-award interest (including interest on costs) may be awarded at judgment rate.

33. Can pre- and post-award interest be included on the principal claim and costs incurred?

Question answered above.

34. 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).

35. 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?

Application for recognition and enforcement of arbitral award to Hong Kong court can be made on an ex parte basis (Order 73, rule 10 of the Rules of High Court). If the application for recognition and enforcement of an award is granted, the court will make an order (i.e. leave to enforce in Hong Kong).

Hong Kong is a pro-arbitration jurisdiction and the Court usually deal with the ex parte application promptly upon the filing of all required supporting documents. Normally, it may take one to a few months from the date of application to granting of court leave for enforcement.

36. 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?

As to the requirement for recognition and enforcement

of Hong Kong award, please refer to Question 33 above. The Ordinance provides for slightly different mechanisms for the enforcement of Convention Awards, Mainland China Awards, Macao SAR Awards and non-Convention Awards. While the documentary requirements for the recognition and enforcement application differ to some extent, once the leave to enforce is granted by Court, these awards can all be enforced in the same manner as a domestic award or by action in court.

37. 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.

38. 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 (Section 4, Schedule 2) and/or a question of law (Sections 5 and 6, Schedule 2). Otherwise, parties will be confined to challenging an arbitration award on the limited procedural grounds set out in Section 81 of the Ordinance, which include:

- A party to the arbitration agreement was under an incapacity;
- The law applicable to the arbitration agreement is not valid;
- The applicant was not given proper notice of appointment of an arbitrator or of the proceedings or was unable to present the case;
- The award deals with a dispute that does not fall within the terms of the submission to the arbitration;
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- The dispute is incapable of being settled by arbitration; and
- The arbitral award conflicts with public policy of Hong Kong.

An arbitration award can be challenged by filing and serving an Originating Summons but the success rate of

such applications is low.

39. 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 rights to apply for setting aside an award pursuant to Section 81 of the Ordinance cannot be contracted out as Section 81 is a mandatory provision of the Model Law (as incorporated in the Ordinance).

In addition, the parties cannot appeal or challenge an award on ground of serious irregularity or on a question of law unless the parties expressly opt into the relevant provisions in Schedule 2 to the Ordinance (see Section 99 of the Ordinance).

40. 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.

41. 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 in Re A [2020] HKCFI 493, where the Court of First Instance provided a lengthy discussion on the rationale for and the statutory framework of third party funding in arbitration to contrast it with third party funding in general litigation (not arbitration), which is not allowed in Hong Kong.

42. 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 2018 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 regarded as binding the parties by the Hong Kong court in *Company A v Company D* [2019] HKCFI 367.

43. 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?

Expedited procedure is available for HKIAC administered arbitrations where the claim does not exceed HK\$25,000,000.

A Small Claims Procedures 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.

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

44. 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 142 appointments of arbitrators in 2021, among whom 34 (22.8%) were female arbitrators and 74 (49.7%) were arbitrators not previously appointed by HKIAC over the last three years.

45. 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. Pursuant to Section 89(2)(f)(ii), for a Convention Award that has been set aside by a competent authority of the country in which it was made, enforcement of the award may (and not shall) be refused by the Hong Kong Court.

It was held in *Dana Shipping and Trading SA v Sino Channel Asia Ltd* [2016] HKCU 1776, 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.

46. 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?

Not aware of such recent court decision(s). Corruption is not an issue that is regularly raised in Hong Kong arbitrations. The Independent Commission Against Corruption is very active in pursuing corruption.

47. 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 usually be done by email.

48. 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. For example, HKIAC launched HKIAC Case Connect in November 2021, being an online case management platform developed for the parties and tribunals. HKIAC Case Connect facilitates case management by serving as a repository to all documents may be uploaded (pleadings, orders etc.), a channel for parties and tribunals to communicate and a timetable management tool.

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

Not aware of material recent development in this respect concerning arbitration.

50. Do the courts in your jurisdiction consider international economic sanctions as part of their international public policy? Have there been any recent decisions in your country considering the impact of sanctions on international arbitration proceedings?

No recent decision in this respect.

51. Has your country implemented any rules or regulations regarding the use of artificial intelligence, generative artificial intelligence or large language models in the context of international arbitration?

There is no overarching legal rules or regulations regarding the use of artificial intelligence in Hong Kong up to September 2023.

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