Arbitration in the

Hong Kong Special Administrative Region

Stephen D. Mau
The Hong Kong Polytechnic University
Department of Building and Real Estate
Hung Hom, Kowloon
Hong Kong SAR
Tel: (852) 3400-3865
E-mail: bssdmau@polyu.edu.hk

Center for International Legal Studies Emerging Trends in Dispute Resolution
Denver, CO December 3, 2007

Introduction

This paper presents a preview of arbitration and particularly the arbitral process as it is practiced in the Hong Kong Special Administrative Region. The Hong Kong model will thus be the emphasis of this presentation. The paper begins by distinguishing arbitration from other forms of alternative dispute resolution (hereinafter "ADR"). This will be followed by an overview of arbitration practice in Hong Kong. Finally, by way of comparison, the paper concludes with an introductory discussion of arbitration law and practice in the People's Republic of China.

Arbitration in General

Definition

Distinct from the non-judicial forms of ADR, such as conciliation, mediation or independent expert determination,[1] arbitration has been described as:

[1] As noted by one authority:

> Arbitration is quite different from conciliation or mediation. There are five main points of comparison.
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> First, both systems are consensual and rest on agreement, but agreements to enter into arbitration will be enforced by the courts whereas the common wisdom is that agreements to enter into an ADR process will not be: though there is now authority in several jurisdictions to indicate that agreements to mediate (often the first stage in comprehensive dispute resolution provisions) will be enforced.
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> The second difference is that arbitration has, as its object, the rendering of a final and binding award. Although the intention in mediation and conciliation is to bring the parties to the point of making a binding agreement to resolve either in whole or in part the matter in dispute between them, it is by no means an automatic consequence of the process. The arbitrator has the authority to make a binding decision, but the mediator or the conciliator does not.
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> A third and very important difference is that mediation and conciliation are subject to no statutory regime in England, whereas arbitration is subject to the extensive statutory regime already described. To some extent, there is a statutory regime elsewhere for mediation and conciliation as expressed in Hong Kong, for example in section 2B of the 1989 Arbitration Ordinance. Some jurisdictions such as Bermuda, India and Singapore have made specific provision for ADR when reforming their arbitration laws.
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> A fourth point of comparison lies in procedures adopted in arbitration and in mediation and conciliation. Arbitral procedures are often said to have the advantage over the courts of informality, but nonetheless they are constrained by the rules of natural justice. Yet, the rules of natural justice would not help a mediator or conciliator who must be free to see the parties together or separately, with the utmost flexibility as to what is disclosed from one party to the other.
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> The fifth and final point of comparison between arbitration, mediation, and conciliation, is the basis upon which decisions are reached. A striking feature of arbitration in many systems, both domestic and international, is the power of arbitrators to act as *amiables compositeurs*; …

> the private *judicial* resolution by an arbitrator of a civil dispute or difference … by agreement of the parties. The arbitrator is a neutral and independent person, other than a judge in a court of competent jurisdiction, who is selected by or on their behalf the parties on the basis of his expertise, reputation and experience in the legal, professional or economic speciality from which the dispute stems. *The normal outcome of the process is an award which is final, legally binding and ultimately enforceable in court in the same manner as a judgment*.[2]

Essential Features of Arbitration

The arbitration process is intended to be:

(i) *private* (proceedings are closed to the public and awards are private);
(ii) *consensual* (the arbitral process is party-driven, subject to case management);
(iii) *judicial* (in that an arbitration results in an enforceable award issued by a tribunal serving as "private judges" and bound by the same rules requiring fairness, absence of bias and proper exercise of discretion as are applicable to the judiciary); and
(iv) *final* and *legally binding* (the arbitral award generally cannot be appealed and is enforceable as a court decision, and under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958,[3] a foreign arbitral award is more easily enforced than a foreign court decision – see "Enforcement of Foreign Awards", *infra*).

There are several objectives for having the final resolution of a dispute through an arbitral proceeding. One perceived advantage of arbitration is the privacy afforded the parties in the dispute. The arbitration is open only to the parties, their representatives and witnesses, the tribunal and the administering institution, if any.[4] The general public is not allowed to attend an arbitration hearing without the parties' permission. Hence, confidential or proprietary business information disclosed at an arbitration hearing will not be disseminated to the public. The award is also to remain private, although court enforcement

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BROWN & MARRIOTT, *supra* note 4, ¶¶ 4-047 – 4-052.

[2] ROBERT MORGAN, THE ARBITRATION ORDINANCE OF HONG KONG: A COMMENTARY, 1 (1997) (emphasis added).

[3] *See* "Enforcement of Foreign Awards" and *infra* note 46 for further discussion of the New York Convention.

[4] Arbitration proceedings can be conducted on an *ad hoc* basis or be conducted on an "administered" basis [*i.e.*, oversight and/or administration by an institution, such as the London Court of International Arbitration or the International Chamber of Commerce (ICC), which provides the administrative/clerical support to the parties and takes certain prescribed actions under the applicable arbitration rules at the preliminary stages].

proceedings may compromise confidentiality when the contents of the award are placed in open court.[5]

Another perceived advantage of arbitration is limited court interference; local courts are to serve only to support or assist in order to ensure the arbitration proceedings are progressed in a fair and orderly manner.[6]

Yet another supposed advantage of arbitration is the speed and lower costs involved that result from flexibility of the process as compared to traditional litigation, particularly in the United States. This perception depends in great part upon the type of arbitral proceedings and upon the disputing parties themselves, who may expedite or delay the proceedings, resulting in the commensurate financial savings or additional expenditure. Some commentators have queried whether substantial cost savings can be achieved where an arbitration is conducted as a traditional court-type proceeding before a private tribunal, with the parties being required to pay additionally for the "private judge(s)" (*i.e.*, members of the arbitral tribunal) and for the room(s) required for the hearing, conferences, *etc*. all of which would be provided by the government in a traditional court proceeding.[7]

Related to the advantage of expeditious resolution of a dispute is perhaps the greatest attraction of arbitration: the flexibility of the process, *i.e.*, party autonomy. Arbitration is consensual, thereby allowing the disputing parties the freedom to agree both time and cost-saving procedures regarding the conduct of the arbitration proceeding. Thus, matters such as rules of court, rules of procedure, strict pleadings, formal evidentiary procedures, *etc*. need not apply in an arbitral hearing.[8] For example, the disputants may, among other items, stipulate in regards to:

(i) the tribunal: the parties may opt for a single or multi-member arbitral tribunal to conduct the proceedings and to decide the

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[5] Awards are sometimes published in legal or trade/industry journals or in book form as compendia of awards (*e.g.* ICC, China International Economic and Trade Arbitration Commission), usually after "sanitization" in order to protect the confidentiality of the disputing parties. For a discussion of the confidentiality of arbitral proceedings, s*ee*, *e.g.*, 1 ARBITRATION IN HONG KONG: A PRACTICAL GUIDE ¶¶ 8-127 – 8- 128 (Geoffrey Ma *et al* (Gen. Eds.), 2003).

[6] *See* Section 2AA(2)(b) of the Hong Kong *Arbitration Ordinance* (CAP 341) which provides that "the Court should interfere in the arbitration of a dispute **only as expressly provided** by this Ordinance". (Emphasis added.) *See*, *e.g.*, Art. 27 of the UNCITRAL Model Law on International Commercial Arbitration, which has been adopted as the Fifth Schedule to the Ordinance, provides: "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. …"
For further information on the Model Law, *see* UNCITRAL Secretariat Explanation of Model Law at http://faculty.smu.edu/pwinship/arb-24.htm (Last visited: January 31, 2007); 1985 - UNCITRAL Model Law on International Commercial Arbitration at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (Last visited: January 31, 2007).

[7] *See*, *e.g.*, ARBITRATION IN HONG KONG, *supra* note 5, ¶¶ 2-152 – 2-153.

[8] *See*, *e.g.*, section 2GA(2) of the Ordinance, *supra* note 6, which provides that "… an arbitral tribunal is not bound by the rules of evidence …"

dispute; specify the professional qualifications or expertise of the tribunal member(s) (*e.g.*, commercial men or women, architect, engineer, lawyer, gemologist, *etc*.);[9] specify the nationality of the tribunal member(s) (an important factor in a multinational, multicultural dispute where the parties are from different legal systems, *i.e.*, civil law and common law legal systems);[10]

(ii) the venue or "seat" where the proceedings will be held (a critical factor in terms of the applicable procedural law, the enforcement of an award and a jurisdiction familiar with and supportive of the arbitration process; furthermore, the seat is of importance where multinational and/or multicultural parties are involved; a perceived neutral location may avoid claims of geographical advantage, bias or prejudice);[11]

(iii) the type of arbitral proceeding, *e.g.*, traditional court-style litigation; short-form (where narrative statements of the case are presented, discovery is limited; oral argument and examination of witnesses are both limited); [12] "look-sniff" procedures in commodity arbitrations (where evidence and legal submissions are of little practical use) and documents-only cases (where a decision is reached without a hearing);[13]

(iv) (a) administered arbitral process under institutional arbitration rules and procedures (*e.g.*, the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce; the Rules of Arbitration of the International Chamber of Commerce and the London Court of International Arbitration Rules);

(b) alternatively, the parties may dispense with administration of the process by adopting an arbitration process on an *ad hoc* basis (where the parties deal directly with the tribunal at the preliminary stages and there is the option of proceeding without any procedural rules or relying upon, *e.g.*, the UNCITRAL Arbitration Rules[14]);

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[9] Art. 10(1) of the Model Law, *supra* note 6, provides: "The parties are free to determine the number of arbitrators."

[10] *Id.*, Art. 11(1) stipulates: "No person shall be precluded by reason of his nationality from acting as an arbitrator, **unless otherwise agreed by the parties**." (Emphasis added)
Id., Art. 11(2) states: "The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, …"

[11] *Id.*, Art. 20(1) specifies: "The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties."

[12] *See, e.g.*, the Hong Kong International Arbitration Centre's *Short Form Arbitration Rules*, which apply to arbitrations conducted according to shortened forms of procedure (whether by hearing or on documents-only basis) available at http://www.hkiac.org/HKIAC/pdf/Rules/e_shortform.pdf (Last visited: January 31, 2007).

[13] Art. 19(1) of the Model Law, *supra* note 6, notes: "… the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."

[14] *See* Resolution 31/98 adopted by the UN General Assembly on December 15, 1976. For the text of the Resolution and the Rules, *see* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf (Last visited: January 31, 2007). These Rules were adopted for use by the Iran-United States Claims

(v) the tribunal's method of gathering evidence, *e.g.*, an adversarial process (with which common law legal system lawyers are most familiar) versus an inquisitorial process (with which civil law legal system lawyers are most familiar) which may impact upon the choice of witnesses of fact, the appointment of expert witnesses, the mode of examination of witnesses and by whom they are examined, the type and extent of discovery, the role of the tribunal, *etc*.;[15]

(vi) the language in which the proceeding will be conducted.[16]

Arbitration in Hong Kong

In the Hong Kong Special Administrative Region (hereinafter "HKSAR"), the *Arbitration Ordinance* (Cap 341) (hereinafter "the Ordinance") is the relevant statute pertaining to arbitral procedural matters. The Ordinance is not a code governing arbitrations, but serves to:

(i) provide a legal structure for the arbitral process;
(ii) confer protections upon the parties to this process;
(iii) impose certain duties and vest powers upon the arbitral tribunals; and
(iv) reserve to the HKSAR's Court of First Instance the authority and power to support and supervise the arbitration process.

The Ordinance comprises several Parts. Sequentially, provisions set out in Part IA apply to all arbitrations conducted in the HKSAR.[17] The Ordinance then allows a dual system of arbitration to exist, providing for a domestic regime and an international regime for arbitration.[18] Part II of the Ordinance governs domestic arbitrations.[19] Part IIA[20] adopts the UNCITRAL Model Law on International Commercial Arbitration (hereinafter "the Model Law"),[21] subject to

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Tribunal. *See* SA BAKER & MD DAVIS, THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN – UNITED STATES CLAIMS TRIBUNAL (1992).

[15] *See, e.g.*, Art. 19(2) of the Model Law, *supra* note 6, provides: "… the arbitral tribunal may … conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence." *See also id.,* Art. 26 concerning the appointment of experts by the arbitral tribunal.

[16] *Id.*, Art. 22(1) states: "The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. …"

[17] Part I (sections 1-2AC) and Part IA (sections 2AD-2GN) of the Ordinance, *supra* note 6.

[18] *Id*., Part IIIA and Part IV of the Ordinance pertains to enforcement of awards, the former for Mainland China awards and the latter for foreign Convention awards. *See* 'Enforcement of Foreign Awards', *infra*.

[19] *Id.*, Part II (sections 2L-34).

[20] *Id.*, Part IIA (sections 34A-34C).

[21] To date, 59 jurisdictions have adopted legislation based upon the UNCITRAL Model Law on International Commercial Arbitration, including in the United States: California, Connecticut, Illinois,

certain provisions, to regulate international arbitrations conducted in the HKSAR. The parties to a Hong Kong arbitration may conduct the arbitral proceedings pursuant to either the domestic regime or the international regime, that is, the disputants may agree, under the concept of party autonomy, to opt out of one regime and into the other.[22] The principal differences between the two regimes relate to rights of appeal against an arbitral award under the domestic regime[23] and in the number of arbitrators should the disputing parties fail to designate or agree on this matter. The default number of arbitrators in a domestic arbitration will be one.[24] The default number in an international arbitration will be one or three.[25] This paper will focus on the provisions of the Ordinance and the Model Law applicable to arbitrations held pursuant to the international regime[26] as of the date of this paper.[27]

In Hong Kong, if the parties to a dispute have agreed to arbitrate the subject matter in dispute, they are bound by this agreement. One party will not, therefore, be permitted to litigate a dispute that is the subject of a valid arbitration agreement. Pursuant to the Ordinance, an attempt to circumvent an arbitration by bringing the matter to litigation will result in a stay of the court proceedings in favor of the arbitration. The court has no discretion to refuse a stay where there is a valid arbitration agreement.[28]

Louisiana, Oregon and Texas. Foreign jurisdictions which have adopted this Model Law on arbitration include: Canada, Germany, Hong Kong, India, Japan, and, Mexico.

[22] *See* sections 2L, 2M, 34A(2) and 34B of the Ordinance, *supra* note 6.

[23] *Id*., section 23 (Judicial review of arbitration awards).

[24] *Id.*, section 8.

[25] *Id.*, section 34C(5) excludes the application of Art. 10(2) of the Model Law, *supra* note 6, which designates the number of arbitrators to be three. Section 34C(5) of the Ordinance provides for the Hong Kong International Arbitration Centre to determine the number of arbitrators in international cases in accordance with prescribed statutory criteria. *See* the Arbitration (Appointment of Arbitrators and Umpires) Rules 1997 (Cap 341B).

[26] For further information on arbitration in Hong Kong, *see*, *e.g.*, MICHAEL MOSER AND TERESA CHENG, HONG KONG ARBITRATION – A USER'S GUIDE (2004), Stephen Mau, *Current Arbitration Practice in Hong Kong*, 60 ARBITRATION (Chartered Institute of Arbitrators) 273 (1994).

[27] The present Hong Kong arbitration statute is to be revised. A Consultation Paper along with a draft of the proposed ordinance is expected to be published at the end of 2007. Proposed amendments include unification of the two regimes into one arbitration regime based upon the Model Law. However, it is anticipated that the revised ordinance will contain mandatory and optional provisions – provisions allowing the parties to opt into the sections' application, *e.g.*, single arbitrator, consolidation of arbitrations, challenges to an award based upon a point of law, etc.

[28] Art. 8(1) of the Model Law, *supra* note 6, provides in part:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement, shall, if a party so requests … refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

This provision implements the treaty obligation under Article II of the New York Convention to recognize and enforce valid international arbitration agreements. *See* "Enforcement of Foreign Awards" and *infra* note 46 for further discussion of the New York Convention.

Hong Kong's arbitration law subscribes to the philosophical intent of the Model Law's Art. 18[29] and Art. 19[30] concerning the purpose and conduct of an arbitration, that is, to "facilitate the **fair** and **speedy resolution** of disputes by arbitration **without unnecessary expense**."[31] Therefore, in relation to case management, the arbitral tribunal "is required to use procedures that are appropriate to the particular case, avoiding unnecessary delay and expense …"[32] These powers permit the parties, subject to contrary agreement, to dispense with a hearing or to adopt inquisitorial procedures.[33] The Ordinance mandates that "[t]here is an implied term in every arbitration agreement that a party who has a claim under the agreement will prosecute the claim without delay"[34] or possibly be sanctioned.[35]

The Arbitration Agreement

Section 2 of the Ordinance adopts the definition of "arbitration agreement" found in the 1985 version of Article 7(1) of the Model Law. Article 7(1) provides:

> "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether consensual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

An "international arbitration agreement" is "an arbitration agreement pursuant to which an arbitration is, or would if commenced be, international within the meaning of article 1(3) of the UNCITRAL Model Law." Article 1(3) and 1(4) of the Model Law states:

> (3) An arbitration is international if:

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[29] Art. 18 of the Model Law, *supra* note 6, provides that the parties to the arbitration "shall be treated with equality and each party shall be given a full opportunity of presenting his case."

[30] Text of Art. 19 of the Model Law, *supra* note 6, is found *supra* notes 13 and 15.

[31] Section 2AA(1) of the Ordinance, *supra* note 6. Emphasis added.

[32] *Id*., section 2GA(1)(b).

[33] For example, section 2GB of the Ordinance, *supra* note 6, provides:

> …
> (6) In conducting arbitration proceedings, an arbitral tribunal may decide whether and to what extent it should itself take the initiative in ascertaining the facts and the law relevant to those proceedings.
> …
> (9) Subsections (6) and (7) are subject to any agreement to the contrary of the parties to the relevant arbitration proceedings.

[34] *Id*., section 2GE(1).

[35] *Id.*, section 2GE(2) *et seq*.

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

Section 34C(2) of the Ordinance expands the Model Law's application in Hong Kong such that the Model Law is not limited to international commercial arbitrations.[36] Furthermore, an arbitration between two local parties may qualify as an "international" arbitration. In *Fung Sang Trading Ltd v Kai Sun Sea Products and Food Co Ltd*, [1992] 1 HKLRD 40, the court held that an arbitration between two Hong Kong companies to be an international arbitration as the agreement's obligations – delivery of the contractual goods – was performed outside of Hong Kong.

The Ordinance requires that the disputing parties' arbitration agreement be in writing.[37] Section 2AC of Ordinance excludes Art 7(2) of the Model Law in

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[36] Section 34C(2) of the Ordinance, *supra* note 6, stipulates: "Article 1(1) of the UNCITRAL Model Law shall not have the effect of limiting the application of the UNCITRAL Model Law to international commercial arbitrations."

[37] *Id.*, section 2AC provides:

(1) An agreement is not an arbitration agreement for the purposes of this Ordinance unless it is in writing.

(2) An agreement is in writing for the purposes of subsection (1) if-

(a) the agreement is in a document, whether signed by the parties or not; or

(b) the agreement is made by an exchange of written communications; or

(c) although the agreement is not itself in writing, there is evidence in writing of the agreement; or

(d) the parties to the agreement agree otherwise than in writing by referring to terms that are in writing; or

(e) the agreement, although made otherwise than in writing, is recorded by one of the parties to the agreement, or by a third party, with the authority of each of the parties to the agreement; or

favor of a broader definition of 'writing'. Thus, arbitration agreements contained or evidenced in writing but not signed by the parties, or agreements made orally but by reference to terms which are set out in writing, are included in the definition of an "agreement in writing" under the Ordinance.

Commencing Arbitration Proceedings

Where the disputing parties have agreed to a particular set of procedural rules, these rules will usually make provision as to the initiation of arbitral proceedings, the appointment of the tribunal, the conduct of the arbitration and the issuance of an award.[38] Where the disputants have neither designated nor agreed to a particular set of arbitration rules, *i.e.*, an *ad hoc* proceeding,[39] the Model Law contains appropriate provisions to address these matters.[40] The Model Law is intended to provide the legal framework to advance the arbitral process.

The Model Law seeks to establish the essential duties to be imposed upon both the parties and the arbitral tribunal. Furthermore, the Model Law sets out the basic provisions concerning the conduct of arbitrations from commencement to award and challenges to awards. For example, the Model Law's provisions assist

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> (f) there is an exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and is not denied by the other party in response to the allegation.
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> (3) A reference in an agreement-
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> (a) to a written form of arbitration clause; or
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> (b) to a document containing an arbitration clause,
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> constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.
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> (4) In this section "writing" (書面) includes any means by which information can be recorded.
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> (5) This section applies to all agreements that would, if they were arbitration agreements, be either **domestic arbitration agreements or international arbitration agreements and applies to those agreements to the exclusion of article 7(2) of the UNCITRAL Model Law**. (Emphasis added.)

Art. 7(2) of the Model Law, *supra* note 6, provides:

> The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunications which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

[38] *See* text accompanying item IV on page 4 of this paper.

[39] For the avoidance of doubt, "*ad hoc*" in this instance refers to the arbitral process itself (that is, where the procedures are being administered by the parties themselves) rather than to an "*ad hoc*" agreement to arbitrate **after** a dispute has arisen.

[40] *See also* Dana H. Freyer, *The United States Federal Arbitration Act and the UNCITRAL Model Law: How and Why are They Different?*, 43 *IPBA Journal* 29 (Sept. 2006).

in the constitution of the tribunal[41] where a recalcitrant party resists arbitration or where there is no agreed procedure.[42] Once constituted, the arbitrator(s) can assume the authority to progress the arbitral proceedings. The Model Law also contains provisions delineating permissible court intervention in an arbitration; generally, courts are only permitted by the Model Law to intervene to assist the arbitral process.[43] The policy of the Model Law is to defer, until the issuance of

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[41] Art. 10 and Art. 11 of the Model Law, *supra* note 6, provide in relevant part:

> Article 10. Number of arbitrators
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> (1) The parties are free to determine the number of arbitrators.
> (2) Failing such determination, the number of arbitrators shall be three.
> [Note: This article is subject to the amendment contained in section 34C(5) of the Ordinance, *supra* note 6, providing for either one or three as decided by the Hong Kong International Arbitration Centre in the particular case.]
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> Article 11. Appointment of arbitrators
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> (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
> (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.
> (3) Failing such agreement,
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> (a) in an arbitration with 3 arbitrators, each party shall appoint one arbitrator, and the 2 arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the 2 arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;
> (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.
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> (4) Where, under an appointment procedure agreed upon by the parties,
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> (a) a party fails to act as required under such procedure, or
> (b) the parties, or 2 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 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

[42] Many arbitral institutions have similar default provisions in their institutional rules which allow the appointment of the tribunal regardless of a party's lack of cooperation or the parties' inability to agree. *See, e.g.*, the Swiss Rules of International Arbitration, Art. 6.1 ("If the parties have not agreed upon the number of arbitrators, the Chambers shall decide …) and Art. 7.3 ("If the parties fail to designate the sole arbitrator …, the Chambers shall proceed with the appointment."). Failing the application of such contractually agreed procedures, national arbitration laws (including the Model Law) provide for the making of appointments by a court or other authority. *See, e.g.*, Art. 6 of the Model Law, *supra* note 6. In Hong Kong, section 34C(3) of the Ordinance, *supra* note 6, provides for the Hong Kong International Arbitration Centre to be the statutory default appointing authority for international cases. The Hong Kong International Arbitration Centre's functions in this regard are exercised pursuant to set statutory criteria. *See* the Arbitration (Appointment of Arbitrators and Umpires) Rules 1997 (Cap 341B).

[43] *See, e.g.*, section 2GC [special powers of court in relation to arbitration proceedings]; section 2GD(8) [power of the court to grant an extension of time]; and section 2GG [enforcement of decisions of the arbitral tribunal] of the Ordinance, *supra* note 6. *See also* ARBITRATION IN HONG KONG, *supra* note 5, ¶¶ 11-72 – 11-74 and Chapt. 13.

an arbitral award, a court's power to review the conduct of an arbitration and to restrict judicial consideration to certain categories of objections.[44]

Chapter VIII of the Model Law provides for the recognition and enforcement of all international commercial arbitration awards, not merely "foreign" awards.[45] The Model Law's provisions for setting aside an arbitral award generally replicate those of the *Convention on the Recognition and Enforcement of Foreign Awards*[46], discussed *infra*, thus creating a seamless and uniform application and approach to international arbitration. These instruments are complementary, as the Model Law derives philosophically from the *Convention on the Recognition and Enforcement of Foreign Awards*.[47] Hong Kong did not, however, adopt Chapter VIII of the Model Law, opting instead for enforcement of awards under the *Convention*. Pursuant to Art. 35 of the Model Law, an arbitral award shall be binding regardless of the country in which it was rendered. This provision, which is based on the principle of universality of enforcement, is inconsistent with the reciprocity reservation made by both the United Kingdom [and extended to its then territory of Hong Kong] and the People's Republic of China [and applicable to its present Special Administrative Region of Hong Kong] to the *Convention*.

Enforcement of Foreign Awards

The *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* of 1958 (hereinafter "NY Convention") relates to the enforcement of an award in a Convention State or territory other than the State or territory in which the award is made.[48] The NY Convention currently applies to

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The Model Law, for example, allows the: staying of legal proceedings where the subject matter is subject to an arbitration agreement (Art. 8); ordering interim measures of protection (Art. 9); assisting in the obtaining of evidence (Art. 27), and making rulings as to the jurisdiction of the arbitral tribunal (Art. 16). One of the foundations of the Model Law is that a court's power to intervene during an arbitration should be primarily to assist the arbitration process rather than to supervise the same. Supervisory powers that may be exercised by the courts during an arbitration are limited to the removal of arbitrators on the following grounds: (i) lack of impartiality or independence or required qualifications (Arts 12 and 13), and (ii) that an arbitrator is *de jure* or *de facto* incapable of conducting the arbitration or has failed to act without undue delay (Art. 14). The principal power of supervision is contained in Art. 34 of the Model Law, which sets out limited technical grounds for challenging awards in the courts of the place of arbitration. These grounds are based on those for challenging the recognition and enforcement of awards under the New York Convention of 1958 – see the discussion in the following section of this paper.

[44] *See* Art. 34 of the Model Law, *supra* note 6.

[45] *See* para. 50 of the Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf. (Last visited: January 31, 2007). *See also* http://faculty.smu.edu/pwinship/arb-24.htm (Last visited: January 31, 2007).

[46] Formally known as the *Convention on the Recognition and Enforcement of Foreign Awards, New York, June 10, 1958* (hereinafter the "NY Convention") found at 330 UNTS 38, no. 4739 (1959) or at this web site: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf. [For further information, *see* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.]

[47] Indeed, the consistent application of both sets of instruments worldwide is a responsibility of UNCITRAL.

[48] *See* Part IV and the Third Schedule of the Ordinance, *supra* note 6. For a review of the history of the NY Convention's application in Hong Kong, *see* Stephen D. Mau, *Hong Kong's Experience with the New*

the recognition and enforcement of international arbitration awards in 142 member States and territories.[49] Article V of the NY Convention provides the grounds for a party's recourse to a court challenge of a foreign award. A party resisting enforcement must establish at least one of a number of limited grounds for setting aside an award under Art. V of the NY Convention:

(i) lack of capacity by one party to enter into an arbitration agreement;
(ii) invalidity of the arbitration agreement;
(iii) lack of proper notice of the appointment of the tribunal or of the arbitration proceedings, such that a party was unable to present its case;
(iv) the tribunal's award exceeds the tribunal's jurisdiction by purporting to determine matters not falling within the submission to arbitration;
(v) improper constitution of the arbitral tribunal;
(vi) the award has not yet becoming binding upon the parties;
(vii) the subject matter of the dispute is not capable of settlement by arbitration under the law of the State where enforcement of the award is sought;
(viii) contravention by the award of the public policy of the State where enforcement of the award is sought.[50]

Thus, under the NY Convention, the objectives of arbitration are sought to be reinforced. Arbitral finality and "fairness" are both realized. A party resisting enforcement has very limited and predominantly technical grounds under the NY Convention on which to challenge the enforceability of an arbitral tribunal's award. There is a 'pro-enforcement bias' in favour of enforcement of the award. The enforcing court has a residual discretion to permit enforcement of an award even where one of these grounds has been shown or proved, if the court is satisfied that a different decision would not have been reached by the arbitral tribunal and no injustice would be caused to the party resisting enforcement.

Enforcement of Hong Kong - China Arbitral Awards

Enforcement of arbitral awards made by recognized Mainland arbitration tribunals sitting in the People's Republic of China (hereinafter, the "PRC") and recognized as valid arbitral awards under the PRC's Arbitration Law are

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York Convention: An Introduction, 9 *Transnat'l Lawyer* 393 (1996). For analysis of the NY Convention, *see* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 (1981).

[49] See, the UNCITRAL web site at:
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html;
and the World Intellectual Property Organization's web site at:
http://www.wipo.int/amc/en/arbitration/ny-convention/parties.html (Last visited: January 31, 2007).

[50] For example, under the Ordinance, *supra* note 6, section 44 permits the enforcement of awards made in other Convention States and territories to be challenged on the grounds provided under Art. V of the NY Convention, *supra* note 46.
Grounds (vii) and (viii) may be raised by the enforcing court *sua sponte* because they affect public policy matters.

considered to be "Mainland" awards.[51] Mainland awards are not enforced in Hong Kong under the NY Convention as Hong Kong is now considered part of the PRC.[52]

Rather, Mainland awards are enforced in Hong Kong under Part IIIA (sections 40A – 40G) of the Ordinance, entitled "Enforcement of Mainland Awards".[53] Section 40B(1) of the Ordinance provides: "A Mainland award shall … be enforceable in Hong Kong either by action in the Court or in the same manner as the award of an arbitrator by virtue of section 2GG", which pertains to "Enforcement of decisions of arbitral tribunal". Nonetheless, Part IIIA closely parallels the NY Convention. The grounds for refusing enforcement of a Mainland award in Sec. 40E are similar to the grounds for refusing enforcement of a Convention award in Art. V of the Convention and identical to those in Sec. 44 of the Ordinance.[54]

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[51] Sec. 2(1) of the Ordinance, *supra* note 6, defines "Mainland award" as "an arbitral award made on the Mainland by a recognized Mainland arbitral authority in accordance with the Arbitration Law of the People's Republic of China." "Recognized Mainland arbitral authorities" are those authorities listed in the Hong Kong Government's Gazette pursuant to sections 2 and 40F of the Ordinance. *See*, GN 768, Gazette No. 6 (2000), dated 11 Feb. 2000. A Chinese language version dated 2003 is available from the Legislative Affairs Office of the State Council, The People's Republic of China on the China Law web site: http://www.chinalaw.gov.cn/jsp/contentpub/browser/contentpro.jsp?contentid=co3555513853

Moser and Cheng, *supra* note 26, comments upon this definition of "Mainland award":

> One significant effect … is that awards rendered in the Mainland by foreign arbitral institutions or tribunals established pursuant to the rules of a foreign arbitral body (such as the ICC) and awards in the Mainland pursuant to ad hoc proceedings will fall outside the scope … As Mainland law does not recognize ad hoc arbitrations, an award rendered in the Mainland pursuant to an ad hoc arbitration would fall foul of the requirement that eligible awards be 'made pursuant to the Arbitration Law of the People's Republic of China' anyway. Such awards may only be enforced in Hong Kong by means of a common law action on the award.

Id. at 90.

[52] As explained in ARBITRATION IN HONG KONG, *supra* note 5:

> Prior to 1 July 1997, Hong Kong was a member of the New York Convention by virtue of the United Kingdom's accession on its behalf. The PRC acceded to the New York Convention on 22 January 1987. Therefore, before 1 July 1997, awards made in the Mainland were enforceable in Hong Kong under the New York Convention as New York Convention awards (and not domestic awards) and vice versa. After the change of sovereignty on 1 July 1997, the PRC assumed responsibility for the performance of Hong Kong's obligations under the New York Convention. However, although the New York Convention continues to apply in Hong Kong, it does not apply to the enforcement of Hong Kong awards in the PRC and vice versa, since the New York Convention only applies to the enforcement of awards between two different contracting countries.

Id. at ¶ 15-33. *See also*, 1 ARBITRATION IN CHINA: A PRACTICAL GUIDE (Daniel R Fung and Wang Sheng Chang (Gen. Eds.), 2004), ¶ 14-129 *et seq*.

[53] For further details, *see*, *e.g.*, ARBITRATION IN CHINA, *supra* note 52, at ¶ 25-66 *et seq*.

[54] Identical but for the text rendering Sec. 40E specifically applicable to a Mainland award.

Hong Kong awards, provided that they concern subject-matter that is deemed "commercial" under PRC law, are enforceable on the Mainland, regardless of whether they arise from administered or *ad hoc* arbitration. This is in contrast to the requirement that a Mainland award must be made by a recognized arbitral institution for enforcement in Hong Kong.[55] The PRC court receiving the application for enforcement is required to act upon the application within two months. The court's decision is subject to appeal or review by its superior court. There is, however, no time limit for the superior court to reach a decision.[56]

Enforcement of Non-Convention Awards

Generally, awards made in jurisdictions that are not signatories to the NY Convention are commonly referred to as non-Convention awards. Non-Convention awards [for example awards made in Taiwan or the Macau SAR] will be enforced under section 2GG(2) of the Ordinance. The whole of section 2GG provides:

> (1) An award, order or direction made or given in or in relation to arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction.
> (2) Notwithstanding anything in this Ordinance, this section applies to an award, order and direction made or given whether in or outside Hong Kong.

Arbitration in the People's Republic of China

Introduction

This section of the paper is intended to present the distinctions or differences between arbitration proceedings in Hong Kong under the UNCITRAL Model Law and in the People's Republic of China under the latter's applicable arbitration-related laws. A brief overview of arbitral procedures under the PRC civil law system will be presented, followed by a review of the PRC's arbitration-related laws. The sections of the PRC's principal law on arbitration will be presented sequentially, *i.e.*, arbitration agreement; arbitration procedure and enforcement of awards. Emphasis will be made on the last section of this law pertaining to enforcement of PRC awards.

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[55] Moser and Cheng, *supra* note 26, at 91. *See also*, ARBITRATION IN CHINA, *supra* note 52, at ¶ 14-134 *et seq*.
[56] Moser and Cheng, *supra* note 26, at 91.

Among the foremost distinctions or differences that ought to be recognized is that the PRC subscribes to an essentially civil law legal system rather than the common law legal system. As a result, arbitration proceedings in the PRC tend to follow the civil law model with shorter hearing times (*i.e.*, of one to two days duration). PRC arbitrators would tend to have a greater similarity to magistrates in civil law countries: PRC arbitrators are more active than common-law trained arbitrators in determining the facts and issues.[57]

On rare occasions, a PRC arbitral tribunal may, if it considers necessary, conduct its own fact-finding investigations and collection of evidence.[58] As in the Hong Kong model, parties involved in a PRC arbitration usually are not required to abide by the strict rules of evidence. PRC arbitration tribunals "tend to take a relatively broad-brush approach in examining evidence compared with common law arbitrations".[59] Generally though, there will be no detailed examination of evidence by a PRC tribunal.[60] Although one party to the dispute may question the other party in a hearing before the arbitral tribunal, cross-examination of witnesses as conducted under the American common law model is rare.[61]

Under the PRC model, general or wide-ranging discovery is not available, although one party may request the opposing party to produce documents in support of that party's claims or defenses.[62]

Unlike in Hong Kong, where court involvement in an arbitral proceeding arises in relation to the court's support and advancement of the arbitration proceedings, actual practical experience tends to suggest that PRC courts are actively involved in arbitration related matters by exercising their judicial powers.[63]

> Under the Arbitration Law, the involvement of the PRC courts is necessary and unavoidable as the courts have: (a) jurisdiction to determine the validity of arbitration agreements or arbitration clauses; (b) power to review a domestic arbitral award both on its merits and on its procedures; (c) power to have an arbitral award set aside; (d) power to decide not to enforce an arbitral award and (e) power to enforce interim protection measures to assist arbitration proceedings.[64]

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[57] ARBITRATION IN CHINA, *supra* note 52, at ¶ 4-19. *See also id*., at ¶¶ 7-09 - 7-12.
[58] *Id.*, at ¶ 4-24 [footnote omitted].
[59] *Id.*, at ¶ 4-23.
[60] *Id.*, at ¶ 4-19.
[61] *Id.*, at ¶ 4-20 [citations omitted].
[62] *Id.*, at ¶ 4-22.
[63] *Id.*, at ¶ 2-64. *See also id.*, at ¶ 7-14.
[64] *Id.*, at ¶ 2-63 [footnote omitted].

The PRC courts appear unrestrained in the use of their judicial powers despite the national government's promotion of arbitration as a viable alternative to litigation.[65]

The Arbitration Law

The PRC did not adopt the Model Law; however, Mainland China's Arbitration Law (hereinafter the "Law") is comparable to its UNCITRAL counterpart. The Law is the primary statute regulating the arbitral process. This statute, which the PRC promulgated on 31 August 1994, came into effect on 1 September 1995.[66] Another law which has a major effect upon arbitrations conducted in the PRC is the Civil Procedure Law (hereinafter the "CPL") as it affects primarily enforcement of arbitral awards and rules of arbitration.[67]

Chapter One of the Law, comprising Articles 1 to 9, contains the general provisions in relation to arbitrations in the PRC. Article 1 provides for the "impartial and prompt arbitration of economic disputes". Article 2 affords an insight as to the definition of "economic disputes": "Contractual disputes and other disputes over rights and interests in property between citizens, legal persons and other organizations that are equal subjects may be arbitrated." Article 3 contains the list of matters or disputes not deemed to be capable of being subject to arbitration: marital, adoption, guardianship, support and succession disputes, and, administrative disputes. As is the instance in Hong Kong, in the PRC a valid arbitration agreement will result in a stay of legal proceedings according to Article 5 of the Law.

Chapter Two of the Law, encompassing Articles 10 to 15, pertains to the establishment of arbitration commissions. Pursuant to this chapter of the Law, several arbitration institutions were established, including for example: the China International Economic and Trade Arbitration Commission (hereinafter "CIETAC"), the Beijing Arbitration Commission (hereinafter "BAC") and the China Maritime Arbitration Commission (hereinafter "CMAC").[68]

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[65] Id., at ¶ 2-64.

[66] Arbitration Law of the People's Republic of China. Article 80 of the Law states: "This Law shall come into force as of September 1, 1995". *See also*, ARBITRATION IN CHINA, *supra* note 52, at ¶¶ 2-09, 3-09.

[67] See Articles 62, 63, 71 and 75 of the Law, *supra* note 66.
The Civil Procedure Law of the People's Republic of China became effective in April 1991. "… the Civil Procedure Law (in Chapter 28, 'Arbitration' and Chapter 29, 'Judicial Assistance') sets out the rules and procedures governing the recognition and enforcement of foreign arbitral awards." Linda Teng, *The Recognition and Enforcement of Foreign Arbitral Awards in China*, [2007] Asian Dispute Review 87 [cites omitted]. Finally, note that the "Civil Procedure Law provides for various measures for executing an award on application by a party who has been granted enforcement", *e.g.*, freezing and transferring savings deposits, sale of property, issuance of a search warrant, etc. Teng, Asian DR 89. *See* Civil Procedure Law, arts. 221-233.

[68] Sec. 2(1) of the Ordinance, *supra* note 6, defines "Mainland award" as "an arbitral award made on the Mainland by a recognized Mainland arbitral authority in accordance with the Arbitration Law of the People's Republic of China." "Recognized Mainland arbitral authorities" are those authorities listed in the Hong Kong Government's Gazette pursuant to sections 2 and 40F of the Ordinance. *See*, GN 768,

An unanswered question arising from this chapter of the Law pertains to foreign arbitral institutions which are confronted with the issue whether they are an "arbitration commission" created under the Law:

> One immediately apparent legal obstacle to recognizing the right of foreign arbitration commissions to operate in China lies in the fact that, under the existing Chinese law, foreign arbitration commissions (like any other foreign corporation or entity), must be properly registered in China if they wish to operate in China. At the moment, it appears that none of the international arbitration commissions are registered to operate in China.[69]

There is uncertainty whether PRC courts would enforce awards made in China by tribunals constituted under the auspices of foreign arbitration institutions. As will be discussed below in more detail, Article 16 of the Law "requires that to be enforceable under Chinese law an arbitration clause must expressly designate an arbitration commission. The standard ICC arbitration clause refers to 'the Rules of Arbitration of the International Chamber of Commerce'; it does not refer to the administering 'commission', the International Court of Arbitration."[70] As one noted international law firm has stated: "… although China is a member of the International Chamber of Commerce, it is doubtful that ICC arbitrations conducted in the PRC will be enforceable there."[71]

Chapter Three of the Law, encompassing Articles 16 to 20, pertains to the arbitration agreement. This chapter generally comports with the current trend in international commercial arbitration. An important item of note is that the arbitration agreement shall be in writing and must contain the following:

1. an expression of intention to apply for arbitration;
2. matters for arbitration; and
3. a designated arbitration commission.[72]

Thus, the parties are required to specify an arbitration commission. Formerly, in relation to the requirement to specify one of these commissions or institutes, the Supreme People's Court stated that if the parties specified two arbitration institutes in the arbitration agreement, such an agreement is valid and the courts

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Gazette No. 6 (2000), dated 11 Feb. 2000. A Chinese language version dated 2003 is available from the Legislative Affairs Office of the State Council, The People's Republic of China on the China Law web site: http://www.chinalaw.gov.cn/jsp/contentpub/browser/contentpro.jsp?contentid=co3555513853 (Last visited February 2, 2007).

[69] *Id.*, at ¶ 4-09. In relation to *ad hoc* arbitrations in the PRC, *see* the main text accompanying notes 83-86, *infra*.

[70] *Id.*, at ¶ 7-47.

[71] Norton Rose, "Arbitration in Asia – China" [2005] at 5.

[72] Article 16 of the Law, *supra* note 66.

will have no jurisdiction over the matter in dispute.[73] However, in the "Judicial Interpretation on Relevant Issues Concerning the Application of the PRC Arbitration Law, dated 23 August 2006, *Fashi* [2006] No. 7, the Supreme People's Court reversed the earlier Legal Letter. With effect from 8 September 2007, where the parties' arbitration clause nominates two or more arbitration institutions, the arbitration agreement is void.[74] In Hong Kong, a situation where two arbitral institutions are named in the same agreement would result in a defective arbitration clause. In the converse situation of no arbitral institution being named in a PRC arbitration clause, the parties will need to reach an agreement on the choice of an arbitration institute, failing which their arbitration agreement shall be held to be defective and hence void.[75] As noted by one source:

> The Reply Concerning Several Issues Regarding the Determination of the Validity of Arbitration Agreements dated 21 October 1998 confirms that: (a) if parties fail to specify a name of any arbitration institute, the arbitration agreement will be declared void; and (b) if there is a dispute on this issue, both the court and arbitration institute have jurisdiction to determine whether the arbitration agreement is valid. Further, if one party requests the court to determine the validity of an arbitration agreement as well as claiming damages for breach of contract or in relation to other commercial related claims, then the court shall have priority over the arbitration institute in determining the validity of the arbitration agreement.[76]

Additionally, Chapter Three provides for the severability of the arbitration clause from the main contract.[77] Unlike international commercial arbitration in Hong

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[73] Letter Concerning the Question Over the Effect of an Arbitration Clause Which Selected Two Arbitration Institutions at the Same Time (12 December 1996 – Legal Letter [1996] No. 176), the Supreme People's Court opined:

> The contractual arbitration clause stipulated by the parties provides that "contractual dispute should be submit [*sic*] to the Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade, or the arbitration court of Sweden's Stockholm Trade Commission, for arbitration", such arbitration clause is clear and specific on the agreement as to arbitration institution, and is also enforceable. A party only has to select one of the agreed arbitration institutions and then it can proceed to arbitration. According to the stipulation in Article 111(2) of the Civil Procedure Law, the dispute in this case should be submitted by the parties for resolution by arbitration, and the people's court does not have jurisdiction over this case.

[74] Graeme Johnston & Steve Kou, *The Latest Incremental Reform of Chinese Arbitration Law*, [2007]Asian Dispute Review 13.
[75] ARBITRATION IN CHINA, *supra* note 52, at ¶ 2-47.
[76] *Id.*, at ¶ 2-47.
[77] Article 19 of the Law, *supra* note 66, states:

Kong, an arbitral tribunal sitting in the PRC does not necessarily rule on its jurisdiction, authority or competence. Article 20 stipulates that:

> If a party challenges the validity of the arbitration agreement, he may request the arbitration commission to make a decision **or apply to the people's court for a ruling.** If one party requests the arbitration commission to make a decision and the other party **applies to the people's court for a ruling, the people's court shall give a ruling.** [emphasis added]

Thus, there is a question concerning the application of the principle of *kompetenz-kompetenz* in the PRC.

Chapter Four, composed of Articles 21 to 57, is the principal section of the Law as it pertains to the arbitral proceedings *propre*. Articles 21 to 29 regulates the arbitration application and acceptance procedure. Note the kindred spirit of Article 26 to Articles 5 and 20 above:

> If the parties have concluded an arbitration agreement and one party has instituted an action in a people's court without declaring the existence of the arbitration agreement and, after the people's court has accepted the case, the other party submits the arbitration agreement prior to the first hearing, the people's court shall dismiss the case unless the arbitration agreement is null and void. If, prior to the first hearing, the other party has not raised an objection to the people's court's acceptance of the case, he shall be deemed to have renounced the arbitration agreement and the people's court shall continue to try the case.

Articles 30 to 38 presents the statutory regulations pertaining to the appointment or formation of the arbitration tribunal. This section of the Law provides that there may be one or three members of the arbitral tribunal and that the default appointing authority is the chairman of the arbitration commission.[78] Articles 34 to 36 provide the parameters concerning, and the grounds for the challenge of or objection to, the appointment of an arbitrator.

Articles 39 to 57 sets out the requirements for the hearing and award. Under Article 39, hearings are required unless the parties agree to a "documents-only" proceeding. As noted earlier, Article 43 allows an arbitration tribunal, if it considers necessary, to collect evidence on its own.

> An arbitration agreement shall exist independently. The amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement.
>
> The arbitration tribunal shall have the power to affirm the validity of a contract.

[78] *See* Articles 10, 12 and 14 of the Law, *supra* note 66, in relation to arbitration commissions.

Chapter Five, consisting of Articles 58 to 61, pertains to the setting aside of an arbitral award. The Intermediate People's Court in the place where the arbitration commission is located exercises jurisdiction in the setting aside process. The grounds for setting aside an award are stated in Article 58:

> A party may apply for setting aside an arbitration award to the intermediate people's court in the place where the arbitration commission is located if he can produce evidence which proves that the arbitration award involves one of the following circumstances:
>
> 1. There is no arbitration agreement;
> 2. The matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission;
> 3. The formation of the arbitration tribunal or the arbitration procedure was not in conformity with the statutory procedure;
> 4. The evidence on which the award is based was forged;
> 5. The other party has withheld the evidence which is sufficient to affect the impartiality of the arbitration; or
> 6. The arbitrators have committed embezzlement, accepted bribes or done malpractices for personal benefits or perverted the law in the arbitration of the case.
>
> The people's court shall rule to set aside the arbitration award if a collegial panel formed by the people's court verifies upon examination that the award involves one of the circumstances set forth in the preceding paragraph.
>
> If the people's court determines that the arbitration award violates the public interest, it shall rule to set aside the award.

Violation of the "public interest" is an additional ground for the mandatory setting aside under Article 58: "If the people's court determines that the arbitration award violates the public interest, it shall rule to set aside the award." Article 59 provides that an application to set aside must be submitted within six months from the date of the receipt of the award. Article 60 requires the people's court to render a decision within two months from the date of accepting an application to set aside. Further information on the setting aside of an award is discussed in the *Enforcement* section, *infra*.

Chapter Six of the Law pertains to enforcement of an arbitral award by the people's court where the losing party fails to perform its obligations according to the award. Article 63 allows setting aside of an arbitral award where the losing party makes out the grounds set out in the second paragraph of Article 217 of the CPL.[79]

Chapter Seven, comprising Articles 65 to 80, of the Law relates to special provisions for arbitrations involving "foreign elements". Found in these articles are a "condensed" version of the Law applied to purportedly "international" arbitrations. Some see Chapter Seven as establishing a system similar to the present Hong Kong law, which provides for the dual system of domestic regime and "foreign-related" [interpreted by this author as referring to an "international"] regime.

The Law does not provide a definition for "foreign-related" arbitration. For example, an obstacle arises in relation to foreign investment enterprises (hereinafter "FIEs"). FIEs are considered to be domestic entities as the FIEs are incorporated in the PRC under PRC law. Therefore, a dispute between two FIEs, or between a FIE and a PRC company, could be considered to be a domestic dispute.[80] Article 178 of the Several Opinions on the Implementation of Principles of Civil Law passed by the Supreme People's Court [adopted on 26 Jan. 1988] provides guidance by clarifying that a foreign element will exist where:

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[79] Article 217 of the CPL, *supra* note 67, provides in full:

> Where a litigant of one party fails to carry out a legally effective verdict rendered by an arbitration organ established according to law, the opposing litigant may ask for its execution at the competent people's court. The people's court accepting the request shall execute the verdict. The people's court may issue a ruling of not carrying out the execution after its collegiate bench has examined the evidence provided by the person concerned, which proves that the following circumstances are found in the verdict of the arbitration organ:
>
> (1) The litigants neither stipulated arbitration provisions in their contract nor reached a written agreement of arbitration afterwards;
> (2) The matter being adjudicated falls neither within the limits of the agreement of arbitration nor the limits of the arbitration organ's authority;
> (3) The formation of the arbitration tribunal or the arbitrating procedure violate the legal procedure;
> (4) The crucial evidence is found to be insufficient;
> (5) The application of the law is found to be erroneous;
> (6) The arbitrator is found to have taken bribes, conducted malpractice out of personal considerations, and misused the law in rendering a verdict in the course of arbitration. The people's court shall rule that the verdict is not to be executed should it certify that the execution runs counter to the society's public interests. Written orders shall be served to the litigants of both parties and the arbitration organ. Where an arbitration verdict is ruled not to be executed by the people's court, the litigant may go to arbitration again with the written agreement of arbitration reached by both parties, as well as lodge a complaint with the people's court.

[80] ARBITRATION IN CHINA, *supra* note 52, at ¶ 2-15; Johnston & Kou, *supra* note 74, at 14.

(i) one party or both parties to the contract are foreign entities, foreign legal persons or stateless persons;
(ii) the subject matter of the contract is located in a foreign country; or
(iii) the act which gives rise to, modifies or extinguishes the rights and obligations under the contract, occurs in a foreign country.[81]

Thus, an arbitration should be deemed to be "foreign-related" where it relates to disputes arising out of a contract with a foreign element.[82]

Ad hoc arbitration is not permitted in the PRC. The Law refers solely to institutional arbitration, *i.e.*, "arbitration commissions", and is silent in regard to ad hoc arbitration, containing no provisions recognizing ad hoc arbitration. The Law only contemplates institutional arbitration by requiring that the arbitration commission be specified in the arbitration agreement.[83] In the case of *People's Insurance Company of China, Guangzhou Branch v Guangdong Guanghe Power Co Ltd* ((2003) Min Si Zhong Zi 29), the Supreme People's Court held that ad hoc arbitrations are not allowed in the PRC.[84] Based on the foregoing analysis, it is probable that ad hoc arbitrations – proceedings not being conducted under an arbitration commission – in the PRC will neither be recognized nor enforced by mainland Chinese courts.[85]

In instances where the contract is not governed by PRC law, ad hoc arbitration nonetheless does not appear to be permitted in the PRC. "Even if the ad hoc arbitration goes ahead, for example if the seat of the arbitration is outside China, the enforcement of an ad hoc arbitration award governed by PRC law may be refused by the Chinese courts on this ground."[86]

Enforcement

The PRC is a signatory to the NY Convention. In theory, this multinational relationship should result in an uncomplicated and unbiased recognition and enforcement procedure for an international arbitral award. However, local corruption, protectionism and/or unfamiliarity with the arbitration process hinder or prevent the enforcement of awards.[87]

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[81] ARBITRATION IN CHINA, *supra* note 52, at ¶ 2-12.
[82] *Id.*, [footnotes omitted].
[83] If the arbitral agreement contains no or unclear provisions concerning the arbitration commission, the parties may enter into a supplementary agreement to select the arbitration commission, failing which the arbitration agreement is null and void. Article 18 of the Law, *supra* note 66.
[84] ARBITRATION IN CHINA, *supra* note 52, at ¶ 2-18 [footnote omitted].
[85] *Id.*, at ¶ 4-03 [footnotes omitted].
[86] *Id.*, at ¶ 8-20 [footnote omitted].
[87] Norton Rose, *supra* note 71, at 10.

The process for enforcement of an arbitral award is initiated by the winning party applying to an Intermediate People's Court for recognition and enforcement.[88] In the event enforcement of an award is sought against a natural person, the party seeking enforcement shall apply to the Intermediate People's Court located in the place of domicile or habitual residence of the natural person. If enforcement is sought against a legal person, then the party seeking enforcement shall apply to the Intermediate People's Court located at the place of the legal entity's principal business office. If the party against whom enforcement is sought has no domicile, habitual residence or principal business office in the PRC, then application shall be made to the Intermediate People's Court having jurisdiction of the place where assets may be found.[89]

One result of the dichotomy presented by foreign-related arbitration and domestic arbitration under the Law, is that PRC courts can only conduct a procedural review of a foreign-related award and cannot review the merits of the case when considering whether to enforce a foreign-related award rendered in the PRC. In comparison, domestic awards, even though final and binding, can still be subject to a substantive review by the courts.[90] For the purpose of enforcement, findings of fact and the application of laws for domestic awards are subject to substantive review by the courts. Enforcement of a domestic award can be refused under Article 58 of the Law and Article 217 of the CPL.[91]

Once a court accepts jurisdiction over the application for enforcement of a foreign-related award, the court, at its discretion, might conduct an examination of the case. Such an examination should not involve any investigation of the facts or on the application of the law. If the court decides to recognize and enforce the award, the court's ruling must be made within two months from the date of acceptance of the moving party's application. If the court decides not to

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[88] *See, e.g.*, Articles 62-64 of the Law [on enforcement] and Articles 58-61 of the Law [on setting aside an award], *supra* note 66. The Notification Concerning Our Nation's Joining of the Convention on Recognition and Enforcement of Foreign Arbitral Awards [promulgated by the Supreme People's Court on April 10, 1987] provides in relevant part:

> 3. According to Article 4 of the 1958 New York Convention, for applications to the courts of our nation for the recognition and enforcement of arbitral awards made within the territory of another convention country, such applications are to be lodged by a party to the arbitral award. As regards an application made by such a party, it should be received for handling by our nation's intermediate people's court located as follows:
>   1. If the party subject to enforcement is a natural person, that party's place of household registration or place of residence;
>   2. If the party subject to enforcement is a legal person, that party's main place of business;
>   3. If the party subject to enforcement has no home, residence or main place of business in our country, but has property within our country's territory, the place of location of such property.

[89] Teng, *supra* note 67, at 87-88.

[90] ARBITRATION IN CHINA, *supra* note 52, at ¶ 2-12.

[91] *Id.*, at 2-80.

recognize and enforce the award, the court shall report to the Higher People's Court, also within two months of the date of acceptance of the application. The Higher People's Court shall in turn report to the Supreme People's Court if the Higher People's Court is also of the opinion not to grant recognition and enforcement.[92]

As a result, the Intermediate People's Court cannot refuse recognition and enforcement without the Supreme People's Court's approval.[93] Consequently,

[92] Notice of the Supreme People's Court Concerning the Handling of Issues Regarding Foreign-related Arbitration and Foreign Arbitration Matters by the People's Courts dated 28 August 1995 provides:

> In order to strictly implement the Civil Procedure Law of the People's Republic of China and the provisions of the relevant international conventions entered into by our country, and ensure that the litigation and arbitration activities are carried out according to law, we hereby decide that a reporting system shall be established in respect of the issues as to whether a foreign-related economic dispute involving an arbitration agreement shall be accepted by the People's Court for hearing, or a foreign-related arbitration award shall not be enforced or a foreign arbitration award shall be rejected to be recognized and enforced. To this effect, we hereby notify as follows:
>
> 1. For any foreign, Hong Kong, Macao or Taiwan related economic, maritime or admiralty disputes submitted to the people's courts where there is an arbitration clause contained in the contract entered into by the parties concerned or an arbitration agreement has been reached thereafter, if, in the opinion of the people's courts, such arbitration clause or agreement is void or invalid, or its contents are too vague to be enforced, the people's courts must report to the Higher People's Court within the relevant jurisdiction for review before it decides to accept the suit filed by one of the parties concerned. If the Higher People's Court agrees to accept the case, it shall report its views to the Supreme People's Court. The acceptance of the suit may be suspended before the reply from the Supreme People's Court is obtained.
> 2. With regard to the applications filed by one of the parties concerned to the people's courts for the enforcement of an award issued by a foreign-related arbitration institution of our country, or for the recognition and enforcement of an award issued by a foreign arbitration institution, if, in the opinion or the people's courts, the award issued by the foreign-related arbitration institution of our country falls within one of the conditions of Article 260 of the Civil Procedure Law, or the foreign arbitration award filed to the people's courts for recognition and enforcement does not comply with the provisions of the international conventions entered into by our country or the principle of mutual benefit, the people's courts must report to the Higher People's Court within the relevant jurisdiction for review before it decides not to enforce or to reject the recognition and enforcement of such awards. If the Higher People's Court agrees not to enforce or to reject the recognition and enforcement of such awards, it shall report its views to the Supreme People's Court. No order as to whether not to enforce or to reject the recognition and enforcement of such awards shall be made before the reply from the Supreme People's Court is obtained.

[93] Teng, *supra* note 67, at 88 [citations omitted].

the decision whether to grant an application for enforcement of a foreign-related award rendered in the PRC is a decision for the Supreme People's Court; that is:

> if a court at a lower level decides not to enforce a foreign-related arbitral award, it must refer the matter up to the court at a higher level; and if the court at the higher level concurs with the court at the lower level on this issue, it must refer the matter to the Supreme People's Court.[94]

The PRC's statutory limitations period under the CPL for commencing enforcement proceedings, including enforcement of Convention awards, is short: six months for legal persons or entities and twelve months for natural persons. This time limit is calculated from the last day by which performance is required by the arbitral award. If the award requires periodical performance, the time limit shall be calculated from the last day of each performance period. If the application is not filed within these time limits, the applying party will be deemed to have waived its right to file the same.[95]

In summary, institutional arbitration is available in the PRC. However, based upon the foregoing, it would appear that arbitration remains in a developing stage in that country. Therefore, in conclusion, other more mature arbitral venues, such as Hong Kong, would warrant consideration.

Version dated: Nov. 27

[94] ARBITRATION IN CHINA, *supra* note 52, at ¶ 2-49.
[95] Teng, *supra* note 67, at 88.