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The proposed new arbitration law of Hong Kong

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*Const. L.J. 379 Abstract

A substantial contributor to Hong Kong's economy is its construction industry. Likewise, with the expansion of the China market, the Mainland's construction activities have resulted in explosive growth in the construction industry. Commensurate with its importance in both economies, construction is also a major source of disputes. As a stakeholder in alternative dispute resolution (ADR) processes, the construction industry tends towards arbitration, which is acceptable to both Hong Kong/Mainland and foreign parties in the event of a dispute arising between these parties. Arbitration in Hong Kong has been touted as a feasible alternative to litigation. Hong Kong has had effective legislation regulating arbitrations conducted in the territory for several decades. The Arbitration Ordinance is about to be amended. This article reviews the proposed amendments and their potential impact in the view of practitioners of arbitration. The research and analysis involve a desktop study of the proposed amendments and comments received during the public consultation period; survey questionnaire of practitioners and academics; followed by semi-structured interviews with practitioners and academics. This research and analysis will conclude that the proposed amendments will advance arbitration as a viable alternative to litigation and maintain, if not further advance, Hong Kong as a preferred venue for arbitration.

Part I--Introduction

On December 31, 2007, the Department of Justice of the Government of Hong Kong (hereinafter the "DoJ") published a Consultation Paper on Reform of the Law of Arbitration in Hong Kong (hereinafter the "Paper") and Draft Arbitration Bill (hereinafter "2007 Bill") for public consultation. The 2007 Bill proposed to create a single unitary regime for arbitration based upon the United Nations Commission on International Trade Law (hereinafter "UNCITRAL") Model Law on International Commercial Arbitration (hereinafter "Model Law"), replacing the domestic regime and international regime available for arbitrations under the current Arbitration Ordinance (Cap. 341) (hereinafter "Ordinance"). At the conclusion of the consultation period in mid-2008, the DOJ received over forty responses resulting in further changes to the 2007 Bill. A revised version of the *Const. L.J. 380 2007 Bill was published in the government Gazette on June 26, 2009 (hereinafter "Bill"). The government's stated intention for this reform is to make Hong Kong's arbitration law more user-friendly and further strengthen the territory's status as a prime jurisdiction for arbitration.¹

Hong Kong, particularly its International Arbitration Centre (hereinafter "HKIAC"), has been held out as an ideal venue for ADR, particularly arbitration. HKIAC statistics appear to support this proposition: for the year 2008, the Centre received 602 cases, of which 449 had international elements.² Of the cases received by the HKIAC over the past twenty years, approximately 45 per cent are classified as construction cases.³

For comparison, data from other regional arbitration centres indicate:

JCAA (Japan)	N/A (15 cases received in 2007)
KLRCA (Kuala Lumpur)	47 (this figure includes both domestic and international cases)

CIETAC (Mainland China)	1,230 (this figure includes both domestic and international cases)
SIAC (Singapore)	71

One principal reason for the success of Hong Kong and the HKIAC as venues for arbitration is due to the Ordinance, which encourages and supports arbitration as an alternative dispute resolution method to litigation, while minimising court-related interference. The Ordinance is intended to harmonise with the Model Law as well as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter “New York Convention”), thus making arbitrations held in Hong Kong to be of an internationally-recognised standard and facilitating the overseas enforcement of Hong Kong arbitral awards.

This article reviews the Bill and examines whether its stated purposes are achievable in the opinion of those involved with arbitrations in Hong Kong. This article is organised into eight sections. This Introduction is followed by a brief review of the history of arbitration law in Hong Kong. Part III introduces the amendments and the research methodology utilised. Part IV examines the key provisions and changes proposed to domestic arbitrations conducted in the territory, while Part V examines the impact of the Bill in terms of international arbitrations. Part VI examines proposed changes which affect both domestic and international arbitrations. The results of the research are presented and analysed in Part VII.

Part II - Evolution of arbitration law in Hong Kong

Arbitration law in Hong Kong has undergone significant development over the past half century. Much of this development was driven by the evolution of English arbitration law. The Arbitration Ordinance was first enacted in 1963, adopting a [*Const. L.J. 381](#) unitary arbitration law regime primarily and historically based on the English Arbitration Act 1950 for both domestic and international arbitrations. In 1981, the Law Reform Commission of Hong Kong (hereinafter “LRCHK”) issued a Report on Commercial Arbitration, which recommended the enactment of several new provisions in the Ordinance. Consequently, the Government enacted the Arbitration (Amendment) Ordinance 1982, which provided for, inter alia, the judicial review of awards, determination of a preliminary point of law by the High Court, consolidation of arbitrations and dismissal of claims for want of prosecution.⁴

In 1987, two years after UNCITRAL adopted the Model Law, the LRCHK recommended adoption of the Model Law in the territory. This was done, with minor modifications, via the Arbitration (Amendment) (No. 2) Ordinance 1989, making the Model Law the procedural law for international arbitrations with effect from April 6, 1990. The 1989 amendments thus created the present separate regimes for domestic and international arbitration in Hong Kong: domestic arbitrations are governed substantially by the domestic regime based on the 1950 English Arbitration Act, while international arbitrations are governed by the Model Law, together with several add-on provisions. The Ordinance does not impose any restrictions on opting in, or out of either regime. In other words, parties can opt in to the international regime for a domestic arbitration, and vice versa, provided that their agreement to do so is in terms of the relevant provisions of the Ordinance. Thus, the two regimes provide different features to meet different parties’ needs and, in so doing, emphasise party autonomy.⁵

Following the publication of a draft Arbitration Act in England & Wales in May 1991, the HKIAC created a committee (hereinafter “HKIAC Committee”) to review the territory’s Ordinance. The HKIAC Committee published its Report of the Committee on Arbitration Law in April 1996 (hereinafter “1996 Report”), which recommended the adoption of the Model Law for both domestic and international arbitrations, together with some additional provisions deemed necessary for the operation of the two regimes. The primary purpose of the recommendation was to harmonise procedures for domestic and international arbitration under the Ordinance. Subsequently, several of the HKIAC Committee’s recommendations were implemented by way of the Arbitration (Amendment) Ordinance 1996. The amendments resulted in improvements to the Ordinance in various aspects, including greater party autonomy, the vesting of more express powers in arbitral tribunals and minimisation of court intervention in arbitration proceedings.

With a view to implementing the wider recommendation of the 1996 Report, to apply the Model Law wholesale to domestic and international arbitration, the Hong Kong Institute of Arbitrators (hereinafter “HKI Arb”) in co-operation with the HKIAC, formed a Committee on Hong Kong Arbitration Law (hereinafter “HKI Arb Committee”) in 1998. The HKI Arb Committee, in its Report of the Committee on Hong Kong Arbitration Law published in April 2003, recommended **Const. L.J. 382* that the Ordinance should be revised by replacing the current separate provisions for domestic and international arbitration with a unitary regime based on the Model Law.

In December 2007, the DoJ published a Consultation Paper on Reform of the Law of Arbitration in Hong Kong, together with a draft Arbitration Bill. These documents were prepared under the auspices of a Departmental Working Group (hereinafter “Working Group”). Hong Kong’s Solicitor General chaired this Working Group, which consisted of representatives from the legal profession, arbitration experts and government officials. The Working Group’s aim was to implement the recommendations proposed in the Report of Committee on Hong Kong Arbitration Law.⁶ A six-month consultation period ensued and, following consideration of submissions and comments on the proposals, the Government introduced an Arbitration Bill in the Legislative Council in mid-2009.⁷ The legislative timetable is as follows⁸ :

Publication in the Gazette	June 26, 2009
First Reading and commencement	July 8, 2009
Resumption of Second Reading debate,	July 8, 2009
Committee Stage and Third Reading debate	To be notified

The 2009 Bill introduces three broad categories of change:

(i) Domestic arbitration

It is anticipated that extending the Model Law to domestic arbitration will result in significant change, though some existing domestic arbitration provisions will be retained as opt-in provisions.⁹ These proposed amendments will be reviewed in Part IV.

(ii) International arbitration

The territory’s Model Law provisions will be retained, subject to a number of changes. These will make minor amendments to the present international arbitration regime. These changes will be presented in Part V.

(iii) Both domestic and international arbitration

The territory’s Model Law provisions will be made subject to several changes which are new to both the domestic and international arbitration regimes. These will be discussed in Part VI of this article.

**Const. L.J. 383* Two points should be noted at the outset. First, this article is not intended as a definitive guide to the Bill. There is not, for example, a clause by clause analysis of reform. Rather, the aim is to provide readers with a broad understanding of the key changes being proposed and the impact that these changes will have on future arbitrations conducted in Hong Kong.

Secondly, it is worth stressing that the provisions of the Bill remain subject to change during the legislative process. Accordingly, whilst this article provides a broad indication of the future arbitral landscape of Hong Kong, this article is not definitive.

The greatest impact of the proposed changes is anticipated to be upon users of the domestic

arbitration regime. The Ordinance defines domestic arbitration in the negative¹⁰; domestic arbitrations are all arbitrations which are not international. An international arbitration is defined in the Ordinance, §2(1) by reference to Model Law, art.1(3) as one where:

- the parties, at the time of concluding the arbitration agreement, have places of business in different states;
- the place of arbitration, or the place where a substantial part of the obligations of the commercial relationship to be performed is located outside the state in which the parties have their place of business; or
- the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Domestic arbitrations are, accordingly, all other arbitrations.

Part III--Purpose and methodology of research

A. Purpose

This article has two principal purposes. First, it seeks to identify the changes which will result from the proposed unification of the current separate regimes for domestic and international arbitration. Secondly, it seeks to explore the impact of the proposed amendments on arbitration law in Hong Kong. This will be done in two ways: first, by identifying and analysing the changes, and secondly, through a quantitative survey followed by qualitative interviews soliciting opinions and comments from those involved with Hong Kong arbitration.

B. Methodology

The research aspect of this article relied upon three main research methodologies. The first methodology involved a literature review. This review included not only scholarly publications concerning arbitration and the Hong Kong Arbitration Ordinance and the sources upon which the current version is based, but also case decisions delivered by the Hong Kong judiciary, interpreting and thus applying *Const. L.J. 384 the provisions of the Ordinance. Much has been written about arbitration in general, arbitration in Hong Kong, and decisions of the Hong Kong court responsible for arbitral matters.¹¹

The second methodology was quantitative. Three hundred and forty-four questionnaires were sent to members listed on the HKIAC Panel of Arbitrators, which comprises both local and overseas arbitrators, and to legal practitioners and academics in Europe, Asia and North America. All questionnaires were distributed over the period April-May 2009. A total of 82 questionnaires were returned, of which 75 were included in the data analysis. Each of the remaining seven was returned indicating that the respondent was unfamiliar with either the present Ordinance and/or the proposed amendments.

The third research methodology was qualitative, in that semi-structured interviews were conducted with those involved in the arbitration field. This aspect of the research was intended to provide a practice-oriented approach, as opinions and viewpoints were invited from those presently involved in arbitration and who anticipated continuing to be involved in arbitration in the future.

A guide for these interviews was created, based upon the results of the questionnaires, which helped determine certain key issues. This guide served as a consistent introduction, or framework, for the in-person interviews with 11 arbitration experts, practitioners, or scholars. The majority of interviews were conducted between June and September 2009, with several others concluded before March 2010.

Part IV--Domestic arbitration

Key provisions for domestic arbitration under the current Ordinance (such as appointment of a sole arbitrator, consolidation of arbitrations, appeal on points of law and so on) are retained in Sch.2 of the Bill. However, application of such provision is subject to §100 of the Bill, which provides that:

“All the provisions in Schedule 2 apply, subject to section 101, to --

(a) an arbitration agreement entered into before the commencement of this Ordinance which has provided that arbitration under the agreement is a domestic arbitration; or

(b) an arbitration agreement entered into at any time within a period of 6 years after the commencement of this Ordinance which provides that arbitration under the agreement is a domestic arbitration.”

Under §101,¹² parties are free to choose the applicable sections of Sch.2 so that the parties can opt in or opt out of one or more of the provisions of Sch.2.

*Const. L.J. 385 A. Number of arbitrators--§23(3) of the Bill

Section 23(3) of the 2009 Bill provides for the HKIAC to determine whether, in the absence of agreement by the parties, one, or three arbitrators should be appointed to hear a dispute. Such is already the current practice in international arbitration in Hong Kong, per Model Law, art.10. However, §23(3) marks a significant change for domestic arbitrations, given that Ordinance, §8 presently provides that, in the absence of agreement by the parties, a sole arbitrator will determine any dispute.

Section 23(3) of the Bill will not apply, however, when the opt-in provision in §1 of the Bill's Sch.2 applies.¹³ Where §1 of Sch.2 applies, a sole arbitrator will be appointed.

B. Consolidation of arbitrations

Section 6B(1) of the current Ordinance confers on the Hong Kong Court of First Instance [hereinafter “Court”] the power to consolidate domestic arbitrations which involve common questions of fact, or law, arising from the same, or same series of, transactions, or which for any other reason it is desirable to consolidate.¹⁴

As with §23(3) above, this is subject to one important exception: the opt-in provision in §2 of Sch.2 of the Bill, which provides for court-ordered consolidation. The proposed §2 of Sch.2 confers on the Court the power not only to order consolidation but also, and alternatively, to order arbitrations to be heard simultaneously, or consecutively, which is identical to those powers presently found in §6B(1) of the Ordinance. Furthermore, §2(2)(a) of Sch.2 authorises the Court to make directions as to costs.

Court-ordered consolidation does not exist in the Model Law, though some American states which have introduced the Model Law have included such a power.¹⁵ In the event that the parties exercise their right to opt out of §2 of Sch.2, the Court will not be able to order consolidation for domestic arbitration proceedings.

C. Minimisation of court interference

Adopting the Model Law provisions reduces the level of Court interference in Hong Kong's domestic arbitration regime. At present, the Court can intervene, or be invited to intervene by the arbitrators, or one of the parties, in a range of circumstances. For example:

- Ordinance, §23A: the Court can, in some circumstances, be invited to make a preliminary ruling on any point of law.
- Ordinance, §23C: if a party fails to comply with an arbitrator's order, the Court can, if invited to do so, permit the arbitrator to continue with the reference in default of appearance, or any other act.

*Const. L.J. 386 • Ordinance, §§23(2)-23(4): a party can appeal an award on a point of law to the Court, which has the power to set aside, vary, or remit the award to the arbitrators.

- Ordinance, §§23(5)-23(6): the Court may order the tribunal to state reasons for its award in sufficient detail to enable the Court to consider any questions of law decided.

Schedule 2 of the Bill confers on parties the ability to opt in to provisions which permit the Court to use the following powers (presently available in the Ordinance):

- §23A of the Ordinance is found in §3 of Sch.2 of the Bill--the Court can determine preliminary question(s) of law.

- §§23(2)-23(4) of the Ordinance are found in §5 Sch.2 of the Bill--a party may appeal from an award on question(s) of law.

D. Grounds to set aside an award--§81 of the Bill

Section 25(2) of the Ordinance provides that awards rendered in a domestic arbitration can be set aside where either:

- the arbitrator misconducts himself, or the proceedings; or
- an arbitration, or award has been improperly procured.

In addition, an award can be set aside as a consequence of an appeal on a point of law to the Court.¹⁶

The Model Law, by contrast, provides for an award to be set aside only in the limited and largely technical circumstances delineated in art.34(2). Awards will only be set aside where:

- One of the parties to the arbitration agreement did not have capacity to conclude the agreement, or the arbitration agreement is in some other way invalid.¹⁷
- The party challenging the award was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings, or was in some other way made unable to present his case.¹⁸
- The award deals with, or makes decisions as to matters outside the scope of those submitted to the arbitral tribunal.¹⁹
- The composition of the arbitral tribunal, or the conduct of the arbitral proceedings was not as agreed by the parties.²⁰
- The court finds the subject matter of arbitration was not capable of settlement under the law of Hong Kong.²¹
- The court finds the award conflicts with public policy.²²

*Const. L.J. 387 Part V - Key provisions and changes to international arbitration

Part IV discussed the impact of the proposed amendments upon domestic arbitrations. Here in Part V, there is a presentation of the effects of the Bill's proposed changes upon arbitrations conducted under the present international regime.

A. Opportunity to present case--§46 of the Bill

Model Law, art.18 provides that "each party shall be given a full opportunity of presenting his case". Concerns have been expressed that the use of the word "full" can lead to abusive delaying tactics by parties wishing to stall the arbitral process.

The extent to which this is considered a real problem varies. For example, one authority has noted:

"At first sight the word 'full' is somewhat disconcerting. It conjures up visions of a party demanding the opportunity to present duplicative testimony for days or even weeks. But in this context the word 'full' must be given an objective, not a subjective, meaning; and in practice it seems unlikely that a national court would set aside an award where the tribunal had taken a clearly reasonable and proportionate approach to limiting the scope of the evidence a party wished to present."²³

Nonetheless, for the complete avoidance of any possibility of abuse, the 2009 Bill amends the Model Law and applies the current domestic arbitration rule that the tribunal need only give each party a "reasonable" opportunity to present its case.²⁴

B. Assessment of arbitrator's fees on refusal to deliver award--§77 of the Bill

Under the domestic arbitration regime, the court may assist the parties where arbitrators refuse to deliver the award until the parties have paid the tribunal's fees and expenses. Ordinance, s.21 provides that the party applying for delivery must pay into the Court the sum claimed by the arbitrators. The Court will then order delivery of the award before paying the arbitrators what the Court deems to be a reasonable sum. Any monies remaining will be returned to the parties.

Section 21 has no counterpart in the Model Law and is unknown in international arbitration. Section 77 of the Bill extends the assessment of arbitrator's fees to international arbitrations held in the territory.²⁵ There is to be no appeal from any determination as to what amounts to "reasonable fees".²⁶ The provision does not apply where the fees demanded have been fixed in a written agreement between the applicant/party and the arbitrators.²⁷

***Const. L.J. 388** The 2003 Report of the Committee on Hong Kong Arbitration Law, on which the Bill is heavily based, provides no real explanation for the position taken. Members of the Committee seemed clear that excessive fees should not be recoverable, but seemed to overstate the present position. The Committee noted:

"The existing laws of Hong Kong provide for the assessment of such [excessive] costs by the Court of First Instance in a case when a party disputes the fees of the arbitral tribunal."²⁸

This, however, is true only where arbitrators refuse to deliver the award and not, as the Report seems to imply, more broadly.

Section 28(2) of the English Arbitration Act 1996 does confer on courts a broader power to remedy excessive fees, providing:

"Any party may apply to the court (upon notice to the other parties and to the arbitrators) which may order that the amount of the arbitrators' fees and expenses shall be considered and adjusted by such means and upon such terms as it shall direct."

The introduction of a similar provision to remedy excessive fees would seem to be both more consistent with the rationale presently underlying §77 and more suitable to protect parties from abuse. Were such a provision to be introduced, it is uncertain whether the provision should be subject to reasonable time limits and whether arbitration institutions in Hong Kong, such as the HKIAC, rather than the Court, would be more appropriate to assess the "reasonable fee" owed to the arbitrators.

C. Appointment of umpires--§30 of the Bill

Ordinance, §10(1) provides that in a domestic arbitration agreement with a reference to two arbitrators, the agreement is:

"deemed to include a provision that the 2 arbitrators may appoint an umpire at any time ... and shall do so forthwith if they cannot agree."

This provision has been retained in §30 of the Bill. The Model Law is silent on the issue, though presumably arbitrators would have the power, subject to parties' withdrawal of consent, to appoint an umpire to break any deadlock.

Save in very specialised (usually maritime) contexts, the appointment of two arbitrators is highly undesirable. Thus:

- All of the above makes it perfectly plain that in the context of arbitration outside of the maritime field, the umpire provision is most unsatisfactory and should be avoided because it causes nothing but delay and cost.²⁹

***Const. L.J. 389** • However, it is not a practice to be recommended in international commercial arbitrations. It is important, particularly in a highly contentious dispute, that there should be someone who can take the lead within the arbitral tribunal.³⁰

In practice, the use of §30 outside specialised circles will be very limited. Where this provision is used, §31 of the Bill defines the functions of an umpire in arbitral proceedings.

Part VI--Key provisions and changes to both domestic and international arbitration

In the previous two parts of this article, the changes possibly impacting arbitrations conducted exclusively in either the domestic and international regimes were reviewed. In this part, amendments common to both regimes are presented.

A. Arbitration-related court hearings in public, or otherwise--§16(1) of the Bill

At present, Ordinance, §2D provides that any proceedings before the Court or the Court of Appeal in relation to matters under the Ordinance are presumptively to be held in private. Section 16 of the Bill introduces two changes. First, it extends the scope of application to include the Court of Final Appeal.

Secondly, §16(1) of the 2007 Bill introduces a presumption in favour of holding proceedings in public, with the option under §16(2) to apply to have the proceedings heard in private. In response to the consultation paper, neither the Hong Kong Bar Association nor the Hong Kong Institute of Arbitrators supported the change³¹ and minutes from the February 2009 Legislative Council Panel meeting further demonstrated the opposition of practising lawyers and arbitrators to this alteration. The argument is that, as confidentiality is one of the benefits of arbitration, §16 jeopardises that confidentiality.

As a result, §16 of the 2009 Bill was amended. Pursuant to the amendment, §16(1) now provides the presumption that cases are to be “heard otherwise than in open court”. Section 16(2) of the Bill now provides the situations in which an arbitration-related court proceeding will be heard in public: (a) on the application of any party; or (b) if, in any particular case, the court is satisfied that those proceedings ought to be heard in open court. The principle stated in §16(3) of the 2007 Bill remains unchanged in the 2009 Bill: there shall be no appeal of the court’s order under §16(2).

B. Interim measures--§§35-42 of the Bill

A significant change made by the Bill is the introduction of the amended Model Law provisions on interim measures. The amendments, made by UNCITRAL in 2006, follow the rapid increase in the importance and use of interim measures, *Const. L.J. 390 about which the original Model Law, art.17 was relatively silent. Ten new provisions, arts 17A-17J, have been added to the original Model Law art.17. Of these ten provisions, seven are proposed to be incorporated into the law of Hong Kong by the Bill.

Section 35 enacts the 2006 version of Model Law, art.17. Accordingly, the tribunal is presumed to be able to order interim measures, unless the parties agree specifically to the contrary. Section 35(3) supplements the Model Law by specifically empowering a tribunal, at the request of a party, to render an award on the same terms as any interim measure it may grant in order to assist in the enforcement of the interim measure abroad.

Sections 36-42 enact, without any alterations, Model Law, arts 17A-17G. The effect of these provisions is to update the territory’s international arbitration regime, which is based upon the original Model Law, art.17, and to transition the domestic regime from Ordinance, §§2GB and 2GC, to the Model Law.

Generally, there will be little difference as to when an interim measure will be granted, the test still being similar to that in American Cyanamid.³² The difference is that §§36-42 now set out—in much greater detail than in §§2GB and 2GC, or the original 1985 version of art.17—the relevant conditions for granting interim measures, as well as ancillary rules as to costs, disclosure and provision of security.

One significant change introduced in arts 17B-17C (§37 and §38 of the Bill) is the creation of “preliminary orders.” These are described by the United Nations Commission on International Trade Law (UNCITRAL) as “a means for preserving the status quo until the arbitral tribunal issues an interim measure adopting or modifying the preliminary order”.³³ In other words, these preliminary orders are simply ex parte interim measures, made prior to a hearing of both parties. Article 17C accordingly contains a number of provisions to ensure the protection of the unrepresented party to the preliminary order, including art.17C(4), which provides for expiry of the order 20 days after issuance, and art.17C(5), which provides that, while the order is binding between the parties, the order is not subject to court enforcement.

While arts 17A-17G have been incorporated without amendment, the DoJ has opted against enactment of art.17H (recognition and enforcement of interim awards) and art.17I (grounds for refusing recognition and enforcement). Rather, both provisions have been addressed in §61 of the Bill, which retains and amends Ordinance, §2GG(1) governing the enforcement of orders and directions of an arbitral tribunal. No explanation is offered in the Consultation Paper for this decision.

The differences between arts 17H and 17I and §61 are several. First, art.17H provides that an interim measure will be automatically recognised as binding, subject to the grounds set out in art.17I. By

contrast, §61 provides an award is enforceable only after leave has been granted by the Court. Further, §61(2) provides that leave to enforce an interim order will not be granted unless the order belongs *Const. L.J. 391 to a type which can be granted in Hong Kong in respect of arbitral proceedings. The quasi-equivalent in the Model Law is art.17(1)(b)(i), which provides that, where a court finds an order to be incompatible with its powers, the court may refuse enforcement, though art.17(1)(b)(i) specifically empowers a court to reformulate the order, without altering its substance, in order to render it enforceable. The Model Law therefore takes a more generous, efficient and practical approach than the Bill.

However, there appears to be broad uniformity in the critical area as to when an interim measure may be set aside. While §61 fails to list the grounds under which an interim measure can be refused enforcement, the case law under Ordinance, §2GG(1) suggests that they will be similar to those in art.17I.³⁴ Under the Ordinance, leave to enforce an interim measure has been refused where the arbitrator was disqualified from acting, the arbitrators exceeded their jurisdiction in granting the measure, or the award has ceased to be binding. All these grounds are common to art.17I. However, since §61 provides no more definite guidance as to the grounds for the refusal of enforcement, future divergence will depend on the development of case law.

Section 61 of the Bill does not incorporate Model Law, art.17J, which provides for a court to have power to issue interim measures in relation to arbitral proceedings. The aim of art.17J is:

“to put it beyond any doubt that the existence of an arbitration agreement does not infringe on the powers of the competent court to issue interim measures and that the party to such an arbitration agreement is free to approach the court with a request to order interim measures.”³⁵

This aim is achieved in the Bill by the preservation in §61 of the more extensive provisions under Ordinance, §2GC. Specifically, §61 contains a far more detailed provision than art.17J as to the award of interim measures by courts in respect of arbitral proceedings conducted outside of Hong Kong. Section 61 makes clear that an interim measure will not be granted unless proceedings abroad give rise to an award enforceable in Hong Kong and that the order sought is of a type that may be granted in Hong Kong.

Part VII--Results of research

The literature review is incorporated where appropriate into the sections reporting on the outcomes of the questionnaires and the interviews. Set out below are the results of the research undertaken for this article.

A. Questionnaires

As noted earlier, a total number of 344 questionnaires were distributed by email to the various recipients in the Asia-Pacific region, Europe and North America. The time period selected for distribution of the questionnaires was intended to be after the conclusion of the Hong Kong Government's consultation period, in order *Const. L.J. 392 to allow time for dissemination of the comments. Eighty-two questionnaires were returned. Of these, 75 were used in assembling the data, with the remainder excluded because the respondent indicated no familiarity with the Model Law, or the present Hong Kong Arbitration Ordinance.

The Questionnaire consisted of eight questions soliciting views on the objective of the arbitration law reform, and seeking comments on selected issues raised during the consultation period.

The data obtained from the questionnaire's respondents is reinforced by the written comments in the open-ended sections of the questionnaire requesting respondents to provide insights to their answers. Not all questions received written comments; some questions were only answered by selecting one of the given answer choices. Those issues receiving written comments are summarised immediately following the respective question's results.

The responses received seem to suggest that there is strong support generally for the Bill's provisions. However, there remain some areas which are controversial. These areas are discussed below.

- Question 1 concerned whether the proposed unitary arbitration regime based on the UNCITRAL Model Law is more user-friendly than the current Arbitration Ordinance. The response was 59 to 2

[agree/disagree]. This indicates that approximately 97 per cent of the respondents agreed that the Bill's amendments are more user-friendly.

- Question 2 concerned the attractiveness of the Bill to international arbitration. The response was 52 to 10 [agree/disagree]. Thus, approximately 84 per cent of the respondents agreed that the proposed amendments would be able to attract more international arbitration to Hong Kong.

Positive comments received on this topic centred on the merits of abolishing the two arbitration regimes in Hong Kong. By adopting the Model Law for a unified arbitration regime, the comments suggest the following advantages: greater familiarity by international arbitration practitioners, a better numbering system within the legislation, and better formatting than in the current Ordinance or, in other words, greater clarity. Opposing comments highlighted that the effect of an arbitration law on the attractiveness of a particular venue should not be overestimated, citing the situation in Scotland, where the Model Law has been repealed by the Arbitration (Scotland) Act 2009 in favour of legislation broadly based on the Model Law.

- Question 3 concerned appeal against a tribunal's decision declining jurisdiction to adjudicate the dispute. The response was 54 to 20 [agree/disagree]. This signifies that approximately 73 per cent of the respondents agreed that a tribunal's ruling that it has no jurisdiction should be subject to appeal.

No favourable comments were received in support of the provision that a decision by the tribunal declining jurisdiction will be subject to no appeal. The negative comments received generally considered that a ruling declining jurisdiction is by its nature not an arbitral **Const. L.J. 393* award which could be set aside. Such a ruling is simply the tribunal's expression of its lack of power under the arbitration agreement in accordance with the principle of competence-competence.

- Question 4 queried the need to distinguish the two meanings of "Place" (geographical and juridical) found in different subsections. The response was 57 to 14 [agree/disagree]. Approximately 80 per cent of the respondents agreed that the term "place of arbitration" and "seat of arbitration" should be distinguished in the Bill.

The comments received opined that "seat" should refer to the legal venue, which determines the applicable procedural law and may also determine the location where the award is made. No unfavourable comments were received.

- Question 5 concerned the obligation to hold an oral hearing upon a party's request. The response was 55 to 16 [agree/disagree], indicating that approximately 77 per cent of the respondents agreed that an in-person hearing should be held, if so requested.

- Question 6 concerned the inclusion of some domestic arbitration provisions into Sch.2 of the Bill as opt-in provisions. The response was 54 to 9 [agree/disagree]. This result denotes a majority of 85.7 per cent agreeing that such provisions should be included as opt in provisions.

- Question 7 solicited a response concerning the requirement to seek leave from the Court for appeal against awards on points of law. The response was 53 to 15 [agree/disagree], revealing that approximately 78 per cent of the respondents agreed that leave should be sought in order to appeal an award on points of law.

- Question 8 concerned the deeming provision (§102 of the 2007 Bill) for the application of Sch.3 of the 2007 Bill where sub-contracts are involved. The response was 40 to 23 [agree/disagree], signifying that only about 63 per cent of the respondents agreed that the deeming provision should apply automatically in cases involving sub-contracts. Although the deeming provision is omitted from the Bill, there is nevertheless speculation that this provision would be reinstated prior to passage of the Bill and therefore is set out in this article.

No positive comments were received. Critical comments received considered the provision to be contrary to the notion of party autonomy. Some respondents also noted that such a provision is in violation of the principle of privity of contract.

The foregoing data overwhelmingly indicates agreement by the respondents (97 per cent) that the Bill is more user-friendly than the current Ordinance. With regard to one of the main purposes of the proposed amendments, the majority (more than 80 per cent) agreed that the Bill would be able to attract more international arbitrations to Hong Kong.

As to the selected issues, the results of the questionnaires appear to be generally in line with the comments given by professional bodies during the consultation period. The results reveal that more respondents than not supported conferring a **Const. L.J. 394* right of appeal against a tribunal's ruling that it has no jurisdiction, to distinguish "place of arbitration" from "seat of arbitration", to allow a hearing upon a party's request, and to seek leave for appeal against awards on points of law.

In relation to the deeming provision (§102 of the 2007 Bill) for application of Sch.3, a comparatively low approval rating was recorded. Nonetheless, over 60 per cent of the respondents agreed to the inclusion of such deeming provisions. This does not comport with the description of the Legislative Council Paper that the submissions received by DoJ are overwhelmingly against the provision.³⁶

B. Interviews

In order to seek further views on the selected issues concerning arbitration law reform in Hong Kong, eleven interviews were conducted. Seven interviews with members of the HKIAC Panel of Arbitrators were conducted between June and September 2009, while the remaining four were interviewed by March 2010. Among the eleven, eight were based in Hong Kong, two in Mainland China and one in New Zealand. Eight of the eleven interviews were conducted by telephone and three were conducted in person.

• Unification of the two regimes

Five interviewees agreed with the advantages and merits of arbitrations conducted under a unified regime regulated by the Model Law. However, one interviewee took a negative view towards this issue, opining that the insertion of too many non-Model Law clauses into the Bill complicated the structure of the Bill, thus causing difficulties in understanding the whole arbitration law in Hong Kong, particularly for a foreign arbitration practitioner. This comment echoed a similar comment made by one of the questionnaire respondents that the proposed Bill is substantially longer than its counterparts elsewhere.

Feedback received from the interviewees on this issue revealed that they were generally supportive of the changes and considered the amendment helpful in continuing to promoting Hong Kong's status as an international arbitration centre in the region. However, the negative comments received from one interviewee were not without merits as similar negative comments were also received from overseas arbitration practitioners via their responses to the questionnaire.

• Arbitral tribunal's ruling that it has no jurisdiction

All the interviewees were of the view that it is uncommon for an arbitrator to decline jurisdiction to decide the dispute. Only in very limited situations, such as invalidity of the arbitration agreement, would an arbitral tribunal decline jurisdiction. Some interviewees were, however, of the view that logically an appeal mechanism against a tribunal's adverse ruling on its jurisdiction should be in **Const. L.J. 395* place. Other interviewees considered an appeal mechanism to be unnecessary, since the competent court would take over the case if a tribunal decided that it had no jurisdiction.

• Request for oral hearing

Generally, the interviewees considered this provision to be in line with the rules of natural justice. One stated that this is the basic standard for arbitration. Interviewees took the view that in the event of a party abusing this right in order to delay the arbitration proceeding, the arbitrator has the discretion (and indeed an obligation under Ordinance, §2AA(1) and §2GA(1)(b)) to resist such unreasonable requests from that party, and thus to avoid unnecessary delay and cost.

• Other comments

One interviewee raised the point that the Bill should also provide for consumer arbitration, rather than focusing on international commercial disputes. This was in view of the fact that many consumer-related standard contracts, such as personal insurance contracts, contain an arbitration clause. It was recommended that the law should have certain safeguard measures to protect consumer interests.

Part VIII--Conclusion

Since 1990, the Model Law has served as the international arbitration law of Hong Kong, thus

beginning a process of breaking away from historical ties to the English model. The proposed unification of the domestic and international regimes, based upon the 2006 version of the Model Law, represents an entirely new direction for the territory.

Several changes were made to critical provisions of the 2007 Bill as a result of the public consultation and following overwhelming criticism from the arbitration community. The most obvious of these was the deletion of the deeming provision in relation to domestic arbitrations (§102 of the 2007 Bill).

The results of the research (by questionnaire and interviews) reveal a generally positive view of the Bill by the respondents and interviewees. It is widely believed that the proposed arbitration law reform in Hong Kong will further improve the territory's arbitration law and thus enable Hong Kong to develop into a more user-friendly centre for international arbitration.

Nonetheless, during the research, respondents to the questionnaire and the interviewees did raise a number of negative comments with regard to the intended purposes of the reform, organisation and the format of the Bill. With regard to the development of consumer-related arbitration in Hong Kong,³⁷ one interviewee significantly commented that arbitration law reform should also cater for such *Const. L.J. 396 types of arbitrations and address the protection of consumers' rights. Such comments and views merit consideration for future arbitration law reform in Hong Kong.

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Const. L.J. 2010, 26(5), 379-396

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1. See Executive Summary of the Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill, at <http://www.doj.gov.hk/eng/public/pdf/2007/arbitration.pdf> [Accessed April 30, 2010]; "The President's Speech at the Ceremonial Opening of the Legal Year 2008", at <http://law.lexisnexis.com/webcenters/hk/Hong-Kong-Lawyer-/The-Presidents-Speech-at-the-Ceremonial-Opening-of-the-Legal-Year-2008> [Accessed April 30, 2010].
 2. Statistics from HKIAC Secretariat.
 3. Data obtained from the HKIAC website at: http://www.hkiac.org/show_content.php?article_id=9 [Accessed April 30, 2010].
 4. R. Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary* (Singapore/Hong Kong/Malaysia: Butterworths, 1997), p.34; M.J. Moser and T.Y.W. Cheng, *Hong Kong Arbitration: A User's Guide* (Kluwer Law International, 2008), pp.47-49.
 5. The major differences between the two regimes are: domestic arbitrations permit appeals of awards to the court under Ordinance, §23; and domestic arbitrations, unless otherwise agreed, are deemed to be heard by a single arbitrator under Ordinance, §8.
 6. See HKI Arb website at http://www.hkiarb.org.hk/e_news_20080202.html [Accessed April 30, 2010].
 7. See LegCo Panel on Administration of Justice and Legal Services -- Information Paper on Reform of the law of Arbitration, at: <http://www.legco.gov.hk/yr06-07/english/panels/ajls/papers/aj0528cb2-1941-1-e.pdf> [Accessed April 30, 2010].
 8. Legislative Council Brief (File Ref.: LP 19/00/3C Pt. 38). See Research and Library Services Division of the Legislative Council Secretariat, Information note on how bills are made at: <http://www.legco.gov.hk/yr03-04/english/sec/library/0304in18e.pdf> [Accessed April 30, 2009].
 9. Such as provisions in Sch.2 of the 2009 Bill (formerly Sch.3 of the 2007 Bill).
 10. As is currently the case in the Ordinance, s.2(1).
 11. See, e.g., Morgan, *The Arbitration Ordinance of Hong Kong* (1997); N. Kaplan, J. Spruce & T.Y.W. Cheng, *Hong Kong Arbitration, Cases and Materials* (Hong Kong: Butterworths, 1991); N. Kaplan, J. Spruce & M.J. Moser, *Hong Kong and*

China Arbitration, Cases and Materials (Singapore: Butterworths, 1994); Arbitration in Hong Kong: A Practical Guide, edited by Ma et al (Hong Kong: Sweet & Maxwell Asia, 2003).

- [12.](#) “Section 101 -- Circumstances under which opt-in provisions do not automatically apply Section 100 does not apply if --(a) parties to the arbitration agreement concerned so agree in writing; or(b) the arbitration agreement concerned has provided expressly that:(i) section 100 does not apply; or(ii) any of the provisions in Schedule 2 applies or does not apply.”
- [13.](#)
- [14.](#)
- [15.](#)
- [16.](#)
- [17.](#) The operation of the opt-in provisions is considered in more detail below.
- [18.](#) A similar power also exists in the Netherlands: c.f. Code of Civil Procedure 1986, art.1046. While this is in practice efficient and prevents the danger of irreconcilable awards, such a provision represents significant court intervention in arbitral proceedings. Parties having no knowledge of each other may suddenly and unwillingly find themselves confronting each other in an arbitration very different to that to which they had originally agreed.
- [19.](#) See, e.g., Florida International Arbitration Act 1988, §684.12; California Code Civil of Procedure, §1297.272.
- [20.](#) Ordinance, s.23(2).
- [21.](#) Model Law, art.34(2)(a)(i).
- [22.](#) Model Law, art.34(2)(a)(ii).
- [23.](#) Model Law, art.34(2)(a)(iii).
- [24.](#) Model Law, art.34(2)(a)(iv).
- [25.](#) Model Law, art.34(2)(b)(i).
- [26.](#) Model Law, art.34(2)(b)(ii).
- [27.](#) Redfern & Hunter on International Arbitration, edited by N. Blackaby, C. Partasides, A. Redfern and M. Hunter, 5th edn (Oxford: Oxford University Press, 2009), p.367.
- [28.](#) Ordinance, §2GA(1)(a).
- [29.](#) It has been suggested that a Court could intervene in this way even under the Model Law. See Arbitration in Hong Kong: A Practical Guide, 2003, p.215.
- [30.](#) Section 77(10) of the 2009 Bill.
- [31.](#) Section 77(4) of the 2009 Bill. This reflects the current position under Ordinance, §21.
- [32.](#) 2003 Report at para.43.34.
- [33.](#) Arbitration in Hong Kong: A Practical Guide, 2003, p.167.
- [34.](#) Redfern & Hunter, 2009, p.184.
- [35.](#) See Response of Hong Kong Bar Association to the Consultation Paper on Reform of the Law of Arbitration in Hong

Kong and Draft Arbitration Bill, at: <http://www.hkba.org/whatsnew/submission-position-papers/2008/20080711.pdf> at 4 [Accessed April 30, 2010].

36. American Cyanamid Co v Ethicon Ltd [1975] A.C. 396. The case concerned an alleged infringement of a patent. The plaintiffs having sought a quia timet injunction, the House of Lords held that there are two requirements therefor: first, that there is a serious question to be tried; and secondly, that the balance of convenience lies in favour of granting an injunction.
37. Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [Accessed April 30, 2010] at p.31.

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