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Legislative Comment

The legislative history of the new Hong Kong Arbitration Ordinance

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Model Law on International Commercial Arbitration (UNCITRAL)

Introduction

On November 10, 2010, after many years of discussion and consultation, the Legislative Council of Hong Kong passed the new Arbitration Ordinance (Cap. 609) (hereinafter “the new Ordinance”). The Ordinance came into effect on June 1, 2011, replacing the previous version of the Arbitration Ordinance (Cap. 341) (hereinafter “the old Ordinance”) originally enacted in 1963. The enactment of the new Ordinance marked an important milestone in the development of Hong Kong as the regional hub for international arbitration. The aims of the reform were to make the arbitration law of Hong Kong more user-friendly and to facilitate the speedy resolution of disputes.[2]

Background

Over the past half century, arbitration law in Hong Kong has been evolving. The origin of the old Ordinance came from its English counterpart, the Arbitration Act 1950. The old Ordinance adopted a unitary arbitration law regime for both domestic and international arbitrations. In 1982, the Government enacted the Arbitration (Amendment) Ordinance following the recommendations of the Law Reform Commission of Hong Kong (LRCHK). This Ordinance provided for a new arbitration system based on reasoned awards with the High Court given power to order an arbitrator to provide sufficient reasons. The system allowed a right of appeal to the High Court on questions of law.[3]

In 1985, the United Nations Commission on International Trade Law (UNCITRAL)[4] adopted the Model Law on International Commercial Arbitration (hereinafter “Model Law”).[5] Hong Kong adopted the Model Law, with minor modifications, via the Arbitration (Amendment) (No. 2) Ordinance, making the Model Law the procedural law for international arbitrations from April 6, 1990. The adoption of the Model Law in Hong Kong, created two separate regimes, one for domestic and one for international arbitration. The domestic regime continued to be based on the English Arbitration Act 1950 while the international regime became based on the Model Law. However, the Ordinance did not impose any restrictions on opting in, or out of either regime, thus giving autonomy to the parties to choose the regime that best suited their needs.

The arbitration law in Hong Kong further evolved in 1996, when a committee created by the Hong Kong International Arbitration Centre (HKIAC) 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. Several of these recommendations were implemented by way of the Arbitration (Amendment) Ordinance 1996.

In 1998, the Hong Kong Institute of Arbitrators (HKIArb) in co-operation with the HKIAC, formed a Committee on Hong Kong Arbitration Law, which issued a report that recommended the revision of the old Ordinance by replacing the separate domestic and international regimes with a single unitary regime based on the Model Law.

In September 2005, the government created the Departmental Working Group (hereinafter “Working Group”) to implement the recommendations proposed in the Report of the Committee on Hong Kong Arbitration Law, published in 2003.[6] On December 31, 2007, the Department of Justice (DoJ)

published a Consultation Paper on Reform of the Law of Arbitration in Hong Kong (hereinafter "Paper"), together with a draft Arbitration Bill.[7]

By the conclusion of the six-month consultation period on June 30, 2008, the DoJ received over forty responses.[8] These responses indicated general support for the Arbitration Bill and for the adoption of the unitary regime of arbitration based on the Model Law. The responses also resulted in a number of changes to the draft Arbitration Bill. The government published a revised version of the Arbitration Bill (hereinafter "the Bill") in the government Gazette on June 26, 2009.

The Arbitration Bill

The purpose of the Bill was to implement the proposed reform of the arbitration law in Hong Kong, which would make the law more user-friendly to arbitration users both in and outside Hong Kong.[9] The Bill sought to align Hong Kong's arbitration regime with widely accepted international practices. This alignment should attract more business parties to conduct arbitral proceedings in Hong Kong and strengthen Hong Kong's status as a regional centre for dispute resolution.[10]

The Bill was divided into 14 parts. The content of the Bill is summarised in the table below[11] :

	Heading	Content
Pt 1	Preliminary	the object and principles of the Bill
Pt 2	General Provisions	the principles for the interpretation of the Model Law, the procedural rules in respect of the delivery of written communications and the application of the limitation provisions
Pt 3	Arbitration Agreement	provisions relating to an arbitration agreement including the definition and the form of an arbitration agreement, and the circumstances under which a court action, the dispute of which is the subject of an arbitration agreement, should be referred to arbitration
Pt 4	Composition of Arbitral Tribunal	provisions relating to the composition of an arbitral tribunal, the appointment of arbitrators and the grounds and procedures for challenging such appointment
Pt 5	Jurisdiction of Arbitral Tribunal	the power of an arbitral tribunal to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement

Pt 6	Interim Measures and Preliminary Orders	the power of an arbitral tribunal to grant interim measures and preliminary orders
Pt 7	Conduct of Arbitral Proceedings	the procedures for the conduct of arbitral proceedings and the general powers exercisable by an arbitral tribunal when conducting arbitral proceedings
Pt 8	Making of Award and Termination of Proceedings	the procedures for the making of arbitral awards and the circumstances under which arbitral proceedings are to be terminated and the mechanism for doing so
Pt 9	Recourse against Award	provisions relating to recourse to the court against an arbitral award made by a party by an application for setting aside the award on specified grounds
Pt 10	Recognition and Enforcement of Awards	retention of the scheme under the old Ordinance for the enforcement of arbitral awards made, whether in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal
Pt 11	Provisions that may be Expressly Opted for or Automatically Apply	provisions which provides that parties to an arbitration agreement may expressly provide in the arbitration agreement whether any of the "opt-in" provisions in Sch.2 to the Bill shall apply
Pt 12	Miscellaneous	miscellaneous provisions relating to the liability of an arbitral tribunal and a mediator and other relevant bodies, the power to make relevant rules of court and the procedures for making an application under the Bill
Pt 13	Repeal, Savings and Transitional Provisions	provisions relating to the repeal of the old Ordinance and the relevant savings and transitional

		arrangements
Pt 14	Consequential and Related Amendments	provisions which provide for the setting out in Sch.4, of consequential and related amendments
Sch.1	UNCITRAL Model Law on International Commercial Arbitration	the full text of the Model Law for information
Sch.2	Provisions that may be Expressly Opted for or Automatically Apply	the opt-in provisions that enable users of arbitration to continue to adopt domestic arbitration provisions based on the old Ordinance
Sch.3	Savings and Transitional Provisions	provisions relating to the savings and transitional arrangements
Sch.4	Consequential and Related Amendments	the consequential and related amendments provided by Pt 14

At the Legislative Council meeting on July 8, 2009, the Arbitration Bill received the First Reading and the Secretary for Justice moved that the Bill receive a Second Reading.[12] In accordance with the Rules of Procedure, the Deputy President adjourned the debate and referred the Bill to the House Committee.

At the House Committee meeting on July 10, 2009, the members agreed to form a Bills Committee consisting of 11 members, with Dr. Hon. Margaret Ng as chair, to study the Bill. The Bills Committee and the DoJ conducted 15 meetings between July 28, 2009 and September 20, 2010. The meeting conducted on October 5, 2010, received the views from eight deputations.[13]

Deliberations of the Bills Committee

During the meetings held with the DoJ, the Bills Committee studied the various parts of the Bill and discussed many issues and concerns raised by members of the Committee (hereinafter "Members") and deputations. The key issues discussed are summarised below.

Establishment of a unitary regime for arbitration

The purpose of the Bill is to establish a unitary regime of arbitration on the basis of the UNCITRAL Model Law for all types of arbitration and to facilitate the speedy resolution of disputes, hence attracting more arbitration business for Hong Kong.[14] Most Members and deputations supported the objective and spirit of this Bill.[15]

However, some deputations objected to the passing of the Bill. The Hong Kong Institute of Surveyors (HKIS) expressed the view that "the purposes of the Arbitration Bill are unsuitable for the construction industry in Hong Kong".[16] The HKIS submitted that most construction arbitrations do not involve foreign elements, and that these arbitrations "involve complicated and substantial legal arguments, evidence and documents akin to High Court proceedings".[17]

The HKIS contended that most construction arbitrations in Hong Kong are domestic, i.e. arbitrations

conducted under the provisions, or rules of the domestic regime.[18] The domestic arbitration regime suits the needs of the construction industry, including features such as a single arbitrator, consolidation of arbitrations, multi-party arbitration, appropriate assistance and supervision from the courts. According to the HKIS, the practice which had been commonly adopted by the construction industry should not be sacrificed for the mere hope of increasing business opportunity for arbitral proceedings to be held in Hong Kong, or promoting Hong Kong as a dispute resolution centre.[19]

The HKIS argued that "the business opportunity of arbitral proceedings will not be increased merely by reforming the existing Arbitration Ordinance which already provides the international regime".[20] The HKIS also criticised the Bill for creating numerous ambiguities. On the grounds that the existing legislation for arbitration worked well for the construction industry, the HKIS opposed the enactment of the new Ordinance.

Nonetheless, other deputations and Members generally supported the guiding objective of the Bill of establishing a unitary regime for arbitration in Hong Kong.

The drafting approach

With the aim of making the new Ordinance more user-friendly, the Working Group recommended that Model Law provisions intending to have the force of law, should be reproduced in the main body of the Bill under the appropriate clauses and be given effect accordingly.[21] The Working Group believed that this proposed structure would enable Hong Kong to be seen as conforming to the Model Law.[22] The Working Group considered that there would not be any significant difficulties in setting out the Model Law provisions in the main body of the new ordinance, as few amendments thereto would be adopted.[23]

Additionally, the full text of the Model Law would also be reproduced in the Bill in Sch.1, for information only, while non-applicable provisions would be underlined. This proposal created some debate. A number of Members questioned the necessity of reproducing the full text of the Model Law in a Schedule as certain provisions are merely reference material which should not be part of the proposed ordinance. These Members believed that this drafting approach was not as user-friendly as intended.[24] Other Members supported this drafting approach believing that this approach could enable international users easily to cross reference the Hong Kong legislation and the UNCITRAL Model Law.[25]

The DoJ believed that this drafting approach reflected the general consensus of the Working Group and could achieve the objective of enhancing the perception of Hong Kong as a Model Law jurisdiction.[26] Consequently, those Model Law provisions having the force of law have been incorporated into the main body of the new Ordinance, and, the Model Law has been set out in full in Sch.1 of the new Ordinance.

Territorial scope

According to cl.5, the Bill is applicable to arbitrations in Hong Kong, regardless of whether the arbitration agreements are entered into in Hong Kong. However, if the place of arbitration[27] is outside Hong Kong, only certain provisions[28] of the Bill would apply to the arbitration. The DoJ explained that the principle of the Bill is that the parties to a dispute should be free to agree on how the dispute should be resolved.[29]

Confidentiality in arbitral proceedings

Section 2D of the old Ordinance, mandated that proceedings under the Ordinance in the Court of First Instance, or the Court of Appeal in Hong Kong be heard otherwise than in open court upon the application of any party to the proceedings.[30] Balancing the need to maintain the confidentiality as a key aspect of arbitration and the need to protect the transparency of the process commensurate with the judicial system's public accountability, cl.16 of the Bill stipulates that the arbitral proceedings should, as a starting point, be heard otherwise than in open court, unless on the application of any party, or on the court's initiative.[31] In other words, cl.16 adopts the default position of the confidentiality afforded by closed court proceedings, unless a party applies for and receives permission to proceed in open court, or upon the court's own initiative to hold the said proceedings in open court.

Some Members expressed the view that the fundamental principle of open justice should not be discarded simply for the purpose of attracting more arbitration, as the court is a public institution of justice. However, having considered that cl.16 allows the court to decide whether the proceedings should be heard in open court after considering the particular circumstances of each case, Members generally agreed with the arrangements.[32]

Whether arbitral awards should be made available for public reference

Under cl.18 of the Bill, no party may publish, disclose, or communicate any information relating to arbitral proceedings under the arbitration agreement, or to an award made in those proceedings, unless otherwise agreed by the parties. This is subject to certain exceptions, namely, if the publication, disclosure, or communication is contemplated by this Ordinance; made to any government body, regulatory body, court, or tribunal and the party is obliged by law to make the publication, disclosure, or communication; or made to a professional, or any other adviser of any of the parties.

Some Members considered that it would be beneficial to have arbitral awards made available for public reference due to the increasing use of arbitration for resolution of disputes.[33] The publication of awards could provide valuable reference on procedural and substantive issues that arose during arbitral proceedings. In response, the DoJ emphasised the importance of adhering to the international practice that arbitral awards should only be made public with the consent of the parties concerned.[34]

The Chairman of the Bar Association noted that, internationally, reports of arbitral awards had been published. Such awards, without offending the principle of privacy and confidentiality inherent in arbitral awards, would be essentially limited to the principles emanating from the cases of wider interest than merely to the interests of the parties themselves. Following this, arbitral awards should only be made public if the consent of the parties involved was obtained.[35]

The DoJ observed that cl.18 of the Bill would strike the necessary balance between the need to preserve an arbitration's confidentiality and the need to disclose information relating to arbitral proceedings and awards under exceptional circumstances.[36] Clause 18(2) serves to provide guidance for the disclosure of information relating to arbitral proceedings and awards.

There were concerns, however, about the interpretation and application of the expression "contemplated by this Ordinance" in cl.18(2)(a).[37] In the light of the concerns, the DoJ agreed to amend the clause so that the expression "contemplated by this Ordinance" is replaced by the following: "To protect or pursue a legal right or interest of the party, or to enforce or challenge the award, in legal proceedings before a court or other judicial authority in or outside Hong Kong."[38]

Whether an order of the court under the Bill should be subject to appeal

Another important issue discussed by the Committee was whether the Bill should allow an order of the court to be subject to appeal. The DoJ agreed with the Working Group's view that no appeal should be provided if the provision was only concerned with a matter of procedure. Mr Albert Ho expressed doubts concerning whether the proposal would be in breach of the Basic Law and relevant case law.[39] The DoJ replied that the proposal would not violate the Basic Law based on the principle of proportionality, given that both parties had expressly agreed to resolve disputes by arbitration.[40] The Bill, therefore, now adopts the position that minor procedural proceedings in court should not be subject to appeal, whereas proceedings which might, or do determine substantive rights may be subject to appeal.[41] This position can help to fulfill the Bill 's objective to facilitate speedy resolution of disputes by arbitration.

Agreement in writing

In the Bill, Option I of art.7 of the Model Law is adopted[42] and given effect by cl.19. This follows the New York Convention requirement for an arbitration agreement to be in writing.[43] Nonetheless, cl.19 also provides that "an arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means".[44] The extension of the definition of an "arbitration agreement in writing" to include electronic communications is due to the international trend to accept modern technology in the course of business. It is increasingly common in Hong Kong that many agreements are recorded by electronic means.

Appointment of arbitrators

Under the domestic regime of the old Ordinance, a sole arbitrator would determine any dispute in the absence of agreement by the parties as to the number of arbitrators. Under the international regime of the old Ordinance, either one, or three arbitrators as decided by the HKIAC would determine any dispute in the absence of agreement by the parties. The Bill adopted the position that the parties are free to determine the number of arbitrators in all types of arbitration. Under cl.23(3) of the Bill, if the parties fail to agree on the number of arbitrators, the number of arbitrators shall be either one, or three as determined by the HKIAC.

Appointment of umpires

The old Ordinance provided for the appointment of an umpire in cases of domestic arbitration agreements which have a reference to two arbitrators. The Model Law is silent on this issue. In the Bill, cl.30 seeks to extend the application to all types of arbitration involving an even number of arbitrators. Where this provision is used, cl.31 of the Bill defines the function of the umpire.

Appointment of mediators

In the event of a default by a third party which has been specified in an arbitration agreement to appoint a mediator, the power to appoint a mediator would be vested in the HKIAC under cl.32(1). The Hong Kong Mediation Centre (HKMC), through its written submission to the Bills Committee, suggested that it, too, should be authorised to appoint a mediator under cl.32(1).[45]

The HKMC commented that the HKIAC was no longer the only competent authority to appoint arbitrators and mediators, as other professional institutes such as the Law Society of Hong Kong, the Hong Kong Bar Association, the Hong Kong Institute of Arbitrators and the HKMC are also experienced in handling such appointments. The HKMC expressed the view that the Bill must respect the end user's decision in the process of appointment of the arbitrator, or mediator.[46] Should the parties fail to appoint their arbitrator, or mediator, the parties' decision as to the appointing authority, or institution to make the appointment should be respected. The HKMC believed that with its experience in appointing mediators and the availability of full-time staff administrating mediation, the HKMC is more suited for the appointment of mediators.[47]

The DoJ's position on this matter was that to authorise more than one authority to appoint mediators under cl.32(1) is undesirable.[48] The power of appointing mediators "would be used as a last resort and only where there is a written arbitration agreement between the parties".[49] As the power of appointment of a mediator under cl.32(1) is derived from an arbitration agreement, this power should be exercised by the HKIAC, a power which is consistent with that given to the HKIAC by cl.24(2) for appointing arbitrators where a party has failed to make the necessary appointment under the terms of an arbitration agreement.[50] The issue of the appointment authority under a stand-alone mediation agreement might be addressed later by the Working Group on Mediation.[51]

Members also expressed concern regarding the appropriateness of an arbitrator acting as a mediator, as the former might have obtained confidential information from a party during the mediation proceedings, such proceedings having been conducted by the arbitrator as a mediator.[52] The DoJ explained that, under cl.33(1), an arbitrator may act as a mediator "only under the condition that all parties consented in writing and for so long as no party withdrew the party's consent in writing".[53] Clause 33(4) of the Bill states that an arbitrator must:

"disclose to all other parties as much of that information as the arbitrator considered was material to the arbitral proceedings if confidential information was obtained by an arbitrator from a party during the mediation proceedings conducted by the arbitrator as a mediator and those mediation proceedings terminated without reaching a settlement acceptable to the parties". [54]

Mediator immunity

The DoJ observed that the report published in February 2010, by the Working Group on Mediation raised the issue of mediator immunity. [55] The Working Group on Mediation considered that the mediations conducted in Hong Kong are mostly of the facilitative type, with the mediators performing no judicial function. Therefore, the rationale underlying immunity for arbitrators and judges does not apply.[56] In instances where the mediation is conducted within the framework of arbitration, immunity

would be available to the mediator under cls 103 and 104 of the Bill.

Jurisdiction of arbitral tribunal

The DoJ added a number of provisions to the Bill. These provisions dealt with the power of an arbitral tribunal. Clause 34 of the Bill gives effect to art.16 of the Model Law, which enables an arbitral tribunal to rule on its own jurisdiction, including any objections with respect to the existence, or validity of the arbitration agreement. The court may decide on the matter,[57] upon any party's request, in situations where an arbitral tribunal rules as a preliminary issue that the tribunal has jurisdiction.[58]

According to cl.34(4) of the Bill, a ruling of the arbitral tribunal that it does not have jurisdiction to decide a dispute is not subject to appeal. During the consultation on the Bill, there were views that the Bill should provide for an appeal from such a negative ruling on jurisdiction, considering that a party who wishes to conduct an arbitration in circumstances where an arbitral tribunal has wrongly decided that there is no jurisdiction should not be left without redress.

However, the Working Group took the view that it would not be desirable to depart from the Model Law as there should be finality in arbitration, and it would be inappropriate to force an arbitral tribunal to conduct an arbitration after a negative jurisdictional finding. As a result, no amendment was made on this issue.[59]

Interim measures

One of the significant changes proposed by the Bill is the introduction of the 2006 amendments of the Model Law. The Bill adopted seven of the ten provisions concerning interim measures and preliminary orders.[60]

An interim measure is any temporary measure ordered prior to the issuance of the award by which the dispute is finally decided. Under cl.45(3), the court is empowered to grant an interim measure in relation to arbitral proceedings irrespective of whether, or not similar powers may be exercised by an arbitral tribunal.

According to cl.35, the tribunal is presumed to be able to order interim measures, unless the parties agree specifically to the contrary. Clause 35(3) empowers 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.[61] Clauses 36 to 42 serve the purpose of updating the international arbitration regime and transitioning the domestic arbitration regime to the current Model Law.

Some Members inquired into the need expressly to provide for a mechanism to appeal against the tribunal's decision to modify an interim measure which the tribunal has granted. The DoJ contended that it would be inappropriate for the Bill to provide for an appeal against interim measures ordered by an arbitral tribunal, as the objective of the Bill is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense.[62] Therefore, cl.45(10) adopts the position that a decision, order, or direction of the court under cl.45 is not subject to appeal.

Opportunity to present case

Pursuant to art.18 of the Model Law, "each party shall be given a full opportunity of presenting his case". The use of the term "full opportunity" had led to concerns that this term can lead to abusive delaying tactics by parties wishing to stall, or to prolong the arbitral process.[63] Therefore, in order to avoid the possibility of such abuse, the DoJ replaced art.18 with cl.46, which provides that the tribunal need only give each party a "reasonable" opportunity to present its case.[64]

Peremptory orders

Clause 53 of the Bill replaces s.23C of the old Ordinance and seeks to give effect to art.25 of the Model Law, which allows the arbitral tribunal to continue the proceedings if a party fails to appear at a hearing, or produce documentary evidence. Clause 53(2) provides that, unless otherwise agreed, subss (3) and (4) apply except in relation to an application for security for costs. Clause 53(3) empowers the tribunal to make a peremptory order requiring compliance in cases where a party fails to comply with any order, or direction of the arbitral tribunal. Clause 53(4) provides the remedies in the event of the failure to comply with a peremptory order. Subsections (2), (3) and (4) are in addition

to art.25 of the Model Law.[65]

Enforcement of arbitral awards

Under the old Ordinance, an award made in the Mainland by a recognised Mainland arbitral authority (hereinafter "Mainland award"), or an award made in a State, or territory (except China) which is a party to the New York Convention (hereinafter "Convention award") can be enforced as provided for, respectively, in Pt IIIA and Pt IV of the old Ordinance.

Article 35 of the Model Law deals with the recognition and enforcement of arbitral awards in international commercial arbitrations. Article 36 of the Model Law sets out the grounds on which an enforcing court can refuse the recognition and enforcement of an arbitral award. The DoJ took the view that arts 35 and 36 of the Model Law should not apply to Hong Kong. In lieu thereof, the statutory scheme for enforcement of awards under the old Ordinance, which is based on the arrangement concluded with the Mainland and the New York Convention, should be adopted and retained in the Bill.[66] The procedures for the enforcement of Mainland awards and Convention awards under the Bill remain the same as those found in the old Ordinance. The enforcement of an arbitral award which is neither a Mainland award nor a Convention award is regulated by cls 84 to 86 of the Bill.[67]

The draft Arbitration Bill of 2007 proposed that a reciprocity requirement be inserted in the Bill for the enforcement of an arbitral award which is neither a Mainland award nor a Convention award.[68] The Working Group, however, noted that there is also a reciprocity requirement in the relevant Taiwan legislation for the enforcement of foreign arbitral awards.Article 49 of the Arbitration Law of the ROC provides as follows: [69] The courts in Taiwan might refuse to enforce a Hong Kong award on the ground that the requirement for reciprocity in the relevant Taiwan legislation is not met if the Bill imposed a reciprocity requirement. The Working Group considered that the requirement for reciprocity in cl.85(2) carries a risk that Hong Kong arbitral awards might be refused recognition and enforcement in an overseas jurisdiction which is not a party to the New York Convention. Therefore the DoJ agreed to delete cl.85(2) so that it did not appear in the 2009 Bill.[70]

Automatic opt-in mechanism

Under Pt 11 of the Bill, an "opting-in" system is provided in order to enable parties to continue to adopt domestic arbitration provisions based on the old Ordinance and as set out in Sch.2 to the Bill. According to cl.100, the opt-in provisions under Sch.2 of the Bill would automatically apply to an arbitration agreement entered into before, or at any time within a period of six years after, the commencement of the Bill and if the said agreement provided that arbitration under the agreement is a domestic arbitration.[71] According to a survey conducted over the period of April to May 2009[72], a majority of the respondents (85.7 per cent) agreed that the opt-in provisions in Sch.2 should be included.[73]

When the Arbitration Bill was published in 2007, the drafters proposed that all the provisions relating to domestic arbitration would apply automatically to an arbitration agreement in a sub contract where the main contract provided for domestic arbitration. Views received concerning this proposal were diverse. While a majority of respondents to the Consultation Paper opposed this proposal, some respondents, particularly those from the construction industry, supported this proposal.[74] Considering the majority view, the DoJ removed cl.102, which contained this proposal, from the Bill.[75] According to the survey conducted in April 2009, only about 63 per cent of the respondents agreed that the automatic opt-in provisions for sub contractors should be retained in the Bill.[76]

The deputations from the construction industry, such as the Hong Kong Construction Association, strongly requested the reinstatement of the automatic opt-in provisions for sub-contractors.[77] These deputations noted that without an express opt-in, all subcontracts will be governed by the Model Law-oriented unitary regime under the Bill. Without the automatic opt-in for sub-contracts, some Members believed that in the absence of contracts in most sub-contracting cases in the construction industry, the status of local construction sub contractors would immediately change after the Bill came into force unless the sub contractors were aware that they needed to state expressly that they will be subject to the domestic regime.[78]

The DoJ explained that the clause was removed as the submissions were overwhelmingly against this mechanism. Also, the opt-in provisions would still apply to subcontracts if the sub-contractors wish

this to be the case, as provided under cls 99 and 100 of the Bill. Clause 99 of the Bill provides that: [79] Nevertheless, after receiving comments from the stakeholders, the DoJ considered it appropriate to introduce the automatic opt-in mechanism but confined its application to construction sub-contracts only. The definition of a "construction contract" incorporates the definition provided in the Construction Industry Council Ordinance (Cap. 587) as "a contract between an employer and a contractor under which the contractor carries out construction operations[80] but does not include a contract of employment".[81]

Another feature of the amendments was the exclusion from the application of the new cl.100A(1),[82] of sub-contractors with a residence, place of incorporation, management and control, or place of business outside Hong Kong, as well as sub-contracts the performance of which are outside Hong Kong. The DoJ believed that the differences amongst the stakeholders on the subject could be resolved, and this amendment received support from the majority of the respondents.[83]

As a result, the government inserted a new cl.100A into the Bill and amended cl.101 in order to give effect to the automatic opt-in mechanism. Clause 100A provides that where a construction contract has opted in under cl.100, sub-contracts with an arbitration agreement are deemed to have opted in to the Sch.2 provisions, except in instances where: [84]

Passage of the Bill

After 15 meetings and having completed the examination of the Bill, the Bills Committee issued a report for the House Committee meeting on October 22, 2010. The Bills Committee supported the Committee Stage Amendments to be moved by the DoJ and the resumption of the Second Reading debate on the Bill at the Legislative Council meeting on November 10, 2010. At the Legislative Council meeting on that date, the legislators passed the Committee Stage Amendments moved by the DoJ. The Bill received its Third Reading and was passed.

On March 4, 2011, the DoJ gazetted the commencement notice of the new Arbitration Ordinance, and the Ordinance came into operation on June 1, 2011 and the old Ordinance was accordingly repealed.

Commentary

The new Ordinance has not been in effect for a sufficient time to generate litigation over its interpretation, or application. Nonetheless, there are certain sections of the new Ordinance which might pose difficulties and hence warrant further consideration. This section reviews three situations.

The first of these situations involves the "transitional" period. The new Ordinance is unambiguous that in situations where arbitrations and related proceedings are commenced prior to June 1, 2011, the old Ordinance will continue to apply.[85] Equally unambiguous is that the new Ordinance will apply to arbitrations commenced on, or after June 1, 2011.[86] Unclear is the application of s.99 of the new Ordinance, which permits the expressed opting into some, or all of the Sch.2 provisions which are essentially the domestic regime provisions of the old Ordinance: sole arbitrator where the parties did not agree otherwise; consolidation of arbitrations; court decision on preliminary questions of law; challenging an award; and appeals of an award on a question of law.[87]

Additionally, although s.99's impact is yet to be determined, s.99 can be compared to the opt-in/opt-out provisions of the old Ordinance allowing parties to opt into, or to opt out of a particular arbitration regime, i.e. domestic,[88] or international.[89] This ability to selectively opt for features of a domestic regime, or an international regime seems to defeat the purpose of the new Ordinance: providing a unified arbitration regime under the Model Law. Moreover, by allowing selective application of the Sch.2 provisions would appear to create potential confusion, or disagreement.[90] This confusion would frustrate the goal of the new Ordinance to be user-friendly.

The second involves the automatic opt-in provisions. Sections 100 and 101 of the new Ordinance relate to the foregoing discussion on electing to opt into, or out of the application of Sch.2 provisions. Section 100 provides for all the provisions of Sch.2 automatically to apply in certain situations: arbitration agreements entered into before, or within six years, of the commencement of the new Ordinance and which agreements provide for "domestic arbitration".[91] Section 101(1) states that the automatic application of s.100 is deemed to apply to Hong Kong construction sub-contracting cases. Section 101(2) sets out the circumstances under which s.101(1) does not apply. Section 101(3) applies s.101(1) to sub-subcontracts.

As explained: Part 11 [which contains sections 99 – 103 of the new Ordinance] provides that parties to an arbitration agreement may expressly provide in the arbitration agreement as to whether any of the opt-in provisions in Sch.2 to the Bill shall apply. The opt-in provisions enable users of arbitration to continue to use certain provisions that only apply to domestic arbitration under the [old] Ordinance. Subject to any express agreement to the contrary, those provisions will be automatically applied if the arbitration agreement is a domestic arbitration agreement —

“

“(a) entered into before the commencement of the Bill; or

(b) entered into at any time within a period of 6 years after commencement of the Bill.”

[92]

Section 102 specifies the circumstances under which neither s.101 nor s.102 would apply: the parties have agreed to exclude the application of these sections and/or provisions of Sch.2.

The language used in Pt 11 was difficult to comprehend on a preliminary reading for this author. More importantly, vagaries as to the application of these sections exist, some examples of which are noted as follows:

1. Where there is no express provision for “domestic arbitration”, but domestic arbitration rules are selected;[93]

2. Where the dispute is related to the construction industry, but does not clearly fall within the ambit of the definition of construction operations, e.g. consultation work;[94]

3. The interplay between ss 99, 100 and 101 are unclear. One authority notes that where the parties elect to opt into the Sch.2 provisions via s.99, the query arises whether the application of s.101 to sub-contractors would be precluded;[95]

4. Likewise, where Pt 11 may be applicable, the parties’ express specification of the number of arbitrators would implicitly include, or exclude the operation of certain Sch.1 provisions, i.e. s.1, which specifies the appointment of a sole arbitrator.[96]

The final situation to be reviewed involves the arbitration/mediation process. The new Ordinance permits an arbitrator to serve as mediator in the matter before which the individual is serving as arbitrator with the written consent of all the disputing parties.[97] For those trained under the common law system, this process raises concern over ethical and conflict issues. Anecdotal comments from practitioners indicate that civil law system professionals would not encounter such conflicts. Nonetheless, the query remains whether the parties would be willing to be completely frank and forthcoming in the mediation knowing that, in the event of an unsuccessful mediation, the arbitrator/mediator is obligated to make full disclosure of “as much of that [confidential] information as the arbitrator considers is material to the arbitral proceedings.”[98]

Additionally, this arb/med procedure could be subject to abuse, with a stronger party, under the guise of a possible expedited, win-win resolution of the dispute, using the mediation process to delay and extend the arbitral procedure at the expense of the weaker party. Assuming a good-faith attempt at mediation, there remains the unanswered question of the arbitrator/mediator’s discretion in the disclosure of confidential information upon resumption of the arbitration after an unsuccessful mediation: “as the arbitrator considers is material”.

Some of these concerns can be addressed by the appointment of an individual other than a sitting arbitral tribunal member as mediator. Alternatively, the arbitral procedure can be concluded with an award prepared, but not yet delivered to the parties. At this stage, a mediation procedure might be more successful. The disputing parties will have had an opportunity to review all the evidence and to evaluate the strengths and weaknesses of the parties’ positions. Additionally, the disputing parties might be more disposed towards a win-win solution than a possible zero-sum gain solution represented by the arbitral award. Neither of these alternatives, however, is the scenario envisaged by s.33 of the new Ordinance: a mediation after commencement of the arbitral process and before its conclusion with the same individual serving, respectively as arbitrator, mediator and arbitrator.[99]

Appendix 1

Hong Kong Arbitration Ordinances, Cap. 341 and Cap. 609

As the following Table demonstrates, most provisions of Cap. 341 have, to a greater, or lesser extent, direct equivalents in Cap. 609. Note, however, a number of these provisions are only approximately equivalent and careful reference should always be made to the provisions in the statutes themselves.

Previous Section	Heading	New Section	Heading	Remark
1	Short title	1	Short title and commencement	
2	Interpretation	2	Interpretation	See also § 9 as to the international origins of the Model Law
2AA	Objective and principles of Ordinance	3	Object and principles of this Ordinance	
2AB	Ordinance to apply to statutory arbitrations	5	Arbitrations to which this Ordinance applies	See § 5(3)
2AC	Arbitration agreement to be in writing	19	Article 7 of UNCITRAL Model Law(Definition and form of arbitration agreement)	
2AD	Application (Part IA)			Not found in new Ordinance
2A	Appointment of conciliator		Appointment of mediator	See also § 2(1) for definition of mediation
2B	Power of arbitrator to act as conciliator	33	Power of arbitrator to act as mediator	See also § 2(1) for definition of mediation
2C	Settlement agreements	66	Article 30 of UNCITRAL Model Law	

			(Settlement)		
2D	Proceedings to be heard otherwise than in open court	16	Proceedings to be heard otherwise than in open court		
2E	Restrictions on reporting of proceedings heard otherwise than in open court	17	Restrictions on reporting of proceedings heard otherwise than in open court		
2F	Representation and preparation work	63	Representation and preparation work		
2G	Costs in respect of unqualified person	76	Costs in respect of unqualified person		
2GA	General responsibilities of arbitral tribunal	46	Article 18 of UNCITRAL Model Law (Equal treatment of parties)	Previous § 2GA(1) is now found in new Ordinance § 46(3), together with duty of independence	
			47	Article 19 of UNCITRAL Model Law (Determination of rules of procedure)	Previous § 2GA(2) is now found in new Ordinance § 47(3)
2GB	General powers exercisable by arbitral tribunal	56	General powers exercisable by arbitral tribunal		
2GC	Special powers of Court in relation to arbitration proceedings	60	Special powers of Court in relation to arbitral proceedings	As to Court, see § 2(1)	

2GD	Power to extend time for arbitration proceedings	58	Power to extend time for arbitral proceedings		
2GE	Delay in prosecuting claims	59	Order to be made in case of delay in pursuing claims in arbitral proceedings	See also § 53(1)	
2GF	Decision of arbitral tribunal	70(1)	Award of remedy or relief		
2GG	Enforcement of decisions of arbitral tribunal	61	Enforcement of orders and directions of arbitral tribunal	Under new Ordinance § 43, § 61 replaces art 17H of the Model Law (Recognition and enforcement) concerning interim measures. Pursuant to § 44 of the new Ordinance, art.17I (Grounds for refusing recognition and enforcement) (interim measures) does not apply.	
			84	Enforcement of arbitral awards	
			86	Refusal of enforcement of arbitral awards	
2GH	Arbitral tribunal may award interest	79	Arbitral tribunal may award interest		

2GI	Rate of interest on money awarded in arbitration proceedings	80	Interest on money or costs awarded or ordered in arbitral proceedings		
2GJ	Costs of arbitral proceedings	74	Arbitral tribunal may award costs of arbitral proceedings		
			75	Taxation of costs of arbitral proceedings (other than fees and expenses of arbitral tribunal)	
2GK	Liability to pay fees of arbitral tribunal	78	Liability to pay fees and expenses of arbitral tribunal		
2GL	Arbitral tribunal may limit amount of recoverable costs	57	Arbitral tribunal may limit amount of recoverable costs		
2GM	Arbitral tribunal to be liable for certain acts and omissions	104	Arbitral tribunal or mediator to be liable for certain acts and omissions	As to “mediator”, see §§ 32 and 33	
2GN	Appointors and administrators to be liable only for certain acts and omissions	105	Appointors and administrators to be liable only for certain acts and omissions	Applies also as to mediators appointed under §§ 32 and 33	
2L	Application to domestic arbitration agreements			Not found in new Ordinance	

2M	Application to international arbitration agreements			Not found in new Ordinance	
3	Authority of arbitrators and umpires to be irrevocable			Not found in new Ordinance	
4	Death of party	22	Whether agreement discharged by death of a party		
			29	Death of arbitrator or person appointing arbitrator	
5	Bankruptcy			Not found in new Ordinance	
6	Court to refer matter to arbitration in certain cases	20	Article 8 of UNCITRAL Model Law (Arbitration agreement and substantive claim before court)		
6B	Consolidation of arbitrations	Sch. 2 § 2	Consolidation of arbitrations	An opt-in provision: see §§ 99–103	
7	Reference of interpleader issues to arbitration	15	Reference of interpleader issue to arbitration by court		
8	When reference is to a single arbitrator	23	Article 10 of UNCITRAL Model Law (Number of arbitrators)		

			Sch. 2 § 1	Sole arbitrator	An opt-in provision: see §§ 99–103
9	Power of parties in certain cases to supply vacancy	24	Article 11 of UNCITRAL Model Law (Appointment of arbitrators)	No equivalent to § 9(2): see § 24(2)(b)	
10	Umpires	30	Appointment of umpire		
			31	Functions of umpire in arbitral proceedings	No equivalent in the previous section (§ 10(2) and § 10(3))
11	Majority award of 3 arbitrators	65	Article 29 of UNCITRAL Model Law (Decision-making by panel of arbitrators)		
12	Power of HKIAC in certain cases to appoint an arbitrator or umpire	24	Article 11 of UNCITRAL Model Law (Appointment of arbitrators)		
13A	Power of judges to take arbitrations			Not found in new Ordinance	
13B	Arbitral tribunal may determine own jurisdiction	34	Article 16 of UNCITRAL Model Law (Competence of arbitral tribunal to rule on its jurisdiction)		
15	Time for making award	72	Time for making award		

16	Interim awards	71	Awards on different aspects of matters	See also Schedule 1—UNCITRAL Model Law - Chapter IV A—Interim Measures and Preliminary Orders (Article 17—17J)—see, in particular, art.17(2) as to definition of “interim measure”.
17	Specific performance	70(2)	Award of remedy or relief	
18	Awards to be final	73	Effect of award	
19	Power to correct slips	69	Article 33 of UNCITRAL Model Law (Correction and interpretation of award; additional award)	
21	Taxation of arbitrator’s or umpire’s fees	77	Determination of arbitral tribunal’s fees and expenses in case of dispute	
23	Judicial review of arbitration awards	Sch. 2 § 5	Appeal against arbitral award on question of law	An opt-in provision: see §§ 99–103
23A	Determination of preliminary point of law by Court	Sch. 2 § 3	Decision of preliminary question of law by Court	An opt-in provision: see §§ 99–103. As to “Court”, see § 2(1)
23B	Exclusion			There is a

	agreements affecting rights under sections 23 and 23A			lacuna in that there is no express power for parties to enter into an agreement excluding rights of appeal. See, however, Schedule 2 § 5(2), whereby an agreement to dispense with reasons for an award operates as an agreement to exclude rights of appeal. This is an opt-in provision: see § 99–103	
23C	Interlocutory orders	53	Article 25 of UNCITRAL Model Law (Default of a party)	Not directly equivalent	
24	Power to remit award	Sch. 2 § 4	Challenging arbitral award on ground of serious irregularity	An opt-in provision: see §§ 99–103	
			Sch. 2 § 5	Appeal against arbitral award on question of law	An opt-in provision: see §§ 99–103
25	Removal of arbitrator and setting aside of award	25	Article 12 of UNCITRAL Model Law (Grounds for challenge)	§ 25 provides the grounds for challenging an arbitrator	
			26	Article 13 of UNCITRAL Model Law (Challenge procedure)	§ 26 states the challenge procedure and includes the consequence

			Sch. 2 § 4	Challenging arbitral award on ground of serious irregularity	Sch. 2 § 4 states that an award may be challenged on the ground of serious irregularity affecting the tribunal, the arbitral proceedings or the award These are opt-in provisions: see §§. 99–103
26	Power of Court to give relief where arbitrator is not impartial or the dispute involves question of fraud			Not found in new Ordinance	
27	Power of Court where arbitrator is removed or authority of arbitrator is revoked			Not found in new Ordinance	
30	Terms as to costs, etc.			Not found in new Ordinance	
31	Commencement of arbitration	10	Article 3 of UNCITRAL Model Law (Receipt of written communications)		
			49	Article 21 of UNCITRAL Model Law (Commencement of arbitral proceedings)	Communication method referred to in § 10 of new Ordinance
34	Transitional—Part			Not found in	

	II			new Ordinance
34A	Application to international arbitration agreements			Not found in new Ordinance
34B	Application to domestic arbitration agreements			Not found in new Ordinance
34C	Application to UNCITRAL Model Law			Not found in new Ordinance
40A	Awards to which Part IIIA applies	96	Mainland awards to which certain provisions of this Division do not apply	
40B	Effect of Mainland awards	92	Enforcement of Mainland awards	
40C	Restrictions on enforcement of Mainland awards	93	Restrictions on enforcement of Mainland awards	
40D	Evidence	94	Evidence to be produced for enforcement of Mainland awards	
40E	Refusal of enforcement	95	Refusal of enforcement of Mainland awards	
40F	Publication of list of recognized Mainland arbitral authorities	97	Publication of list of recognised Mainland arbitral authorities	

40G	Savings	98	Saving of certain Mainland awards	
41	Awards to which Part IV applies			Not found in new Ordinance
42	Effect of Convention awards	87	Enforcement of Convention awards	
43	Evidence	88	Evidence to be produced for enforcement of Convention awards	
44	Refusal of enforcement	89	Refusal of enforcement of Convention awards	
45	Saving	91	Saving of rights to enforce Convention awards	
46	Order to be conclusive evidence	90	Order for declaring party to New York Convention	
47	Government to be bound	6	Application	
48	Chief Executive in Council may amend Sixth Schedule			Not found in new Ordinance
Sch. 5	UNCITRAL Model Law on International Commercial	Sch. 1	UNCITRAL Model Law on International Commercial	

	Arbitration		Arbitration	

Appendix 2

A flow chart of the opt-in provisions in the new Arbitration Ordinance is shown below[100] :

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Const. L.J. 2012, 28(6), 482-506

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1. BA, JD, LLM, Assistant Professor, Department of Building and Real Estate, Faculty of Construction and Environment, The Hong Kong Polytechnic University. The author thanks the Hong Kong Construction Industry Council for funding the research for this article.

2. LC Paper No. CB(2)2475/08-09, Minutes of the first Meeting, p.4.

3. Law Reform Commission of Hong Kong, Report on Commercial Arbitration (Hong Kong: Printing Department, January 1982), pp.29–32.

4. See UNCITRAL's website, at http://www.uncitral.org [Accessed August 8, 2012].

5. See the Model Law's website, at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html [Accessed August 8, 2012] and the General Assembly's resolution 40/72 adopted on 11 December, 1985.

6. HKIArb's website, at http://www.hkiarb.org.hk/e_news_20080202.html [Accessed August 8, 2012].

7. LC Paper No. CB(2)2261/08-09(02). See the DoJ's website for the online version: http://www.doj.gov.hk/eng/public/pdf/2007/arbitration.pdf [Accessed August 8, 2012].

8. Consultation Paper Submission Summary, p.1.

9. See, e.g., presentations by Mr. Frank Poon, Solicitor General, Department of Justice of the Hong Kong SAR, "Reform of Arbitration Law: The New Arbitration Ordinance (Cap. 609)" ; and, Mr. Huen Wong, President of The Law Society of Hong Kong, "The New Hong Kong Arbitration Law—Impact on Domestic Arbitration ". Both presentations delivered on March 22, 2011.

10. Legislative Council Brief on Arbitration Bill (File Ref.: LP 19/00/3C Pt. 38), p.2.

11. Legislative Council Brief on Arbitration Bill, pp.2–4.

12. When the government intends to amend the existing laws, the relevant policy bureau first consults various parties and the public before a Bill is drafted and submitted to the Executive Council. The Bill will be published in the Gazette if the Chief Executive in Council supports its introduction. After a Bill has been gazetted, it must pass through three readings in the Legislative Council (LegCo). The time required depends on its complexity and controversy. The three readings include formal introduction into LegCo, debate in the House Committee and Bills Committee, if formed, and a final decision by voting. A Bill, once passed, will finally be endorsed by the Chief Executive through publication in the Gazette and take effect on a stipulated date. 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 August 8, 2012].

13. These deputations are representatives from various professional organisations and individuals, namely, The Hong Kong Institute of Architects, International Chamber of Commerce—Hong Kong, China, The Hong Kong Institute of Surveyors, Hong Kong Construction Association, The Hong Kong Federation of Electrical and Mechanical Contractors Limited, and the Hong Kong International Arbitration Centre. Comments from two individuals, Mr Peter Scott Caldwell(Arbitrator and Mediator, former Secretary-General of HKIAC, Council Member of HKIAC) and Mr. Samuel C. C. Wong (Arbitrator and Mediator, Barrister-at-Law, Past President of Hong Kong Institute of Arbitrators), were also received.

14. LC Paper No. CB(2)2261/08-09(02) and the Legislative Council Brief on Arbitration Bill.

15. LC Paper No. CB(2)444/09-10, Minutes of the third meeting, pp.5–9.

16. LC Paper No. CB(2)2508/08-09(03), Submission on the Arbitration Bill from the Hong Kong Institute of Surveyors, p.3.

17. LC Paper No. CB(2)2508/08-09(03), p.3.

18. LC Paper No. CB(2)2508/08-09(03), p.3.

19. LC Paper No. CB(2)2508/08-09(03), p.4.

20. LC Paper No. CB(2)2508/08-09(03), p.5.

21. LC Paper No. CB(2)2469/08-09(01), Rationale and Justifications for the Drafting Approach of the Arbitration Bill, p.3.

22. Alan Redfern and Martin Hunter, Law And Practice Of International Commercial Arbitration, 4th edn (London: Sweet & Maxwell, 2004), p.633 provided an unofficial definition of "Model Law conformity":

"1. When reading the national statute, the impression must be given that the legislator took the Model Law as basis and made certain amendments and additions, but did not simply take the Model Law as one amongst various models or follow only its "principles";

2. The bulk of the Model Law provisions must be included (70 to 80 per cent);

3. The law must contain no provision incompatible with modern international commercial arbitration (e.g. foreigners may not be arbitrators, no-excludable appeal on errors of law)."

23. LC Paper No. CB(2)2469/08-09(01), p.3.

24. LC Paper No. CB(2)162/10-11, Report of the Bills Committee on Arbitration Bill, p.6.

25. LC Paper No. CB(2)162/10-11, p.6.

26. LC Paper No. CB(2)2469/08-09(01), p.5.

27. For the purpose of the Ordinance, the "place of arbitration" means the seat of arbitration.

28. The provisions of the Bill are:

Clause 20: Article 8 of UNCITRAL Model Law (Arbitration agreement and substantive claim before court)

Clause 21: Article 9 of UNCITRAL Model Law (Arbitration agreement and interim measures by court)

Clause 45: Article 17J of UNCITRAL Model Law (Court-ordered interim measures)

Clause 60: Special powers of Court in relation to arbitral proceedings

Clause 61: Enforcement of orders and directions of arbitral tribunal

Part 10: Recognition and Enforcement of Awards.

29. No question was raised on this clause during the clause-by-clause examination of the Bill by the Bills Committee.

30. "Otherwise than in open court" is not defined in the new Ordinance. However, Judiciary's Practice Directions 25.1 provides that "A hearing open to the public is one where the hearing is open to the press and the public to attend. A hearing not open to the public is a closed one where the press and the public are excluded from attending."

31. LC Paper No. CB(2)162/10-11, p.8.

32. LC Paper No. CB(2)162/10-11. p 8. See also the DoJ's response: (1) Concerns Raised by the Construction Industry on the Proposed Arbitration Regime and (2) Comparison of Specific Provisions in the Arbitration Bill with International Arbitration Practices, September 2009, LC Paper No. CB(2)2546/08-09(04), para.9 ; Consultation Paper Submission Summary, para.22 ; Legislative Council Background Brief, para.15.

33. LC Paper No. CB(2)162/10-11, p.9.

34. LC Paper No. CB(2)2261/08-09(01), Paper on the Arbitration Bill prepared by the Legislative Council Secretariat (background brief), p.5.

35. LC Paper No. CB(2)2261/08-09(01), p.5.

36. LC Paper No. CB(2)162/10-11, p.9.

37. LC Paper No. CB(2)702/09-10, Minutes of the fifth meeting, p.6.

38. LC Paper No. CB(2)162/10-11, p.9.

39. LC Paper No. CB(2)593/09-10, Minutes of the fourth meeting, pp.7–8.

40. LC Paper No. CB(2)593/09-10, p.8.

41. LC Paper No. CB(2)162/10-11, p.10. See also John Choong and J. Romesh Weeramantry, The Hong Kong Arbitration Ordinance: Commentary and Annotations (Hong Kong: Sweet & Maxwell, 2011), para.16.20.

42. Option I of art.7 sets out both the definition and the form of an arbitration agreement. See Choong, The Hong Kong Arbitration Ordinance (2011), paras 19.05–19.3 9.

43. Kim M. Rooney, "The new Hong Kong Arbitration Law", Arbitration Newsletter (March 2011), p.53.

44. Clause 19(3) of the Bill.

45. LC Paper No. CB(2)2303/08-09(01), Submission on Arbitration Bill from Hong Kong Mediation Centre, p.1.

46. LC Paper No. CB(2)2303/08-09(01), p.1.

47. LC Paper No. CB(2)2303/08-09(01), p.2.

48. LC Paper No. CB(2)1477/09-10(02), Administration's response to issues raised at the Bills Committee meeting held on December 3, 2009, p.1.

49. LC Paper No. CB(2)1477/09-10(02), p.1.

50. LC Paper No. CB(2)1477/09-10(02), p.1.

51. LC Paper No. CB(2)1477/09-10(02), p.2.

52. LC Paper No. CB(2)870/09-10, Minutes of the sixth meeting, p.6.

53. LC Paper No. CB(2)870/09-10, p.6.

54. LC Paper No. CB(2)870/09-10, p.6.

55. DoJ, The Government of the Hong Kong Special Administrative Region, Report of the Working Group on Mediation, (Hong Kong: Printing Department, February 2010), pp.108–116.

56. DoJ, Report of the Working Group on Mediation (2010), p.113.

57. Clause 13 of the Bill.

58. For a discussion concerning the situation where an arbitral tribunal determines that it has no jurisdiction, see Choong, The Hong Kong Arbitration Ordinance (2011), paras 34.31, 34.44–34.49 (citations omitted).

59. LC Paper No. CB(2)2469/08-09(03), Summary of submissions and comments on the Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill, p.14–15. See Choong, The Hong Kong Arbitration Ordinance (2011), paras 34.44–34.49 and citations therein.

60. The 2006 amendments are listed in arts 17A–17J of the Model Law. Articles 17H, 17I and 17J are not adopted in the new Ordinance.

61. See Choong, The Hong Kong Arbitration Ordinance (2011), paras 35.17–35.21, 84.08.

62. LC Paper No. CB(2)162/10-11, p.16.

63. See Choong, The Hong Kong Arbitration Ordinance (2011), para.46.19.

64. See Choong, The Hong Kong Arbitration Ordinance (2011), paras 46.19–46.26.

65. LC Paper No. CB(2)162/10-11, p.16. For discussion, see, e.g., Geoffrey Ma and Denis Brock, Arbitration in Hong Kong—A Practical Guide 2nd edn (Hong Kong: Sweet & Maxwell, 2011), paras 14.210–14.223.

66. LC Paper No. CB(2)2546/08-09(04), Administration's paper entitled "(1) Concerns Raised by the Construction Industry on the Proposed Arbitration Regime and (2) Comparison of Specific Provisions in the Arbitration Bill with International Arbitration Practices", p.6.

67. Clause 84 of the Bill provides that an award, whether made in, or outside Hong Kong in arbitral proceedings by an arbitral tribunal is enforceable in the same manner as a judgment of the Court that has the same effect, but only with the leave of the Court. Clause 85 stipulates the evidence required to be produced for an application to enforce an arbitral award, whether made in or outside Hong Kong, and which is neither a Convention nor a Mainland award. Clause 86 of the Bill provides that the enforcement of such an award may be refused on any of the grounds specified in that provision. Note that Clause 86(2)(c) contains a ground not found in the Model Law or the 1958 New York Convention "any other reason the court considers it just to do so". See Choong, The Hong Kong Arbitration Ordinance (2011), paras 86.09–86.11.

68. LC Paper No. CB(2)2546/08-09(04). See Choong, The Hong Kong Arbitration Ordinance (2011), para.86.11.

69. "The court shall issue a dismissal with respect to an application submitted by a party for recognition of a foreign arbitral award, if such award contains one of the following elements:

"1. Where the recognition or enforcement of the arbitral award is contrary to the public order or good morals of the Republic of China.

2. Where the dispute is not arbitrable under the laws of the Republic of China."

The court may issue a dismissal order with respect to an application for recognition of a foreign arbitral award if the country where the arbitral award is made or whose laws govern the arbitral award does not recognise arbitral awards of the Republic of China.

70. LC Paper No. CB(2)2546/08-09(04), p.8.

71. These provisions related, inter alia, to determination of a dispute by a sole arbitrator in default of agreement, consolidation of arbitrations, determination of a preliminary point of law by the Court of First Instance, challenging an arbitral award on ground of serious irregularity and appeal against an arbitral award on point of law.

72. Stephen D. Mau, "The Proposed New Arbitration Law of Hong Kong" (2010) 26 Const. L.J. 379, 393.

73. A total number of 344 questionnaires were distributed by e-mail to arbitrators, legal practitioners and academics in Europe, Asia and North America. A total of 82 questionnaires were returned, of which 75 were included in the data analysis.

74. LC Paper No. CB(2)162/10-11, p.23.

75. LC Paper No. CB(2)2508/08-09(01), Submission on the Arbitration Bill from Hong Kong Construction Association, p.5.

76. Mau, "The Proposed New Arbitration Law of Hong Kong" (2010) 26 Const. L.J. 379, 393.

77. LC Paper No. CB(2)2508/08-09(01), p.6. See also Consultation Paper 2007, pp.69–71; Choong, The Hong Kong Arbitration Ordinance (2011), para.100.04.

78. LC Paper No. CB(2)162/10-11, p.23.

79. "An arbitration agreement may provide expressly that any or all of the following provisions are to apply—

"(a) section 1 of Schedule 2;

(b) section 2 of Schedule 2;

(c) section 3 of Schedule 2;

(d) sections 4 and 7 of Schedule 2;

(e) sections 5, 6 and 7 of Schedule 2."

Clause 100 of the Bill 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."

80. "Construction operation" is defined as having the meaning provided for this term in Schedule 1 to the Construction Industry Council Ordinance (Cap. 587).

81. Section 2(1) of the Construction Industry Council Ordinance.

82. Clause 100A was later renumbered as s.101 in the new Ordinance.

83. See LC Paper No. CB(2)162/10-11, p.25.

84. • There is no arbitration agreement in the sub-contract.

• Parties agree, or the arbitration agreement provides that the automatic opting in provisions (s.100 or 101) do not apply (see s.102(A)).

• The arbitration agreement provides that any of the provisions in Sch.2 does or does not apply (see s.102(b)).

• The sub-contractor is not based in Hong Kong.

• Substantial part of the construction operations sub-contracted is to be performed outside Hong Kong.

85. Section 1 of Sch.3 of the new Ordinance provides: "arbitration and all related proceedings, including (where the award made in that arbitration has been set aside) arbitral proceedings resumed after the setting aside of the award, are to be governed by the repealed Ordinance [i.e. Cap. 341] as if this Ordinance [i.e. Cap. 609] had not been enacted." As noted in Ma et al., Arbitration in Hong Kong (2011), para 1.010 :

"Schedule 3 consists of four sections … It enables the old Ordinance to govern the following, in the event they have commenced, taken place or been made before the commencement of the Arbitration Ordinance: arbitration proceedings (s.1); the appointment of arbitrators and the termination of an arbitrator's mandate (s.2); settlement agreements (s.3); and the appointment of members of the Appointment Advisory Board (s.4)"(emphasis in original).

86. Section 1(2) of the new Ordinance stipulates: "This Ordinance comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette." The Gazette published on March 4, 2011 (No. 9 Vol. 15) contains Legal Notice 38, Arbitration Ordinance (Commencement) Notice, dated February 22, 2011, wherein the Secretary for Justice appointed June 1, 2011 as the commencement date.

87. See, e.g., Ma et al., Arbitration in Hong Kong (2011), paras 5.054–5.055, 7.006–7.008.

88. Sections 2M and 34(A)(2) of the old Ordinance provides that parties to an international arbitration can opt into the domestic regime, i.e. the arbitral proceedings to be conducted under the domestic provisions (Part II of the old Ordinance).

89. Sections 2L and 34B of the old Ordinance provides that parties to a domestic arbitration can opt into the international regime, i.e. the arbitral proceedings be conducted under the international regime provisions (Part IIA of the old Ordinance).

90. For example, see the scenarios and analyses in Choong, The Hong Kong Arbitration Ordinance (2011), paras 99.05–99.08.

91. After the six years, i.e. after May 31, 2017, the automatic opt-in provision will be spent. After this date, parties must elect to have the Sch.2 provisions apply to their arbitration.

92. Legal Service Division Report on Arbitration Bill, submitted Paper for the House Committee Meeting on July 10, 2009, LC Paper No. LS101/08-09, para.11 (emphasis added).

93. Choong, The Hong Kong Arbitration Ordinance (2011), paras 100.09–100.10.

94. Choong, The Hong Kong Arbitration Ordinance (2011), para 101.18.

95. Choong, The Hong Kong Arbitration Ordinance (2011), para 101.12.

96. Choong, The Hong Kong Arbitration Ordinance (2011), paras 102.10–102.16.

97. Section 33 of the new Ordinance.

98. Section 33(4) of the new Ordinance. For discussion, see e.g., Ma et al., Arbitration in Hong Kong (2011), para 5.052.

99. It should be noted that this form of arb/med may face challenges on the grounds of public policy. See, e.g., the case of Gao Haiyan v Keeneye Holdings Limited [2011] HKEC 514 [High Court] and [2011] HKEC 1626 [Court of Appeal].

100. The following assumptions are made: 1. The arbitration agreement is entered into at any time before, or within a period of six years after the commencement of the new Arbitration Ordinance (Cap.609); 2. The construction works are performed in Hong Kong; 3. There is an arbitration agreement in the sub-contracts; 4. No special conditions of contract were made to the contract. (This flow chart was devised and prepared and is reproduced here with the permission of Tse Man Yeung, Jim; Wong Yuen Ling, Linda; and Yu Hung Kwan, Jason.)