INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION PROCESSES

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Introduction

This article is a brief introduction to Alternative Dispute Resolution methodologies available in Hong Kong. Particular focus will be directed to international commercial arbitration as it is practiced within the territory.

With the increasing pace of globalization and the relative ease with which international commercial transactions can be conducted, misunderstandings and/or disputes can and do arise with increasing frequency. The commonly perceived method of resolving such disagreements is a resort to inter-party negotiation, failing which litigation often follows. With the ever-increasing costs of litigation, in terms both of financial cost and of the consequential hidden costs of management supervision/participation/distraction caused by the litigation, alternatives to this traditional method of dispute resolution have been sought. Indeed, a recent survey of in-house counsel indicated a clear preference for alternative dispute resolution rather than litigation.[2]

This article will firstly introduce and compare several methods of alternative dispute resolution [hereinafter "ADR"] available in Hong Kong to traditional litigation, with a particular emphasis upon international arbitration. It is in this context of international commercial dispute resolution that the term "arbitration" is used in this article.[3]

Alternative Dispute Resolution Options

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[2] *See* http://www.pwc.com/Extweb/pwcpublications.nsf/docid/0B3FD76A8551573E85257168005122C8 (Last visited: January 30, 2007) and Loukas Mistelis, *International Arbitration - Corporate Attitudes and Practices. 12 Perceptions Tested: Myths, Data and Analysis*, 15 AM REV OF INTL ARB 525 (2004). *See also*, http://www.news.cornell.edu/Chronicle/97/6.19.97/dispute_resolution.html (Last visited: January 30, 2007) and http://72.14.235.104/search?q=cache:T3pEXRvg5MQJ:www.adrforum.com/resource.aspx%3Fid%3D505+price+waterhouse+survey+arbitration&hl=en&gl=hk&ct=clnk&cd=1 (Last visited: January 30, 2007).

[3] *I.e.*, matters generally considered to be commercial such as contract or tort disputes. Hence, specialised types of international ADR or arbitration (*e.g.*, WTO, foreign investments/ICSID) will not be discussed.

Many types of ADR exist.[4] Some exist in a "pure" form, while others are a variation of an existing form or an agglomeration of methodologies created to suit the needs and requirements of the disputing parties and/or of a particular industry, such as construction.[5] Set out below are some ADR processes commonly used in international commercial disputes.[6] However, as ADR continues to evolve and as ADR processes are flexible, the definitions provided below are not necessarily universally agreed and the methodologies involved will not remain static.

Adjudication/Independent expert determination

For the purposes of this article, these two processes have been grouped together as one ADR process, the reason being that adjudication (as applied to construction disputes) may be considered as a form of expert determination.[7] This ADR process has been variously defined thus:

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[4] In the US, the term "ADR" generally embraces all forms of private dispute resolution, both judicial and non-judicial in nature. In many other jurisdictions (*e.g.*, Australia, England & Wales, Hong Kong, Malaysia, New Zealand and Singapore), ADR refers to *non-judicial* private dispute resolution methods (*e.g.*, conciliation, mediation, independent expert determination) and therefore does not include arbitration. *See also* HENRY BROWN & ARTHUR MARRIOTT, ADR PRINCIPLES AND PRACTICE ¶ 2-029 (2nd ed. 1999).

[5] *E.g.*: "direct" negotiations between the disputing parties, "indirect" negotiations between appointed representatives (*e.g.*, lawyers) of the disputing parties, conditional arbitration, Dispute Resolution Advisors, Dispute Resolution Boards, early neutral evaluation, mini-trials, non-binding arbitration, med-arb, partnering contracts. For a discussion of some of these dispute avoidance/resolution methodologies, *see*, *e.g.*, the Appendix and two Annexes to the Provisional Construction Industry Co-ordination Board's discussion paper *Alternative Dispute Resolution for Public Works* (Paper No. PCICB/034, June 2002) at: http://www.pcicb.gov.hk/eng/meeting/download/p-PCICB-034-e.doc (Last visited: January 30, 2007); 1 ARBITRATION IN HONG KONG: A PRACTICAL GUIDE ¶¶ 2-57 – 2-116 (Geoffrey Ma *et al* (Eds.), 2003); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 1-81 – 1-90 (4th ed. 2004).

[6] For a summary of the major dispute resolution processes, *see*, *e.g.*, BROWN & MARRIOTT, *supra* note 4, ¶ 2-026.

[7] *Id.* at ¶¶ 4-027 – 4-028.

> Contractual adjudication, a form of expert determination, (sometimes called "interim" or "fast-track" adjudication) is now frequently used to resolve certain types of commercial dispute. It is of increasing relevance in construction … It is in the commercial interest of the parties … to have a disputes' resolution procedure which can be applied during the currency of the contract to resolve, albeit on an interim basis, disputes which may otherwise impede or threaten timeous completion. As dissatisfaction with the role of the engineer [in a construction contract] has grown, so parties have turned to other methods such as reference to an impartial adjudicator.
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> Where an adjudicator is engaged … his terms of reference and authority will be contained in the relevant contract. There is no standard basis, but there are a number of common threads that usually exist. First, the adjudicator will usually be a third party neutral who, unlike the engineer or architect, will not have any personal involvement in the contract. Secondly, the adjudication takes place as soon as possible after the dispute has arisen rather than waiting until completion of the works. Thirdly, the procedure is likely to be more summary and informal than arbitration, with the adjudicator making such enquiries and accepting such submissions as he may consider appropriate. Fourthly, the adjudication has a binding quality, insofar as the parties are bound by it unless and until there is a subsequent arbitration award, court judgment or agreement between the parties

> Adjudication involves an independent third party (adjudicator) imposing a binding decision upon parties to resolve a dispute between them. It is an inquisitorial process rather than adversarial. The adjudicator should have expertise relevant to the matters in dispute, and is chosen by the parties to act as expert and not arbitrator. His decision is usually compulsory, binding and is implemented immediately, but subject to review by an arbitrator or the courts.[8]

> A process by which disputing parties may refer a matter to a third person, an expert in the area, for expert opinion, appraisal or valuation to settle the dispute. An expert appraisal is usually an assessment of value or loss in monetary terms ... The procedures and enforcement of expert appraisal are determined solely by the agreement between the parties. An appraisal tends to be an inquisitorial or investigative inquiry, while an arbitration tends to be judicial and adversarial in nature ... An expert generally decides a matter on the basis of the expert's own specialist knowledge, skill and experience, with no obligation to hear the parties unless the agreement appointing the expert so provides. An expert is obliged to act impartially and carefully ...[9]

Note that, whilst an independent expert makes a binding decision, the expert is generally not obligated to accept evidence presented by the parties and is under a duty to conduct an investigation and generate his own evidence.[10] An independent expert is also under no obligation to receive or hear submissions by the parties. The disputants may, however, agree to adopt procedural rules that oblige an independent expert to receive submissions and evidence, whether by way of an oral hearing or on a documents-only basis. The "system is infinitely flexible: there need not be a dispute, no writing is necessary and any form of procedure can be adopted."[11] Indeed, independent expert determination can be used to prevent disputes from arising, *e.g.* by providing for a binding valuation of assets on the dissolution of a professional partnership firm.

The Hong Kong Government's construction contracts, for example, contain a tiered dispute resolution procedure. Once a dispute arises, the matter is firstly determined

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> varying the adjudication. Fifthly, the right is commonly reserved for either party to refer the matter to arbitration (or to litigation if this is envisaged under the contract) notwithstanding that an adjudication has been made; consequently the adjudicator's decision has the interim quality to it noted above …

[8] ARBITRATION IN HONG KONG, *supra* note 5, ¶ 2-46. The process of adjudication is set out in *id*. at ¶¶ 2-47 – 2.56. "Binding" in this context means "provisionally binding".

[9] *Butterworths Australian Legal Dictionary* (1997).

[10] *See supra* note 6.

[11] John Uff, *Forward* to the second edition of JOHN KENDALL, EXPERT DETERMINATION (3rd ed. 2001).

by the Engineer. This decision is final and binding unless either the Contractor or the Employer challenges the Engineer's decision. In this event, or in the event the Engineer fails to render a decision in the dispute, the second tier is reached where the dispute will be referred to adjudication and/or mediation under the respective Government Rules. Should a party be dissatisfied with the resolution of the dispute at this tier, or should a party decline to adjudicate and/or mediate, the dispute will be referred to arbitration.[12]

Conciliation

The term "conciliation", and its process, is an example of the earlier statement that ADR terms are not universally agreed. Conciliation is frequently considered to be the same ADR process as mediation, which is discussed in the following section.[13] Nevertheless, conciliation in its own right has been defined as:

> A without prejudice, non-binding dispute resolution process in which an independent third party ('neutral') assists the parties to

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[12] Peter Turner, *Adjudication in the Hong Kong construction industry*, ASIAN DISPUTE REVIEW, April 2005, at 13.

[13] Section 2 of the Hong Kong *Arbitration Ordinance* (CAP 341) states that "conciliation" includes mediation. The Australian Centre for International Commercial Arbitration states that: "Mediation (also called conciliation) is a procedure in which a neutral intermediary appointed at the parties' request endeavours to assist the parties in reaching a mutually satisfactory settlement of a dispute." http://www.acica.org.au/mediation_conciliation.html (Last visited: January 30, 2007).

> The terms "mediation" and "conciliation" are generally used as if they are interchangeable; and there is no general agreement as to how they should be defined. Historically, in private dispute resolution, a conciliator was seen as someone who went a step further than the mediator, so to speak, in that the conciliator would draw up and propose the terms of an agreement that he or she considered represented a fair settlement. In practice, the two terms seem to have merged, although common lawyers tend to speak of "mediation", whilst civil lawyers speak of "conciliation".

Redfern & Hunter, *supra* note 5, ¶ 1-75.

See also the UNCITRAL Model Law on International Commercial Conciliation, adopted on June 24, 2002 and Resolution 57/18 adopted by the UN General Assembly on November 19, 2002. Article 1(3) of this Model Law provides:

> For the purposes of this Law, “conciliation” means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

UNCITRAL is the United Nations Commission on International Trade Law. The full text of the Model Law on International Commercial Conciliation can be found at these UNCITRAL web sites: http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf or http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html (Last visited: January 30, 2007).

> settle their differences *but may, if necessary, deliver his opinion as to the merits of the dispute*. [14]

The neutral third party may therefore play a more active role than in mediation. A successfully conciliated dispute is concluded on the making of a written settlement agreement between the disputing parties in which the recommendations made by the conciliator are accepted. Some dispute resolution organizations have adopted rules for use in conciliations.[15]

Mediation

The mediation process has been defined as follows:

> A without prejudice, non-binding dispute resolution process in which an independent third party ('neutral') assists the parties to settle their differences *but does not advise them of his own opinion as to the issues and merits of the dispute*.[16]

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[14] *The Language of ADR: A Glossary* (1992, Academy of Experts, London). (Emphasis added.) An on-line site describes conciliation as:

> … a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavor to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role.

See http://www.legal-definitions.com/dispute-resolution/what-is-conciliation.htm (Last visited January 31, 2007).

[15] *See, e.g.*, UNCITRAL Conciliation Rules, adopted July 23, 1980 and Resolution 35/52 adopted by the UN General Assembly on December 4, 1980. The Conciliation Rules can be found at the UNCITRAL web site: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980Conciliation_rules.html (Last visited: January 30, 2007).

[16] *The Language of ADR*, *supra* note 14. (Emphasis added.) "In mediation, a professionally trained mediator helps the parties to work out their own mutually agreeable solution to the dispute." *See* http://www.legal-definitions.com/dispute-resolution/what-is-mediation.htm (Last visited January 31, 2007). The Hong Kong Mediation Council defines "mediation" as a:

> voluntary, non-binding, confidential process in which a neutral (the mediator) assists the parties in a dispute to reach a negotiated settlement. The terms of such settlement can, by mutual agreement, be made legally binding.

For an example of the application of the mediation process in the local construction industry, *see* the Hong Kong Institute of Construction Managers' *Practice Notes for Construction Managers – Mediation* (First Issue – March 2005) found at: http://www.hkicm.org.hk/FILES/HKICM-PNCM6-M01.pdf. (Last visited: January 30, 2007). A pilot mediation scheme is in place in Hong Kong as of September 2006 whereby litigation cases on the Construction and Arbitration List provides for an adverse inference in relation to costs for a party which declines or refuses mediation. *See* Practice Direction 6.3, found at http://legalref.judiciary.gov.hk/lrs/common/pd/pdcontent.jsp?pdn=PD6.3.htm&lang=EN (Last visited Feb. 21, 2007).

Mediation may take various forms, each approach having its own focus or goal which commensurately would affect the precise responsibilities of the mediator. The most common forms of mediation are "evaluative", "facilitative" or "transformative".[17]

Evaluative mediation is "rights-based", in that this process is oriented towards a settlement of the dispute. This orientation allows the mediator to focus upon the legal rights of the parties rather than their needs or interests. Under this approach, the mediator is allowed to be actively involved in the process by expressing an opinion on the respective merits of the issues between the parties and the strengths and weaknesses of each party's case, and/or suggesting solutions to the dispute. Although non-binding, the evaluation may influence the parties' assessment of their chances of success if their dispute were to go to litigation or binding arbitration.[18] In an evaluative mediation, the mediator controls the procedure of the process and conducts separate meetings with each of the parties. Thus, evaluative mediation is a process structured primarily by the mediator, who directly influences the resolution and who, because of his/her active participation, generally has expertise in the topic of the dispute.

Facilitative mediation is "interest-based", in that this type of mediation is oriented towards the concept that the disputing parties themselves are capable of resolving the dispute with the assistance of a neutral third party. Thus, the mediator expresses no opinion on the strengths and weaknesses of the parties' cases and does not advance possible solutions to the parties' dispute. The mediator is active in controlling the procedure of the mediation process, while the parties are in control of the outcome of the dispute. Consequently, the mediator generally holds joint sessions with the parties in an attempt to assist these parties to explore mutually beneficial solutions.

Transformative mediation is oriented towards a process through which the mediator assists the parties to achieve "recognition" (the appreciation of the opposing party's position) and "empowerment" (the parties' own ability to achieve a productive result). The mediator offers no opinion on the strengths or weaknesses of the parties' cases, nor offers any solutions. Unless the parties so agree, there is no procedure to be followed in this type of mediation. Thus, the mediator does not exercise control over the topics or issues to be discussed by the parties. Transformative mediation is focused on assisting the disputing parties to alter their perceived relationship to each other. As such, the mediator generally holds joint sessions with the parties.

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[17] For further details on these types of mediation services offered by commercial practitioners, *see, e.g.*:
http://www.peoples-law.org/core/mediation/adr_directory/mediation_approaches.htm (Last visited: January 30, 2007);
http://mediate-facilitate.com/services-mediation2.html (Last visited: January 30, 2007);
http://learn2mediate.com/resources/nafcm.php (Last visited: January 30, 2007).

[18] ARBITRATION IN HONG KONG, *supra* note 5, ¶ 2-29.

In summation, both conciliation and mediation are neutral-assisted, "without prejudice" negotiations that preserve the parties' legal rights to "escalate" the dispute to arbitration or litigation. A conciliator/mediator does not make "decisions" as such, so that there is no decision or award that would bind the parties. Any agreements to which the parties arrive as a result of either of these processes generally can be enforced only on a breach of contract basis in a court action.[19]

Dispute Resolution Advisor/Dispute Review Board

This process is intended to provide for both the early and speedy resolution of disputes as they arise in the course of a contract. Both the Dispute Resolution Advisor [hereinafter "DRA"] and Dispute Resolution Board [hereinafter "DRB"] involve an independent party composed of vary number of members, dependent upon the relevant contract, being appointed by the parties to the contract. This independent party's members, generally possessing expertise in the technical areas anticipated to give rise to disputes under the subject contract or project, are retained at the commencement of the contract and serve for the duration of the contract. Thus, the intended methodologies of both the DRA and the DRB are similar, albeit not necessarily identical.

A DRA's "jurisdiction" may be set out in the parties' contract, e.g., matters of certification.[20] At the onset of a dispute, the DRA has a contractual time period within which to resolve the conflict. The DRA's role in the conflict:

> … is to act as an expert and make use of his specialist knowledge, skills and judgement, but is not to act as an arbitrator. He is usually given wide discretion in performing his function. It is an inquisitorial rather than adversarial process. … His investigations should be aimed at ascertaining relevant facts. Upon failing to reach an agreeable resolution, the DRA must write a decision based on his expertise and investigations, ... The parties must give effect to the DRA's decision, unless and until it is revised by an amicable settlement or by an arbitration award (which cannot be made until after the contract has been completed). If there is no dispute as to the DRA's decision, it is final and binding upon the parties. However, if one of the parties is not satisfied with the DRA's decision the contract usually will provide for the matter to be referred to arbitration.[21]

A DRB generally regularly monitors the project and engages in regular site visits when not actually situated on site. A DRB generally is required to investigate and promptly issue its decision in order to enable an early resolution of the dispute.[22] Whether the DRB conducts hearings is dependent upon the contracting parties' agreement. If a hearing or hearings are held in relation to a particular issue arising from the project, the practice is

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[19] For a detailed analysis of mediation in Hong Kong, *see, e.g.*, ARBITRATION IN HONG KONG, *supra* note 5, ¶¶ 2-21 – 2-45.
[20] *Id*. at ¶ 2-73.
[21] *Id*. at ¶ 2-74.
[22] *Id*. at ¶ 2-64.

that the hearing will be conducted: informally, such that the court rules of evidence do not apply; in a non-adversarial manner; and, observing natural justice.[23] Upon the conclusion of the hearing(s), the DRB is to arrive at a written conclusion.

This decision generally is non-binding and cannot be enforced as an arbitration award but rather as a matter of contract.[24] Should a party object to the DRB decision, recourse may be had to arbitration or litigation.[25] Whether this DRB decision may be admitted in the future proceedings is determined by the disputing parties' original contract.[26] However, in the Hong Kong context, in relation to the construction of the new Hong Kong International Airport, the Airport Authority's standard contract provided that the courts had the power to enforce DRB decisions.[27]

Arbitration

Arbitration is another form of ADR. As a process, it differs greatly from any non-judicial form of ADR, such as conciliation, mediation or independent expert determination.[28] The arbitral process has been defined as:

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[23] *Id.*
[24] *Id.*, citing to *A Cameron v. John Mowlem & Co, plc* (1990) 52 BLR 24. ARBITRATION IN HONG KONG, *supra* note 5, ¶ 2-69.
[25] ARBITRATION IN HONG KONG, *supra* note 5, at ¶ 2-64.
[26] *Id.*
[27] *Id*. at ¶ 2-65.
[28] As noted by one authority:

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

> the private *judicial* resolution by an arbitrator of a civil dispute or difference … by agreement of the parties. The arbitrator is a neutral and independent person, other than a judge in a court of competent jurisdiction, who is selected by or on their behalf the parties on the basis of his expertise, reputation and experience in the legal, professional or economic speciality from which the dispute stems. *The normal outcome of the process is an award which is final, legally binding and ultimately enforceable in court in the same manner as a judgment.*[29]

At this juncture, an introductory comment concerning Hong Kong is required. In the Hong Kong Special Administrative Region (hereinafter "HKSAR"), the *Arbitration Ordinance* (Cap 341) (hereinafter "the Ordinance") is the principal governing procedural law. The Ordinance is not a complete code governing arbitrations. Rather, its function is to: (i) provide a general legal framework; (ii) confer certain protections on the parties; (iii) vest certain powers in arbitral tribunals; and (iv) reserve residual powers of intervention to the HKSAR's Court of First Instance in order to support and supervise the arbitration process.

The Ordinance provides a dual regime for the conduct of domestic and international arbitrations.[30] Part IA applies to all arbitrations conducted in the HKSAR.[31] Part II governs domestic arbitrations.[32] Part IIA[33] provides for the adoption of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter "the Model Law")[34], subject to a number of additions and exclusions made in the main body of the Ordinance rather than in the Model Law itself, and

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> see the parties together or separately, with the utmost flexibility as to what is disclosed from one party to the other.
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> The fifth and final point of comparison between arbitration, mediation, and conciliation, is the basis upon which decisions are reached. A striking feature of arbitration in many systems, both domestic and international, is the power of arbitrators to act as *amiables compositeurs*; …

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

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

[30] Arbitration Ordinance, *supra* note 13. Part IIIA and Part IV of the Ordinance pertains to enforcement of awards, the former for Mainland China awards and the latter for foreign Convention awards. *See* 'Enforcement of Foreign Awards', *infra*.

[31] Part I (sections 1-2AC) and Part IA (sections 2AD-2GN) of the Ordinance, *supra* note 13.

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

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

[34] To date, 57 jurisdictions have adopted legislation based upon the UNCITRAL Model Law on International Commercial Arbitration, including in the United States: California, Connecticut, Illinois, Louisiana, Oregon and Texas. Foreign jurisdictions which have adopted this Model Law on arbitration include: Canada, Mexico, Japan, Hong Kong, India, Germany. For further information on the Model Law, *see* UNCITRAL Secretariat Explanation of Model Law at http://faculty.smu.edu/pwinship/arb-24.htm (Last visited: January 31, 2007); 1985 - UNCITRAL Model Law on International Commercial Arbitration at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (Last visited: January 31, 2007).

governs international arbitrations conducted in the HKSAR. The parties to an arbitration in Hong Kong may select whether the proceedings will be conducted pursuant to either the domestic or the international regime, that is, the disputants may opt out of one regime and into the other.[35] The principal substantive differences between the two regimes relate to rights of appeal against an arbitral award under the domestic regime[36] and in the number of arbitrators should the disputing parties fail to designate or agree on this matter. The default number of arbitrators in a domestic arbitration will be one.[37] The default number in an international arbitration will be one or three.[38] This article will focus on the provisions of the Ordinance and the Model Law applicable to arbitrations held pursuant to the international regime[39] as of the date of this article.[40]

Essential Features of Arbitration

The arbitration process is intended to be:

(i) *private* (proceedings are closed to the public and awards are private);

(ii) *consensual* (the arbitral process is to a certain extent party-driven, subject to arbitral case management);

(iii) *judicial* (in that an arbitration results in an enforceable award issued by a tribunal serving as "private judges" and bound by the same rules requiring fairness, the absence of bias and the proper exercise of discretion as are applicable to the judiciary); and

(iv) *final* and *legally binding* (the arbitral award generally cannot be appealed and is enforceable as a court decision, and under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958,[41] a foreign arbitral award is more easily enforced than a foreign court decision – see "Enforcement of Foreign Awards", *infra*).

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[35] *See* sections 2L, 2M, 34A(2) and 34B of the Ordinance, *supra* note 13.

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

[37] *Id*., section 8.

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

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

[40] The present Hong Kong arbitration statute is to be revised and it is hoped that the legislative process will be completed by 2008. Amendments will include unification of the two regimes into one arbitration regime based upon the Model Law. However, like the present law, it is anticipated that the revised Ordinance will contain supplemental provisions, some of which will be mandatory and some of which will be optional -- allowing the parties to opt into their application, *e.g.*, single arbitrator, consolidation of arbitrations, challenges to an award based upon a point of law, etc. These provisions will be particularly relevant to parties to domestic arbitrations.

[41] *See* "Enforcement of Foreign Awards" and *infra* note 73 for further discussion of the New York Convention.

The objectives of having a final resolution of a dispute through an arbitral proceeding are several. One perceived advantage of arbitration is the privacy afforded the parties in the dispute. The arbitration is open only to the parties, their representatives and witnesses, the tribunal and the administering institution, if any.[42] The general public is not allowed to attend an arbitration hearing without the consent of the parties. Hence, information disclosed at an arbitration hearing, which might contain confidential or proprietary business information, will not be disseminated to the public. Likewise, the award itself is to remain private to the extent possible, although court enforcement proceedings may render the contents of the award in the public domain.[43]

Another feature favoring the use of arbitration is limited court interference; local courts serve only to support or assist in order to ensure the arbitration proceedings are progressed in a fair and orderly manner.[44] In Hong Kong, if the parties to a dispute have agreed to arbitrate the subject matter in dispute, they are bound by this agreement. One party will not, therefore, be permitted to litigate a dispute that is the subject of a valid arbitration agreement. Pursuant to the Ordinance, an attempt to circumvent an arbitration by bringing the matter to litigation will result in a stay of the court proceedings in favor of the arbitration. The court has no discretion to refuse a stay where there is a valid arbitration agreement.[45]

Yet another advantage of arbitration is the perceived speed and lower costs involved that result from flexibility of the process as compared to traditional litigation, particularly in the United States. The applicability of this general statement depend in part upon the type of arbitral proceedings to be conducted and upon the disputing parties themselves, who may expedite or delay the proceedings, resulting in the commensurate financial savings or additional expenditure. Furthermore, some commentators have queried whether substantial cost savings

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

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

[44] *See* Section 2AA(2)(b) of the Ordinance, *supra* note 13, which provides that "the Court should interfere in the arbitration of a dispute **only as expressly provided** by this Ordinance". (Emphasis added.) *See, e.g.*, Art. 27 of the Model Law, *supra* note 34, which has been adopted as the Fifth Schedule to the Ordinance, *supra* note 13, which provides: "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. …"

[45] Art. 8(1) of the Model Law, *supra* note 34, provides in part:

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

This provision implements the treaty obligation under Article II of the New York Convention to recognize and enforce valid international arbitration agreements. *See* "Enforcement of Foreign Awards" and *infra* note 73 for further discussion of the New York Convention.

can be achieved where parties have agreed that an arbitration should be conducted as a traditional court-type proceeding before a private tribunal, with the parties being required to pay additionally for the "private judge(s)" (*i.e.*, members of the arbitral tribunal) and for the room(s) for the hearing, conferences, *etc*. all of which would be provided by the government of the locale in a court proceeding.[46]

Related to the advantage of expeditious resolution of a dispute is perhaps the greatest attraction of arbitration: the flexibility of the process, *i.e.*, party autonomy. Being a consensual procedure, arbitration allows the disputing parties the freedom to select and agree to options regarding the conduct of the arbitration proceeding. Thus, matters such as rules of court, rules of procedure, strict pleadings, formal evidentiary procedures, *etc*. need not apply in an arbitral hearing.[47] For example, the disputants may, among other items, stipulate in regards to:

(i) the tribunal: the parties may opt for a single or multi-member arbitral tribunal to conduct the proceedings and ultimately to decide the dispute; specify the professional qualifications or expertise of the tribunal member(s) (*e.g.*, commercial men or women, architect, engineer, lawyer, gemologist, *etc*.);[48] specify the nationality of the tribunal member(s) (an important factor in a multinational, multicultural dispute where the parties are from different legal systems, *i.e.*, civil law and common law legal systems);[49]

(ii) the venue or "seat" where the proceedings will be held (potentially a critical factor because the seat is important in terms of the applicable procedural law, the enforcement of an award and location in a jurisdiction which is familiar with and supportive of the arbitration process; furthermore, the seat is of importance where multinational and/or multicultural parties are involved; a perceived neutral location may be in order so as to avoid claims of geographical advantage, bias or prejudice);[50]

(iii) the type of arbitral proceeding, *e.g.*, traditional court-style litigation; short-form (where narrative statements of the case are presented, discovery is limited; oral argument and examination of witnesses both are limited);[51] "look-sniff" procedures in commodity arbitrations

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

[47] *See, e.g.*, section 2GA(2) of the Ordinance, *supra* note 13, which provides that "… an arbitral tribunal is not bound by the rules of evidence …"

[48] Art. 10(1) of the Model Law, *supra* note 34, provides: "The parties are free to determine the number of arbitrators."

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

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

[51] *See, e.g.*, the Hong Kong International Arbitration Centre's *Short Form Arbitration Rules* which apply to arbitrations conducted according to shortened forms of procedure (whether by hearing or on documents-only

(where evidence and legal submissions are of little practical use) and documents-only cases (where a decision is reached without a hearing);[52]

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

(b) alternatively, the parties may dispense with administration of the process by an arbitration institution proceed upon an *ad hoc* basis (where the parties deal directly with the tribunal at the preliminary stages and there is the option of proceeding without any procedural rules or relying upon, *e.g.*, the UNCITRAL Arbitration Rules[53]);

(v) the method of evidence gathering by the tribunal, *e.g.*, an adversarial process (with which common law legal system lawyers are most familiar) versus an inquisitorial process (with which civil law legal system lawyers are most familiar) which may impact upon the choice of witnesses of fact, the appointment of expert witnesses, the examination of witnesses, the type and extent of discovery, the role of the tribunal, *etc*.;[54]

(vi) the language in which the proceeding will be conducted.[55]

Hong Kong's arbitration law subscribes to the philosophical intent of the Model Law's Art. 18[56] and Art. 19[57] concerning the purpose and conduct of an arbitration, that is, to "facilitate the **fair** and **speedy resolution** of disputes by arbitration **without unnecessary expense**."[58] Therefore, in relation to case management, the arbitral tribunal "is required to use procedures that are appropriate to the particular

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basis) available at http://www.hkiac.org/HKIAC/pdf/Rules/e_shortform.pdf (Last visited: January 31, 2007).

[52] Art. 19(1) of the Model Law, *supra* note 34, notes: "… the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."

[53] *See* Resolution 31/98 adopted by the UN General Assembly on December 15, 1976. For the text of the Resolution and the Rules, *see* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf (Last visited: January 31, 2007). These Rules were adopted for use by the Iran-United States Claims Tribunal. *See* SA BAKER & MD DAVIS, THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN – UNITED STATES CLAIMS TRIBUNAL (1992).

[54] *See, e.g.*, Art. 19(2) of the Model Law, *supra* note 34, provides: "… the arbitral tribunal may … conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence." *See also* Art. 26 concerning the appointment of experts by the arbitral tribunal.

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

[56] Art. 18 of the Model Law, *supra* note 34, provides that the parties to the arbitration "shall be treated with equality and each party shall be given a full opportunity of presenting his case."

[57] Text of Art. 19 of the Model Law, *supra* note 34, is found *supra* notes 52 and 54.

[58] Section 2AA(1) of the Ordinance, *supra* note 13. Emphasis added.

case, avoiding unnecessary delay and expense …"[59] These powers of the arbitral tribunal allow it, subject to the contrary agreement of the disputants under the principle of party autonomy, to dispense with a hearing or to adopt inquisitorial procedures.[60] Under the Hong Kong Ordinance, a party has an obligation to prosecute its claim as "[t]here is an implied term in every arbitration agreement that a party who has a claim under the agreement will prosecute the claim without delay"[61] or face sanctions.[62]

The Arbitration Agreement

Section 2 of the Ordinance accords "arbitration agreement" the same definition as that found in Article 7(1) of the Model Law. Article 7(1) provides:

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

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

> (3) An arbitration is international if:
>
> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
>
> (b) one of the following places is situated outside the State in which the parties have their places of business:
>
> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
>
> (ii) any place where a substantial part of the

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

[60] For example, section 2GB of the Ordinance, *supra* note 13, provides:

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

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

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

obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

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

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

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

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

Section 34C(2) of the Ordinance modifies the application of the Model Law so that the latter is not limited to international commercial arbitrations.[63] Furthermore, an arbitration between two local disputants may nonetheless qualify as "international." In *Fung Sang Trading Ltd v Kai Sun Sea Products and Food Co Ltd*, [1992] 1 HKLRD 40, the court held that an arbitration between two Hong Kong companies was an international arbitration as a substantial part of the agreement's obligations – delivery of the contractual goods – was performed outside of Hong Kong.

Application of the Ordinance requires that the disputing parties' arbitration agreement be in writing.[64] Section 2AC of Ordinance excludes Art 7(2) of the

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[63] Section 34C(2) of the Ordinance, *supra* note 13, stipulates: "Article 1(1) of the UNCITRAL Model Law shall not have the effect of limiting the application of the UNCITRAL Model Law to international commercial arbitrations."

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

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

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

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

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

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

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

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

(f) there is an exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and is not denied by the other party in response to the allegation.

(3) A reference in an agreement-

(a) to a written form of arbitration clause; or

(b) to a document containing an arbitration clause,

constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

(4) In this section "writing" (書面) includes any means by which information can be recorded.

(5) This section applies to all agreements that would, if they were arbitration agreements,

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

Commencing Arbitration Proceedings

Where the disputing parties have agreed to a particular set of procedural rules, these rules will usually make provision as to the initiation of arbitral proceedings, the appointment of the tribunal, the conduct of the arbitration and the issuance of an award.[65] Where the disputants have not designated or agreed to a particular set of arbitration rules, *i.e.*, an *ad hoc* proceeding,[66] the Model Law makes appropriate provision on these matters in those jurisdictions where the Model Law has been adopted.[67] The Model Law is intended to provide the legal framework within a jurisdiction to permit the progress of the arbitral process.

The Model Law contains provisions intended to establish the essential duties to be imposed both upon the disputing parties and the arbitral tribunal. In addition, the Model Law sets out the basic provisions concerning the conduct of arbitrations from commencement to award and challenges to awards. For example, the Model Law's provisions assist in the constitution of the tribunal[68] in the event either of a

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> be either **domestic arbitration agreements or international arbitration agreements and applies to those agreements to the exclusion of article 7(2) of the UNCITRAL Model Law**. (Emphasis added.)

Art. 7(2) of the Model Law, *supra* note 34, provides:

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

[65] *See* text accompanying item IV on page 13 of this paper.

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

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

[68] Art. 10 and Art. 11 of the Model Law, *supra* note 34, provide in relevant part:

> Article 10. Number of arbitrators
>
> (1) The parties are free to determine the number of arbitrators.
> (2) Failing such determination, the number of arbitrators shall be three.
> [Note: This article is subject to the amendment contained in section 34C(5) of the Ordinance, *supra* note 13, providing for either one or three as decided by the Hong Kong International Arbitration Centre in the particular case.]

recalcitrant party resisting arbitration or the lack of agreed procedures on this matter. [69] Once the tribunal is constituted, the arbitrator(s) can assume the authority to progress the arbitral proceedings. The Model Law also contains provisions delineating permissible court intervention in an arbitration; generally, courts are only permitted by the Model Law to intervene in order to assist the arbitral process and its progress. [70] The policy of the Model Law is to defer, until

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> Article 11. Appointment of arbitrators
>
> (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
> (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.
> (3) Failing such agreement,
>
> (a) in an arbitration with 3 arbitrators, each party shall appoint one arbitrator, and the 2 arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the 2 arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;
>
> (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.
>
> (4) Where, under an appointment procedure agreed upon by the parties,
>
> (a) a party fails to act as required under such procedure, or
>
> (b) the parties, or 2 arbitrators, are unable to reach an agreement expected of them under such procedure, or
>
> (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

[69] Many arbitral institutions have similar default provisions in their institutional rules which would allow the appointment of the tribunal regardless of a party's lack of cooperation or the parties' inability to agree. *See, e.g.*, the Swiss Rules of International Arbitration, Art. 6.1 ("If the parties have not agreed upon the number of arbitrators, the Chambers shall decide …) and Art. 7.3 ("If the parties fail to designate the sole arbitrator …, the Chambers shall proceed with the appointment."). Failing the application of such contractually agreed procedures, national arbitration laws (including the Model Law) provide for the making of appointments by a court or other authority. *See, e.g.*, Art. 6 of the Model Law, *supra* note 15. In Hong Kong, section 34C(3) of the Ordinance, *supra* note 13, provides for the Hong Kong International Arbitration Centre to be the statutory default appointing authority for international cases. The Hong Kong International Arbitration Centre's functions in this regard are exercised pursuant to set statutory criteria. *See* the Arbitration (Appointment of Arbitrators and Umpires) Rules 1997 (Cap 341B).

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

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

the issuance of an arbitral award, a court's power to review the most serious objections to the conduct of an arbitration and to limit the types of objection that may be entertained.[71]

Finally, Chapter VIII of the Model Law provides for the recognition and enforcement of all international commercial arbitration awards, not merely "foreign" awards as will be discussed below.[72] The Model Law's provisions for setting aside an arbitral award largely replicate those of the *Convention on the Recognition and Enforcement of Foreign Awards*[73], discussed *infra*, thus creating a seamless and uniform application and approach to international arbitration. These instruments are complementary, as the Model Law derives philosophically from the *Convention on the Recognition and Enforcement of Foreign Awards*. Indeed, the consistent application of both sets of instruments worldwide is a responsibility of UNCITRAL. Hong Kong did not adopt Chapter VIII of the Model Law, opting for enforcement of arbitral awards under the *Convention*. Pursuant to Art. 35 of the Model Law, an arbitral award shall be binding regardless of the country in which it was rendered. This provision is inconsistent with the reciprocity reservation made by both the United Kingdom [and extended to its then territory of Hong Kong] and the People's Republic of China [and applicable to its present Special Administrative Region of Hong Kong] to the *Convention*.

Enforcement of Foreign Awards

As its name implies, the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* of 1958 (hereinafter "NY Convention") pertains to the enforcement of an award in a Convention State or territory other than the State or territory in which the award is made.[74] The NY Convention currently applies to the recognition and enforcement of international arbitration awards in more than 145 member States and territories.[75] Article V of the NY Convention sets forth the limited grounds on which the enforcement of a foreign

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technical grounds for challenging awards in the courts of the place of arbitration. These grounds are based on those for challenging the recognition and enforcement of awards under the New York Convention of 1958 – see the discussion in the following section of this paper.

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

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

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

[74] *See* Part IV and the Third Schedule of the Ordinance, *supra* note 13. For a review of the history of the NY Convention's application in Hong Kong, *see* Stephen D. Mau, *Hong Kong's Experience with the New York Convention: An Introduction*, 9 *Transnat'l Lawyer* 393 (1996). For analysis of the NY Convention, *see* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 (1981).

[75] For example, under the Ordinance, *supra* note 13, section 44 permits the enforcement of awards made in other Convention States and territories to be challenged on the grounds provided under Art. V of the NY Convention, *supra* note 73.

award may be challenged in court. A party resisting enforcement must establish at least one of a number of exclusive grounds for setting aside an award under Art. V of the NY Convention:

(i) lack of capacity by one party to enter into an arbitration agreement;
(ii) invalidity of the arbitration agreement;
(iii) lack of proper notice of the appointment of the tribunal or of the arbitration proceedings, such that a party was unable to present its case;
(iv) the tribunal's award exceeds the tribunal's jurisdiction by purporting to determine matters not falling within the submission to arbitration;
(v) improper constitution of the arbitral tribunal;
(vi) the award has not yet becoming binding upon the parties;
(vii) the subject matter of the dispute is not capable of settlement by arbitration under the law of the State where enforcement of the award is sought;
(viii) contravention by the award of the public policy of the State where enforcement of the award is sought.[76]

Thus, under the NY Convention, the objectives of arbitration are sought to be reinforced. Arbitral finality, *i.e.*, a final decision without further challenges or appeals to the courts, and "fairness" are both realized. A party resisting enforcement has limited and predominantly technical grounds under the NY Convention on which to challenge the enforceability of an arbitral tribunal's award. There is a presumption or 'pro-enforcement bias' in favour of enforcement of the award. The enforcing court has a residual discretion to permit enforcement of an award even where one of these grounds has been shown or proved, if the court is satisfied that a different decision would not have been reached by the arbitral tribunal but for the act or omission complained of and that no injustice would be caused to the party resisting enforcement.

Enforcement of Hong Kong China Arbitral Awards

Enforcement of arbitral awards made by recognised Mainland arbitration tribunals sitting in the People's Republic of China (PRC) and recognized as valid arbitral awards under the PRC's Arbitration Law are considered to be "Mainland" awards.[77] Mainland awards are not enforced in Hong Kong under the New York Convention as Hong Kong is now considered part of the PRC.

[76] Grounds (vii) and (viii) may be raised by the enforcing court *sua sponte* because they affect public policy matters.
[77] Sec. 2(1) of the Ordinance, *supra* note 13, defines "Mainland award" as "an arbitral award made on the Mainland by a recognized Mainland arbitral authority in accordance with the Arbitration Law of the People's Republic of China." "Recognized Mainland arbitral authority" are those authorities listed in the Hong Kong Government's Gazette pursuant to sections 2 and 40F of the Ordinance.

Rather, Mainland awards are enforced in Hong Kong under Part IIIA (sections 40A – 40G) of the Ordinance, entitled "Enforcement of Mainland Awards". Section 40B(1) thereof provides: "A Mainland award shall … be enforceable in Hong Kong either by action in the Court or in the same manner as the award … by virtue of section 2GG ("Enforcement of decisions of arbitral tribunal"). Nonetheless, Part IIIA closely parallels the NY Convention. The grounds for refusing enforcement of a Mainland award in Sec. 40E are similar to the grounds for refusing enforcement of a Convention award in Art. V of the Convention and identical to those in Sec. 44 of the Ordinance.[78]

Conclusion

If conducted properly, ADR, particularly international commercial arbitration, can be more efficient, less time consuming and thus commensurately less costly than traditional litigation. The Model Law can be seen as creating, for arbitrations conducted in jurisdictions that have adopted this recommended legislation, the wherewithal for instituting and progressing arbitral proceedings in an orderly fashion with a minimum of judicial control from commencement of the arbitral proceedings to the enforcement of an *international* commercial award. The NY Convention, likewise, promotes finality in international commercial arbitration by facilitating the recognition and enforcement of a *foreign* arbitral award, subject only to limited grounds for the refusal of enforcement.

~5064 words - Main text

~9657 words - Total

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