Consultation Paper
Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill

COMMENTS FROM HONG KONG BAR ASSOCAITION

A. Background to Current Consultation

1. This Consultation Paper on *Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill* is published by the Department of Justice on 31 December 2007, with the assistance of the Department Working Group to implement the Report of the Committee on Hong Kong Arbitration Law ("the Working Group").

2. The Draft Arbitration Bill adopts, with modifications, the proposals as set out in the Report of Committee on Hong Kong Arbitration Law ("the Report"), published in April 2003 by the Committee on Hong Kong Arbitration Law, recommending a unitary regime with the Model Law to govern both domestic and international arbitrations. The Hong Kong Bar Association took an active part the preparation of the Report and was represented throughout its preparation[1].

3. The HKBA has been invited to comment and will be focusing on matters arising out of the Draft Arbitration Bill.

4. Generally, the HKBA welcomes and supports the proposed reform to the law of arbitration in Hong Kong and believes that this can further promote Hong Kong as a venue and practice for arbitration users, local and overseas. We include our comments below, aiming mainly at improving the use of the new Ordinance and for the better implementation of it.

[1] See paragraph 2.2 of the Report.

5. Also, HKBA would very much like to see that the new Ordinance can come into operation as soon as practicable, after reviewing the comments received during this consultation.

B. Approach to Reform

6. As per the Report, the HKBA supports the provision of a unitary arbitration law regime based on the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law ("the UNCITRAL Model Law"), applying it to both domestic and international arbitrations[2].

7. The HKBA also notes that, since the publication of the Report, amendments to the UNCITRAL Model Law are introduced in 2006[3] and is pleased to see that these amendments have also been considered by the Working Group when drafting the bill.

8. As seen from the Draft Bill, optional provisions on how the arbitration is to be conducted are at the choice of the parties. The HKBA agrees with and supports party autonomy as to choosing the desired process of dispute resolution by the parties. Yet, with all these new approach, particularly in relation to provisions that may be expressly opted for or automatically apply, corresponding support for educating the users, by both the arbitration community and the government, to introduce and promote the use of the new Ordinance in order to enable informed choices to be made by parties should be necessary.

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2 As a matter of history, a unitary regime was provided for by the Arbitration Ordinance when enacted in 1963, when adopting the English Arbitration Act 1950.

3 The UNCITRAL Model Law adopted in 1985 was amended on 7 July 2006. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html for the amendments.

C. Format and Structure of the Draft Bill

9. HKBA welcomes the adoption of the structure and article headings of the UNCITRAL Model Law by the Draft Bill and understands that other provisions are inserted at parts and places to fill in the gaps left over by the UNCITRAL Model Law.

10. Regarding Division 2 ("Mediators") of Part 4 ("Composition of Arbitral Tribunal") of the Draft Bill, there seems to be an apparent inconsistency in these headings. To avoid this, it may simply to add "and Appointment of Mediators" to the heading of Part 4.

D. Content of the Draft Bill

11. Part 1 – Preliminary

Clause 5(3)(b) provides for the deeming application of the Schedule 3 provisions, to retain the application of the former domestic regime and HKBA is of the view that this should be the logical approach.

12. Part 2 – General Provisions

(a) As to clause 14(4), there are apparent advantages in support of not subjecting the court order under this clause to any further appeal. However, HKBA is of the view that a court order to excluding from the computation of the limitation period that period between the commencement of the arbitration and the date of the order can still be a matter important in substance to the parties and, therefore, an appropriate appeal procedure should still be needed to subject that order to further appeal.

(b) Regarding clause 15(1), HKBA agrees that a direction under clause

15(1) would bring serious consequence on the parties and there is no strong justification for not allowing further appeal in these circumstances. Therefore, for protecting the parties, HKBA is in support of subjecting such a direction to appeal and considers that proper procedural safeguards can be achieved by calling for leave to appeal.

(c) In relation to clause 16, HKBA considers that confidentiality is one of the key aspects in many types of arbitrations. On the other hand, HKBA also considers that it is in the public interest in having transparency of process and public accountability of the judicial system. Therefore, a balance between confidentiality and the public interest of having transparent court process should be maintained. With clause 17 in place, it may be more logical to start off providing that proceedings under the new Ordinance shall be heard otherwise than in open court, unless on application of any party or even on the court's initiatives and, in any particular case, the court is satisfied that the proceedings ought to be heard in open court. This may perhaps help save the parties from having to incur expenses or time to formally make the application each time.

13. <u>Part 3 - Arbitration Agreement</u>

(a) As to clause 19, HKBA is of the views that Option I should be more consistent in operation with the existing section 2AC(2) of the existing Ordinance, reproduced as clause 19(2), and the UNCITRAL Model Rules. It has been noted that another purpose of the requirement that the arbitration agreement be in writing was to avoid uncertainty as to whether the UNCITRAL Rules have been made applicable and that requirement was also intended to ensure conformity with article II, paragraph (2), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New

York, 1958) ("the New York Convention")[4]. HKBA agrees that Option I should be adopted.

(b) Clause 20

Scope of Clause 20(2)

(i) In relation to clause 20(2), the case of *Paquito Lima Buton v. Rainbow Joy Shipping Ltd*[5] concerns a dispute over employee compensation and the issue is whether the District Court had exclusive jurisdiction notwithstanding arbitration agreement in employment contract. The Court of Final Appeal ruled that there was no power to stay employees' compensation claims for arbitration even there existed an agreement to arbitrate[6]. Thus, as the laws presently stand, employees' compensation claims are within the exclusive jurisdiction of the District Court. The policy under the Employees' Compensation Ordinance (Cap.282) is self-evidently to provide a framework of legal protection for injured and incapacitated employees, operated by the Commissioner for Labour and the District Court. To this end, it restricts freedom of contract, for example, by requiring certain settlement agreements to be approved by the Commissioner and nullifying any contractual attempts to extinguish or reduce the employer's liabilities under the Ordinance. There may be justifications in restricting the freedom of contract for such injured and incapacitated employees, for their protection.

(ii) However, as seen from the *Paquito Lima Buton v. Rainbow Joy*

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4 See, for example, UNCITRAL document referenced A/CN.9/WG.II/WP.139, "Settlement of commercial disputes: Preparation of uniform provisions on written form for arbitration agreements- Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)".

5 [2007] 1 HKLRD 926.

6 [2008] HKCFA 30. The judgment of the Court of Final Appeal was delivered on 28 April 2008, finding that there was no arbitration agreement and that there is no power to stay claims covered by the Employees' Compensation Ordinance for arbitration even if there were such an arbitration agreement.

Shipping Ltd case, employment contracts cover much more than salaries and dismissals nowadays. Therefore, as the laws currently stand, claimants may be required to pursue their cases, in some cases, before more than one tribunal or court to get full compensation for disputes arising under the same employment contract. Also, arguments over what is an 'employment contract' (and its scope) for the purpose of clause 20 can be complicated. Thus, for the parties, HKBA sees that it may make more sense if a one-stop proceeding can be made available to claimants involved in employment contract or workplace related disputes and is of the view that this can certainly be provided for via expanding the use of arbitration to cover such disputes, which may, for example, involve claims for personal injuries, wrongful dismissal and outstanding salaries arising from an employment contract.

(iii) HKBA notes that there may be potential arguments against the use of arbitration in this manner due to the potential power imbalance between the employer and the employees in using arbitration. It should yet also be noted that resolving employment disputes by arbitration is indeed very common in many other jurisdictions[7]. Indeed, when properly conducted, there can always be added benefits of using arbitration in employment disputes, such as flexibility in procedures (and hence at a quicker speed and at lower costs), confidentiality, and choice of experts as arbitrators, as contrast to going through the Labour Tribunal system[8]. Further, with clause 20(3) retaining the Control of Exemption Clauses Ordinance (Cap.71), HKBA sees

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[7] See, for example, the Federal Mediation and Conciliation Services in US (http://www.fmcs.gov/) and the Advisory, Conciliation and Arbitration Service in UK (http://www.acas.gov.uk).

[8] See, for example, the paper titled "The Operation of Labour Tribunals and Other Mechanisms for Resolving Labour Disputes in Hong Kong and Selected Places" by the Research and Library Services Division Legislative Council Secretariat in 2004."

nothing objectionable in principle in upholding parties to an employment contract to their arbitration agreement contained therein.

(iv) Hence, HKBA do not see the justifications to expand the existing section 6(2) of the Ordinance into proposed clause 20(2) herein. On the contrary, HKBA is of the view that the use of arbitration should be favoured in appropriate employment disputes even to cover matters currently within the jurisdiction of the Labour Tribunal.

Leave Procedure for Clauses 20(1) & (2)

(v) The stay of arbitration is surely a matter of serious consequence to the parties. Furthermore, an automatic right to appeal may not be beneficial to the parties who have agreed to resolve the disputes by way of arbitration in that the resolution process will be prolonged.

(vi) HKBA supports the view that leave of the court should be required for in the appeal procedure thereunder.

Leave Procedure for Clauses 20(6)

(vii) Though appeared to be a relatively minor procedural matter, the issues and amount at stake in such cases can be substantial. HKBA is of the view that a likewise appeal procedure with clauses 20(1)&(2) should be adopted for clause 20(6).

14. <u>Part 4 – Composition of Arbitral Tribunal</u>

(a) Part 4 generally follows the recommendations in the Report. Clauses.

(b) As to clause 31(8), replacing the arbitrators (who fail to observe the procedure for their replacement) by an umpire can be serious to the parties and HKBA tends to support the view that an appeal procedure with proper safeguards should be introduced.

(c) As to clause 32, section 13A of the current Ordinance has been in

operation for years without any observed problems. HKBA is of the view that is may be retained as it is.

15. Part 5 – Jurisdiction of Arbitral Tribunal

(a) Part 5 generally follows the recommendations in the Report.

(b) HKBA welcomes the addition of clauses 35(2) in an non-exhaustive manner.

16. Part 6 – Interim Measures and Preliminary Orders

(a) With the amendments adopted in 2006 to the UNCITRAL Model Law, HKBA agrees that these should be reviewed for adoption into the new Ordinance.

(b) Essentially, the gist of the amendments is to provide a generic definition of interim measures and set out the conditions for granting such measures and an important innovation of the revision lies in the establishment of a regime for the recognition and enforcement of interim measures, which was modelled, as appropriate, on the regime for the recognition and enforcement of arbitral awards under articles 35 and 36 of the UNCITRAL Model Law[9].

(c) HKBA supports the introduction of clauses 36 to 43 to implement articles 17, 17A to 17G and agrees that articles 17H to 17I should not be adopted in the new Ordinance. In fact, the current version of section 2GG has given to the court powers to enforce orders and directions on interim measures. HKBA also observes that Hong Kong may be the first jurisdiction in the world to enact legislation modelled on articles 17A to 17G and that articles 17A to 17G are well-defined provisions, though they may be argued to be more limiting than current powers available to arbitral tribunals

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[9] See paragraph 27 of the Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006.

under section 2GB of the existing Arbitration Ordinance.

(d) In relation to court-ordered interim measures, HKBA agrees with the drafting as appeared in clause 46 of the Draft Bill and sees this as a balanced approach to the matter. However, HKBA is of the view that consideration should be given on allowing the arbitral tribunal to vary, modify or cancel by order such court-ordered interim measures[10].

(e) Also, HKBA is of the view that an appeal procedure against a decision to grant or refuse to grant an interim measure can be of great significance to the parties and, as such, should be provided with proper safeguards against abuses.

17. Part 7 – Conduct of Arbitral Proceedings

(a) Part 7 generally follows the recommendations in the Report.

(b) As to clause 59, HKBA considers that an appeal procedure safeguarded with leave of the court is necessary to protect the parties' rights to arbitration and to balance against abuses.

(c) Likewise, as to clause 60, such a power exercisable by the court is a matter of great significance to the parties and an appeal procedure safeguarded with leave of the court is necessary to protect the parties' rights to arbitration and to balance against abuses.

(d) In relation clause 62, HKBA is of the views that:-

(i) there are diverging views on the question whether the regime of enforcement under articles 35 and 36 of the UNCITRAL Model Law can still apply in the context of recognition and enforcement of an interim measure granted by an arbitral tribunal in the form of an award[11];

(ii) such orders or directions, though perhaps more likely to be procedural and interlocutory in nature, can be of importance

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10 See, for example, section 44(6) of the English Arbitration Act 1996.

11 See paragraph 77 of the UNCITRAL document referenced A/CN.9/589, "Report of the Working Group on Arbitration and Conciliation on the work of its forty-third session)".

in substance to the parties;

(iii) on the proof reciprocity, a model with reference to the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap.319) may be considered;

(iv) if reciprocity is introduced, this may help limiting the wider effect that section 2GG under the current Arbitration Ordinance has.

18. Part 8 – Making of Award and Termination of Proceedings

(a) Again, Part 8 generally follows the recommendations in the Report.

(b) In relation to settlement, HKBA is of the view that clause 67(2) is a useful device that should be promoted to the users when together with the promotion of the use of mediation. To the issue of whether a settlement agreement is reached, it is an important issue affecting the parties and an appeal procedure should be introduced as a safeguard.

(c) As to the proposal in clause 80(1)(c), HKBA is of the view that new provisions should be drafted to clarify the position.

19. Part 9 – Recourse Against Award

Part 9 implements the recommendations in the Report and HKBA believes that an appeal procedure with proper safeguards against abuses should be introduced on the decision to set aside an arbitral award.

20. Part 10 – Recognition and Enforcement of Awards

Part 10 implements the recommendations in the Report and HKBA believes that an appeal procedure with proper safeguards against abuses should be introduced on the decision to grant or refuse leave to enforce an arbitral award made outside Hong Kong, which is neither a Convention award nor a Mainland award.

21. Part 11 – Provisions That May be Expressly Opted For Or

Automatically Apply

(a) In paragraph 49 of the Report, opt-in provisions are recommended. As said in the above, to enable informed choices of these and other provisions being made by the parties, joint efforts of the arbitration community and the government would be necessary. Otherwise, users may find the application of these provisions confusing and, sometimes, contrary to their expectations.

(b) On the other hand, HKBA welcomes the retaining of these choices for opt-in provisions to be adopted by the parties. With clauses 3 to 7 of Schedule 3 of the Draft Bill, HKBA is of the view that it may allow jurisprudence on laws for commercial sector be developed and, therefore, provide predictability in commercial transactions.

(c) As to clause 101, if with proper promotion and education of the new Ordinance, HKBA considers that a period of 6 years should be a reasonable period for transition.

(d) In relation to clause 102, HKBA observes that the purpose is intended to ensure that all the opt-in provisions in Schedule 3 would automatically apply to an arbitration agreement contained in every contract down the line of subcontracting process in the construction industry. If without a proper defined scope of applicability, for example, by restricting its application to the construction industry, by defining the meaning of 'construction industry' or by defining 'subcontracting', parties may find to their surprise that clause 102 may apply in their contracts to opt-in for them those provisions in Schedule 3 of the Draft Bill. In any case, it seems that, most of those subcontract situations in the construction industry should have been well covered by clause 101. Therefore, HKBA is of the view that, clause 102, in its present form, should not be introduced, for avoiding all the potential uncertainties.

(e) Consideration should also be given as to whether an award rendered

with the deeming/automatic the consolidation provision (i.e. clause 2 of Schedule 3) would be enforceable under the New York Convention outside Hong Kong.

22. Part 12 – Miscellaneous

HKBA considers that mediators are also performing their roles as a third-party neutral and the parties understand that any opinions/views expressed should be non-binding under the process (even in evaluative mediation). As such, HKBA considers that clauses 105 and 106 should also be applicable to mediators.

Hong Kong Bar Association
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