SYMPOSIUM ON INTERNATIONAL COMMERCIAL ARBITRATION IN THE ASIA-OCEANIA REGION

REGIONAL REPORT FOR HONG KONG, CHINA

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1. Introduction

1.1 This *Regional Report* has been prepared for the purposes of a comparative research study by the Institute for Socioeconomic Dispute Studies, Meijo University Graduate School of Law, entitled *Conditions and Measures for Activation of the International Commercial Arbitration System in Asia and Oceania.*

1.2 The purpose of this *Report* is to discuss:

(i) the adoption of the UNCITRAL Model Law on International Commercial Arbitration[2] on arbitration in Hong Kong, with particular reference to the measures that were necessary to adapt it for international arbitration in the territory;

(ii) Hong Kong's experience of the Model Law;

(iii) the arbitration law reforms of 1996-1997, their effect on the Model Law and the creation of internal inconsistencies between those reforms and the Model Law, and

(iv) the influence of the Model Law as a catalyst for possible fundamental reform of arbitration law in Hong Kong.

1.3 ***The significance of the Model Law to Hong Kong*** The adoption of the Model Law is considered to have been critical to the development of Hong Kong both as a regional and as an international arbitration centre. The contribution of the Model Law to this development has been both 'inward' and 'outward'.

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[2] Hereinafter 'the Model Law' or 'the UNCITRAL Model Law'.

1.4 ***The 'inward' contribution*** Hong Kong has joined a growing body of states and territories that have adopted the Model Law or enacted legislation based upon it. This has, in turn, led to the widespread citation and application of overseas judicial authority in the Hong Kong courts since 1990 in considering the meaning and application of the Model Law. In the post-colonial era, this practice has been endorsed by art 84 of the territory's 'mini-constitution', the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China[3], which permits the courts of the Special Administrative Region[4] to refer to precedents of other common law jurisdictions. Furthermore, because the Model Law is philosophically based on the principles of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958[5], there is much cross-application or application 'by analogy' of case law decided under one or other instrument. Indeed, statute requires arbitral tribunals sitting in Hong Kong and the courts of Hong Kong to have regard to the Model Law's international origin[6].

1.5 ***The 'outward' contribution*** Hong Kong has since 1990 contributed in real terms towards the development and harmonisation of international arbitration. Its case law is widely cited in the courts and arbitration textbooks of other states and territories, both Model Law and Model Law-influenced. This jurisprudence appears in authoritative compendia such as ICCA's *Yearbook Commercial Arbitration* and is available through UNCITRAL's Case Law on UNITRAL Texts (CLOUT) database. As such, therefore, it is in a position to influence the development of international arbitration in both the common law and the civil law worlds. In common with the 'inward' contribution, the 'outward' contribution extends to the development of jurisprudence under philosophically related juridical instruments, such as the New York Convention and the juridical assistance agreement made under art 95 of the Basic Law to facilitate the recognition and enforcement of awards made in Hong Kong and Mainland China in each other's territory[7].

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3 Hereinafter 'the Basic Law'.

4 Hereinafter 'SAR' or 'Hong Kong SAR'.

5 Hereinafter 'the New York Convention'.

6 See note 33 below.

7 *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region* (21 June 1999). The agreement was implemented into Hong Kong law by the Arbitration (Amendment) Ordinance 2000 (Ordinance No 2 of 2000), as to which see para 28 below.

1.6 ***The effect of the Model Law's contributions*** These contributions have resulted in a substantial raising of Hong Kong's profile in international arbitration, and with it a substantial increase in arbitration business[8]. They have promoted comparative study and the cross-fertilisation of ideas and experience between individual jurisdictions in the East Asia-Oceania region, for example Hong Kong and Singapore[9]. Coming at a time of fundamental political and geopolitical change for Hong Kong, with the impending resumption of sovereignty by Mainland China, the advent of the Model Law in the territory promoted a further move away from a colonialist ot parochial model of law to something more international, internationalist and (in some quarters) internationally acceptable. Harmonisation of arbitration laws gives rise to a system of internationally accepted and recognisable principles. Taken together with the right combination of other conditions necessary to promote the existence of a healthy arbitration centre, such as location, a stable political and economic system, good communications, an efficient financial system, the availability of local arbitral and professional talent and an arbitration-friendly local judiciary, the identification of a particular law district as a 'Model Law jurisdiction' develops a *cachet* all of its own. This has been recognised as a selling point for Hong Kong arbitration[10]. The importance of this recognition is such that one of the concerns of the Committee on Hong Kong Arbitration Law[11], which is advising the Government of the SAR on arbitration law reform, is that any new Arbitration Ordinance should not represent a move away from or a dilution of Hong Kong's Model Law status. Whilst the promotion of individual states and territories as international arbitration centres was not among UNCITRAL's aims in promulgating the Model Law, there can be no denying that this has been one of the Model Law's practical and most beneficial side-effects.

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8 Cases referred to Hong Kong International Arbitration Centre 1985-1998:

1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1991	1997	1998	1999
9	20	43	24	45	54	94	185	139	150	184	187	218	240	257

Source : HKIAC

The Secretary General of HKIAC, in a 'guesstimate' to the author, is of the opinion that approximately of the cases referred were international.

9 This subject is discussed *in extenso* in Jan K Schaefer, *Borrowing and Cross-Fertilising rbitration Laws: A Comparative Overview of the Development of Hong Kong and Singapore Legislation for International Commercial Arbitration* (1999) 16 J Intl Arb 4, 41.

10 See, for example, Robert Morgan, *Hong Kong Arbitration A Decade of Progress - But Where to Next?* Hong Kong Lawyer, October 1999, p 65 at 73 (English text), p 76 at 81 (Chinese text) See also Schaefer, *op cit* (note 9). See generally Pieter Sanders, *Unity and Diversity in the Adoption of the Model Law* (1995) 11 Arb Int'l 1 at 1.

11 This Committee was established in 1998 by the Hong Kong Institute of Arbitrators.

2. The legal framework of arbitration in Hong Kong

2.1 ***Introduction*** In order for the outside observer to understand how the Model Law fits into Hong Kong's arbitration system, it is necessary firstly to survey the sources and structure of the SAR's arbitration law.

2.2 ***Sources of law*** The sources of arbitration law in Hong Kong are fragmented.

(i) Arbitration is governed principally by statute, presently the Arbitration Ordinance[12]. The Ordinance lays down a general legal framework, conferring certain protections on the parties, vesting certain powers in arbitral tribunals and reserving a minimal number of powers to the Court of First Instance to intervene for the purpose of supporting and supervising the arbitration process. As discussed in para 2.4below, the Ordinance makes separate provision for domestic and international arbitrations, though since 27 June 1997 there has been greater commonality of provisions[13]. Thus, there is internal fragmentation within the Ordinance itself. In common with other arbitration statutes worldwide, the Ordinance does not provide a detailed code of procedure for arbitrations. This is a matter for arbitration rules agreed between the parties or, failing such agreement, directed by the arbitrator.

(ii) The agreement of the parties is also, in a sense, a source of law. Many of the provisions of the Ordinance apply to arbitration agreements terms which may be excluded or modified by express agreement of the parties, thus in effect enabling the parties to 'create' their own statute law[14]. Such agreement may be expressed through:

(a) the original arbitration agreement, which may be either a clause in a wider contract or an *ad hoc* submission to arbitration of a dispute that has already arisen;

(b) a supplemental arbitration agreement, which may be made before or after a dispute has arisen;

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12 Chapter (Cap) 341 of the Laws of Hong Kong, hereinafter referred to as 'the Ordinance' or 'the principal Ordinance'.

13 See note 18 below.

14 In domestic arbitration law, such terms are generally referred to as implied terms. In international arbitrations, where the Model Law applies, such nomenclature is not used. Rather, the provisions of the Model Law permitting such excludable terms are referred to as 'non-mandatory' provisions. See also para 2.10 below.

(c) arbitration rules governing detailed procedure. These may be customised rules drafted by the parties themselves or institutional rules which they have agreed to adopt.

(iii) The Ordinance is supplemented by the common law, *viz* principles of law declared in cases decided by the courts, which cases are applied as precedents. The Basic Law of the Hong Kong SAR provides for the continued application of the common law in Hong Kong[15] and for regard to be had to decisions of overseas common law courts[16]. The common law in Hong Kong now takes two forms:

(a) common law made in Hong Kong by the Court of Final Appeal, the Court of Appeal and the Court of First Instance. Decisions of these courts are binding on arbitrators;

(b) overseas common law, including that of England & Wales. Decisions of foreign common law courts have persuasive authority for Hong Kong courts and arbitrators.

2.3 ***Effects of fragmentation*** The fragmentation of Hong Kong's arbitration law, both within the legislation and as between the major sources of law (but particularly in the latter case), can make it difficult for non-lawyers and foreign users to find the relevant law and, even when they do, to follow it. This has been a major criticism of the Hong Kong system, one which was shared with the arbitration law of England & Wales, on which much of the SAR's arbitration law remains based[17].

2.4 ***Structure of the Arbitration Ordinance*** The Ordinance provides for separate systems of arbitration law to govern domestic arbitrations and international arbitrations conducted in Hong Kong:

(i) Parts I (sections 1-2AC) and IA (sections 2AD-2GN) - contain provisions of common application to both régimes;

(ii) Part II (sections 2L-34) - governs domestic arbitrations;

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15 Article 8.

16 Article 84.

17 It may, however, be noted that the English Arbitration Act 1996, which took effect on 31 January 1997, not only consolidates and modernises previous arbitration law but also codifies fundamental common law principles, such as the rules of natural justice.

(iii) Part IIA (sections 34A-34C) - governs international arbitrations conducted in Hong Kong.

Although the Arbitration (Amendment) Ordinance 1996[18] has greatly harmonised the domestic and international régimes, this structure still prevails.

2.5 ***Duality of laws governing arbitrations conducted in Hong Kong*** This duality of arbitration laws has existed since 6 April 1990, when the UNCITRAL Model Law[19] was adopted as Hong Kong's international arbitration law.

(i) *International arbitrations conducted in Hong Kong.* the Model Law governs international arbitrations conducted in Hong Kong, subject to:

(a) a number of 'add-on' provisions set out in Part IIA of the Ordinance[20];

(b) provisions of common application to both régimes set out in Parts I and IA of the Ordinance[21], and

(c) contrary agreement by the parties[22].

(ii) *Domestic arbitrations:* Part II of the Ordinance substantially comprises the provisions of the Arbitration Ordinance originally enacted in 1963, together with a number of subsequent amendments (which provisions were based on the now-repealed English Arbitration Acts 1950-1979). The changes made by the 1996 Ordinance have, however, effectively created a new system of domestic arbitration law, relegating the status of Part II of the Ordinance to that of 'add on' provisions.

The domestic arbitration provisions of the Ordinance may on occasion be relevant to international arbitrations conducted in Hong Kong because parties are free to agree to opt out of the Model Law régime[23].

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18 Ordinance No 75 of 1996, hereinafter 'the 1996 Ordinance' This Ordinance took effect on 27 June 1997

19 The text of the Model Law is set out in the Fifth Schedule to the Ordinance. References in this Report to articles of the Model Law are also references to provisions of that Schedule

20 See section 3 of this *Report*

21 *Ibid*

22 As to which see para 3 7 below

23 *Ibid*

2.6 ***Foreign awards*** Part IV of the Ordinance (sections 41-46) governs the enforcement in Hong Kong of arbitral awards made overseas, pursuant to the New York Convention[24]. This Convention currently applies to the recognition and enforcement of international arbitration awards in about 135 states and territories[25]. Recognition and enforcement continue to be afforded to overseas awards in Hong Kong in its own right as a Special Administrative Region of the People's Republic of China, as was the case under British rule[26], and on the same terms as applied previously, *viz* subject only to the application of the 'reciprocity' reservation[27].

2.7 ***Mainland Chinese awards*** Until 1 July 1997, the Convention applied to the recognition and enforcement in Hong Kong of awards made in Mainland China, and vice versa. This is no longer the case. The absence of a replacement mechanism at the date of resumption of sovereignty over Hong Kong by Mainland China created an unfortunate legal vacuum in the enforcement of cross-border awards. This problem has only recently been remedied by the Arbitration (Amendment) Ordinance 2000[28], the relevant provisions of which became law on 1 February 2000 but have retrospective effect to 1 July 1997.

2.8 ***Taiwanese awards*** The Convention has never applied to Taiwanese awards, given Taiwan's lack of legal statehood. Notwithstanding this, such awards were, under the pre-27 June 1997 law, generally enforceable without any difficulty. There is now, however, a legal vacuum in relation to such awards which has no immediate prospect of being filled.

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24 Awards that may be recognised or enforced under the Convention are known as 'Convention awards': see s 2(1) of the Ordinance. The Convention no longer applies to Mainland China: see para 2.7 below.

25 UNCITRAL, *Status of Conventions and Model Laws* (updated as at 14 December 1999) (http://www.uncitral.org/english/status/index.htm).

26 Depositary Notifications to the Secretary-General of the United Nations by the Governments of China and the United Kingdom of Great Britain and Northern Ireland relating to Hong Kong, CN273.1997.TREATIES-2, dated 6 June 1997 (China) and 10 June 1997 (UK) and published 10 August 1997.

27 New York Convention, art I(3). It is for this reason that Chapter VIII of the UNCITRAL Model Law, which provides for the recognition and enforcement of foreign awards on the basis of the principle of 'universality', does not apply in Hong Kong. The Hong Kong approach differs radically from that of Mainland China, which applies not only the 'reciprocity' reservation but also the 'commercial' reservation provided for by art I(3) of the Convention.

28 Ordinance No 2 of 2000. This Ordinance implements into Hong Kong law the Hong Kong/Mainland China juridical assistance agreement referred to at note 7 above.

2.9 ***Application of the Ordinance*** In line with the domestic provisions, the Model Law applies to *any* type of arbitration, not only to commercial arbitration[29].

2.10 ***Mandatory and non-mandatory provisions of the Ordinance*** The provisions of the Ordinance divide into:

(i) *mandatory provisions*, from which the parties cannot contract out or which they cannot modify, and

(ii) *non-mandatory provisions*, from which they can.

2.11 **Arbitration-related applications to the courts** The same statutory rules and procedures govern the making of arbitration-related applications to the courts, regardless of whether they arise out of domestic or international arbitration or from the enforcement of arbitral awards made in Hong Kong or overseas. Thus

(i) any court before which legal proceedings are being heard may order a stay of those proceedings to arbitration; and

(ii) the court having sole jurisdiction over all other arbitration-related applications under the Ordinance is the Court of First Instance. The procedure for such applications is governed by Order 73 of the Rules of the High Court[30] and by the relevant Practice Directions[31].

3. Adoption and adaptation of the Model Law by Hong Kong, 1990-1996

3.1 ***Enactment of the Model Law*** The Model Law was enacted into Hong Kong law with effect from 6 April 1990, pursuant to the Arbitration (Amendment) (No 2) Ordinance 1989[32], which added Parts IA and IIA of and the Fifth and Sixth Schedules to the principal Ordinance[33]. Its adoption as Hong Kong's international

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29 Section 34C(2) of the Ordinance. See para 3.6 below.

30 Hereinafter 'RHC'

31 The relevant Practice Directions are as follows: *Practice Direction – 6.1, Construction and Arbitration List* [1999] HKLRD (PD) 39, which also incorporates a previous Practice Direction of 1993, *Interlocutory Applications under the Arbitration Ordinance*; and *Practice Direction – 6.2, Application for Leave to Appeal against Arbitration Awards* [1999] HKLRD (PD) 48.

32 Ordinance No 64 of 1989, hereinafter 'the 1989 Ordinance'.

33 As stated in note 19 above, the text of the Model Law is set out in the Fifth Schedule. The Sixth Schedule lists three *travaux préparatoires* to which regard may be had by arbitral tribunals and by the courts in interpreting and applying the Model Law: see also s 2(3) of the Ordinance. The

arbitration law was the culmination of a process which began with the creation of Hong Kong International Arbitration Centre[34] in 1985. It was firmly recommended by the Law Reform Commission of Hong Kong in its *Report on the Adoption of the UNCITRAL Model Law of Arbitration*[35] in order to achieve "internationalisation in an area of law which must of necessity have international content"[36]. The Commission was also of the view that to deal with both the domestic and international arbitration régimes within the confines of the same principal Ordinance would enhance the law's accessibility[37].

3.2 ***Manner of adoption*** A jurisdiction adopting the Model Law may do so in a number of ways[38], examples of all of which occur in the East Asia-Oceania region. The first is to adopt the Model Law verbatim, but for the enacting statute to make it subject to a number of 'add-on' provisions. This approach has been followed by Hong Kong[39] and Singapore[40]. The second manner of adoption is to enact the Model Law with enactments on its face. This approach has been followed by New Zealand, although the relevant legislation[41] also contains 'add-on' provisions. The third is to enact a statute based, to a greater or lesser extent, upon the Model Law, rather than adopting it wholesale. This approach has been followed by Taiwan[42].

3.3 ***Extent of application*** A jurisdiction adopting the Model Law may apply it to all arbitrations, whether domestic or international, or only to international arbitrations. In Hong Kong, the Model Law was applied only to international arbitrations where Hong Kong is the forum, thus for the first time giving rise to bifurcation of régimes in the Arbitration Ordinance. As will be seen, however, there were also provisions in the 1989 Ordinance which applied to both régimes, while the 1996

Sixth Schedule may be amended from time to time by order of the Chief Executive in Council: see s 48.

34 Hereinafter 'HKIAC'.

35 Topic 17, 1987. The Report is hereinafter referred to as 'the 1987 *Report*'.

36 1987 *Report*, para 2.1.

37 *Ibid*, para 5.3.

38 See generally Sanders, *op cit* (note 10).

39 See paras 3.4-3.9 below.

40 International Arbitration Act (Cap 143A), which was passed in 1994 and took effect on 25 January 1995.

41 The Arbitration Act 1996.

42 The Arbitration Code of the Republic of China 1998, which took effect on 24 June 1998.

amendments have begun a process of reharmonising Hong Kong's arbitration law, on the basis of the Model Law rather than on an English model[43]. In Singapore, the Model Law applies to international arbitrations where Singapore is the forum. In New Zealand, there is a unitary arbitration régime, so that the Model Law as modified applies to both domestic and international arbitrations, though certain provisions of the Arbitration Act apply only to domestic arbitrations and certain provisions of the Model Law are excluded from the domestic régime. In Taiwan, there is a unitary arbitration régime, so that the 1998 legislation applies both to domestic and 'foreign-related' arbitration.

3.4 ***Adaptation of the Model Law*** The 'add-on' provisions enacted pursuant to the 1989 Ordinance, together with further amendments enacted by the Arbitration (Amendment) Ordinance 1991[44], not only supplemented the Model Law but also excluded or limited the operation of parts of it. The purposes of these provisions was fourfold:

(i) to confer complete party autonomy in deciding whether to arbitrate under the domestic or international régimes;

(ii) to aid the construction and interpretation of the Model Law;

(iii) to make provision with regard to a limited number of matters excluded from the Model Law, and

(iv) to allocate responsibility for the performance of the functions listed in art 6 of the Model Law.

The relevant provisions are summarised below.

3.5 ***Application of the Model Law - exclusion of Chapter VIII*** For the reasons stated in note 27 above, only Chapters I-VII of the Model Law were enacted[45].

3.6 ***Application of the Model Law - types of dispute*** In common with the domestic régime, a *laissez faire* approach is applied with regard to the types of dispute to which the Model Law applies. Provided that an international dispute is arbitrable (*viz* is not reserved to public courts or tribunals or for public policy reasons is not

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43 Although, ironically, the 1996 amendments drew heavily on the English Arbitration Act 1996 which, as already stated, is influenced by the Model Law, rather than an enactment of it.

44 Ordinance No 56 of 1991, hereinafter 'the 1991 Ordinance', which took effect on 7 June 1991.

45 Section 34C(1) of the Ordinance.

referable to arbitration[46]), it may be referred to arbitration. The dispute does not need to be commercial. Indeed, s 34C(2) of the Ordinance provides that art 1(1) of the Model Law shall not have the effect of limiting the Model Law's application to commercial arbitrations[47]. Not surprisingly, this exclusion has caused no difficulty in practice, although prior to 1 July 1997 it would have been difficult or impossible to enforce in Mainland China a Hong Kong award concerning non-commercial or questionably commercial subject-matter, because of the former's adherence to the 'commercial' reservation under the New York Convention[48].

3.7 ***Opting into/out of the Model Law*** Many arbitrations which would have been considered domestic prior to 6 April 1990 are now classified as international: see art 1(3) of the Model Law, in particular sub-para (b)(ii), by virtue of which an arbitration is international if any place where a substantial part of the obligations of the commercial relationship is to be performed is situated outside the state or territory in which the parties have their places of business[49]. Parties may, however, opt into or out of either Part II or Part IIA of the Ordinance[50].

(i) Parties to a domestic arbitration agreement may agree in writing only after a dispute has arisen that Part IIA of the Ordinance should govern the arbitration[51].

(ii) Parties to an international arbitration agreement may agree in writing at any time that Part II should govern the arbitration[52].

One of the underlying policies of the Model Law is to limit opportunities for

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46 For discussion, see Neil Kaplan & Robert Morgan, 'National Report - Hong Kong', in the ICCA *International Handbook on Commercial Arbitration* (Suppl 29, December 1999, Kluwer, The Hague) at pp 20-23.

47 Statutory footnote ** to that article therefore has no relevance in Hong Kong. This was recommended by the Law Reform Commission in its 1987 *Report* (paras 4.11-4.16) on the commonsense basis that there was no consensus between different legal systems as to the precisely what constituted a 'commercial' transaction.

48 See note 27 above. There is, however, no recorded instance of this.

49 See, for example, *Fung Sang Trading Ltd v Kai Sun Sea Products and Food Co Ltd* [1992] 1 HKLR 40.

50 Where the parties make such an election, ss 34A(2) and 34B make further provision regarding the application of the relevant Parts of the Ordinance.

51 Section 2L of the Ordinance. This requirement was recommended in the 1987 *Report* to protect weaker parties to domestic arbitration agreements from having the less protective international régime thrust upon them by stronger parties: see 1987 *Report*, para 5.6.

52 *Ibid*, s 2M.

judicial intervention, both during and after the reference, whether by way of support or supervision. Whilst judicial policy in Hong Kong broadly follows this aim both for domestic and international arbitrations, and s 2AA(2)(b) of the Ordinance reinforces this by enjoining the Court of First Instance to 'interfere' in an arbitration only as provided by the Ordinance[53], at the same time it has to be said that the powers available to the courts to intervene in domestic references are greater, both in number and in nature[54]. The practical effect of ss 2L and 2M of the Ordinance, therefore, is to enable parties either to maximise or to limit the powers of the courts to intervene in the arbitration process, whether domestic or international. Parties who wish to exercise this choice must, however, opt unequivocally for one régime or the other by following not only the requirements but also the precise wording of ss 2L or 2M of the Ordinance. Thus, they cannot exclude a régime simply by adopting a particular set of domestic or international arbitration rules[55]. The courts have also made it clear that, in the absence of such

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53 That is to say, following the approach of art 5 of the Model Law, the court may intervene only as expressly provided by the Ordinance in relation to matters that are the subject of the Ordinance. Conversely, court intervention is not excluded in matters not governed by the Ordinance: see *UDL Contracting Ltd* (HCCW 762/1999, 21 December 1999, unreported, Court of First Instance). This decision will be reported shortly in Hong Kong Cases (HKC). See also UNCITRAL, *International Commercial Arbitration: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration - Report of the Secretary-General* (A/CN.9/264, 25 March 1985, UNCITRAL, Vienna), Commentary on art 5, para 5.

54 The principal powers of the Court of First Instance to support or supervise a live arbitration or to review an award under the principal Ordinance, as it has stood since 27 June 1997, are as follows:

Domestic arbitrations: ss 3 (revocation of arbitrator's authority), 13B (ruling as to tribunal's jurisdiction, applying art 16(3) of the Model Law), 15(3) (removal of arbitrator for failure to proceed with reasonable dispatch), 23 (appeal against award on a point of law), 23A (determination of a preliminary point of law arising during the course of the reference), 23C (extending the tribunal's powers to deal with defaults), 24 (remission of award) and 25 (removal of arbitrator and/or setting aside of award on the ground of 'misconduct').

International arbitrations Model Law arts 13 (removal of arbitrator for lack of impartiality or independence or of qualifications agreed by the parties), 14 (termination of mandate of arbitrator who becomes *de jure* or *de facto* unable to perform his functions or who for any other reason fails to act without undue delay, 16(3) (ruling as to tribunal's jurisdiction) and 34 (setting aside of award on technical grounds based exclusively on lack of capacity to enter into an arbitration agreement, invalidity of the arbitration agreement, breach of natural justice, excess of jurisdiction, non-accordance of composition of the arbitral tribunal or the arbitral procedure with the parties' agreement, substantive inarbitrability and breach of Hong Kong public policy).

Domestic and international arbitrations: ss 2GC (power to order interim measures of protection and to make certain evidentiary orders where it is not appropriate for the arbitral tribunal to do so), 2GG (enforcement of tribunal's orders, directions or awards), 2GD (residual power to extend time for commencing arbitration proceedings), 2GE (residual power to dismiss claim for want of prosecution) and 6(1) (stay of proceedings to arbitration, applying art 8 of the Model Law to domestic arbitrations).

55 *SOL International Ltd v Guangzhou Dong-jun Real Estate Interest Co Ltd* [1998] 3 HKC 493.

election, they will not entertain at the post-award stage any argument as to whether the arbitration was in fact domestic or international[56].

3.8 ***Supportive powers of the courts as to interim measures of protection and evidence*** The Model Law makes no specific provision as to the power of a court of the forum to order interim measures of protection, art 9 merely taking it for granted that such court may order such measures by stipulating that an application to a court for an interim measure is not incompatible with the arbitration agreement. Article 27, in open-ended terms, accepts the jurisdiction of a court to assist an arbitral tribunal in taking evidence within the confines of the former's municipal rules in this regard. Given the importance of these residual powers to international arbitration, in particular where powers needed to be exercised which could affect the rights of third parties (eg *Mareva* injunctions, *Anton Piller* orders, subpoenas) and of parties to foreign arbitrations, the 1991 Ordinance added s 34E (now repealed) to the principal Ordinance, which in turn applied the now repealed s 14(4)-(6)[57] to arbitrations governed by the Model Law. This provision was, however, a contradiction in terms, an early example of internal inconsistency between the main Ordinance and the Model Law, as it was expressed to be subject to art 5 of the Model Law, which provides that no court shall intervene "except where so provided by *this Law*" (emphasis added)[58].

3.9 ***Miscellaneous additions*** The Model Law, as *lex specialis*, represented a compromise between common law and civil law countries as to the proper subject-matter of a harmonising international arbitration instrument. It was therefore left to each adopting state or territory to decide what further matters should be included in municipal arbitration statutes. Unlike an international convention, the Model Law is, as its name suggests, a 'model'. The most important provisions enacted in Hong Kong in 1990 concerned, for international purposes, the following matters.

(i) *'Med-Arb'*. Sections 2A and 2B of the Ordinance, which apply both to domestic and international arbitrations, reflect long-standing conciliation

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56 *Ananda Non-Ferrous Metals Ltd v China Resources Metal and Minerals Co Ltd* [1993] 2 HKLR 331, affirmed [1994] 1 HKC 204 (Court of Appeal)

57 Section 14(4) and (5) concerned the powers of the court to order subpoenas *ad testificandum* and *duces tecum* and writs of *habeas corpus ad testificandum* Section 14(6) concerned the powers of the court to order security for costs, discovery, affidavit evidence, evidence on commission, the preservation, sale, inspection and testing etc of any property, security for amounts in dispute, interim injunctions and the appointment of a receiver

58 This difficulty was discussed by Kaplan J in *Vibroflotation AG v Express Builders Co Ltd* [1995] 1 HKLR 239 at 241-242

practice in China[59]. Section 2A, which was enacted by the Arbitration (Amendment) Ordinance 1982[60] and amended by the 1989 Ordinance, stipulates that where an arbitration agreement provides for the appointment of a conciliator and that that person shall act as arbitrator, then if the conciliation proceedings fail to produce a settlement, no objection shall be taken to his acting as arbitrator solely because he had previously acted as conciliator. Section 2B, which was enacted by the 1989 Ordinance, permits parties to a reference to arbitration to agree in writing (either in the arbitration agreement or on an *ad hoc* basis after the arbitration proceedings have commenced) to an arbitrator acting as a conciliator.

(ii) *Settlement agreements*. Section 2C of the Ordinance, which was enacted by the 1982 Ordinance and repealed and re-enacted by the 1989 Ordinance, provides for the summary enforcement of a written settlement agreement reached in arbitration proceedings, whether domestic or international, in the same manner as an arbitral award[61]. Such agreement may have been reached by direct negotiation, or through conciliation or mediation under either ss 2A or 2B of the Ordinance or under a 'staged' dispute resolution agreement providing for conciliation or mediation, followed by arbitration if no settlement results.

(iii) *Representation*. Section 2F of the Ordinance, which was enacted by the Arbitration (Amendment) Ordinance 1989[62] and applies to both domestic and international arbitrations, makes clear that any person who is not qualified as a solicitor or as a barrister may give advice, prepare documents or do any other thing in connection with arbitration proceedings, save for anything done in connection with court proceedings in relation to an arbitration. Section 2G of the Ordinance, which was enacted by the later 1989 Ordinance, supplements s 2F by permitting the costs of such an 'unqualified' person to be recovered as directed by an arbitrator's award and for the amount of such costs to be taxed (assessed) by an arbitrator or by a

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59 Conciliation and mediation as understood in Hong Kong are fundamentally similar procedures, save that a conciliator is expected to take a more proactive rôle by expressing his own views and making settlement proposals: see, for example, *The Language of ADR - A Glossary* (Academy of Experts, London 1992), which is also reproduced in K Mackie, D Miles & W Marsh, *Commercial Dispute Resolution An ADR Practice Guide* (1995, Butterworths, London), App 1. These terms are, however, almost invariably used interchangeably. Thus, s 2(1) of the Ordinance (interpretation) was amended by the 1996 Ordinance so that the definition of 'conciliation' now includes 'mediation'.

60 Ordinance No 10 of 1982, hereinafter 'the 1982 Ordinance'.

61 Pursuant to Order 73 rule 10 of the Rules of the High Court. See also para 3.9(vi) below.

62 Ordinance No 31 of 1989,

Taxing Master of the High Court. These provisions, which exclude ss 44, 45, 47 and 50 of the Legal Practitioners Ordinance (Cap 159), reflect the right of parties to Hong Kong arbitrations, whether domestic or international, to representation by persons of their choice.

(iv) *Awards of interest.* Section 34D(1)(b), which was added by the 1989 Ordinance and has since been repealed and replaced by s 2GH of the principal Ordinance, empowered Model Law tribunals to award simple interest on any sum awarded and on any sum which was the subject of the reference but paid before the date of the award, in either case at such rate as the tribunal thought fit[63].

(v) *Awards of costs.* Section 34D(1)(a), which was added by the 1989 Ordinance and has since been repealed and replaced by s 2GJ of the principal Ordinance, empowered Model Law tribunals to award the costs of the reference (ie the parties' own costs) and of the award (ie the tribunal's fees and expenses) and to make such orders for the assessment and payment of those costs as they thought fit[64].

(vi) *Enforcement of awards.* The now-repealed s 2H of the Ordinance, which was originally enacted in 1963 and then repealed and re-enacted by the 1989 Ordinance, provided for the summary enforcement of awards on the *ex parte* application of a party[65]. The mechanism for summary enforcement was to apply for leave to enforce the award in the same manner as a judgment of the court to the same effect and for judgment to be entered in terms of the award. This section availed the enforcement of awards made in Hong Kong, whether domestic or international, Convention awards and awards made in Taiwan. It was repealed on 27 June 1997 by the 1996 Ordinance and replaced by s 2GG, which is in wider terms but does not avail the enforcement of Taiwanese awards[66].

(vii) *Responsible authority.* Section 34C(3) of the Ordinance, which was added by the 1989 Ordinance and has since been repealed and replaced by a new s 34C(3) and (4), made provision for an adaptation required by the Model Law itself. Article 6 of the Model Law requires each adopting jurisdiction

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63 This provision was broadly similar to the now repealed s 22A of the Ordinance, which applied to domestic arbitrations

64 This provision was broadly based upon part of the now repealed s 20 of the Ordinance, which applied to domestic arbitrations

65 Pursuant to Order 73 rule 10 of the Rules of the High Court

66 See para 2 8 above

to designate the court or other body that is responsible for the performance of functions under the following provisions of the Model Law: arts 11(3) (appointment of arbitrator where there is no agreed appointment mechanism), 11(4) (appointment of arbitrator where an agreed appointment mechanism breaks down because of default by one party or by a third party), 13(3) (termination of arbitrator's mandate for lack of impartiality, independence or agreed qualifications), 14 (termination of arbitrator's mandate for *de jure* or *de facto* inability to perform his functions or failure for any reason to act without undue delay), 16(3) (review of decision by tribunal that it has jurisdiction) and 34(2) (setting aside of award). The relevant body so designated was the High Court (since 1 July 1997 reconstituted as the Court of First Instance).

4. Hong Kong's experience of the Model Law

4.1 ***Introduction*** At the time of the enactment of the Model Law in Hong Kong, there were some fears that users of arbitration might find difficulty in dealing with the compromise drafting of the Model Law and in finding the lines of demarcation between domestic and international arbitration, that they would be alienated by the reduced level of judicial intervention provided for by the Model Law and that the courts would be swamped with applications involving the construction of the Model Law. That these fears were largely unfounded has been confirmed by commentators[67]. The reasons for this may be summarised as follows:

(i) the clear guidance given in art 1(3) of the Model Law as to what constitutes an international arbitration, supplemented by the common definition of 'arbitration agreement' for both domestic and international arbitrations stipulated by s 2(1) of the Ordinance by reference to art 7(1) of the Model Law, and the definitions of 'domestic arbitration agreement' and 'international arbitration agreement' also given in s 2(1) of the Ordinance;

(ii) helpful practical guidance by the courts on a number of matters, such as:

(a) the need for the parties to agree the applicable arbitration régime at the earliest possible stage, so as to avoid arguments at a later stage,

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67 Neil Kaplan, *The Model Law in Hong Kong - Two Years On* (1992) 8 Arb Int'l 223 at 223; Neil Kaplan, *New Developments in the Hong Kong Law of Arbitration*, Law Lectures for Practitioners 1994 (1994, Hong Kong Law Journal Ltd) pp 58 *et seq*; Neil Kaplan, *A Model for Arbitration*, The New Gazette (February 1996) pp 42 p *et seq*; Morgan, *op cit* (note 10) at p 69.

when the reference is well advanced or when an award has been made[68];

(b) the attitude of the court towards investigating the arbitral tribunal's jurisdiction. The court applies a 'hands off' policy, leaving the tribunal to investigate in detail and determine the tribunal's jurisdiction, the court only investigating in detail whether the tribunal has jurisdiction where a party challenges the tribunal's holding in this regard[69];

(c) the incorporation of arbitration agreements by reference, avoiding the cumbersome English requirement of specific and explicit reference to incorporation which characterised the pre-Arbitration Act 1996 era[70];

(d) when it is appropriate for the arbitral tribunal to order interim measures of protection and when this may conveniently or appropriately be done by the court[71];

(e) a suggested commentary on the Model Law[72];

(iii) helpful early guidance by leading practitioners on such matters as:

(a) dealing with a bifurcated arbitration system and identifying what is a domestic or international arbitration agreement[73];

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68 *Ananda Non-Ferrous Metals Ltd v China Resources Metal and Minerals Co Ltd* [1993] 2 HKLR 331, affirmed [1994] 1 HKC 204 (Court of Appeal): see para 3.7 above.

69 *Star (Universal) Co Ltd v Private Company 'Triple V' Inc* [1995] 2 HKLR 62 (Court of Appeal).

70 *Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd* [1995] 1 HKLR 300.

71 *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] 4 HKC 347.

72 Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (1990, Kluwer, The Hague), the use of which was recommended to practitioners by Kaplan J in *Fung Sang Trading Ltd v Kai Sun Sea Products and Food Co Ltd* [1992] 1 HKLR 40.

73 See, for example, John Scott, *Getting to grips with arbitration amendments*, The New Gazette (July 1990) pp 23 *et seq*.

(b) drafting arbitration agreements to take full account of the dual system and thus to avoid pathological clauses[74];

(iv) guidance given by HKIAC on the proper drafting of 'opt in'/'opt out' agreements under s 2M of the Ordinance[75].

4.2 ***The underlying philosophy of the Model Law*** Both the domestic and the international arbitration provisions of the Ordinance seek to maximise party autonomy, define the powers of the arbitral tribunal and delimit the powers of the courts to intervene in live arbitrations and to review awards. The Model Law goes much further, however, in expressing party autonomy, emphasising the primacy of the tribunal's authority, vesting essential powers in the tribunal and limiting the rôle of the courts. The general principles of the Model Law governing intervention in arbitrations may be stated thus:

(i) the court has extremely limited jurisdiction to deal with allegations of procedural injustice during a live arbitration[76];

(ii) the tribunal should be left free to continue the proceedings and make an award, and

(iii) allegations of procedural injustice should be raised when challenging or resisting enforcement of the award.

4.3 ***Three problems*** In ten years of operation, only three areas of the Model Law have caused difficulty and required review: the definition of 'agreement in writing' under art 7(2), the fallback requirement to appoint three arbitrators under art 10(2) in the absence of party agreement to a lesser number and the making of default appointments of arbitrators by the court under art 11. All three problems were addressed by the 1996 amendments, which are discussed in the next section of this paper.

4.4 ***Agreements in writing*** From an early stage, practitioners and commentators expressed the view that the definition of 'agreement in writing' in art 7(2) of the Model Law was prone to cause difficulty and did not match modern commercial

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74 See, for example, Barry I Ayliffe, *Two regimes affect parties' interests*, Asia Law & Practice (24 December 1992) pp 9 *et seq*.

75 See *Hong Kong Dispute Solutions* (1998, HKIAC). The suggested clause therein correctly anticipated the decision of the Court of First Instance in *SOL International Ltd v Guangzhou Dong-jun Real Estate Interest Co Ltd* [1998] 3 HKC 493.

76 A jurisdiction which arises only where there is an allegation of lack of impartiality or independence: see art 12(2) of the Model Law.

realities[77]. Article 7(2), in dealing with arbitration agreements contained in single documents rather than exchanges of correspondence, telexes or telegrams, contained a strict requirement of signature. The reality of the situation was, however, that all too often this was not complied with, particularly where one party required the other to sign and return a copy of its terms and conditions of business, including an arbitration clause, but nevertheless proceeded to do business in the absence of a duly signed and returned copy. Whilst the agreement may have been in writing, the lack of a signature was fatal[78]. Article 7(2) of the Model Law also did not recognise:

(i) contractual documents which made no provision for signature, such as bills of lading and shipbrokers' notes;

(ii) oral acceptance of a written contract containing an arbitration clause (such as a Lloyd's Open Form salvage agreement);

(iii) oral incorporation of a written arbitration agreement contained in a document other than the principal contractual document[79], and

(iv) arbitration agreements arising out of a course of dealing[80].

4.5 ***Number of arbitrators in Model Law cases*** Traditionally, international tribunals comprise three arbitrators, one appointed by each party, the two so appointed appointing a third. In most cases this system works well, reassuring each party of the system's independence because it is not dominated by an arbitrator of his opponent's nationality. In practice, however, it can be procedurally and organisationally over-elaborate, time-consuming and therefore expensive where the claim is small or medium in range, as many shipping cases are. In these circumstances, a weaker party may be deterred from prosecuting or defending his case for fear of costs being out of all proportion to the amount at stake. In Hong Kong, a primary shipping arbitration centre, this problem was acutely felt.

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77 For example, Neil Kaplan, *Is the Need for Writing as expressed in the New York Convention and the Model Law out of step with Commercial Practice?* (the Goff Lecture 1995) (1996) 5 APLR 1.

78 See *H Smal Ltd v Goldroyce Garment Ltd* [1994] 2 HKC 526.

79 Cf *Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd* [1986] 2 Lloyd's Rep 225 (Court of Appeal, England), a case decided under the more open-ended wording of the now-repealed English Arbitration Act 1950 s 32. The pre-6 April 1990 definition of 'arbitration agreement' in s 2(1) was based on this.

80 See *H Smal Ltd v Goldroyce Garment Ltd* [1994] 2 HKC 526.

4.6 The former High Court had statutory jurisdiction to make default appointments of arbitrators where the parties had failed to agree contractual appointment machinery or such machinery had broken down. By contrast with the situation in paras 4.4 and 4.5, however, the problems to which this gave rise did not arise from any weakness in the Model Law but from the designation of the court under art 6 of the Model Law to perform art 11's functions[81]. The problems were threefold:

(i) the time taken to get an appointment from the court;

(ii) lack of familiarity of some judges with appropriate appointees, and

(iii) the need to serve the application and the court's order out of the jurisdiction, with all the time, money and overseas bureaucracy that could entail.

4.7 ***Conclusion*** As discussed earlier in this *Report*, the Model Law has done a great service to Hong Kong as an international arbitration centre and in promoting the harmonisation of international arbitration. It has also served the territory well in its practical application, having by and large been trouble-free.

5. The arbitration law reforms of 1996-1997

5.1 ***Introduction*** In January 1992 the then Attorney General invited HKIAC to establish a committee to consider reform of the Arbitration Ordinance, with particular reference to emerging arbitration legislation in England & Wales. The Committee's terms of reference were as follows:

"To consider whether the Arbitration Ordinance requires any, and if so, what amendments particularly in the light of the May 1st 1991 draft of a new Arbitration Act prepared by Basil Eckersley or any subsequent versions thereof."

In its deliberations, the Committee considered (*inter alia*) various drafts of what became the English Arbitration Act 1996 and provisions of Singapore's International Arbitration Act (Cap 143A)[82]. Views expressed in the Committee and in consultations with Hong Kong arbitration practitioners confirmed that the Model Law had generally worked well in the territory and that few undue problems had been encountered in practice with a dual system of arbitration law. The consensus of opinion favoured greater harmonisation between the domestic

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81 Under the pre-27 June 1997 version of s 34C(3) of the Ordinance.

82 For detailed discussion of this process, see Robert Morgan, *Hong Kong Arbitration. Getting the Legislation Right* [1998] ADRLJ 287; Schaefer, *op cit* (note 9).

and international provisions of the Ordinance, leading eventually to reunification of arbitration laws, but with a new unitary system being based on the Model Law.

5.2 ***Criticisms of the domestic provisions of the Ordinance*** The following criticisms were made of the pre-27 June 1997 version of Part II of the Ordinance:

(i) they were not set out in a logical order, failing to treat arbitration in a systematic and chronological manner;

(ii) they were not, in a number of respects, as comprehensive as the Model Law. For example, they were silent as to *Kompetenz-Kompetenz*, which, although by now relatively settled, remained governed by the common law[83], and as to the written and oral stages of the arbitration process[84];

(iii) they did not vest (or did not vest explicitly) fundamental powers in the tribunal to take control of and progress the arbitration, such as the power to decide whether or not there should be an oral hearing in the absence of party agreement on this matter[85]. This was something of a fundamental failing, given the many exhortations given by judges to arbitrators since 1977, both judicially and extra-judicially, to be robust case managers[86];

(iv) a number of interlocutory powers were vested in the former High Court under the now-repealed s 14 of the Ordinance which could quite appropriately have been exercised by the arbitral tribunal, subject to the court retaining a residual jurisdiction in respect of some of them.

5.3 ***Criticisms of the Model Law*** For all its popularity, the Model Law did not escape some degree of censure. As discussed in the previous section of this *Report*, the following criticisms were made of it:

(i) the rigidity of the signature requirement for arbitration agreements under the first limb of art 7(2);

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83 *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co* [1993] QB 701 (Court of Appeal, England).

84 Cf, respectively, arts 23 and 24 of the Model Law.

85 This matter was still covered by the common law, which took the strict line that if one party requested an oral hearing, it had to be given. Indeed, this is still the case under the Model Law: see art 24(1).

86 See, for example, Lord Roskill, *The Alexander Lecture* (untitled) (1977) 44 JCIArb 1, 4 at 6; *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909 at 985, per Lord Diplock (House of Lords); *UBC (Construction) Ltd v Sung Foo Kee Ltd* [1993] 2 HKLR 207 at 211-213, per Kaplan J.

(ii) its failure to take into account certain trade usages and practices on concluding arbitration agreements, eg oral acceptance, course of dealing;

(iii) the inconvenience and expense involved in having to appoint three arbitrators under art 10(2) if the parties did not agree on a sole arbitrator;

(iv) the time, effort and expense involved in getting an arbitrator appointed by the former High Court under art 11;

(v) the presence of a number of gaps in the coverage of the Model Law. The following subject-matter were identified in particular:

(a) enlargement of time for commencing arbitration proceedings;

(b) lack of definition of the powers of the tribunal to order interim measures of protection[87];

(c) lack of definition of the powers of the court to order interim measures of protection and to make evidentiary orders[88];

(d) dismissal for want of prosecution, and

(e) immunity of arbitrators and arbitral appointing authorities.

5.4 ***The Report of the Committee*** The Committee on Arbitration Law submitted its report to the Attorney General in April 1996[89]. Its recommendations, and responses received by the Government to subsequent consultation on draft reform proposals, formed the nucleus of a Bill which was passed by the Legislative Council in December 1996. The 1996 Ordinance took effect on 27 June 1997.

5.5 ***Purposes of the 1996 Ordinance*** The purposes of the 1996 Ordinance may be expressed as follows:

(i) to begin the process of harmonising domestic and international arbitration in Hong Kong along the lines of the Model Law[90];

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87 Cf art 17 of the Model Law

88 Cf, respectively, arts 9 and 27 of the Model Law

89 *Report of the Committee on Arbitration Law* (1996, HKIAC)

90 Except with regard to the number of arbitrators, for which special provision would be made for Model Law cases only see para 5 7(vi) below

(ii) to address the deficiencies identified in the Model Law[91];

(iii) to fill a number of gaps in the Model Law[92];

(iv) to state the overriding objective and governing principles of the Ordinance to be observed by parties, arbitral tribunals and the courts at all stages of the arbitration process;

(v) to emphasise and delimit party autonomy;

(vi) to vest a greater number of powers in the arbitral tribunal but, in so doing, to make the exercise of those powers subject to overriding statutory duties;

(vii) to vest exclusive default appointment powers in both domestic and international arbitrations in a specialised arbitration agency, *viz* HKIAC;

(viii) in the light of (vi) and (vii) above, to redress the balance of power between arbitral tribunals and the court, limiting the court's power of intervention in the arbitration process by general reference to the underlying philosophy of art 5 of the Model Law.

5.6 ***The nature of the 1996 provisions*** The provisions of the 1996 Ordinance divide into mandatory provisions and non-mandatory provisions. The summary of provisions set out in para 5.7 below indicates which of them are mandatory and which of them are not.

5.7 ***Summary of the provisions*** The most important new provisions of the principal Ordinance that were introduced by the 1996 Ordinance are summarised below. All of them, with the exception of the new s 34C(3), are based upon or influenced by provisions of the English Arbitration Act 1996. Section 34C(3) is modelled on s 8 of Singapore's International Arbitration Act (Cap 143A) and is thus an example of the regional cross-fertilisation referred to by Schaefer[93].

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91 As to which, see paras 4.3-4.6 above.

92 As to which, see para 5.3(v) above. Given the Model Law's position as the *lex specialis*, it operates all other legal provisions to the extent that they deal with the same subject-matter as the Model Law. With regard to any subject-matter that is outside its scope, adopting jurisdictions remain free to legislate or to apply existing provisions: see UNCITRAL, *International Commercial Arbitration. Analytical Commentary on Draft text of a Model Law on International Commercial Arbitration - A Report by the Secretary-General*, A/CN.9/264, 25 March 1985 (UNCITRAL, Vienna), Commentary on art 1, para III.7.

93 *Op cit* (note 9).

***Note:** Except for the provisions discussed at para 5.7(iv), (vi) and (vii) below, the provisions summarised herein are set out in Part IA of the Ordinance and therefore apply both to domestic and international arbitrations.*

(i) *Object of the Ordinance:* s 2AA(1) declares that the object of the Ordinance is to facilitate the fair and speedy resolution of disputes without unnecessary expense. This provision, which is mandatory, should be read together with ss 2AA(2)[94] and 2GA(1)[95]. It is unique among Hong Kong legislation in being the only known provision which expressly declares its object.

(ii) *Overriding principles:* s 2AA(2) bases the Ordinance on two overriding governing principles:

(a) that, subject to such safeguards as are necessary in the public interest, parties to a dispute should be free to agree how the dispute is to be resolved, and

(b) that the court should interfere in an arbitration only as expressly provided by the Ordinance.

This provision is mandatory. It gives primacy to party autonomy and relegates the rôle of the court to that of minimal support and supervision with regard to any matter which is the subject of the Ordinance. It does not, however, exclude the power of the court under any other statute to intervene in the arbitration process, eg a discretionary stay of arbitration proceedings pending approval by the court of an insolvent company's scheme of arrangement with its creditors[96].

(iii) *Arbitration agreements*[97]*:* s 2AC excludes article 7(2) of the Model Law (and places a statutory explanatory note to this effect on the face of the Model Law), so that arbitration agreements contained or evidenced in

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94 See para 5.7(ii) below.

95 See para 5.7(viii) below.

96 See *UDL Contracting Ltd* (HCCW 762/1999, 21 December 1999, unreported, Court of First Instance). This decision will be reported shortly in Hong Kong Cases (HKC). This is in line with UNCITRAL's view of art 5 of the Model Law, on which s 2AA(2)(b) of the Ordinance is based: see UNCITRAL, *op cit* (note 92).

97 As mentioned in para 2.2(ii) above, these embrace both arbitration clauses in contracts and *ad hoc* submissions to arbitration: see the common definition of 'arbitration agreement' which applies to both domestic and international arbitrations and which is provided for by s 2(1) of the Ordinance by reference to art 7(1) of the Model Law.

writing but not necessarily signed by the parties, and agreements made orally but by reference to terms set out in writing, are encompassed by the definition of an 'agreement in writing'. This provision is mandatory. In summary, s 2AC sets out 6 alternative but overlapping criteria for determining whether an agreement is in writing for the purposes of the Ordinance:

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

(b) it is made by an exchange of written communications;

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

(d) the parties to the agreement agree otherwise than in writing by reference to terms that are in writing and contain an arbitration clause;

(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;

(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 and not denied by the other party in its response.

Thus, apart from dispensing with the strict requirement of signature, s 2AC also allows for the oral acceptance of written arbitration agreements. Entirely oral arbitration agreements remain entirely outwith the ambit of the Ordinance.

Section 2AC also restates with clarifications the provision in art 7(2) of the Model Law dealing with incorporation of arbitration agreements by reference. What the arbitrator or a court must determine, as a matter of construction and by reference to the words used, is whether the parties intended to incorporate an arbitration agreement[98].

(iv) *Determining jurisdiction:* s 13B extends *Kompetenz-Kompetenz* to domestic arbitration tribunals by reference to art 16 of the Model Law,

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98 *Astel-Peiniger Joint Venture v Argos Engineering & Heavy Industries Co Ltd* [1995] 1 HKLR 300.

subject to the power of the Court of First Instance to review a determination by a tribunal that it does have jurisdiction. Section 13B also extends to domestic arbitrations the principle of total separability of the arbitration agreement. This is a mandatory provision.

(v) *Default appointments of arbitrators:* s 12 of the Ordinance is amended so as to vest exclusive responsibility for making default appointments of domestic tribunals in HKIAC *in lieu* of the court. A new s 34C(3) applies in similar terms to appointments to international tribunals in Model Law cases[99]. It should, however, be noted that s 34C(3) unequivocally vests jurisdiction in HKIAC to perform *any* function that may be required by an agreed appointment procedure that has broken down. This might include, under art 11(4) of the Model Law, determining the appropriate qualifications of the members of the tribunal. These are mandatory provisions. Whilst HKIAC's new appointment jurisdiction has undoubtedly streamlined the appointment process and saved costs, however, there is a downside to this change in a minority of cases. HKIAC does not exercise judicial functions and does not have any of the powers of a court. By contrast with the old High Court powers, therefore, HKIAC has no power to penalise recalcitrant parties with orders for indemnity costs[100].

(vi) *Determining the number of arbitrators in international cases*: A new s 34C(5) of the Ordinance empowers HKIAC to decide whether one arbitrator or three should be appointed to an international tribunal in a Model Law case, failing agreement by the parties. This is a mandatory provision[101]. It operates to the exclusion of art 10(2) of the Model Law and places a statutory explanatory note to this effect on its face.

(vii) *Staying legal proceedings to arbitration:* a substituted s 6(1) of the Ordinance applies art 8 of the Model Law to applications to stay legal proceedings to arbitration in domestic cases. A stay will thus be granted unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. This is a mandatory provision. If recent English authority on s 9 of the 1996 Act is followed in Hong Kong, this means in effect that parties to arbitration agreements can

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99 Detailed rules governing applications to HKIAC under these provisions are set out in the Arbitration (Appointment of Arbitrators and Umpires) Rules 1997 (Cap 341 sub leg B).

100 Prior to 27 June 1997 there was a not inconsiderable body of case law on this matter: see *Wong Yu Hing v Tong Pak Wing* [1995] 1 HKC 160, affirmed [1995] 2 HKC 430 (Court of Appeal); *Safond Shipping Sdn Bhd v East Asia Sawmill Corpn* [1994] ADRLJ 295; *China Ocean Shipping Co v Mitrans Maritime Panama SA* [1994] 2 HKC 614.

101 See note 99 above.

no longer seek summary judgment under Order 14 of the Rules of the High Court[102]. Furthermore, if a dispute resolution clause requires a dispute to be referred to the determination of a particular person prior to arbitration (eg the Engineer or Architect under a construction contract) and a dispute has not been so referred, the court may nevertheless stay proceedings to arbitration and the court may oblige a party to take the required step[103].

(viii) *Overriding duties of the tribunal:* s 2GA(1) requires arbitrators:

(a) to act fairly and impartially, and

(b) to use procedures that are appropriate to the particular case, avoiding unnecessary delay and expense.

This is a mandatory provision. It codifies the common law rules of natural justice for the purposes of arbitration law and imposes a duty on arbitrators to manage cases by adopting appropriate procedures (eg by dispensing with an oral hearing, unless the parties have agreed to the contrary). In so doing, however, the arbitrator must act fairly, as considerations of speed, efficiency and economy can never predominate over fairness[104]. The duty to act fairly arises whatever the source of the arbitrator's procedural authority, whether statute, the arbitration agreement or arbitration rules.

(ix) *Exclusion of strict rules of evidence:* s 2GA(2) provides that the tribunal is not bound by the strict rules of evidence. It cannot, however, compel a party to produce evidence that could not be compelled by a civil court[105]. This provision is a re-enactment of the previous law.[106]

(x) *Security for costs, interim measures of protection, evidentiary orders and inquisitorial powers:* s 2GB defines the interim orders (including interim measures of protection for the purposes of arts 17 of the Model Law) and evidentiary orders the tribunal may specifically make. Section 2GB(1) empowers the tribunal to:

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102 *Halki Shipping Corpn v Sopex Oils Ltd* [1998] 1 WLR 726 (Court of Appeal, England).

103 *Westco Airconditioning Ltd v Sui Chong Construction & Engineering Co Ltd* [1998] 1 HKC 254.

104 *Damond Lock Grabowski & Partners v Laing Investments (Bracknell) Ltd* (1992) 60 BLR 112.

105 Section 2GB(8) of the Ordinance.

106 Note, however, that with regard to international cases, it purports to exclude art 19(2) of the Model Law by implication: see para 5.8(v) below.

(a) order security for costs;

(b) order interim measures of protection, ie orders securing sums in dispute, orders for the inspection, photographing, preservation, custody, detention, sale and testing of *property which is the subject-matter of the arbitration*, interim injunctions and other interim measures relating to such property;

(c) make orders that are protective of property as evidence in the arbitration, ie orders for the inspection, photographing, preservation, custody, detention and testing of *property which is evidence in the arbitration* and interim injunctions relating to such property, and

(d) administer oaths and take affirmations, examine witnesses on oath or affirmation and direct the attendance of witnesses before the tribunal.

The list of interim measures is not exhaustive. The tribunal may order any interim measure which is known to Hong Kong law[107] or which it is empowered to order by contract.

Section 2GB(6) empowers the tribunal to act inquisitorially. In doing so, the tribunal must, however, act fairly and not take the parties by surprise by making an award taking into account matters which have not been put to them for comment[108].

The tribunal's powers to make the evidentiary orders listed in (d) above and to act inquisitorially are subject to contrary agreement by the parties and are therefore non-mandatory. The remainder are mandatory.

(xi) *Extending time limits for commencing arbitrations:* s 2GD empowers the tribunal to extend time limits for commencing arbitrations. Two alternative tests apply to such applications:

(a) whether the circumstances were outside the reasonable contemplation of the parties when they made the arbitration agreement and that it would be just to extend the period, and

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107 *Bocotra Construction Pte Ltd v Attorney-General of Singapore* [1995] 2 SLR 523 (Court of Appeal, Singapore).

108 *Fox v P G Wellfair Ltd (in liquidation)* [1981] 2 Lloyd's Rep 514 (Court of Appeal, England); *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39; *Apex Tech Investment Ltd v Chuang's Development (China) Ltd* [1996] 2 HKC 293 (Court of Appeal).

(b) in any other case, whether the conduct of one party makes it unjust to hold the other to the strict terms of the agreement.

This is a mandatory provision. These alternative tests replace the former 'undue hardship' test under the now-repealed s 29 of the Ordinance, which was considered to have been too indulgently applied by the courts. Much will continue to turn on whether a party has taken effective steps to refer a claim to arbitration[109].

(xii) *Dismissal of claims for want of prosecution* s 2GE empowers the tribunal to make orders dismissing a party's claim or counterclaim for want of prosecution and prohibiting him from commencing further arbitration proceedings on that claim. The tribunal may make such orders if satisfied that that party or his adviser has unreasonably delayed bringing or prosecuting his claim. This is a mandatory provision. The power was previously vested exclusively in the High Court by virtue of the now-repealed s 29A of the Ordinance. Applying the principles in *Birkett v James*[110], where delay occurs after the commencement of arbitration proceedings but within the relevant limitation period, a claim will not normally be dismissed[111].

(xiii) *Reducing the supportive powers of the court:* the vesting of powers in arbitral tribunals by ss 2GB, 2GD and 2GE means that the powers of the Court of First Instance to make orders during the arbitration proceedings are correspondingly reduced in three respects:

(a) *interim measures of protection and evidentiary orders*: s 2GC limits the court's powers to make evidentiary orders and to order interim measures of protection to instances where it would not be appropriate for the tribunal to make them (eg where a third party is affected, or where a tribunal cannot grant all forms of relief sought in one order[112]). It also makes clear the interim measures of protection and evidentiary orders that the court may make for the

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109 There is as yet no decided case law on this in Hong Kong After some argument in the English courts on similar provisions, however, the balance of opinion has reverted to the straightforward approach of Lord Denning MR in *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] QB 933 at 944 (Court of Appeal, England)

110 [1978] AC 297 (House of Lords)

111 *James Lazenby & Co v McNicholas Construction Co Ltd* [1995] 1 WLR 615, *Acme Metal Works Ltd v Shum Shing Construction and Engineering Co Ltd* [1990] 2 HKLR 474

112 *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] 4 HKC 347

purposes of, respectively, art 9 and 27 of the Model Law. The court cannot order security for costs, by contrast with the previous law;

(b) *extending time for commencing arbitral proceedings*: s 2GD(8) empowers the court to make orders extending time for commencing arbitral proceedings where no tribunal has yet come into existence;

(c) *dismissal for want of prosecution*: s 2GE(5) empowers the court to make orders dismissing a claim or counterclaim for want of prosecution where no tribunal has yet come into existence.

All of these are mandatory provisions.

(xiv) *Remedies:* s 2GF empowers the tribunal to award any remedy that may be ordered by a civil court, whether interim or final. Thus, in addition to damages, the tribunal may award equitable remedies (which are discretionary), eg specific performance and injunctions. This is a mandatory provision.

(xv) *Enforcement of tribunal's orders, directions and awards:* s 2GG empowers the Court of First Instance to enforce the tribunal's orders or directions, as well as its awards, as orders of the court. This is a mandatory provision. However, whilst this section re-enacts and expands upon the former section 2H of the Ordinance with regard to the summary enforcement of awards, it was held, during the hiatus between 1 July 1997 and the coming into force of the Arbitration (Amendment) Ordinance 2000[113], that s 2GG did not avail the enforcement of Mainland Chinese awards[114]. It also did not avail the enforcement of Taiwanese awards; this continues to be the case.

(xvi) *Awards of interest:* s 2GH empowers the tribunal to award compound interest at such rate as it thinks fit (which must of course be reasonable) from the date on which a sum became legally due up until the date of the award or, where a sum has been paid late but before the date of the award and is the subject of the arbitration, up until the date of payment. This is a non-mandatory provision. It is largely a re-enactment of previous law, save that there is now power to award compound interest[115].

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113 See note 28 above.

114 *Ng Fung Hong Ltd v ABC* [1998] 1 HKC 213.

115 It had been argued unsuccessfully that the previous provision, the now-repealed s 22A of the Ordinance, which was silent as to the type of interest that could be awarded, vested arbitral tribunals with power to award compound interest: *Attorney General v Shimizu Corpn (formerly*

(xvii) *Interest from the date of the award:* s 2GI restates that interest runs from the date of the award and at judgment debt rate[116], unless the tribunal directs that no interest shall run from that date. This is a mandatory provision.

(xviii) *Costs:* s 2GJ restates previous provisions (a) empowering the tribunal to direct to whom and by whom and in what manner the costs of the arbitration are to be paid and to tax (assess) and settle the amount of those costs, (b) rendering void any agreement as to costs made before a dispute has arisen, (c) permitting the tribunal to make an order for costs in its award where it has previously made none and (d) applying s 70 of the Legal Practitioners Ordinance (Cap 159) to arbitration proceedings (entitlement of a solicitor employed in the arbitration to seek a charge on property recovered or preserved). The provisions of s 2GJ summarised in (a) and (b) above are non-mandatory, as is a new provision which makes clear that the tribunal can direct costs to be paid on the same bases as those applicable to civil proceedings in the Court of First Instance. The remainder are mandatory.

(xix) *Limiting costs in advance during the arbitration:* s 2GL empowers the tribunal to limit a party's recoverable costs of the arbitration to a specified amount in advance of their being incurred. This is a non-mandatory provision. It is a new form of case management device which is intended to encourage parties to be economical in pursuing their rights and not to engage in oppressive behaviour by using or abusing financial muscle. The power must be exercised sufficiently in advance of costs being incurred, fairly and reasonably and in accordance with the arbitrator's overriding duties under s 2GA(1) of the Ordinance. Though not expressly apparent, learned commentary on almost identical provisions in s 65 of the English Arbitration Act 1996 suggests that the arbitrator may invoke this power of his own volition as well as on the application of a party[117]. In any event, whilst the arbitrator may limit a party's recoverable costs, he cannot limit what that party actually spends.

(xx) *Immunity of arbitrators and arbitral authorities.* ss 2GM and 2GN provide respectively that arbitrators and arbitral appointing authorities, or their

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known as Shimizu Construction Co Ltd) (No 2) [1997] 1 HKC 453 (Court of Appeal)

116 This is a rate of interest that is declared from time to time by the Chief Justice under s 49 of the High Court Ordinance (Cap 4)

117 B Harris, R Planterose & J Tecks, *The Arbitration Act 1996 A Commentary* (1st Edn 1996, Blackwell Science, Oxford) p 241.

employees or agents, are immune from suit for acts done or omitted to be done in the performance or purported performance of their functions, unless an act was done or omitted to be done dishonestly. These are mandatory provisions. Whilst it had been generally, though not conclusively, accepted at common law that arbitrators enjoyed judicial immunity[118], there was no doubt - though the point had never been tested - that under the previous law an appointing authority would be liable for negligently making an appointment if a party suffered loss.

5.8 ***Internal inconsistencies*** The application of the new provisions of Part IA of the Ordinance to both domestic and international arbitrations has, however, created some unfortunate internal inconsistencies between Part IA and the Model Law[119]. One reason why these anomalies arose was that the law reform process was a rushed affair during its latter days. Despite the difficulties that have arisen, it must be presumed that the later legislation must supersede the earlier, despite the imperfections. The nature of the inconsistencies varies from implicit exclusion of Model Law provisions to outright conflict with them.

5.9 The most significant inconsistencies may be summarised as follows.

(i) *Overriding duties of the arbitral tribunal (I).* Section 2GA(1)(a) requires the tribunal to act fairly and impartially. In the Model Law, art 12(1) requires the tribunal to be impartial and art 18 requires it to treat the parties with equality. All of these provisions are mandatory. Article 12(1) goes a stage further, however, by also requiring the tribunal to be independent.

(ii) *Overriding duties of the arbitral tribunal (II).* Section 2GA(1) requires each party to be given a *reasonable* opportunity to present his case and to deal with that of his opponent. Article 18 of the Model Law, by contrast, requires a *full* opportunity to be given. Both are mandatory provisions. It may be that this particular conflict is more apparent than real, in that the phrase "full opportunity" should be interpreted reasonably, the tribunal being obliged only to provide opportunities that are reasonable in all the circumstances of the case without having to accommodate unreasonable demands of recalcitrant and *mala fide* parties[120]. Article 18 of the Model

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118 *Sutcliffe v Thackrah* [1974] AC 727 (House of Lords), *Arenson v Casson Beckman Rutley & Co* [1977] AC 405 (House of Lords).

119 For detailed discussion of these anomalies, see Morgan, *op cit* (note 82).

120 See H M Holtzmann & J E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration Legislative History and Commentary* (1990, Kluwer, The Hague), p 551

Law is, however, said to be of wider application, in that it imposes a duty on the parties to treat each other with equality as well[121].

(iii) *Limitations on the court's power to intervene.* Article 5 of the Model Law states categorically that the court shall not intervene in matters governed by the Model Law except to the extent permitted by the Model Law. This makes it clear that the court may not intervene in matters governed by the Model Law over and above the powers expressly conferred by it. Section 2AA(2)(b) of the Ordinance states in bald terms that the court should interfere only as expressly provided by the Ordinance, without any similar qualifying wording. Clearly, this cannot mean that the Arbitration Ordinance has primacy over all others that may impinge upon arbitration[122]. Whilst s 2AA(2)(b) was influenced by s 1(c) of the English Arbitration Act, the latter, though using the word 'should' instead of 'shall', more faithfully follows the approach of art 5 by expressing itself in negative language and limiting its application to matters governed by Part I of the 1996 Act. Both art 5 of the Model Law and s 2AA(2)(b) are mandatory provisions.

(iv) *Hearings.* Section 2GA(1)(b) obliges the arbitrator to adopt appropriate procedures in order to avoid delay and cost. It thus empowers him to refuse an oral hearing where one party only requests it and the arbitrator does not consider it appropriate. This provision conflicts with art 24(1) of the Model Law, which obliges the arbitrator to hold an oral hearing if so requested by one party. These are mandatory provisions.

(v) *Non-application of the strict rules of evidence.* Section 2GA(2) of the Ordinance empowers arbitral tribunals to disregard the strict rules of evidence but is subject to s 2GB(8), whereby a person cannot be compelled to produce to the tribunal any evidence that is subject to legal objection (eg any category of privileged material). Section 2GA(2) is mandatory. Article 19(2) also empowers tribunals to disregard the strict rules of evidence but has no rider about evidence that is subject to legal objection. By contrast with s 2GA(2), it is non-mandatory and appears to be excluded by implication.

(vi) *Interim measures of protection.* Section 2GB(1)(b), (e) and (f) empower the tribunal to order security for money in dispute, to make orders that are protective of the subject-matter of the dispute and to grant interim

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121 Broches, *op cit* (note 72), p 95.

122 See *UDL Contracting Ltd* (HCCW 762/1999, 21 December 1999, unreported, Court of First Instance). This decision will be reported shortly in Hong Kong Cases (HKC). See also UNCITRAL, *op cit* (note 92).

injunctions or order other interim measures to be taken. This provision is mandatory. Article 17 of the Model Law, which empowers the tribunal to order interim measures, is non-mandatory. This conflict is all the more unfirtunate when it is remembered that the principal reason for enacting s 2GB in the first place was to clarify the interim measures that a tribunal may order.

6. The Model Law as a catalyst for fundamental law reform

6.1 ***Introduction*** As stated earlier in this *Report*, the results of consultations with Hong Kong's arbitration community showed a groundswell of opinion in favour of regaining a unitary system of arbitration, with the Model Law applying to both domestic and international arbitrations and supplemented by a small number of 'add-on' provisions, some of which would be applicable to domestic arbitration only. The 1996 amendments were intended by the Committee on Arbitration Law to be paving provisions, pending more fundamental root and branch reform of the law.

6.2 ***A new advisory committee*** The Committee on Arbitration Law was disbanded shortly after the passage of the 1996 Ordinance. Early in 1998 the Hong Kong Institute of Arbitrators took the initiative, with the support of the Secretary for Justice, of establishing a Committee on Hong Kong Arbitration Law to take forward the work started by its predecessor. Like its predecessor, the present Committee is multidisciplinary and comprises representatives from the main arbitral, trade and professional bodies involved in arbitration, including HKIAC, the Chartered Institute of Arbitrators (East Asia Branch), the Bar Association and the Law Society. Its terms of reference, which are based upon a paragraph its predecessor's report of April 1996 to the Attorney General, are stated thus:

"The [HKIAC] committee therefore proposes that the Arbitration Ordinance, Cap 341, as amended by the 1996 [Ordinance], should be completely redrawn in order to apply the [UNCITRAL] Model Law equally to both domestic and international arbitrations, and arbitration agreements, together with such additional provisions as are deemed, in the light of experience in Hong Kong and other Model Law jurisdictions, both necessary and desirable. In the process the legislation would keep pace with the needs of the modern arbitration community, domestically and globally, and would free Hong Kong from the outdated and illogically arranged English Arbitration Acts [1950-1979, now repealed], and the large body of case law on which their interpretation depends."

It is anticipated that the present Committee will report to Government sometime in 2000[123].

6.3 ***Questions of principle*** During the course of its deliberations, the Committee has considered and decided a number of fundamental questions of principle about the shape and content of a future Arbitration Ordinance. The main questions, and the Committee's decisions thereon, are as follows:

(i) *The applicable system of arbitration law.* The concept of a unitary system of arbitration law, with the Model Law governing both domestic and international arbitrations, was endorsed.

(ii) *How a new Ordinance should be structured.* The Model Law should form the body of the new Ordinance and incorporate amendments thereto. This would be to follow the New Zealand approach and would make the Ordinance user-friendly. The Committee was unanimous in taking the view that Hong Kong should continue to be and be seen to be a Model Law jurisdiction proper.

(iii) *Security for costs.* The powers of the arbitral tribunal to order security for costs should be reconsidered and, in particular, consideration should be given to allowing the parties to opt out of this power, as is the case under s 38(1)-(3) of the English Arbitration Act 1996. The current Hong Kong power, s 2GB(1)(a) of the Ordinance, by contrast, is mandatory. Security for costs can be a highly emotive issue in Hong Kong.

(iv) *Deprivation of an arbitrator's right to fees.* The Court of First Instance should have the power to decide whether to deprive an arbitrator of his fees and/or to order repayment of monies already received following removal under arts 13 and 14 of the Model Law. This power should be discretionary. This is much wider than the current law, whereby a court exercises this jurisdiction in domestic cases alone and only on the ground of failure by an arbitrator to proceed with reasonable dispatch. This ground having been proved, however, the court must make an order depriving him of his fees[124]. This has led to at least one hard case[125].

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123 For further discussion of current law reform in Hong Kong, see Robin Peard, *The Arbitration Ordinance What Further Changes are Needed?* [1999] 1 Asian DR 33.

124 Section 15(3) of the current Ordinance.

125 See *Kailay Engineering (HK) Ltd v Farrance* [1999] 2 HKC 765 (Court of Appeal).

(v) *Immediate payment of costs of unmeritorious interlocutory applications.* The arbitrator should have an express power to assess and order the immediate payment of the costs of an unmeritorious interlocutory application. The court has such a power at present and it is likely that an arbitrator can lawfully make such an order under his existing powers, but it would be appropriate to underwrite it in statute.

(vi) *Taxation of arbitrators' fees in international cases.* The court should be empowered to tax arbitrators' fees in both domestic and international cases, along the lines of the power set out in s 21 of the current Ordinance, *viz* in cases where fees have not been agreed. An arbitrator should be able to refer his fees to court for taxation and then make an award incorporating the assessment. It was also agreed that the arcane term 'taxation' should be replaced with the more modern 'assessment'.

(vii) *Rights of appeal in domestic cases.* Rights of appeal should be retained in domestic cases, but only if parties opted into it, rather than on a mandatory basis. Parties should be able to opt into rights of appeal at any time[126].

6.4 ***Questions of detail*** The full Committee established a Principles Working Group to draw up and submit the questions of principle listed in para 6.3 above, to examine a large number of detailed proposals for law reform and to make recommendations to the Committee accordingly. The general approach which was adopted was to see if the Model Law as it currently stands was capable of dealing with a particular matter. Indeed, where both the domestic provisions and the Model Law appeared capable of so doing, preference was always expressed for the Model Law. This was of course appropriate in the light of the underyling general principle that the Model Law should form the basis of a new Arbitration Ordinance. This was reflected in the guiding principle for reform of the Arbitration Ordinance, which was agreed as follows:

"That, insofar as a matter had not been dealt with by the UNCITRAL Model Law, the enactment of any additional provision would only be recommended where there was good reason for doing so, for example:

"(i) where a domestic provision of the Ordinance was widely accepted, or

"(ii) the provision in question was not contemplated att the time the Model Law was adopted.

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126 This subject to the Hong Kong Government's views on the subject being obtained. The reasons for this are twofold: (i) it is the Government's policy not to enter into agreements excluding rights of appeal under s 23B of the current Ordinance, and (ii) arbitrations under all Government forms of contract are deemed to be domestic.

"The [Principles Working] Group would not, therefore, seek to codify Hong Kong arbitration law."

6.5 In a small number of cases it was decided that there should either be 'add-on' provisions to accommodate domestic cases or amendments to the face of the Model Law so as to provide equally for domestic and international arbitrations. The most important of these decisions concerned the following:

(i) *Seat of the arbitration.* A unitary régime would require a 'scope of application' provision, in particular to specify which of the court's supportive powers should apply where the seat of the arbitration was outside Hong Kong.

(ii) *Umpires.* Provision should be made for the appointment of umpires, together with provisions governing whether and when they should sit in on arbitral proceedings, the types of disagreement that would trigger entry upon the reference and the challenge and replacement of umpires.

(iii) *Determination by the court of a preliminary point of law.* A power along the lines of s 45 of the English Arbitration Act 1996 should be considered and, if adopted, should only apply where parties opt into it.

(iv) *Consolidation of references.* Section 6B of the current Ordinance should be retained as an opt-in provision and applied to both domestic and international arbitrations.

(v) *Overriding general duty on the parties.* It was noted that a general duty on the parties to progress arbitrations and obey the tribunal's directions was not explicitly stated in art 19 of the Model Law[127]. It was appropriate to adopt a provision based on s 40(1) of the English Arbitration Act 1996 and to incorporate it in that part of any new Ordinance dealing with general duties.

(vi) *Interim awards.* The arcane nomenclature 'interim award' should be done away with and the modern nomenclature 'partial final award' adopted.

(vii) *Remission of awards under the Model Law.* It was agreed that art 34(4) of the Model Law, which provides for remission of an award to the tribunal to put right any matter forming a ground for challenge of the award under art 34(2), is defectively drafted. It does not make clear how and in what circumstances remission may be ordered.

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127 Broches, *op cit* (note 72), p .

(viii) *Ensuring internal consistency.* The existing internal inconsistencies between Part IA of the Ordinance and the Model Law having been noted, care would need to be taken to avoid them in the future. Whilst having a unitary régime would go some way towards promoting consistency, there remained a danger that there could be inconsistency between the Model Law as enacted with amendments in a new Ordinance and any add-on provisions.

6.6 Although supportive of the Committee's work, the Government has given no firm commitment to devote administrative resources or legislative time to the root and branch reform of arbitration law.

6.7 ***Law reform initiatives by UNCITRAL*** It is interesting to note that the UNCITRAL Secretariat has begun to examine ways in which the substance of the Model Law may be improved and its coverage broadened. A document of April 1999[128] sets out a list of possible topics for consideration by the Commission, most of which have been dealt with in Hong Kong by virtue of the 1996 amendments or addressed in the deliberations of the present Committee. These include conciliation[129], requirements as to agreements in writing[130], confidentiality of arbitral proceedings, consolidation, liability of arbitrators, awards of interest and costs of arbitral proceedings. The Principles Working Group will consider these in due course[131].

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128 UNCITRAL, *International Commercial Arbitration: Possible future work in the area of international commercial arbitration - Note by the Secretariat*, A/CN.9/460, 6 April 1999 (UNCITRAL, Vienna).

129 See also UNCITRAL, *Settlement of Commercial Disputes: Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement - Report of the Secretary-General*, A/CN.9/WG.II/WP.108, 14 January 2000 (UNCITRAL, Vienna).

130 See also UNCITRAL, *Settlement of Commercial Disputes: Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement - Report of the Secretary-General*, A/CN.9/WG.II/WP.108/Add.1, 26 January 2000 (UNCITRAL, Vienna).

131 For further discussion of and proposals for reform of the Model Law, see Pieter Sanders, *What May Still be Done in the World of Arbitration?* (1999) 65 JCIArb 4, 260; Pieter Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice* (1999, Kluwer, The Hague), Chs V and VII.