

Consultation Paper

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

**Department of Justice
December 2007**

CONSULTATION PAPER

REFORM OF THE

LAW OF ARBITRATION IN

HONG KONG

AND

DRAFT ARBITRATION BILL

This Consultation Paper can be found on the internet at:

<http://www.doj.gov.hk/eng/public/pdf/2007/arbitration.pdf>

and

<http://www.gov.hk/en/residents/government/consultation/current.htm>

December 2007

1. This Consultation Paper has been prepared by the Department of Justice with the assistance of the Departmental Working Group to implement the Report of the Committee on Hong Kong Arbitration Law (“Working Group”) set up for the reform of the law of arbitration in Hong Kong.

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3. The views and recommendations in this Consultation Paper are published to facilitate comments and discussions. They are not to be regarded as the final views of the Department of Justice or the Working Group. The draft Arbitration Bill annexed to this Consultation Paper will be subject to further revisions in the light of submissions and representations received by the Department.

4. The Department would be grateful for views and comments on the draft Arbitration Bill and any matters discussed in the Consultation Paper by 30 April 2008. All correspondence (marked “Arbitration Law Reform”) should be addressed to:

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5. It will be helpful for the Department and the Working Group, either in discussion with others or in any subsequent documents, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will be respected but if no such request is made, it will be assumed that the response is not intended to be confidential.

CONSULTATION PAPER

REFORM OF THE LAW OF ARBITRATION IN HONG KONG AND DRAFT ARBITRATION BILL

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ABBREVIATIONS

AJLS Panel	Legislative Council Panel on Administration of Justice and Legal Services
CJMA Bill	Civil Justice (Miscellaneous Amendments) Bill 2007
current Ordinance	Arbitration Ordinance (Cap 341)
Convention award	Award made in a State or territory (other than China) which is a party to the New York Convention
draft Bill	Consultation draft of Arbitration Bill
HKIAC	Hong Kong International Arbitration Centre
HKIAC Committee	A committee of the Hong Kong International Arbitration Centre
Mainland award	Award made on the Mainland by a recognized Mainland arbitral authority
Model Law	UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended on 7 July 2006
new Ordinance	New Arbitration Ordinance
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL report 2006	Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session (19 June – 7 July 2006) accessible at

	<p>http://www.uncitral.org/uncitral/en/commission/sessions/39th.html (View Report : http://daccess-ods.un.org/TMP/4439278.html)</p>
Working Group	<p>Departmental Working Group set up by the Department of Justice to implement the Report of the Committee on Hong Kong Arbitration Law</p>
1987 report	<p>Report on the Adoption of the UNCITRAL Model Law of Arbitration [Topic 17] issued by the Law Reform Commission of Hong Kong in 1987 accessible at http://www.hkreform.gov.hk/en/publications/runcitral.htm (View Report : http://www.hkreform.gov.hk/en/docs/runcitral-e.pdf)</p>
1996 report	<p>Report of the Committee on Arbitration Law issued in April 1996 by the HKIAC Committee</p>
<i>Report</i>	<p>Report of Committee on Hong Kong Arbitration Law issued in 2003 by the Committee on Hong Kong Arbitration Law established by the Hong Kong Institute of Arbitrators in co-operation with the Hong Kong International Arbitration Centre accessible at http://www.hkiac.org/HKIAC/HKIAC_English/main.html (View Report : http://www.hkiac.org/HKIAC/pdf/Announcement/REPORT%20OF%20COMMITTEE%20ON%20HK%20ARBITRATION%20LAW.pdf)</p>

EXECUTIVE SUMMARY

The Department of Justice published a Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill on 31 December 2007 (“Consultation Paper”) to seek views on reform of the law of arbitration in Hong Kong.

A Unitary Regime for Arbitration

2. The current Arbitration Ordinance (Cap 341) (“the current Ordinance”) has created two different regimes for “domestic” and “international” arbitrations. The Consultation Paper and the consultation draft of the Arbitration Bill (“draft Bill”) attached to it propose the creation of a unitary regime of arbitration on the basis of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) adopted by the United Nations Commission on International Trade Law (“UNCITRAL”) for all types of arbitration, thereby abolishing the distinction between domestic and international arbitrations under the current Ordinance.

3. The purpose of the reform is to make the law on arbitration more user-friendly. As the Model Law is familiar to practitioners from civil law as well as common law jurisdictions, this would have the benefit of enabling the Hong Kong business community and arbitration practitioners to operate an arbitration regime which accords with widely accepted international arbitration practices and development. Hong Kong would be seen as a Model Law jurisdiction thereby attracting more business parties to choose Hong Kong as the place to conduct arbitral proceedings. The reform of the law of arbitration will also promote Hong Kong as a regional centre for legal services and dispute resolution.

The framework and contents of the draft Bill

4. The draft Bill adopts the structure of the Model Law as its framework. The relevant provisions of the Model Law including some of the revised articles recently adopted by the UNCITRAL in 2006 are reproduced in the draft Bill and are supplemented by other provisions

having regard to the proposals made in the *Report of Committee on Hong Kong Arbitration Law* published in 2003 (“*Report*”) and the relevant existing provisions of the current Ordinance that are to be retained. The major issues in the draft Bill are summarised below.

Part 1 Preliminary

5. Part 1 sets out the object and principles of the draft Bill. It gives effect to the provisions of the Model Law as expressly stated in the draft Bill subject to such modifications and supplements as provided for in the draft Bill. Part 1 also defines the scope of application of the draft Bill. It provides that the draft Bill applies to any arbitration agreement and any arbitration to which the Government of the Hong Kong Special Administrative Region is a party.

Part 2 General Provisions

6. Part 2 sets out the principle for the interpretation of the Model Law. It provides for the procedural rules for delivery of written communications including new forms of electronic communications. It further states that the Limitation Ordinance (Cap 347) and any other Ordinances relating to the limitation of actions shall apply to arbitrations as they apply to actions in the court. It is also provided in this Part that proceedings are to be heard in open court. However, upon application of any party, the court shall order those proceedings to be heard otherwise than in open court, unless the court is in any particular case satisfied that those proceedings ought to be heard in open court. The court is also empowered to give directions as to what information relating to proceedings heard otherwise than in open court may be published.

Part 3 Arbitration Agreement

7. Part 3 requires an arbitration agreement to be in writing and defines what constitutes writing for this purpose. It also provides for disputes under an arbitration agreement to be referred to arbitration.

8. In view of the concern that employees with weaker bargaining power could be denied access to the court by standard arbitration clauses in their employment contracts, provision is made under Part 3 to empower the court to decide whether or not to refer to arbitration, not just disputes involving a claim or other matter that is within the jurisdiction of the Labour Tribunal as provided for in the current Ordinance, but also matters involving claims or disputes made pursuant to or arising under any employment contract.

Part 4 Composition of Arbitral Tribunal

9. Part 4 contains provisions relating to the number of arbitrators and their appointment and sets out the grounds and procedures for challenging such appointment. It further provides for the appointment of umpires and their functions in arbitral proceedings and the appointment of mediators. It also specifies that an arbitrator may act as a mediator upon consent of all parties in writing after the commencement of arbitral proceedings.

Part 5 Jurisdiction of Arbitral Tribunal

10. An arbitral tribunal is empowered under Part 5 to rule on its own jurisdiction. Where an arbitral tribunal rules that it has jurisdiction to decide a dispute, a party may, within a 30-day period, request the Court of First Instance to decide on the issue. No appeal lies from a decision of the Court of First Instance on the issue. If an arbitral tribunal rules that it does not have jurisdiction to decide a dispute, the court shall, if it has jurisdiction, decide the dispute.

Part 6 Interim Measures and Preliminary Orders

11. Part 6 empowers an arbitral tribunal to grant interim measures and preliminary orders and to specify the grounds and procedures relating to the application for and the grant, modification, suspension or termination of such interim measures and preliminary orders.

12. It further provides that the Court of First Instance may grant an interim measure in relation to arbitral proceedings conducted in or outside Hong Kong. If the arbitral proceedings are conducted outside Hong Kong, an interim measure may be granted only if those proceedings are capable of giving rise to an arbitral award (whether interim or final) which may be enforced in Hong Kong under the new Arbitration Ordinance (“new Ordinance”) or any other Ordinance and that the interim measure sought belongs to a type or description of interim measures that may be granted in Hong Kong in relation to arbitral proceedings conducted in Hong Kong.

13. An alternative proposal, which we do not recommend, has been made that where arbitral proceedings take place outside Hong Kong, the Court of First Instance should only be able to make an order to grant an interim measure in relation to such proceedings if a court in the corresponding place of arbitration will act reciprocally to grant a similar order in aid of arbitral proceedings conducted in Hong Kong.

Part 7 Conduct of Arbitral Proceedings

14. Part 7 states that the parties may agree on the procedures to be followed, which otherwise are to be determined by the arbitral tribunal. It further sets out the general powers exercisable by an arbitral tribunal when conducting arbitral proceedings.

15. Part 7 preserves the present statutory position in respect of the enforcement of orders or directions, including interim measures, made by an arbitral tribunal in relation to arbitral proceedings conducted in or outside Hong Kong. A new requirement is however added which provides that leave for enforcement of such order or direction made outside Hong Kong shall not be granted by the court in Hong Kong unless it can be demonstrated that the order or direction belongs to a type or description of order or direction that may be made in Hong Kong in relation to arbitral proceedings conducted in Hong Kong.

16. An additional proposal, with which we do not agree, has been made that where an arbitral proceeding takes place outside Hong Kong, leave should only be granted for the enforcement of any order or

direction, including any interim measure, made by such arbitral tribunal in a foreign jurisdiction if a court in the corresponding place of arbitration will act reciprocally in respect of such order or direction made in arbitral proceedings conducted in Hong Kong.

Part 8 Making of Award and Termination of Proceedings

17. Part 8 prescribes the procedures for deciding on the choice of substantive law that is applicable to the substance of the dispute. It sets out the requirements for the form and contents of an arbitral award and provides for the correction and interpretation thereof and the making of an additional award. It provides for the award on costs of the arbitral proceedings including the fees and expenses of the tribunal to be made by an arbitral tribunal. Proposal has also been made to empower an arbitral tribunal to order payment of interest on award of costs in arbitral proceedings. Part 8 further states the circumstances under which arbitral proceedings are to be terminated and the mechanism for doing so.

Part 9 Recourse against Award

18. Part 9 provides that recourse to the court against an arbitral award may be made by a party by an application for setting aside the award. It further provides that the Court of First Instance may set aside an award on the grounds specified in Article 34 of the Model Law but may not set aside an award on the ground of error of fact or law on the face of the award.

Part 10 Recognition and Enforcement of Awards

19. The statutory scheme under the current Ordinance for the enforcement of awards made, whether in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal is retained under Part 10 subject to certain modifications. Leave of the court is required for enforcement of an arbitral award made by an arbitral tribunal whether in or outside Hong Kong.

20. In the case of the enforcement of an arbitral award made outside Hong Kong which is neither a Convention award nor a Mainland award, a new provision is added under Part 10 to provide that no leave shall be granted by the court unless the party seeking to enforce such award can demonstrate that the court in the place where the award is made will act reciprocally in respect of awards made in Hong Kong in arbitral proceedings by an arbitral tribunal. The new requirement proposed is to ensure that the enforcement of arbitral awards made outside Hong Kong, whether a Convention award, a Mainland award or an award which is neither a Convention award nor a Mainland award, is granted on the same principle of reciprocity of enforcement.

Part 11 Provisions that may be Expressly Opted for or Automatically Apply

21. Certain provisions under the current Ordinance that only apply to domestic arbitrations have been retained as opt-in provisions under Schedule 3 to the draft Bill. It is provided under Part 11 that parties to an arbitration agreement may expressly provide in the arbitration agreement as to whether any of the provisions in Schedule 3 shall apply.

22. To address the concern raised by the construction industry where users of standard form contracts may continue to use the term “domestic arbitration” in such contracts either before or for sometime after the commencement of the new Ordinance, it is provided under Part 11 that, where an arbitration agreement entered into before, or at any time within a period of 6 years after, the commencement of the new Ordinance stipulates that an arbitration under that arbitration agreement shall be a “domestic arbitration”, all the opt-in provisions under Schedule 3 shall automatically apply to that arbitration agreement subject to any express agreement to the contrary between the parties.

23. A deeming provision is included under Part 11 to ensure that, subject to some exceptions, all the opt-in provisions in Schedule 3 would automatically apply to an arbitration agreement contained in every contract down the line of the subcontracting process.

Part 12 Miscellaneous

24. Part 12 contains miscellaneous provisions relating to the liability of an arbitral tribunal, a mediator and the relevant bodies, the power to make relevant rules of court and the procedures for making an application under the new Ordinance.

Part 13 Repeal, Savings and Transitional Provisions

25. Part 13 provides for the repeal of the current Ordinance and states that the savings and transitional provisions are set out in Schedule 4.

Part 14 Consequential and Related Amendments

26. Part 14 provides that the consequential and related amendments are specified in Schedule 5.

Schedule 1 UNCITRAL Model Law on International Commercial Arbitration

27. The full text of the Model Law is set out in Schedule 1.

Schedule 2 Application of Ordinance to Judge-Arbitrators and Judge-Umpires

28. The provisions under the Fourth Schedule to the current Ordinance are retained under Schedule 2 to the draft Bill with necessary modifications. This Schedule deals with the application of certain provisions of the draft Bill to a judge who has been appointed as sole arbitrator or umpire.

Schedule 3 Provisions that may be Expressly Opted for or Automatically Apply

29. Schedule 3 contains provisions relating to the determination of a dispute by a sole arbitrator, the consolidation of arbitrations, the determination of a preliminary point of law by the Court of First Instance,

the challenging of an arbitral award on ground of serious irregularity and the appeal against an arbitral award on point of law.

Schedule 4 Savings and transitional provisions

30. The savings and transitional provisions are set out in Schedule 4.

Schedule 5 Consequential and related amendments

31. The consequential and related amendments are set out in Schedule 5. Amendments have been proposed to Order 73 of the Rules of the High Court (Cap 4 sub. leg. A) in respect of the making of an application, request or appeal under the draft Bill to the Court of First Instance. A proposal has been made under Section 38 of this Schedule to add the “President of the Hong Kong Construction Association” to the list of persons and organizations set out in Rule 3(2) of the Arbitration (Appointment of Arbitrators and Umpires) Rules (Cap 341 sub. leg. B).

Consultation

32. The Department of Justice invites comments on the issues raised in the Consultation Paper and welcomes any views generally on the draft Bill.

33. The consultation period will end on 30 April 2008.

INTRODUCTION

THE BACKGROUND TO THE REFORM

The development of arbitration law in Hong Kong

1. The Arbitration Ordinance (Cap 341) was first enacted in 1963. Its provisions mirrored those of the English Arbitration Act 1950 (which has now been repealed). It provided for a unitary arbitration law regime applicable to both domestic and international arbitrations.

2. In its *Report on the Adoption of the UNCITRAL Model Law of Arbitration* issued in 1987 (“1987 report”), the Law Reform Commission of Hong Kong recommended that the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) adopted by the United Nations Commission on International Trade Law¹ (“UNCITRAL”) should replace existing Hong Kong law on international arbitration, whether commercial or otherwise, subject to certain minor changes. It was further recommended that the law relating to domestic arbitration should remain intact.

3. The Law Reform Commission’s recommendations in the 1987 report were implemented resulting in separate regimes for the conduct of domestic and international arbitrations respectively. The Model Law has applied with minor modifications to international arbitration in Hong Kong since 4 April 1990.

4. In January 1992, at the invitation of the then Attorney General, a committee of the Hong Kong International Arbitration Centre (“HKIAC Committee”) was established under the chairmanship of Mr Justice Neil Kaplan (as he then was) to consider whether amendments to

¹ On 21 June 1985, the United Nations Commission on International Trade Law adopted a Model Law on International Commercial Arbitration. On 11 December 1985, the General Assembly of the United Nations passed a resolution that all states should “give due consideration to the Model Law on International Commercial Arbitration in view of desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice”.

the Arbitration Ordinance (Cap 341) were required in the light of the publication in May 1991 of a new draft Arbitration Act in the United Kingdom.

5. In its *Report of the Committee on Arbitration Law* issued in April 1996 (“1996 report”), the HKIAC Committee was of the view that the Model Law was suitable for application to domestic arbitrations. In order to keep pace with the needs of the modern arbitration community domestically and globally, the Committee considered that the Ordinance should be completely redrawn in order to apply the Model Law equally to both domestic and international arbitrations, together with such additional provisions as are deemed necessary and desirable.

6. However, as the unification of the two arbitral systems was a complex issue, the HKIAC Committee recommended that limited improvements be made to the Arbitration Ordinance (Cap 341) to minimize the differences between the two systems as an interim measure. The HKIAC Committee’s recommendations were implemented by way of the Arbitration (Amendment) Ordinance 1996. It promoted greater party autonomy, vested primary authority in arbitral tribunals and limited the scope of court intervention during arbitral proceedings.

The current state of arbitration law in Hong Kong

7. The current Arbitration Ordinance (Cap 341) (“current Ordinance”) has created two different regimes for “domestic” and “international” arbitrations. Domestic arbitration is governed under Part II of the current Ordinance. It is largely based on UK arbitration legislation. Part IIA applies to international arbitration. It is based on the Model Law. Part IA of the current Ordinance contains provisions applicable to both domestic and international arbitrations. The classification of the two types of arbitration is based on Article 1(3) of the Model Law as set out in the Fifth Schedule to the current Ordinance.

8. There are provisions in the current Ordinance which enable the parties to switch from one regime to another. Section 2L of the current Ordinance provides that parties to a domestic arbitration agreement, after a dispute has arisen, may agree in writing that Part IIA

(International Arbitration) is to apply, or that the agreement is to be treated as an international arbitration agreement; or that the dispute is to be arbitrated as an international arbitration. Pursuant to section 2M of the current Ordinance, parties to an international arbitration agreement may agree in writing that Part II (Domestic Arbitration) is to apply, or that the agreement is to be treated as a domestic arbitration agreement; or the dispute is to be arbitrated as a domestic arbitration.

The proposal for reform of arbitration law in 2003

9. In 1998, the Hong Kong Institute of Arbitrators in co-operation with the Hong Kong International Arbitration Centre (“HKIAC”) established the Committee on Hong Kong Arbitration Law to follow up on the 1996 report. The Committee issued a *Report of Committee on Hong Kong Arbitration Law* (“*Report*”) in April 2003.² It recommended that the current Ordinance should be redrawn and a unitary regime with the Model Law governing both domestic and international arbitrations should be created, thereby abolishing the distinction between the two types of arbitration.

The establishment of a Working Group for review of the current Arbitration Ordinance based on the Model Law

10. The Department of Justice agrees with the *Report’s* recommendation that the distinction between domestic and international arbitrations in the current Ordinance should be abolished and that the Model Law should be adopted for both domestic and international arbitrations in Hong Kong. The Department also considers that the new Arbitration Ordinance should be as user-friendly as possible so that arbitration users, both in and outside Hong Kong, can easily find their way round the Ordinance. Furthermore, by adopting the proposals in the *Report* with necessary modifications, the new Arbitration Ordinance (“new Ordinance”) could meet the objections to the proposed establishment of a unitary regime.

² The *Report* is accessible at http://www.hkiac.org/HKIAC/HKIAC_English/main.html
(View Report : <http://www.hkiac.org/HKIAC/pdf/Announcement/REPORT%20OF%20COMMITTEE%20ON%20HK%20ARBITRATION%20LAW.pdf>)

11. The Arbitration Bill (draft Bill at Annex A) was drafted with a view to closer adherence to the Model Law. This should have the benefit of enabling the Hong Kong business community and arbitration practitioners to operate an arbitration regime which accords with widely accepted international arbitration practices and development. Hong Kong should also be clearly seen as a Model Law jurisdiction as the Model Law is familiar to practitioners from civil law as well as common law jurisdictions, thereby attracting more business parties to choose Hong Kong as the place to conduct arbitral proceedings. The reform of the law of arbitration in Hong Kong will reinforce and promote Hong Kong as a leading regional centre for legal services and dispute resolution.

12. In June 2005, the Department of Justice consulted and sought the views of the members of the Legislative Council Panel on Administration of Justice and Legal Services (AJLS Panel) on the recommendations made in the Report and on the proposals made by the Department of Justice to take forward those recommendations.

13. Having obtained the support of the AJLS Panel, the Department of Justice set up the Departmental Working Group to implement the Report of the Committee on Hong Kong Arbitration Law (“Working Group”) in September 2005 with a view to implement the recommendations in the *Report*. Representatives of the legal profession, arbitration experts and others were appointed to the Working Group to work with the Department of Justice in formulating legislative proposals to give effect to those recommendations. A Sub-committee was formed under the Working Group to examine those legislative proposals and the draft legislation in detail.

14. The Working Group has now completed its review on the law of arbitration in Hong Kong. The Consultation Paper provides brief explanation on the provisions in the draft Bill and sets out the matters over which views are sought.

PART 1

PRELIMINARY

Clause 1 Short title and commencement

1.1 Clause 1 provides that the new Ordinance may be cited as the Arbitration Ordinance and shall come into operation on a date to be fixed.

Clause 2 Interpretation

1.2 Clause 2(1) sets out the definitions of the terms used in the draft Bill. The definitions in section 2 of the current Ordinance have basically been retained in this Clause. Article 2 of the Model Law has also been incorporated in so far as it is applicable.

1.3 Clause 2(2) is adapted from Article 2(e) of the Model Law and it provides that where a provision of the draft Bill refers to the parties' agreement on any matter, such agreement includes any arbitration rules referred to in that agreement.

1.4 Clause 2(3) is adapted from Article 2(f) of the Model Law to provide, except in specified provisions, that references to claims and defences should be read to include counter-claims and defences to counter-claims.

Clause 3 Object and principles of Ordinance

1.5 Clause 3 sets out the object and principles of the draft Bill. It is originally section 2AA of the current Ordinance.

Clause 4 UNCITRAL Model Law to have force of law in Hong Kong

1.6 Clause 4 states that the Model Law shall have the force of law in Hong Kong subject to two qualifications: firstly, it applies only to

the extent of those provisions which are expressly stated in the draft Bill as having effect; and secondly, it is subject to such modifications and supplements as expressly provided for in the draft Bill.³

Clause 5 Application of Ordinance

1.7 Clause 5 defines the scope of application of the draft Bill. It takes effect in substitution for Article 1 of the Model Law.⁴

Subclause (1)

1.8 Clause 5(1) provides that the draft Bill is to apply to “an arbitration under an arbitration agreement”. It differs from Article 1(1) of the Model Law which restricts the scope of the application of the Model Law to “international commercial arbitration”.⁵

1.9 At present, section 34C(2) of the current Ordinance expressly provides that Article 1(1) of the Model Law shall not have the effect of limiting the application of the Model Law to international commercial arbitrations.

1.10 In the 1987 report, the Law Reform Commission of Hong Kong recommended that in the interests of giving the law the widest possible scope, the term “commercial” should be deleted”.⁶

³ In “A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law” by Lord Justice Mustill, *Arbitration International* Volume 6, Number 1 (1990) 3 -62, at pages 5-6, the following observations were made: “The purpose of the discussions [of the UNCITRAL] was to develop a text which could be offered to states at large as a workmanlike and readily comprehensible basis for an arbitration regime broadly conforming with generally accepted concepts of international commercial arbitration. It was not to be expected that all states, whatever the characteristics of their arbitral procedures, and of their contractual, constitutional and other laws directly or indirectly bearing on arbitration, would necessarily find it advantageous or even practicable to adopt the Model Law in its entirety. ... we suggest that when considering what action might be taken in relation to the Model Law it is legitimate to take into account the possibility of (a) enacting only some of the articles, or (b) enacting the text with modifications;...”

⁴ See Clause 7 of the draft Bill which provides: “Section 5 shall have effect in substitution for Article 1 of the Model Law.”

⁵ The interpretation of the term “commercial” has been set out in the Model Law in a Note to Article 1 of the Model Law.

⁶ See paras 4.12-4.16 of the 1987 report which is accessible at: <http://www.hkreform.gov.hk/en/publications/runcitral.htm> (View Report : <http://www.hkreform.gov.hk/en/docs/runcitral-e.pdf>)

1.11 Similar proposal has been made in the *Report*:

“8.5 We are of the view that the new unitary regime should apply to all cases, domestic and international, and should not be limited to commercial arbitrations.”

1.12 The application of the draft Bill is therefore not limited to international commercial arbitrations.

1.13 Clause 5(1) further adapts Article 1(2) of the Model Law as revised by the UNCITRAL in its *Report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session (19 June-7 July 2006)* (“UNCITRAL report 2006”).⁷ It provides that the draft Bill applies to arbitrations where the place of arbitration is in Hong Kong. The arbitration agreement itself which gives rise to an arbitration however may be entered into in or outside Hong Kong.

Subclause (2)

1.14 Clause 5(2) provides that, for arbitrations which take place outside Hong Kong, only the following provisions of the draft Bill apply :

- (a) Clause 20 which gives effect to Article 8 of the Model Law which empowers a court to refer parties to arbitration where an action is brought in a matter governed by a valid arbitration agreement;
- (b) Clause 21 which provides for the application of Article 9 of the Model Law which states that a request to a court for the grant of interim measures of protection is compatible with an

⁷ Article 1(2) states: “The provisions of this Law, except articles 8, 9, 17H, 17I, 17J, 35 and 36, apply only if the place of arbitration is in the territory of this State.” See Annex 1 of the UNCITRAL report 2006 (General Assembly, Supplement No.17 (A/61/17)) which can be found at the following website:

<http://www.uncitral.org/uncitral/en/commission/sessions/39th.html>

(View Report : <http://daccess-ods.un.org/TMP/4439278.html>)

agreement submitting the underlying dispute to arbitration;

- (c) Clause 46 which empowers the Court of First Instance in Hong Kong to grant interim measures in relation to arbitral proceedings in or outside Hong Kong;
- (d) Clause 61 which specifies the special powers that may be exercised by the Court of First Instance in relation to any arbitral proceedings in or outside Hong Kong;
- (e) Clause 62 which provides for the enforcement of orders or directions made by arbitral tribunals in relation to arbitral proceedings whether in or outside Hong Kong;
- (f) Part 10 which is concerned with the recognition and enforcement of arbitral awards.

Subclause (3)

1.15 Clause 5(3) provides for the application of the draft Bill to statutory arbitrations under other Ordinances.

1.16 Clause 5(3) is modelled on section 2AB of the current Ordinance. Based on the exclusions in that section, Clause 5(3) has excluded the application of Clauses 20(2) to 20(4), 22(1), 59 and 75(8) and (9) to statutory arbitrations. The reasons for the exclusion are as follows:

- (a) Clause 20(2) to (4) should be excluded from applying to statutory arbitrations as the power of the court to refer the parties in an action to arbitration is not relevant in the context of statutory arbitrations.
- (b) Clause 22(1) (equivalent to section 4(1) of the current Ordinance) provides that unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party subject to the exceptions specified in Clause 22(2).⁸ We suggest that Clause 22(1) be excluded from its

⁸ Clause 22(1) of the draft bill is modelled on section 8(1) of the UK Arbitration Act and replaces section 4 of the current Ordinance. The application of section 4(1) of the current Ordinance has been excluded under section 2AB(3) of the same Ordinance.

application to statutory arbitrations as an enactment may provide that an arbitration agreement cannot be discharged by agreement of parties but may still be enforceable by or against the personal representatives of a party.⁹

- (c) Clause 59 (equivalent to section 2GD of the current Ordinance) provides for the power of an arbitral tribunal to extend the time limit for commencing arbitral proceedings or other dispute resolution procedures that must be exhausted before commencement of arbitral proceedings.¹⁰ We recommend that this provision be excluded from applying to statutory arbitrations as the statutory time limit fixed under other Ordinances for commencement of a statutory arbitration should not be subject to variation by the application of the draft Bill.¹¹
- (d) Clause 75(8) and (9) (equivalent to section 2GJ(3) of the current Ordinance) provides that, with one exception, any agreement for the parties to pay their own costs of arbitral proceedings is void.¹² We recommend the exclusion of the application of this provision to statutory arbitrations as there may be provisions under other Ordinances providing for alternative modes for assessment and award of costs under those statutory proceedings.

1.17 Clause 5(3)(b) provides that statutory arbitrations under other Ordinances shall be deemed, subject to the exception in Clause 5(3)(c), to have included all the provisions in Schedule 3 of the draft Bill.

⁹ The application of section 8 of the UK Arbitration Act (whether agreement discharged by death of a party) has been excluded by virtue of section 97 of the same Act.

¹⁰ Clause 59 is originally section 2GD of the current Ordinance. The application of section 2GD to statutory arbitrations has been excluded under section 2AB(3) of the current Ordinance.

¹¹ Section 12 of the UK Arbitration Act, being the equivalent provision to Clause 59 of the draft Bill, has also been excluded under section 97 of the UK Act. Section 97(b) of the UK Arbitration Act provides: “97. The following provisions of Part 1 do not apply in relation to a statutory arbitration - ... (b) section 12 (power of court to extend agreed time limits); ...”.

¹² Clause 75(8) and (9) of the draft bill is adapted from section 2GJ(3) of the current Ordinance. The application of section 2GJ(3) to statutory arbitrations has been excluded under section 2AB(3) of the current Ordinance.

Clause 5(3)(b) seeks to replace section 2AB(1) of the current Ordinance. Section 2AB(1) provides that the current Ordinance applies to arbitrations under every other Ordinance as if the arbitration were under a domestic arbitration agreement.¹³ As domestic arbitrations cease to exist under the new unitary statutory regime, Clause 5(3)(b) allows statutory arbitrations to continue to have access to the procedural arrangements available (now included in Schedule 3 to the draft bill) under the former domestic regime. **Views are sought with respect to the deeming provision under Clause 5(3)(b).**

Clause 6 Ordinance to apply to arbitration agreements and arbitrations to which Government is party

1.18 Clause 6 replaces section 47 of the current Ordinance.¹⁴ It provides that the draft Bill applies to any arbitration agreement to which the Government is a party and any arbitration to which the Government is a party.

¹³ The effect of section 2AB(1) is to deem all statutory arbitrations to be domestic arbitrations. Section 2AB(1) of the current Ordinance provides: “(1) This Ordinance (other than the provisions specified in subsection (3)) applies to arbitrations under every other Ordinance, whether passed before or after the commencement of this section, as if – (a) the arbitration were under a domestic arbitration agreement; and (b) the other enactment were such an agreement.”

¹⁴ Section 47 of the current Ordinance provides: “This Ordinance (other than Part IV) [Enforcement of Convention Awards] binds the Government.”

PART 2

GENERAL PROVISIONS

Clause 7 Article 1 of UNCITRAL Model Law (Scope of application)

2.1 Clause 7 expressly provides for the substitution of Clause 5 for Article 1 of the Model Law.

2.2 We have explained the reasons for substituting Article 1(1) and (2) in Part 1.¹⁵ We further recommend the substitution of the remaining provisions of Article 1 of the Model Law:

- (a) Article 1(3) and (4) of the Model Law defines when an arbitration is “international”. As the distinction between “domestic” and “international” arbitrations will be abolished under the new statutory regime, the above provision is not applicable under the draft Bill;
- (b) Article 1(5) excludes non-arbitrable subject matter from arbitration. We consider that it is not necessary to include Article 1(5) in the draft Bill.¹⁶ The question of what may validly be arbitrated should be left to be dealt with by the general law or at the stage of enforcement. It would not be practicable to make an exhaustive list in the draft Bill of matters that are not arbitrable as to do so would hinder development of the law.

¹⁵ See paras 1.7 to 1.13 of Part 1 of this Consultation Paper.

¹⁶ Article 1(5) of the Model Law establishes that the Model Law does not affect other laws of the enacting State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of the Model Law. Common examples that are excluded under national laws from arbitration include bankruptcy, anti-trust, securities or patents.

Clause 8 Article 2 of the UNCITRAL Model Law (Definitions and rules of interpretation)

2.3 Clause 8(1) provides that Clause 2 shall have effect in substitution for Article 2 of the Model Law. The definitions of some of the terms and the rules of interpretations found in Article 2 of the Model Law have been adapted with modifications and become part of Clauses 2 and 23(2).

Clause 9 Article 2A of the UNCITRAL Model Law (International origin and general principles)

2.4 Clause 9 gives effect to the new Article 2A of the Model Law as adopted by the UNCITRAL in 2006.

2.5 Article 2A(1) of the Model Law is similar to section 2(3) of the current Ordinance. It sets out the principle that in the interpretation of the Model Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith. Such a provision is intended to “facilitate interpretation by reference to internationally accepted principles” and “would be useful and desirable because it would promote a more uniform understanding of the Arbitration Model Law”.¹⁷

Repeal of the Sixth Schedule to the current Ordinance

2.6 Pursuant to section 2(3) of the current Ordinance, in interpreting and applying the provisions of the Model Law, regard may be had to the documents specified in the Sixth Schedule to the current Ordinance. It is recommended in the *Report* that the existing documents listed in the Sixth Schedule should be retained with other documents added to a new list.¹⁸

¹⁷ At page 29, paras 174 and 175, UNCITRAL report 2006.

¹⁸ See paras 48.7-48.8 of the *Report*.

2.7 However, in view of the fact that some of the documents referred to in the Sixth Schedule are already outdated and in order to avoid the inclusion of a massive volume of new documents to the list, we take the view that the relevant part of section 2(3) of and the Sixth Schedule to the current Ordinance are no longer necessary. We consider that it would be desirable to allow a party to arbitral proceedings to refer to any case law, reports or any other relevant materials e.g. preparatory materials of the Model Law in the course of the proceedings. It is then within the power of the arbitral tribunal or the court to decide whether those documents or materials are indeed relevant and, if so, to determine the weight to be attached to them.

Clause 10 Article 3 of UNCITRAL Model Law (Receipt of written communications)

2.8 Clause 10 provides for the application of Article 3 of the Model Law. The parties to an arbitration agreement or arbitral proceedings are free to agree on the procedural rules for delivery of written communications and to determine when they have been received in arbitral proceedings. In the absence of such agreement, Clause 10 will govern the matter relating to the receipt of written communications in arbitral proceedings. It is to be noted that Clause 10 does not apply to court proceedings.¹⁹

2.9 The *Report* suggested that “it is necessary to consider updating it [Article 3] to take into account new forms of electronic communications”.²⁰ We support the recommendation made in the *Report*. We propose to add new provisions in Clause 10(2) and (3) to the effect that without prejudice to Article 3 of the Model Law in Clause 10(1), a written communication will be deemed to have been received on the day it is sent, if it is sent by any means by which information can be recorded and transmitted to the addressee and if there is a record of the receipt of the communication by the addressee. The necessity for a record of the receipt by the addressee ties in with the requirement for notice of commencement of arbitral proceedings under Clause 50.

¹⁹ See *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (Vienna, 3-21 June 1985) (A/40/17)*, paras 45 and 106.

²⁰ See paras 10.2 - 10.4 of the *Report*.

Clause 11 Article 4 of UNCITRAL Model Law (Waiver of right to object)

2.10 Clause 11 gives effect to Article 4 of the Model Law.

2.11 Article 4 of the Model Law provides for an implied waiver of the right to object to any non-compliance with any requirement under the arbitration agreement or the draft Bill in the case of delay in raising the objection.

2.12 We agree with the recommendation in the *Report* that Article 4 of the Model Law “is to be adopted unchanged and applies in all cases”.²¹

Clause 12 Article 5 of UNCITRAL Model Law (Extent of court intervention)

2.13 Clause 12 provides for the application of Article 5 of the Model Law.

2.14 Article 5 of the Model Law reaffirms the important principle which has been set out in Clause 3(2)(b) that the court shall not intervene in any matters governed by the draft Bill except where so provided in the draft Bill.

2.15 We agree with the recommendation in the *Report* that Article 5 of the Model Law “is to be adopted unchanged and applies in all cases”.²²

Clause 13 Article 6 of UNCITRAL Model Law (Court or other authority for certain functions of arbitration assistance and supervision)

2.16 Clause 13(1) provides that Clause 13(2) to (5) shall have effect in substitution for Article 6 of the Model Law.²³ The relevant

²¹ See para 11.4 of the *Report*.

²² See para 12.3 of the *Report*.

²³ Article 6 of the Model Law enables the legislature of each State enacting the Model Law to designate which court or authority in the State is competent to perform certain functions under

clauses designate the HKIAC and the Court of First Instance respectively as the competent authority and the competent court to exercise the functions and the powers of various provisions of the draft Bill. Such designating arrangements are the same as those under section 34C(3) and (4) of the current Ordinance.

Clause 14 Application of Limitation Ordinance and other limitation enactments to arbitrations

2.17 We agree with the recommendation in the *Report* that section 34(1), (2) and (5) of the Limitation Ordinance (Cap 347) should be incorporated into the draft Bill to make it more user-friendly.²⁴

2.18 Clause 14(1) provides that the Limitation Ordinance (Cap 347) and any other Ordinances relating to the limitation of actions shall apply to arbitrations as they apply to actions in the court. The term “court” in Clause 14(1) replaces the term “High Court” in section 34(1) of the Limitation Ordinance (Cap 347) so as to include any court of competent jurisdiction in Hong Kong as defined in the Interpretation and General Clauses Ordinance (Cap 1).

2.19 As provided for in Clause 14(2), a reference to the bringing of actions in the Limitation Ordinance (Cap 347) or any other Ordinances relating to the limitation of actions shall be construed as a reference to the commencement of arbitral proceedings in relation to arbitrations.

2.20 Clause 14(3) is adapted from section 34(2) of the Limitation Ordinance (Cap 347) to deal with the “*Scott v Avery*” situation where an arbitration agreement includes a term that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement.²⁵ Under Clause 14(3), a cause of

the Model Law. These functions relate to the appointment of an arbitrator (Article 11(3) and (4)), deciding on challenges to an arbitrator (Article 13(3)), deciding on the termination of the mandate of an arbitrator (Article 14(1)), ruling on the jurisdiction of the arbitral tribunal (Article 16(3)) and deciding on an application for setting aside an arbitral award (Article 34(2)).

²⁴ See para 29.3 of the *Report*.

²⁵ A “*Scott v Avery*” clause (after *Scott v Avery* (1865) 5 HL Cas 11) in an arbitration agreement creates an obligation to refer a dispute to arbitration and makes it an express term of the arbitration agreement that no action may be brought on the substantive contract until an arbitration has been held and an award made. It does not exclude but postpones a right of

action is deemed to have accrued at the time when it would have accrued but for that term in the agreement, so as not to cause any delay of a party's right of access to the court.

2.21 Under Clause 14(4), where a court sets aside an award, the court may further order that the period between the commencement of the arbitration and the date of the order of the court shall be excluded in the computation of the limitation period in respect of the matter submitted to arbitration. We propose that an order of the court under Clause 14(4) shall not be subject to any further appeal in order not to cause undue delay to the commencement of new arbitral proceedings over the same subject matter in dispute. **Views are sought on this proposal.**

2.22 A recommendation has been made in the *Report* to repeal section 34(4) of the Limitation Ordinance (Cap 347) and replace it with a provision equivalent to section 76 of the UK Arbitration Act, the latter of which contains provisions on services of notices and other documents in pursuance of an arbitration agreement or for the purposes of arbitral proceedings.²⁶ However, we find the provision in section 76 of the UK Arbitration Act which permits a notice or other document to be served on a person "by any effective means" to be too broad in its scope of application. We prefer to rely on Clause 10 which provides for specific means of delivery of written communications and their deemed receipt.

2.23 As the relevant provisions under section 34 of the Limitation Ordinance (Cap 347) have been adapted and incorporated into Clause 14, we propose that section 34 of the Limitation Ordinance (Cap 347) should be repealed.

Clause 15 Reference of interpleader issue to arbitration by court

2.24 Clause 15 is adapted from section 10 of the UK Arbitration Act.

access to the court: see Mustill & Boyd *Commercial Arbitration* (2nd Ed 1989, Butterworths, London) chapter 13.

²⁶ See para 29.3 of the *Report* .

2.25 Clause 15, which is intended to replace section 7 of the current Ordinance, makes it mandatory for the court in interpleader proceedings to refer the competing claimants to arbitration if the subject matter falls within the scope of an arbitration agreement between those claimants unless the circumstances are such that legal proceedings in respect of the subject matter would not be stayed.

2.26 Where an interpleader issue is covered by an arbitration agreement, a court before which an action is brought may refuse to refer the parties to arbitration under Clause 15(1) on grounds such as those specified in Article 8(1) of the Model Law as incorporated under Clause 20(1), namely, where it finds that an arbitration agreement is null and void, inoperative or incapable of being performed. We consider that a direction of the court under Clause 15(1) should be subject to appeal with leave of the court as an order to grant or refuse mandatory stay of legal proceedings would bring about serious consequence on the parties. By providing for the possibility of appeal against a direction of the court made under Clause 15(1), the procedures for application for stay of legal proceedings under Clause 15 will be consistent with those proposed under Clause 20. **Views are sought as to whether or not a direction under Clause 15(1) should be subject to appeal with leave.**

Clause 16 Proceedings to be heard in open court unless otherwise ordered

2.27 Clause 16 replaces section 2D of the current Arbitration Ordinance.

2.28 The *Report* recommended the retention of section 2D which makes it mandatory for proceedings under the current Ordinance in the Court of First Instance or the Court of Appeal in Hong Kong to be heard otherwise than in open court upon the application of any party to the proceedings. It has further been suggested in the *Report* that the application of such provision should be extended to relevant proceedings before the Hong Kong Court of Final Appeal.²⁷

²⁷ See para 8.17 of the *Report*.

2.29 However, we take the view that it is necessary to balance the need to protect the confidentiality of arbitral proceedings as a consensual method of dispute resolution on the one hand, and the public interest in having transparency of process and public accountability of the judicial system on the other. Having taken into account the above considerations, it is provided under Clause 16(1) that proceedings under the new Ordinance in the court shall be heard in open court. However, under Clause 16(2), upon application of any party, the court shall order those proceedings to be heard otherwise than in open court unless, in any particular case, the court is satisfied that those proceedings ought to be heard in open court.

2.30 Clause 16(3) provides that an order of the court under Clause 16(2) shall be subject to no appeal. We consider that as such an order only involves a relatively minor procedural matter, it is not necessary for an appeal procedure to be provided.

2.31 We agree with the recommendation in the *Report* that Clause 16 should be applicable to relevant proceedings in the court in Hong Kong including the Court of Final Appeal.

Clause 17 Restrictions on reporting of proceedings heard otherwise than in open court

2.32 Clause 17(1) to (5) is adapted from section 2E of the current Ordinance and empowers the court to give directions as to what information relating to proceedings heard otherwise than in open court may be published.

2.33 Clause 17(6) provides that a direction of the court given under Clause 17 shall be subject to no appeal. We take the view that as such direction is only concerned with a relatively minor procedural matter, it is not necessary for an appeal procedure to be provided.

2.34 We support the recommendation in the *Report* that Clause 17 should be made applicable to relevant proceedings in the court in

Hong Kong including the Court of Final Appeal.²⁸

Clause 18 Disclosure of information relating to arbitral proceedings and awards prohibited

2.35 Clause 18 gives effect to the proposal in the *Report* for the adoption of “a provision to further safeguard the confidentiality in arbitration”.²⁹ The *Report* recommended the adding of a provision similar to section 14 of the New Zealand Arbitration Act 1996 for the above purpose.³⁰

2.36 Under Clause 18, the parties are deemed to have agreed not to publish, disclose or communicate any information relating to arbitral proceedings under the arbitration agreement or to an award made in those proceedings, subject to certain exceptions stated in that clause. The first exception is where the parties otherwise agree. The second exception is that disclosure of such information is permitted if the publication, disclosure or communication is contemplated by the draft Bill; or if a party is obliged by law to make such publication, disclosure or communication to any government body, regulatory body, court or tribunal; or if the publication, disclosure or communication is made to a professional or other advisor of any party.

²⁸ Ibid.

²⁹ See para 8.18 of the *Report*.

³⁰ Ibid.

PART 3

ARBITRATION AGREEMENT

Clause 19 Article 7 of UNCITRAL Model Law (Definition and form of arbitration agreement)

3.1 Clause 19(1) replaces section 2AC of the current Ordinance and provides that Option I of the revised Article 7 of the Model Law shall have effect.

3.2 The UNCITRAL has in the UNCITRAL report 2006 approved revision to Article 7 of the Model Law. The purpose of the revision has been explained as follows:

“It was recalled that the Working Group’s intention in revising article 7 of the Arbitration Model Law was to update domestic laws on the question of the writing requirement for the arbitration agreement, while preserving enforceability of such agreements as foreseen in the New York Convention. The Commission had before it two texts for consideration, the first gave a detailed description of how the writing requirement could be satisfied (the revised draft article 7) and the other omitted the writing requirement altogether (the alternative proposal). ...”³¹

3.3 Option I of the revised Article 7 permits an arbitration agreement to relate to existing or future disputes. It requires an arbitration agreement to be in writing and defines what will constitute writing for this purpose.

3.4 Option II of the revised Article 7 merely states that an arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether

³¹ See para 147 of the UNCITRAL report 2006.

contractual or not.

3.5 We are of the view there should be a requirement for an arbitration agreement to be in writing and this is in fact the statutory position at present. Option I, however, provides a wide meaning to the words “in writing” and takes account of the use of modern means of communication including electronic communication. Option II in this regard does not take heed of the modern means by which arbitration agreements may be made nor does it require arbitration agreements to be in writing. Option II is likely to be incompatible with Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958 (“New York Convention”) which requires arbitration agreements to be in writing. We recommend the adoption of Option I of the revised Article 7 of the Model Law.

3.6 Clause 19(2) reproduces section 2AC(2)(a) and (e) of the current Ordinance. It supplements what constitutes an arbitration agreement in writing referred to in Clause 19(1).

3.7 Clause 19(3) is equivalent to section 2AC(3)(a) of the current Ordinance. It makes additional provision for what constitutes an arbitration agreement for the purpose of Clause 19(1).

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

3.8 As recommended in the *Report*, Clause 20(1) gives effect to Article 8 of the Model Law³². It requires the court, upon the request of a party, to refer parties to arbitration where an action is brought before the court in a matter which is the subject of an arbitration agreement, unless the court finds that the arbitration agreement is “null and void, inoperative or incapable of being performed”. Such a request must be made before the requesting party submits his first statement on the substance of the dispute.

³² See paras 15.1-15.4 of the *Report*.

3.9 Clause 20(2) is adapted from section 6(2) of the current Ordinance. However, under the existing provision, where legal proceedings have been brought in any matter which is subject to an arbitration agreement, the court may only decline to make an order for stay of legal proceedings where the dispute involves a claim or other matter that is within the jurisdiction of the Labour Tribunal. We find the existing provision too narrow in scope in view of the concern that employees with weaker bargaining power could be denied access to the court by standard arbitration clauses in their employment contracts.³³ We propose to expand the cases in which the court may decide whether or not to refer to arbitration, under Clause 20(2), to include matters involving claims or disputes made pursuant to or arising under any employment contract.

3.10 Clause 20(3) reproduces section 6(3) of the current Ordinance. It provides that the operation of Clause 20(1) and (2) is subject to Clause 15 of the Control of Exemption Clauses Ordinance (Cap 71). Clause 20(3) thus protects consumers from being subject to enforcement of agreements to submit future differences to arbitration without their consent.

3.11 Clause 20(5) further provides that where the parties in an action are referred to arbitration, the court shall order a stay of legal proceedings in that action.

³³ In *Paquito Lima Buton v Rainbow Joy Shipping Limited Inc* [2007] 1 HKLRD 926, the applicant (being the employee) sustained injuries in the course of his employment with the respondent (being the employer) on board a vessel. The applicant commenced proceedings in the District Court in Hong Kong for compensation under the Employees' Compensation Ordinance (Cap 282). The respondent applied for an order that the proceedings be stayed and that the claims of the applicant be referred to arbitration pursuant to the Arbitration Ordinance (Cap 341). It was held by the Hong Kong Court of Appeal that the applicant's contract of employment included an international arbitration agreement so that pursuant to the Arbitration Ordinance (Cap 341), the UNICITRAL Model Law applied. Under Article 8(1) of the Model Law, where a party to the arbitration so requested, there would be a mandatory stay of court proceedings in favour of arbitration unless the court found that the agreement was null and void, inoperative or incapable of being performed. On the facts of the case, the arbitration agreement was not found to be null and void. The Court of Appeal ruled that Article 8(1) of the Model Law applied and the Court had no discretion but to order a mandatory stay and that the claims of the applicant had to be referred to arbitration pursuant to the arbitration agreement. Application by the applicant for leave to appeal to the Court of Final Appeal has been granted by the Court of Final Appeal in September 2007.

3.12 Clause 20(6) and (7) is added, as recommended in the *Report*, to allow the court to order retention of property arrested in admiralty proceedings as security for the satisfaction of any arbitral award where admiralty proceedings are stayed.³⁴ Alternatively, the court may order a stay of admiralty proceedings and refer them to arbitration upon the giving of equivalent security.

3.13 We consider that an appeal procedure should be provided as a decision of the court on whether to refer the parties to arbitration and to order a stay of legal proceedings is a matter of serious consequence to the parties and the grounds upon which a grant or refusal may be made may involve complex legal arguments. **We further suggest that leave of the court should be required for such appeal. Views are sought as to whether or not a decision of the court under Clause 20(1) and (2) should be subject to appeal with leave.**

3.14 On the other hand, we propose that an order of the court made under Clause 20(6) relating to the staying of admiralty proceedings subject to the condition of giving security and the retention of property arrested in those proceedings as security should not be subject to any appeal. Such an order of the court apparently involves a relatively minor procedural matter. It may however affect a party's ability to proceed with the matter in dispute if a party is not able to provide security. **Views are sought on this proposal.**

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

3.15 As recommended in the *Report*, Clause 21 gives effect to Article 9 of the Model Law which sets out the dual principles that a party does not waive its right to go to arbitration by requesting interim measures of protection from the court and the court is not prevented from granting such measures by the existence of an arbitration agreement.³⁵

³⁴ See paras 16.12-16.15 of the *Report*.
³⁵ See paras 16.1-16.6 of the *Report*.

Clause 22 Whether agreement discharged by death of a party

3.16 Clause 22 replaces section 4 of the current Ordinance. The present statutory provision is that an arbitration agreement is not discharged by the death of a party and may be enforceable by or against the personal representative of the deceased. In line with the recommendation in the *Report* to give effect to party autonomy, Clause 22 provides that the parties can agree that death shall have the effect of discharging the arbitration agreement.⁶

PART 4

COMPOSITION OF ARBITRAL TRIBUNAL

Division 1 – Arbitrators

4.1 Part 4 relates to the composition of an arbitral tribunal and is divided into two Divisions. Division 1 is concerned with the appointment and challenge of arbitrators. It also sets out the procedures for the appointment of umpires and their functions in arbitral proceedings. “Arbitrator” has been defined under Clause 2(1) to include, an umpire except in Clauses 23, 24, 29, 30, 33, 66, Schedule 2 and section 1 of Schedule 3 in this Part. Division 2 deals with the appointment of mediators and specifies the circumstances under which an arbitrator may act as a mediator.

Clause 23 Article 10 of UNCITRAL Model Law (Number of Arbitrators)

4.2 As recommended in the *Report*, Clause 23(1) gives effect to Article 10(1) of the Model Law which provides that the parties are free to determine the number of arbitrators.³⁶

4.3 We have incorporated Article 2(d) of the Model Law into Clause 23(2) so as to give the parties the right to authorize a third party, including an institution, to make that determination.

4.4 Under the current Ordinance, in the absence of agreement, the default number of arbitrator shall be one in domestic arbitration and either one or three, as decided by the HKIAC, in international arbitration³⁷. Such provision applies to the exclusion of Article 10(2) of the Model Law which, on the other hand, stipulates that where the parties have failed to make a determination, the number of arbitrators shall be three.

³⁶

See para 17.4 of the *Report*.

³⁷

See sections 8 and 34C(5) of the current Ordinance.

4.5 We prefer to preserve the existing statutory position by the operation of an opt-in provision set out in section 1 of Schedule 3 to the draft Bill which, in the circumstances where that section applies, requires a dispute to be referred to a sole arbitrator. Clause 23(3) is also based on the current statutory provisions by providing that in default of agreement on the number of arbitrators and where section 1 of Schedule 3 does not apply, the number of arbitrators shall be either one or three as decided by the HKIAC in any particular case.

Clause 24 Article 11 of UNCITRAL Model Law (Appointment of arbitrators)

4.6 Clause 24 replaces section 12 of the current Ordinance.

4.7 Clause 24(1), in accordance with the recommendation in the *Report*, gives effect to Article 11 of the Model Law which provides the procedures for the appointment of arbitrators.³⁸ It establishes the basic principle that the parties may agree on a procedure for appointment of an arbitrator. In the absence of agreement by the parties, the mechanism for such appointment set out in Clause 24(1) will apply. If the procedure agreed on by the parties fails to produce the necessary appointment, the HKIAC³⁹ is to appoint the arbitrator unless the agreement on the appointment procedure provides other means for securing the appointment. It also lays down the guidelines for the exercise of the power of appointment of an arbitrator by the HKIAC.

4.8 Clause 24(2) to (4) are added, as proposed in the *Report*, to provide the appointment procedures respectively for arbitrations with an even number of arbitrators, arbitrations with an uneven number of arbitrators greater than three and any other cases where there are more than two parties to the arbitration.⁴⁰

³⁸ See para 18.9 of the *Report*.

³⁹ According to Clause 13(2) of the draft Bill, the functions of the “court or other authority” referred to in Article 11(3) and (4) of the Model Law, as reproduced in Clause 24(1), shall be performed by the HKIAC.

⁴⁰ See para 18.10 of the *Report*.

4.9 We have also provided in Clause 24(5) that any appointment of an arbitrator made by the HKIAC shall be deemed to have been made with the agreement of all parties and shall be subject to no appeal.⁴¹

Clause 25 Article 12 of UNCITRAL Model Law (Grounds for challenge)

4.10 As recommended in the *Report*, Clause 25 provides for the application of Article 12 of the Model Law.⁴² It sets forth the grounds for challenging an arbitrator and the requirements of disclosure of circumstances which are likely to affect the impartiality and independence of persons who have been approached for possible appointment as arbitrators and persons appointed as arbitrators throughout the arbitral proceedings.

Clause 26 Article 13 of UNCITRAL Model Law (Challenge procedure)

4.11 As recommended in the *Report*, Clause 26(1) provides for the application of Article 13 of the Model Law.⁴³ It recognizes the parties' freedom to agree on a procedure for challenging an arbitrator. It further provides a supplementary challenge procedure in case the parties fail to agree on one. A decision of the Court of First Instance on the challenge shall be subject to no appeal pursuant to Article 13(3) of the Model Law as incorporated under Clause 26(1).

4.12 It is provided under Clause 26(2) that the Court of First Instance may refuse to grant leave for the enforcement of an award made by the arbitral tribunal, including the challenged arbitrator, during the period while a request for the Court of First Instance's decision on the challenge is pending.

4.13 We have, in accordance with the proposal in the *Report*, provided in Clause 26(3) that an arbitrator who is challenged under Article 13 of the Model Law in Clause 26(1) may withdraw from his

⁴¹ See para 18.14 of the *Report*.

⁴² See para 19.2 of the *Report*.

⁴³ See para 20.6 of the *Report*.

office if he considers it appropriate in the circumstances of the challenge.⁴⁴

4.14 We have also added a provision under Clause 26(5) to empower the Court of First Instance, upon deciding that a challenge to an arbitrator should be upheld, to set aside an arbitral award which was made by the challenged arbitrator during the period when the request for that Court to decide on the challenge was pending.

Clause 27 Article 14 of UNCITRAL Model Law (Failure or impossibility to act)

4.15 As recommended in the *Report*, Clause 27 gives effect to Article 14 of the Model Law.⁴⁵ It sets out the grounds and methods for terminating the mandate of an arbitrator. Clause 27 replaces section 3 of the current Ordinance which applies in relation to domestic arbitration.⁴⁶ Article 14(1) of the Model Law as applied under Clause 27 provides that the decision of the Court of First Instance on a request for termination of the mandate of an arbitrator shall be subject to no appeal.

Clause 28 Article 15 of UNCITRAL Model Law (Appointment of substitute arbitrator)

4.16 Clause 28, in accordance with the recommendation in the *Report*, gives effect to Article 15 of the Model Law. It provides a mechanism for appointing substitute arbitrators. Clause 28 replaces section 9 and relevant provisions under section 12 of the current Ordinance which are now applicable only to domestic arbitration.⁴⁷

Clause 29 Death of arbitrator or person appointing him

4.17 As recommended in the *Report*, Clause 29 preserves the

⁴⁴ Ibid.

⁴⁵ See para 21.5 of the *Report*.

⁴⁶ See para 21.6 of the *Report*. Section 3 of the current Ordinance provides that the authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the Court or a judge thereof.

⁴⁷ See paras 22.1-22.3 of the *Report*.

current statutory position by providing that the mandate of an arbitrator terminates on his death.⁴⁸ As proposed in the *Report*, we have also added in a provision similar to section 4(2) of the current Ordinance that the death of the person by whom an arbitrator was appointed does not revoke the arbitrator's authority unless otherwise agreed by the parties.⁴⁹

Clause 30 Appointment of umpire

4.18 Under section 10(1) of the current Ordinance which applies to domestic arbitration, every arbitration agreement with a reference to two arbitrators, subject to any contrary intention, shall be deemed to include a provision that the two arbitrators may appoint an umpire at any time after they are themselves appointed and shall do so forthwith if they cannot agree. There are deeming provisions under section 10(2) and (3) regulating the procedures, again subject to any contrary agreement, as to when and how an umpire may enter on the reference.

4.19 There is no provision in the Model Law for the appointment of umpires.

4.20 As recommended in the *Report*, we have extended the application of Clause 30 to arbitrations involving an even number of arbitrators.

Clause 31 Functions of umpire in arbitral proceedings

4.21 As recommended in the *Report*, we have retained relevant provisions concerning umpires in the current Ordinance with adaptations.⁵⁰ We consider that, unless the parties have agreed otherwise, the arbitrators should be free to agree what the functions of an umpire are, when the umpire is to attend the arbitral proceedings as well as when and the extent to which he is to replace the arbitrators as the arbitral tribunal. This is dealt with in Clause 31(1) and (2). It is also stipulated in Clause 31(3) to (5) that in the absence of agreement between the parties or the arbitrators, an umpire should attend the arbitral

⁴⁸ See paras 21.8-21.10 of the *Report*.

⁴⁹ Ibid.

⁵⁰ See paras 18.15-18.22 of the *Report*.

proceedings and should be supplied with the same documents and materials as other arbitrators. Clause 31(6) and (7) provides that an umpire may replace the arbitrators as the arbitral tribunal on a matter relating to the dispute over which the arbitrators cannot agree.

4.22 Clause 31(8) provides that where the arbitrators fail to observe the procedure for their replacement by an umpire, a party may seek the assistance of the Court of First Instance who may order their replacement by the umpire as the arbitral tribunal. Under Clause 31(11), leave is required for any appeal against the decision of the Court. **Views are sought as to whether a decision of the Court of First Instance under Clause 31(11) to grant or refuse leave for appeal should be subject to appeal.**

4.23 We have provided in Clause 31(9)(a) for the arbitrators to refer particular matters relating to the dispute over which they disagree to the umpire while retaining jurisdiction on other matters if they consider that it would save costs to do so.⁵¹

Clause 32 Judges, etc. may be appointed as arbitrators

4.24 Clause 32 reproduces section 13A of the current Ordinance as recommended in the *Report*, which provides for the appointment of judges, District Judges, magistrates and public officers as sole arbitrators.⁵² Schedule 2 to the draft Bill deals with the applications of certain provisions in the draft Bill to judge-arbitrators and judge-umpires.

4.25 An alternative proposal made is that the draft Bill should no longer include any provision for the appointment of judicial officers as arbitrators subject to two exceptions. The reasons are twofold. Firstly, there is already a very large body of arbitrators available in Hong Kong and overseas, many of whom are retired judges. Secondly, the Model Law is based on the concept of minimal court intervention and whilst this in itself is not court intervention, it does nevertheless introduce a possible perception of such in foreign users or potential users of arbitration.

⁵¹ See para 18.18 of the *Report*.
⁵² See para 18.26 of the *Report*.

4.26 The first exception referred to in paragraph 4.25 above is that a judge, District Judge or magistrate may accept appointment as a sole arbitrator only in relation to arbitral proceedings of which he or she has been acting as a sole arbitrator prior to his or her taking up respectively the post of a judge, District Judge or magistrate. The second exception is that a judge, District Judge or magistrate is required to act as a sole arbitrator in any particular arbitral proceedings for any constitutional reason.

4.27 **Views are sought on the proposal and its exceptions set out in paragraphs 4.25 and 4.26 above.**

Division 2 – Mediators

Clause 33 Appointment of mediator

4.28 The *Report* recommends the retention of section 2A of the current Ordinance which relates to the appointment of a conciliator.⁵³ As “mediation” is defined under Clause 2(1) of the draft Bill to include “conciliation”, we consider it appropriate to replace the term “conciliator” with “mediator” in the draft Bill. In this connection, views are sought as to whether “mediator” should be defined in the draft Bill.

4.29 Clause 33(1) stipulates that where a written arbitration agreement provides for the appointment of a mediator by a person who is not a party to the arbitration and where such appointment has not been duly made, an application may be made by a party to the HKIAC for the HKIAC to appoint a mediator. Such appointment is to be made by the Court of First Instance or a judge thereof under the current Ordinance.

4.30 Under Clause 33(2), an appointment by the HKIAC shall be subject to no appeal. A mediator may act as an arbitrator in the circumstances specified under Clause 33(3).

⁵³ See para 38.13 of the *Report*.

Clause 34 Power of arbitrator to act as mediator

4.31 Clause 34 reproduces section 2B of the current Ordinance pursuant to the recommendation in the *Report*.⁵⁴ It empowers an arbitrator to act as a mediator upon consent of all parties in writing after the commencement of the arbitral proceedings. Clause 34(2) provides for a stay of the arbitral proceedings so as to facilitate the conduct of the mediation proceedings.

⁵⁴

Ibid.

PART 5

JURISDICTION OF ARBITRAL TRIBUNAL

Clause 35 Article 16 of UNCITRAL Model Law (Competence of arbitral tribunal to rule on its jurisdiction)

5.1 As recommended in the *Report*, Clause 35(1) gives effect to Article 16 of the Model Law.⁵⁵ It enables an arbitral tribunal to rule on its own jurisdiction. This provision is mandatory such that the parties cannot by agreement decide that an arbitral tribunal shall not have the power to rule on its own jurisdiction. It helps to avoid delays on arbitral proceedings as it empowers the arbitral tribunal to resolve issues on jurisdiction without having to stay the arbitral proceedings.

5.2 Under Clause 35(1), where an arbitral tribunal rules that it has jurisdiction, a party may, within a 30-day period, request the Court of First Instance to decide the matter. Where a decision of the Court of First Instance on the ruling of the arbitral tribunal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. No appeal lies from a decision of the Court of First Instance on the issue.

5.3 Clause 35(2) is added to specify some other matters that an arbitral tribunal may decide upon when it rules on its own jurisdiction in addition to those stipulated in Clause 35(1). The list as set out in Clause 35(2) is not exhaustive.

5.4 Clause 35(3) gives effect to the recommendation in the *Report* in respect of the jurisdiction of an arbitral tribunal to decide on a claim or counter-claim of a party arising out of a dispute that has been referred to arbitration.⁵⁶

⁵⁵ See para 24.6 of the *Report*.

⁵⁶ See paras 24.7-24.10 of the *Report*.

5.5 As recommended in the *Report*, Clause 35(4) is added to provide that the ruling of an arbitral tribunal that it does not have jurisdiction to decide a dispute shall be subject to no appeal.⁵⁷ Clause 35(5) gives effect to the recommendation in the *Report* that if an arbitral tribunal rules that it does not have jurisdiction to decide a dispute, the court, if it has jurisdiction, shall decide that dispute.⁵⁸

⁵⁷ See paras 24.11-24.13 of the *Report*.

⁵⁸ See para 24.14 of the *Report*.

PART 6

INTERIM MEASURES AND PRELIMINARY ORDERS

Division 1 – Interim measures

Clause 36 - Article 17 of UNCITRAL Model Law (Power of arbitral tribunal to order interim measures)

6.1 It has been recommended in the *Report* that Article 17 of the Model Law which deals with the power of arbitral tribunal to order interim measures is to be adopted unchanged.⁵⁹ However, we need to consider the revision to Article 17 as adopted by the UNCITRAL in its thirty-ninth session in 2006, as well as the addition of the new Articles 17A to 17J to the Model Law so adopted by the UNCITRAL.⁶⁰

6.2 Clause 36(1) gives effect to the revised Article 17 of the Model Law. Article 17(1) empowers an arbitral tribunal to grant interim measures at the request of a party unless the parties have agreed otherwise. Article 17(2) defines the meaning and purpose of an interim measure. Clause 36(2) extends such meaning to include an injunction but not an order made by an arbitral tribunal under Clause 57. We consider it necessary for an arbitral tribunal to be given the power under Clause 36(3), where the tribunal has granted an interim measure, to make an award to the same effect as such interim measure to facilitate the enforcement of the interim measure.

⁵⁹ See paras 25.6-25.10 of the *Report*.

⁶⁰ The reasons for the revision of Article 17 and the addition of Articles 17A to 17J have been stated at the UNCITRAL report 2006, at paragraph 88, as follows: “The Commission recalled that the provisions had been drafted in recognition not only that interim measures were increasingly being found in the practice of international commercial arbitration, but also that the effectiveness of arbitration as a method of settling commercial disputes depended on the possibility of enforcing such interim measures. ... General agreement was expressed as to the need for a harmonized and widely acceptable model legislative regime governing interim measures granted by arbitral tribunals and their enforcement as well as interim measures ordered by courts in support of arbitration. ...”.

Clause 37 - Article 17A of UNCITRAL Model Law (Conditions for granting interim measures)

6.3 We recommend the adoption of the new Article 17A of the Model Law, which deals with the grounds on which an interim measure may be granted by an arbitral tribunal.

Division 2 – Preliminary orders

Clause 38 - Article 17B of UNCITRAL Model Law (Applications for preliminary orders and conditions for granting preliminary orders)

6.4 We recommend the adoption of the new Article 17B of the Model Law, which deals with the application for a preliminary order and provides for the grounds on which a preliminary order may be granted by an arbitral tribunal.

Clause 39 - Article 17C of UNCITRAL Model Law (Specific regime for preliminary orders)

6.5 We also recommend the adoption of the new Article 17C of the Model Law, which provides for the giving of notice upon determination of an application for a preliminary order by an arbitral tribunal and the effect of such an order if granted.

Division 3 - Provisions applicable to interim measures and preliminary orders

Clause 40 - Article 17D of UNCITRAL Model Law (Modification, suspension, termination)

6.6 We recommend the adoption of the new Article 17D of the Model Law, which deals with the modification, suspension and termination of an interim measure or preliminary order granted by an arbitral tribunal.

Clause 41 - Article 17E of UNCITRAL Model Law (Provision of security)

6.7 We also recommend the adoption of the new Article 17E of the Model Law, which deals with the giving of security in connection with an interim measure or preliminary order to be granted by an arbitral tribunal.

Clause 42 - Article 17F of UNCITRAL Model Law (Disclosure)

6.8 We also recommend the adoption of the new Article 17F of the Model Law, which provides for the disclosure of circumstances relevant to the granting of an interim measure or preliminary order by an arbitral tribunal.

Clause 43 - Article 17G of UNCITRAL Model Law (Costs and damages)

6.9 We further recommend the adoption of the new Article 17G of the Model Law, which provides that the party requesting for an interim measure or preliminary order is liable for any costs or damages caused by the measure or order if that measure or order should not have been granted.

Division 4 – Recognition and enforcement of interim measures

Clause 44 - Article 17H of UNCITRAL Model Law (Recognition and enforcement)

6.10 It is provided under Clause 44 that the new Article 17H of the Model Law does not have effect as the enforcement of interim measures granted by an arbitral tribunal is dealt with under Clause 62.

Clause 45 - Article 17I of UNCITRAL Model Law (Grounds for refusing recognition or enforcement)

6.11 It is provided under Clause 45 that the new Article 17I of the Model Law does not have effect, also, as the enforcement of interim

measures granted by an arbitral tribunal is dealt with under Clause 62.

Division 5 – Court-ordered interim measures

Clause 46 Article 17J of UNCITRAL Model Law (Court-ordered interim measures)

6.12 Clause 46(1) provides that the new Article 17J of the Model Law does not have effect as it is intended that the power and procedures for the granting of interim measures by the Court of First Instance in support of arbitral proceedings, whether in or outside Hong Kong, are to be separately provided for in Clause 46(2) to (7).

6.13 Clause 46(2) preserves the existing statutory position under section 2GC(1)(c) of the current Ordinance by providing that the Court of First Instance may grant an interim measure in relation to arbitral proceedings which take place in or outside Hong Kong. The meaning of an interim measure granted by the court is provided for in Clause 46(8).

6.14 Clause 46(4)(a) and (5) to (7) reproduces the proposed amendments to be introduced into the current Ordinance as section 2GC(1A) to (1D) of the current Ordinance by Clause 11 of the Civil Justice (Miscellaneous Amendments) Bill 2007 (“CJMA Bill”). Under this clause, the Court of First Instance may grant an interim measure in relation to arbitral proceedings outside Hong Kong only if those proceedings are capable of giving rise to an arbitral award (whether interim or final) which may be enforced in Hong Kong under the new Ordinance or any other Ordinance.

6.15 An alternative proposal has been made that where arbitral proceedings take place outside Hong Kong, the Court of First Instance may only make an order to grant interim measure in relation to such proceedings if two conditions are satisfied –

- (1) that a court in the corresponding place of arbitration will act reciprocally to grant a similar order in aid of arbitral proceedings in Hong Kong; and

- (2) that the order to be made by the Court of First Instance belongs to a type of orders that may be made in Hong Kong in relation to arbitral proceedings conducted in Hong Kong.

6.16 We take the view that it may be difficult to adduce evidence to prove reciprocity particularly in urgent applications under the alternative proposal. We prefer to adopt the proposed provisions to be added as section 2GC(1A) to (1D) of the current Ordinance as introduced by the CJMA Bill⁶¹. However, we recommend that the second condition referred to in paragraph 6.15 above be added as one of the requirements to be satisfied for the grant of an interim measure by the Court of First Instance in relation to arbitral proceedings outside Hong Kong. This is now provided for in Clause 46(4)(b) of the draft Bill. **Views are invited on the proposals described in paragraphs 6.14 to 6.16.**

6.17 We propose that a decision of the Court of First Instance to grant or refuse to grant an interim measure shall be subject to appeal with leave of the court. We take the view that such a decision of the Court would be a matter of great significance to the parties. **Views are sought on this proposal.**

⁶¹ See paragraph 6.14 of this Consultation Paper.

PART 7

CONDUCT OF ARBITRAL PROCEEDINGS

Clause 47 Article 18 of UNCITRAL Model Law (Equal treatment of parties)

7.1 Clause 47(1) provides for the substitution of Article 18 of the Model Law by Clause 47(2) and (3).

7.2 Clause 47(2) provides that the parties shall be treated with equality. It is identical to the first part of Article 18(1) of the Model Law. The requirement that an arbitral tribunal is to be independent when conducting arbitral proceedings or when exercising its powers is added under Clause 47(3)(a) to give effect to the recommendation in the *Report*.⁶²

7.3 Clause 47(3)(b) requires that the parties should be given a “reasonable” opportunity to present their cases. However, the term “full” opportunity is used in Article 18 of the Model Law. We agree with the recommendation in the *Report* that the word “reasonable” should be used in place of “full”.⁶³ This gives an arbitral tribunal the power to control the conduct of the arbitral proceedings and is consistent with the statutory position under section 2GA(1)(a) of the current Ordinance.

7.4 The general duties of an arbitral tribunal to act fairly and impartially and to use appropriate procedures without unnecessary delay or expense, which have been specified in Clause 47(3)(b) and (c), are equivalent to those under section 2GA(1) of the current Ordinance.

Clause 48 Article 19 of UNCITRAL Model Law (Determination of rules of procedure)

7.5 The *Report* recommends that Article 19 of the Model Law

⁶² See para 6.7(a) of the *Report*.

⁶³ See para 26.4 of the *Report*.

should be adopted unchanged.⁶⁴ Clause 48(1) gives effect to Article 19(1) of the Model Law. Under this provision, the parties are free to agree on the arbitral procedure to be followed. Clause 48(2) then provides that, in the absence of such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. This is identical to the first part of Article 19(2) of the Model Law.

7.6 Clause 48(3) reproduces section 2GA(2) of the current Ordinance which allows an arbitral tribunal to receive any evidence it considers relevant to the arbitral proceedings. This provision would substitute the second part of Article 19(2) of the Model Law.

Clause 49 Article 20 of UNCITRAL Model Law (Place of arbitration)

7.7 In accordance with the recommendation in the *Report*, Clause 49 provides for the application of Article 20 of the Model Law.⁶⁵ It establishes the autonomy of the parties to choose the place of arbitration and provides that in default of agreement by the parties, the arbitral tribunal shall determine the place of arbitration having regard to the circumstances of the case, including the convenience of the parties. It further empowers the arbitral tribunal, unless otherwise agreed by the parties, to meet at any place it considers appropriate for specified purposes.

Clause 50 Article 21 of UNCITRAL Model Law (Commencement of arbitral proceedings)

7.8 Clause 50 gives effect to Article 21 of the Model Law.⁶⁶ It provides a rule for determining when the arbitral proceedings commence, subject to any other agreement between the parties. For the reasons given in paragraph 2.22 of PART 2 above, we do not agree with the proposal in the *Report* to adopt the provisions under section 76 of the UK Arbitration Act relating to service of notices and other documents. We do not find it necessary to amend Article 21 of the Model Law.

⁶⁴ See para 27.5 of the *Report*.

⁶⁵ See para 28.4 of the *Report*.

⁶⁶ See paras 29.1-29.4 of the *Report*.

Clause 51 Article 22 of UNCITRAL Model Law (Language)

7.9 As recommended in the *Report*, Clause 51 provides for the application of Article 22 of the Model Law.⁶⁷ Under this provision, the parties are free to agree on the language or languages to be used in the arbitral proceedings and that in the absence of agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. We do not consider it necessary to include in Clause 51 the relevant factors that have been set out in the *Report* in respect of which the arbitral tribunal needs to take into account in deciding the language or languages to be used.⁶⁸ We prefer to leave it to the discretion of the tribunal where required.

Clause 52 Article 23 of UNCITRAL Model Law (Statements of claim and defence)

7.10 Clause 52 gives effect to Article 23 of the Model Law as recommended in the *Report*. It provides for the requirements and procedures to be applied for the submission, supplements and amendments of the statements of claim and defence by the parties.⁶⁹

Clause 53 Article 24 of UNCITRAL Model Law (Hearings and written proceedings)

7.11 Clause 53 gives effect to Article 24 of the Model Law as recommended in the *Report*.⁷⁰ This provision stipulates the rules and procedures for determining whether oral hearings are to be held or whether the proceedings are to be conducted on the basis of documents and other materials. It further sets out the requirements that the parties need to comply with to ensure procedural fairness in the conduct of arbitral proceedings.

⁶⁷ See paras 30.1-30.4 of the *Report*.

⁶⁸ See para 30.2 of the *Report*.

⁶⁹ See paras 31.1-31.2 of the *Report*.

⁷⁰ See paras 32.1-32.3 of the *Report*.

Clause 54 Article 25 of UNCITRAL Model Law (Default of a party)

7.12 Clause 54 replaces section 23C of the current Ordinance.⁷¹ Clause 54(1) gives effect to Article 25 of the Model Law as recommended in the *Report*.⁷² It provides for the powers of the arbitral tribunal to terminate or continue the arbitral proceedings upon default by a party to communicate the statement of claim or the statement of defence, or in case of a party's failure to appear at a hearing or to produce documentary evidence.

7.13 Clause 54(3) empowers the arbitral tribunal to make peremptory orders. Clause 54(4) sets out the directions that may be made by the tribunal and the inferences that may be drawn in case of the failure by a party to comply with such peremptory order. It further empowers the tribunal to proceed to make awards or cost orders in such cases.

Clause 55 Article 26 of UNCITRAL Model Law (Expert appointed by arbitral tribunal)

7.14 Clause 55(1) gives effect to Article 26 of the Model Law in accordance with the recommendation in the *Report*.¹³ Unless the parties have agreed otherwise, this provision empowers an arbitral tribunal to appoint one or more experts to report to it on specific issues to be determined by the tribunal. Subject to any agreement between the parties, a party may request or the arbitral tribunal may require the expert to participate in the hearing and to be questioned by the parties. Also, as recommended in the *Report*, Clause 55(2) makes clear that the arbitral tribunal may appoint experts, assessors or legal advisers to report to it on matters relating to the assessment of the amount of the costs of the arbitral proceedings other than the fees and expenses of the arbitral tribunal.¹⁴

⁷¹ See para 25.27 of the *Report*.

⁷² See paras 33.1-33.3 of the *Report*.

Clause 56 Article 27 of UNCITRAL Model Law (Court assistance in taking evidence)

7.15 Clause 56(1) gives effect to Article 27 as proposed in the *Report*.⁷³ It allows an arbitral tribunal or a party with the approval of the arbitral tribunal to seek the assistance of the court in Hong Kong in taking evidence. The court may execute such request within its competence and according to its rules on taking evidence.

7.16 Clause 56(2) and (3) preserves the statutory position under section 2GC(3) and (4) of the current Ordinance respectively. It empowers the Court of First Instance to order a person to attend proceedings before an arbitral tribunal to give evidence or to produce documents or other evidence, and to issue a writ of *habeas corpus ad testificandum* requiring a prisoner to be taken before an arbitral tribunal for examination. Clause 56(5) provides that a decision or order of the Court of First Instance made under Clause 56 shall be subject to no appeal.

Clause 57 General powers exercisable by arbitral tribunal

7.17 Clause 57 is adapted from section 2GB of the current Ordinance. It specifies the general powers that may be exercised by an arbitral tribunal when conducting arbitral proceedings. The powers under Clause 57 include the powers to order security for costs, to direct discovery of documents, and to direct the inspection, preservation, detention or sale of property. The general powers exercisable by an arbitral tribunal under Clause 57(1), (7) and (8) are subject to any other agreement of the parties to the arbitral proceedings.

Clause 58 Arbitral tribunal may limit amount of recoverable costs

7.18 Clause 58 is adapted from section 2GL of the current Ordinance. Clause 58(1) empowers the arbitral tribunal to make a direction to limit the amount of recoverable costs of the arbitral proceedings, unless the parties have agreed otherwise.

⁷³ See paras 35.1-35.4 of the *Report*.

7.19 In accordance with the recommendation in the *Report*, Clause 58(2) provides that an arbitral tribunal may make or vary such direction on its own initiative or upon application by a party.⁷⁴ Clause 58(3) and (4) respectively makes clear that any such direction shall be made or varied sufficiently in advance and that the costs that may be limited only relate to the parties' own costs.⁷⁵

Clause 59 Power to extend time for arbitral proceedings

7.20 As recommended in the *Report*, Clause 59 is adapted from section 2GD of the current Ordinance.⁷⁶ Clause 59(1) to (5) provides for the power of the arbitral tribunal to extend time for the commencement of arbitral proceedings or for the commencement of any other dispute resolution procedure that must be exhausted before arbitral proceedings may be commenced. Clause 59(4) specifies the criteria for the grant of such extension. Clause 59(7) stipulates that the power of an arbitral tribunal to extend time is exercisable by the Court of First Instance if no arbitral tribunal which is capable of exercising that power exists at the relevant time.

7.21 We propose that a decision of the Court of First Instance under Clause 59(7) on whether to extend time for the commencement of relevant proceedings shall be subject to appeal with leave of the Court as such a decision of the Court is likely to affect the substantive rights of the parties in pursuing their claim. **Views are sought on this proposal.**

Clause 60 Order to be made in case of delay in pursuing claims in arbitral proceedings

7.22 As recommended in the *Report*, Clause 60 is adapted from section 2GE of the current Ordinance.⁷⁷

7.23 Under the current statutory provision, there is an implied

⁷⁴ See paras 43.25-43.27 of the *Report*.

⁷⁵ Ibid.

⁷⁶ See para 16.10-16.11 of the *Report*.

⁷⁷ Ibid.

term in an arbitration agreement that a party has to prosecute his claim under the arbitration agreement without delay. However, it is possible to construe any delay in prosecuting a claim under the arbitration agreement as including a delay in commencing arbitral proceedings. We take the view that such interpretation is against the present legislative intent which is to encourage parties to resolve the dispute by settlement without having to go through the arbitral process. We further consider that there is likely to be uncertainty as to what constitutes unreasonable delay prior to the expiry of the limitation period for commencement of arbitral proceedings in any particular case.

7.24 We therefore propose to make it clear in Clause 60(1) that a party shall pursue his claim under the arbitration agreement without unreasonable delay after the arbitral proceedings have commenced, subject to any express term in the agreement to the contrary.

7.25 Clause 60(5) stipulates that the power of an arbitral tribunal to dismiss a claim or to prohibit a party from commencing further arbitral proceedings in respect of a claim for unreasonable delay in pursuing the claim is exercisable by the Court of First Instance if no arbitral tribunal which is capable of exercising that power exists at the relevant time. We consider that an appeal procedure where leave of the court is required should be provided in respect of a decision of the Court of First Instance made under Clause 60(5) as such a decision is likely to affect the substantive rights of the parties. **Views are sought on the above proposal.**

Clause 61 Special powers of Court in relation to arbitral proceedings

7.26 Clause 61 specifies the special powers that may be exercised by the Court of First Instance in support of arbitral proceedings in or outside Hong Kong. The powers under Clause 61 include the power to direct the inspection, preservation, detention or sale of property.

7.27 Clause 61(1) is adapted from section 2GC(1)(b) of the current Ordinance. Clause 61(3) and (4) reproduces section 2GC(5) and (6) respectively of the current Ordinance to ensure that the Court of First

Instance will only interfere with the arbitral process when it is considered necessary to do so. Under Clause 61(5), the Court of First Instance, after having made an order, may leave it to the arbitral tribunal to decide whether and, if so, when the order made by the Court shall cease to have effect.⁷⁸ Clause 61(6), (7) and (8) is modelled on the proposed amendments to be introduced into the current Ordinance as section 2GC(1A) to (1D) of the current Ordinance by clause 11 of the CJMA Bill.

7.28 Clause 61(9) provides that an order of the Court of First Instance made under Clause 61 shall be subject to appeal with leave of the Court. We take the view that as such an order may affect property rights, an appeal procedure is required to be provided.

Clause 62 Enforcement of orders and directions of arbitral tribunal

7.29 Clause 62(1) seeks to preserve the present statutory position under section 2GG(1) of the current Ordinance in respect of the enforcement of orders or directions made by an arbitral tribunal in relation to arbitral proceedings conducted in or outside Hong Kong.

7.30 It has been made clear in Clause 62(4) that such an order or direction includes an interim measure.

7.31 We have also, as recommended in the *Report*, included in Clause 62(2) a provision that leave for enforcement of an order or direction made outside Hong Kong shall not be granted by the court in Hong Kong unless it can be demonstrated that the order or direction belongs to a type or description of orders or directions that may be made in Hong Kong in relation to arbitral proceedings by an arbitral tribunal.⁷⁹

7.32 However, we do not agree with the proposal made in the *Report* that where an arbitral proceeding takes place outside Hong Kong, leave should only be granted for the enforcement of any orders or directions including interim measures made by such arbitral tribunal in a foreign jurisdiction if a court in the corresponding place of arbitration

⁷⁸ See paras 16.10-16.11 of the *Report*.

⁷⁹ See paras 45.7 and 45.12(b) of the *Report*.

will act reciprocally in respect of such orders or directions made in arbitral proceedings conducted in Hong Kong.⁸⁰ We take the view that any such orders or directions are likely to be procedural and interlocutory in nature and that problems with conflicting expert opinions as to the existence of reciprocity may arise in practical situations. **Views are sought on the above proposal.**

7.33 Clause 62(4) provides that on order of the Court of First Instance under Clause 62(1) relating to the grant or refusal of leave to enforce an order or direction made, whether in or outside Hong Kong, in relation to arbitral proceedings by an arbitral tribunal shall not be subject to appeal. We take the view that as such an order is generally concerned with a matter that is procedural in nature, an appeal procedure is not required to be provided.

Clause 63 Power of Court to order recovery of arbitrator's fees

7.34 Clause 63(1) gives effect to the recommendation in the *Report* by providing that the Court of First Instance, in its discretion and having regard to the conduct of the arbitrator and any other relevant circumstances, may order that an arbitrator shall not be entitled to receive his fees and may order the repayment by the arbitrator of fees already paid to him if the arbitrator's mandate terminates upon being successfully challenged in the circumstances specified in Clause 26 or 27.⁸¹

7.35 It is provided under Clause 63(2) that an order of the Court of First Instance made under Clause 63(1) shall not be subject to appeal. We consider that as such an order of the Court is procedural in nature, it is not necessary for an appeal procedure to be provided.

Clause 64 Representation and preparation work

7.36 Clause 64 reproduces section 2F of the current Ordinance, as recommended in the *Report*, which excludes the application of sections 44, 45 and 47 of the Legal Practitioners Ordinance (Cap 159) to arbitral proceedings, the giving of advice and the preparation of documents for

⁸⁰ See paras 45.8, 45.9, 45.11 and 45.12(a) of the *Report*.

⁸¹ See paras 21.7 and 43.42-43.43 of the *Report*.

the purposes of arbitral proceedings and certain things done in relation to arbitral proceedings. The effect of this provision is that it allows advisers and advocates, whether they are legally qualified or not and whether they are local or from overseas jurisdictions, to be appointed by the parties in connection with arbitral proceedings.⁸²

⁸²

See paras 8.20-8.21 of the *Report*.

PART 8

MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Clause 65 Article 28 of UNCITRAL Model Law (Rules applicable to substance of dispute)

8.1 Clause 65 gives effect to Article 28 of the Model Law as recommended in the *Report*.⁸³ This provision prescribes the procedures for deciding on the choice of substantive law that is applicable to govern the substance of the dispute.

8.2 Under this provision, the parties have complete autonomy to choose any rules of law to govern the substance of the dispute. In the absence of any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. The parties may agree to have the arbitral tribunal decide *ex aequo et bono* or as *amiable compositeur* which means that the decision of the tribunal shall be based on equity, that is, general considerations of justice and fairness rather than on strict legal standards.⁸⁴ In other words, the parties may agree that their dispute is not to be decided in accordance with a recognized system of law but under equity principles.⁸⁵ In all cases where the tribunal is making a decision on the choice of substantive law applicable to the dispute, it shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

⁸³ See paras 36.1-36.4 of the *Report*.

⁸⁴ See *A Guide To The UNCITRAL Model Law On International Commercial Arbitration, Legislative History And Commentary*, Howard M. Holtzmann and Joseph E. Neuhaus, at page 765.

⁸⁵ For detailed explanation of the expressions “*ex aequo et bono*” and “*as amiable compositeur*”, see *The Hong Kong Arbitration Ordinance - A Commentary*, Robert Morgan, paras [S528.14] – [S528.15] at Annex B of this Consultation Paper.

Clause 66 Article 29 of UNCITRAL Model Law (Decision making by panel of arbitrators)

8.3 Clause 66 gives effect to Article 29 of the Model Law as recommended in the *Report*.⁸⁶ This provision provides rules to govern the method of reaching decisions when the arbitral tribunal consists of more than one arbitrator.

Clause 67 Article 30 of UNCITRAL Model Law (Settlement)

8.4 Clause 67(1) gives effect to Article 30 of the Model Law as recommended in the *Report*.⁸⁷ This provision sets out the procedures to be followed where the parties settle the dispute during the arbitral proceedings. It enables an agreed settlement of the dispute to be given the status of an arbitral award.

8.5 Clause 67(2) is adapted from section 2C of the current Ordinance. It provides for the enforcement of a settlement agreement in writing in the same manner as an award on an arbitration agreement.

8.6 We take the view that a procedure for appeal against a decision of the court under Clause 67(2) to grant or refuse leave to enforce a settlement agreement should be provided with leave of the court being required as such a decision is likely to affect the substantive rights of the parties and disputes may arise as to whether a settlement agreement is in existence. **Views are sought as to whether such a decision should be subject to appeal with leave.**

Clause 68 Article 31 of UNCITRAL Model Law (Form and contents of award)

8.7 Clause 68 provides for the application of Article 31 of the Model Law as recommended in the *Report*.⁸⁸ It establishes the formal requirements for the form and contents of an arbitral award. Article 31(4) of the Model Law in Clause 68(1), which provides for delivery of

⁸⁶ See para 37.3 of the *Report*.

⁸⁷ See para 38.4 of the *Report*.

⁸⁸ See para 39.7 of the *Report*.

the award, is subject to Clause 78 (payment of fees of the arbitrators).

Clause 69 Article 32 of UNCITRAL Model Law (Termination of proceedings)

8.8 Clause 69 gives effect to Article 32 of the Model Law as recommended in the *Report*.⁸⁹ This provision prescribes the circumstances under which the arbitral proceedings are to be terminated and the mechanism for doing so.

Clause 70 Article 33 of UNCITRAL Model Law (Correction and interpretation of award; additional award)

8.9 As recommended in the *Report*, Clause 70(1) replaces section 19 of the current Ordinance and gives effect to Article 33 of the Model Law.⁹⁰ This provision empowers an arbitral tribunal to correct errors of form in an arbitral award either on its own initiative or upon request by a party. It further allows a party to the arbitral proceedings to request an arbitral tribunal to give an interpretation of a specific point or part of an award or to make an additional award.

8.10 Clause 70(2) is added pursuant to the recommendation in the *Report* which provides that the arbitral tribunal has the power to make other changes to the arbitral award that are necessitated by or consequential upon the correction of any error in the award or the interpretation of any specific point or part of the award.⁹¹

8.11 Clause 70(3) and (4) is added to give effect to the recommendation in the *Report* that an arbitral tribunal should be granted a residual power to review an arbitral award on costs in circumstances where matters which have not been revealed in advance prevent the tribunal from making an appropriate award on costs.⁹²

⁸⁹ See para 40.2 of the *Report*.

⁹⁰ See para 41.7 of the *Report*.

⁹¹ See para 41.8 of the *Report*.

⁹² See paras 43.13 to 43.14 of the *Report*. See also *Chinney Construction Co Ltd v Po Kwong Marble Factory Ltd* [2005] 3 HKC 262. It was held by the Court of First Instance in that case that it was not open for the arbitrator to re-visit the question of costs once an award has been made. However, the Court of First Instance has the jurisdiction under section 23(2)(b) of the current Ordinance to remit the decision on costs to the arbitrator for reconsideration where the arbitrator made an award of costs without being aware of offers having been made

Clause 71 Award of remedy or relief

8.12 As recommended in the *Report*, Clause 71(1) restates the existing law presently found in section 2GF of the current Ordinance.⁹³ Clause 71(2) is adapted from section 17 of the current Ordinance. Both provisions in Clause 71 provide for the types of remedy or relief that can be ordered by an arbitral tribunal when deciding a dispute.

Clause 72 Awards on different issues, etc.

8.13 As recommended in the *Report*, Clause 72 is added to replace section 16 of the current Ordinance.⁹⁴ This provision empowers an arbitral tribunal to make a determination on some of the issues which may help the parties to resolve their other differences on the dispute. It further avoids the confusion of using the term “interim award” under section 16 of the current Ordinance which may mean a temporary decision rather than a determination on some aspects of the dispute.

Clause 73 Time for making award

8.14 As recommended in the *Report*, Clause 73 is adapted from section 15(1) and (2) of the current Ordinance. Clause 73(1) provides that an arbitral tribunal may make an award at any time, unless otherwise agreed by the parties. Clause 73(2) further empowers the Court of First Instance to extend the time limit, if any, for making an award irrespective of whether that time limit has expired or not.⁹⁵

8.15 We take the view that section 15(3) of the current Ordinance which provides for the application by a party to remove an arbitrator or an umpire for failing to use reasonable dispatch to make an award need not be retained as such procedure has already been provided for under Article 14 of the Model Law as incorporated under Clause 27.

by one party to another.

⁹³ See para 6.7 of the *Report*.

⁹⁴ See paras 39.8-39.11 of the *Report*.

⁹⁵ See para 39.16 of the *Report*.

8.16 Clause 73(3) provides that an order of the Court of First Instance under Clause 73(2) to extend or refuse to extend the time for making an award shall not be subject to any appeal. We consider that as such an order of the Court is concerned with a minor procedural matter, it is not necessary for an appeal procedure to be provided.

Clause 74 Effect of award

8.17 Clause 74 preserves the statutory position under section 18 of the current Ordinance which sets out the effect of an award on the parties.⁹⁶

Clause 75 Arbitral tribunal may award costs of arbitral proceedings

8.18 Clause 75(1) and (2) is adapted from section 2GJ(1)(a) of the current Ordinance. Clause 75(1) empowers an arbitral tribunal to include directions on the costs of the arbitral proceedings (including the fees and expenses of the tribunal) in an award. Clause 75(2) provides that an arbitral tribunal, in making an award on costs, may take into account all relevant circumstances including the fact, where appropriate, that a written offer of settlement of the dispute concerned has been made.

8.19 Clause 75(3) and (4) provides that an arbitral tribunal may direct that costs (including the fees and expenses of the tribunal) be paid forthwith or within a specified period by a party who makes or opposes a request to the tribunal for any order or direction, including an interim measure, which is found by the tribunal to be without merit.⁹⁷ **Views are sought on the above proposal.**

8.20 Clause 75(5) is adapted from section 2GJ(1)(b) of the current Ordinance. This provision states that unless the parties have agreed that the costs of arbitral proceedings are to be taxed by the court, the arbitral tribunal shall assess the amount of costs of the arbitral

⁹⁶ We do not find it necessary to adopt a provision along the line of section 44 of the Singapore Arbitration Act 2001 as recommended in paras 38.12-39.15 of the *Report* since all relevant provisions have been incorporated into Clauses 68 and 74.

⁹⁷ See paras 43.15 to 43.17 of the *Report*.

proceedings (other than the fees and expenses of the arbitral tribunal) to be so paid. As recommended in the *Report*, the terms “assess” and “assessment” are used in place of “tax” and “taxation” respectively in relation to an award on costs made by an arbitral tribunal.⁹⁸

8.21 As recommended in the *Report*, Clause 75(6) provides that an arbitral tribunal is not obliged to follow the scale adopted by the court on taxation when the tribunal assesses the costs of the arbitral proceedings between the parties.⁹⁹

8.22 Clause 75(7) provides that the arbitral tribunal shall only allow costs that are reasonable having regard to all the circumstances. This clause also makes it clear that, unless otherwise agreed by the parties, such costs may include costs incurred in the preparation of the arbitral proceedings prior to the commencement of the arbitration.¹⁰⁰

8.23 Clause 75(8) and (9) restates the statutory position under section 2GJ(3) of the current Ordinance. These provisions stipulate that a provision in an arbitration agreement that the parties to the agreement or any of the parties must pay its own costs is void unless it is part of an agreement to refer to arbitration a dispute that has arisen before the agreement was made.

8.24 We take the view that section 2GJ(6) of the current Ordinance which provides for the application of section 70 of the Legal Practitioners Ordinance (Cap 159) to arbitral proceedings under the current Ordinance should not be retained for the following reasons:¹⁰¹

- (a) to our knowledge, the provision has never been invoked in any arbitral proceedings;

⁹⁸ See para 43.3 of the *Report*.

⁹⁹ See para 43.9 of the *Report*.

¹⁰⁰ Ibid.

¹⁰¹ It is stated in the Note to section 2GJ of the current Ordinance that: “Section 70 of the Legal Practitioners Ordinance (Cap. 159) empowers a court before which proceedings are being heard or are pending to declare a solicitor employed in connection with the proceedings to be entitled to a charge on property recovered or preserved in the proceedings”.

- (b) the provision appears to favour solicitors practising in Hong Kong as such protection has not been accorded to solicitors and other lawyers from overseas jurisdictions;
- (c) no similar provision is found in the arbitration laws of other jurisdictions.

8.25 For the reasons given above, we accordingly recommend the repeal of section 2GJ(6) of the current Ordinance.

Clause 76 Taxation of costs of arbitral proceedings (other than fees and expenses of arbitral tribunal)

8.26 In accordance with the recommendation in the *Report*, Clause 76(1) is adapted from section 2GJ(1)(c) and (2) of the current Ordinance.¹⁰² It is to be noted that under the present statutory position, an arbitral tribunal may, subject to any contrary provision of the arbitration agreement, direct that costs between the parties be paid on the basis of an award of costs in civil proceedings before the court. Any costs awarded by the tribunal are taxable by the court unless the award otherwise directs. Clause 76(1), however, only permits and in fact obliges an arbitral tribunal to make directions in an award for the taxation of the costs of arbitral proceedings (other than the fees and expenses of the arbitral tribunal) by the court and the basis on which the costs are to be paid, where the parties have agreed that the costs are to be taxable by the court.

8.27 As recommended in the *Report*, Clause 76(2) empowers an arbitral tribunal to make an additional award of costs to reflect the result of the taxation of costs by the court.¹⁰³

8.28 Clause 76(3) provides that any taxation by the court of the costs of arbitral proceedings made pursuant to Clause 76(1) shall not be subject to any appeal. As taxation of costs by the court is procedural in nature, we consider that an appeal procedure is not required.

¹⁰² See paras 43.10-43.11 of the *Report*.

¹⁰³ See para 43.10 of the *Report*.

Clause 77 Costs in respect of unqualified person

8.29 As recommended in the *Report*, Clause 77 re-enacts section 2G of the current Ordinance.¹⁰⁴ The effect of this provision is that it may be directed that costs in respect of work done in any arbitral proceedings by a person who is not qualified to act as a solicitor are recoverable.

Clause 78 Determination of arbitral tribunal's fees and expenses in case of dispute

8.30 As recommended in the *Report*, Clause 78 provides for the application by a party to the Court of First Instance for determination of an arbitral tribunal's fees and expenses where the arbitral tribunal refuses to deliver an award to the parties except upon full payment of the fees and expenses of the tribunal.¹⁰⁵ This provision sets out the orders that may be made by the Court. It further provides for the procedure for such application under which an arbitrator is entitled to appear and be heard on any determination. The arbitral tribunal is required to amend its award on fees and expenses of the tribunal to reflect the result of the determination.

8.31 We take the view that a determination by the Court of First Instance under this provision shall not be subject to any appeal for the reason that there should be finality in the arbitral process and that the determination of an arbitral tribunal's fees and expenses needs to be dealt with speedily. This has been so provided in Clause 78(10).

Clause 79 Liability to pay fees and expenses of arbitral tribunal

8.32 As recommended in the *Report*, Clause 79 is adapted from section 2GK of the current Arbitral Ordinance.¹⁰⁶ It stipulates that the parties to the arbitral proceedings are jointly and severally liable to pay to the arbitral tribunal such reasonable fees and expenses of the tribunal as are appropriate in the circumstances.

¹⁰⁴ See para 43.30 of the *Report*.

¹⁰⁵ See paras 43.33-43.36, 43.38-43.39, 43.44 -43.46 of the *Report*.

¹⁰⁶ See paras 43.18-43.20 of the *Report*.

Clause 80 Arbitral tribunal may award interest

8.33 As recommended in the *Report*, Clause 80 is adapted from section 2GH of the current Ordinance.¹⁰⁷ Clause 80(1)(a) and (b) empowers an arbitral tribunal, unless otherwise agreed by the parties, to award simple or compound interest on money awarded or on money claimed and paid before the award is made.

Proposal on power of an arbitral tribunal to award interest on costs

8.34 Clause 80(1)(c) provides for the powers of an arbitral tribunal as regards interests on costs.

The current statutory position in Hong Kong

8.35 Section 2GJ of the current Ordinance provides that an arbitral tribunal may include in an award directions with respect to the costs of the relevant arbitral proceedings. It does not however specify whether an arbitral tribunal has any power to order payment of interest on costs.

8.36 Section 2GH of the current Ordinance provides an arbitral tribunal with the power to award “simple or compound interests from such dates as the tribunal considers appropriate” on “money awarded by the tribunal in the proceedings”. It is however doubtful and indeed there is no consensus as to whether the application of this provision is wide enough to extend to an order for costs.

8.37 It is provided under section 2GI of the current Ordinance that interest “is payable on the amount of an award from the date of the award”. It may be arguable that an arbitral tribunal may award interest on costs pursuant to this provision. However, even if the view taken above is correct, another issue that may arise is the difficulty in deciding the correct commencement date for the payment of such interest. The commencement date may either be - (a) the date on which the costs award is made by the arbitral tribunal; or (b) the date on which the amount of

¹⁰⁷ See paras 42.6-42.7 of the *Report*.

the costs payable is fixed by the arbitral tribunal if the assessment is done by the tribunal itself; or (c) the date on which the court gives a determination on the taxation of costs.

8.38 It has been suggested that “the *incipitur* rule” in litigation should apply to arbitral proceedings such that interest on costs should run from the date of the costs award even though the actual assessment of the amount of costs is to be carried out later. However, there is no statutory basis for the application of “the *incipitur* rule” at present.

8.39 Furthermore, it is not clear under section 2GH of the current Ordinance whether in the case that an arbitral tribunal has made a costs award in principle and subsequently gives an assessment on the actual amount of the costs, interest on costs is to be payable from the date of the earlier award or the date of the delivery of the assessment.

8.40 Another issue that may arise is in cases where the costs of the arbitral proceedings are taxed by the court, it is not clear whether payment of the interest on costs should start from the date of the original costs award made by the arbitral tribunal or whether it should be payable from the date on which the certificate of taxation is issued by the court. In other words, there is a potential difference on the commencement date for payment of interest on costs depending on whether it is the arbitral tribunal or the court that is carrying out the actual assessment or taxation.

The position in the UK

8.41 Section 49(4) of the UK Arbitration Act provides:

“The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs).”

8.42 Under the UK Arbitration Act, it seems that “the *incipitur* rule” is adopted. However, it appears that the commencement date for payment of interest on costs cannot be earlier than the date of the award

on costs. It is to be noted that the reforms to the civil justice system in England and Wales, initiated by Lord Woolf, conferred on the court specific powers to back-date interest on a costs order, including the power to impose penal interest rates.

The options

8.43 The options proposed relating to the power of an arbitral tribunal to order payment of interest on award of costs in arbitral proceedings are:

- (1) maintaining the status quo under the current Ordinance;
- (2) adopting legislative provision similar to section 49(4) of the UK Arbitration Act;
- (3) enacting new provisions in the draft Bill that would clear all the ambiguities under the current Ordinance.

8.44 We recommend that a new provision, now Clause 80(1)(c) should be added under the draft Bill to empower an arbitral tribunal to award interest on costs awarded by the tribunal in arbitral proceedings.

8.45 **Views are sought on the proposal in paragraphs 8.43 and 8.44.**

Clause 81 Rate of interest on money awarded or costs in arbitral proceedings

8.46 As recommended in the *Report*, Clause 81(1) preserves the present statutory position under section 2GI of the current Ordinance. It provides that interest is payable on the money awarded by an arbitral tribunal, from the date of the award, at the judgment rate determined by the Chief Justice under the High Court Ordinance (Cap 4) unless the award provides otherwise.¹⁰⁸

¹⁰⁸ Ibid.

8.47 We further recommend that Clause 81(2) should be added to provide that the date from which interest is payable on costs awarded or ordered by an arbitral tribunal is to run from the date when the award or order on costs is made.

PART 9

RECOURSE AGAINST AWARD

Clause 82 Article 34 of UNCITRAL Model Law (Application for setting aside as exclusive recourse against arbitral award)

9.1 As recommended in the *Report*, Clause 82(1) gives effect to Article 34 of the Model Law.¹⁰⁹ This provision provides that recourse to the court against an arbitral award may be made by a party by an application for setting aside the award. The application is to be made to the Court of First Instance within the period of time specified in the provision. The grounds that may justify the setting aside of an arbitral award are set out in the provision.

9.2 Clause 82(2) restates section 23(1) of the Arbitration Ordinance which provides that the Court of First Instance may not set aside an arbitral award on the ground of errors of fact or law on the face of the award.

9.3 **Views are sought on whether the decision of the Court of First Instance to set aside an arbitral award should be subject to appeal with leave.**

¹⁰⁹ See paras 44.1-44.6 of the *Report*.

PART 10

RECOGNITION AND ENFORCEMENT OF AWARDS

Division 1 – Enforcement of arbitral awards

Clause 83 Article 35 of UNCITRAL Model Law (Recognition and enforcement)

10.1 Clause 83 states that Article 35 of the Model Law which provides for the recognition and enforcement of arbitral awards do not apply. We take the view that the statutory scheme under section 2GG of the current Ordinance for the enforcement of awards made, whether in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal should be retained subject to modifications.

Clause 84 Article 36 of UNCITRAL Model Law (Grounds for refusing recognition or enforcement)

10.2 Clause 84 provides that Article 36 of the Model Law which sets out the grounds on which a court may refuse recognition or enforcement of an arbitral award do not have effect.

Clause 85 Enforcement of awards of arbitral tribunal

10.3 The enforcement of arbitral awards made in arbitral proceedings is presently regulated under section 2GG of the current Ordinance.

10.4 Clause 85(1) and (3) is adapted from Clause 2GG of the current Ordinance. Clause 85(1) makes it clear that leave of the court is required for enforcement of an arbitral award made, whether in or outside Hong Kong, by an arbitral tribunal. Where leave is granted, judgment may be entered in terms of the award as provided for in Clause 85(3).

10.5 Under the present statutory scheme, an award made on the Mainland by a recognized Mainland arbitral authority (“Mainland award”), and an award made in a State or territory (other than China) which is a party to the New York Convention (“Convention award”) can be enforced as provided for in Part IIIA and Part IV respectively of the current Ordinance. An arbitral award which is neither a Mainland award nor a Convention award is enforceable at the discretion of the Court of First Instance pursuant to section 2GG of the current Ordinance.

10.6 The procedures for the enforcement of Mainland awards and Convention awards under the draft Bill remain the same as those found in the current Ordinance. However, in accordance with the recommendation in the *Report*, a new provision is added under Clause 85(2) to regulate the enforcement of an arbitral award made outside Hong Kong which is neither a Convention award nor a Mainland award.¹¹⁰ It states that no leave shall be granted by the court unless the party seeking to enforce such award can demonstrate that the court in the place where the award is made will act reciprocally in respect of awards made in Hong Kong in arbitral proceedings by an arbitral tribunal.

10.7 The adding of the new requirement under Clause 85(2) is to ensure that the enforcement of arbitral awards made outside Hong Kong, whether a Convention award, a Mainland award or an award which is neither a Convention award nor a Mainland award, are all granted on the same principle, namely that there will be reciprocity of enforcement of an award made by an arbitral tribunal in Hong Kong in the corresponding place, State or territory where the arbitral award sought to be enforced in Hong Kong is made.

10.8 **Views are sought on whether a decision of the court to grant or refuse leave to enforce an arbitral award made outside Hong Kong, which is neither a Convention award nor a Mainland award, should be subject to appeal with leave.**

¹¹⁰ See paras 45.13 of the *Report*.

Clause 86 Evidence to be produced for enforcement of arbitral awards

10.9 Clause 86 is added to prescribe the evidence that is required to be produced for an application to enforce an arbitral award, whether made in or outside Hong Kong, which is neither a Convention award nor a Mainland award.

Clause 87 Refusal of enforcement of arbitral awards

10.10 Clause 87 is a new provision which provides that an application to enforce an arbitral award, whether made in or outside Hong Kong, which is neither a Convention award nor a Mainland award may be refused on any of the grounds specified in that provision.

Division 2 – Enforcement of Convention awards

Clause 88 Enforcement of Convention awards

10.11 Clause 88 restates the statutory position under section 42 of the current Ordinance relating to the enforcement of Convention awards.¹¹¹

10.12 **Views are sought on whether a decision of the court to grant or refuse leave to enforce a Convention award should be subject to appeal with leave.**

Clause 89 Evidence to be produced for enforcement of Convention awards

10.13 Clause 89 re-enacts section 43 of the current Ordinance which sets out the evidence that is required to be produced for the enforcement of a Convention award.

¹¹¹ See paras 46.1-46.3 of the *Report*.

Clause 90 Refusal of enforcement of Convention awards

10.14 Clause 90 reproduces section 44 of the current Ordinance which provides that the enforcement of a Convention award shall not be refused except on any of the grounds specified in that provision.

Clause 91 Order for declaring party to New York Convention

10.15 Clause 91(1) and (2) is adapted from section 46 of the current Ordinance which provides that an order may be made by the Chief Executive to declare parties to the New York Convention and such order is conclusive evidence that the State or territory concerned is such a party. Clause 91(3) is added to allow proof by other method, apart from an order by the Chief Executive, that a State or territory is a party to the New York Convention.

Clause 92 Saving of rights to enforce Convention awards

10.16 Clause 92 preserves the statutory position under section 45 of the current Ordinance. It provides that nothing in Division 2 of Part 10 of the draft Bill shall prejudice any right to enforce or rely on an award otherwise than under Division 2.

Division 3 – Enforcement of Mainland awards

Clause 93 Enforcement of Mainland awards

10.17 Clause 93 restates the statutory position under section 40B of the current Ordinance relating to the enforcement of Mainland awards.¹¹²

10.18 **Views are sought on whether a decision of the court to grant or refuse leave to enforce a Mainland award should be subject to appeal with leave.**

¹¹² See paras 47.1-47.4 of the *Report*.

Clause 94 Restrictions on enforcement of Mainland awards

10.19 Clause 94 re-enacts section 40C of the current Ordinance. It provides that a Mainland award shall not be enforceable under Division 3 of Part 10 of the draft Bill if an application has been made on the Mainland for enforcement of the award except where the award has not been fully satisfied by way of that enforcement.

Clause 95 Evidence to be produced for enforcement of Mainland awards

10.20 Clause 95 re-enacts section 40D of the current Ordinance which sets out the evidence that is required to be produced for the enforcement of a Mainland award.

Clause 96 Refusal of enforcement of Mainland awards

10.21 Clause 96 reproduces section 40E of the current Ordinance which provides that the enforcement of a Mainland award shall not be refused except on any of the grounds specified in that provision.

Clause 97 Mainland awards to which certain provisions of this Division do not apply

10.22 Clause 97 is adapted from section 40G of the current Ordinance. It sets out the circumstances under which certain provisions of Division 3 of Part 10 of the draft Bill relating to the enforcement of Mainland awards do not apply to a particular award.

Clause 98 Publication of list of recognized Mainland arbitral authorities

10.23 Clause 98 re-enacts section 40F of the current Ordinance which provides that the Secretary for Justice shall from time to time publish in the Gazette a list of the recognized Mainland arbitral authorities.

Clause 99 Saving of certain Mainland awards

10.24 Clause 99 re-enacts section 40G of the current Ordinance. It provides that a Mainland award of which enforcement has previously been refused during the period specified in the provision may still be enforceable under the circumstances specified in Clause 99.

PART 11

PROVISIONS THAT MAY BE EXPRESSLY OPTED FOR OR AUTOMATICALLY APPLY

Clause 100 Arbitration agreements may provide expressly for opt-in provisions

11.1 Certain provisions under the current Ordinance that only apply to domestic arbitrations have been retained as opt-in provisions in Schedule 3 to the draft Bill. Clause 100 states that the parties to an arbitration agreement may expressly provide in the agreement as to whether any or all of the provisions in Schedule 3 shall apply.

Clause 101 Opt-in provisions automatically apply in certain cases

11.2 Where an arbitration agreement entered into before, or at any time within a period of 6 years after, the commencement of the new Ordinance stipulates that an arbitration under that arbitration agreement shall be a “domestic arbitration”, then pursuant to Clause 101, all the provisions under Schedule 3 shall automatically apply to that arbitration agreement, unless there is any express agreement to the contrary between the parties as provided for under Clause 103(a) or where the arbitration agreement concerned has provided expressly that Clause 101 or 102 shall not apply or that any of the provisions in Schedule 3 shall or shall not apply as provided for in Clause 103(b).

11.3 The purpose of Clause 101 is to address the concern raised by the construction industry where users of standard form contracts may continue to use the term “domestic arbitration” in such contracts either before or sometime after the commencement of the new Ordinance. Through the operation of Clause 101, the opt-in provisions in Schedule 3 would automatically apply to an arbitration agreement which refers to “domestic arbitration” that is entered into within the time specified in Clause 101 subject to the exceptions set out in Clause 103.

Clause 102 Opt-in provisions that automatically apply under section 101 deemed to apply in subcontracting cases

11.4 In the case where all the provisions in Schedule 3 automatically apply to an arbitration agreement under Clause 101 and where the whole or any part of the subject matter of the contract which includes that arbitration agreement is subcontracted to any person under a subcontract which also includes an arbitration agreement, Clause 102(1) provides that all the provisions in Schedule 3 would also apply to the arbitration agreement in the subcontract.

11.5 Clause 102(2) specifies the circumstances under which Clause 102(1) does not apply. In general, except where the arbitration agreement between the subcontracting parties is an arbitration agreement referred to in Clause 101(a) or (b), Clause 102(1) does not apply if the subcontractor or the subject matter of the subcontract has no connection with Hong Kong

11.6 Where the whole or any part of the subject matter under the subcontract referred to in Clause 102(1) is further subcontracted to another person under another contract which also includes an arbitration agreement, Clause 102(3) provides that all the provisions in Schedule 3, subject to Clause 102(2), shall apply to the arbitration agreement so included in that other subcontract as if that other subcontract were a subcontract within the meaning of Clause 102(1).

11.7 The deeming effect as provided for in Clause 102(3) is intended to ensure that all the opt-in provisions in Schedule 3 would automatically apply to an arbitration agreement contained in every contract down the line of the subcontracting process. In other words, where the whole or any part of the subject matter under the deemed subcontract is further subcontracted, all the opt-in provisions in Schedule 3 would also automatically apply to the arbitration agreement contained in that further subcontract which is in itself a deemed subcontract by operation of Clause 102(3).

Clause 103 Circumstances under which opt-in provisions not automatically apply

11.8 As stipulated under Clause 103(a), the parties to an arbitration agreement may agree in writing that Clauses 101 and 102 do not apply in which case the opt-in provisions in Schedule 3 shall not apply.

11.9 Clause 103(b) provides that Clauses 101 and 102 shall not apply to an arbitration agreement if it has been expressly provided in the arbitration agreement concerned that Clause 101 or 102 is not applicable or if it has been so provided in that arbitration agreement that any of the opt-in provisions in Schedule 3 shall or shall not apply.

11.10 Clauses 100 to 103 establish an “opting-in” system in respect of the provisions in Schedule 3 which are now (with the exception of section 4 to Schedule 3) applicable to domestic arbitration under the current Ordinance. **Comments are invited on the “opting-in” system.**

Clause 104 Application of provisions under this Part

11.11 Clause 104 provides that if there is any conflict or inconsistency between any opt-in provision that applies under this Part and any other provision of the draft Bill, the opt-in provision shall prevail to the extent of the conflict or inconsistency.

PART 12

MISCELLANEOUS

Clause 105 Arbitral tribunal or mediator to be liable for certain acts and omissions

12.1 As recommended in the *Report*, Clause 105 re-enacts section 2GM of the current Ordinance.¹¹³ This provision specifies that the arbitral tribunal, a mediator and their employee or agent are liable for an act done or omitted to be done in relation to the exercise or performance of the tribunal's arbitral functions or the mediator's functions only if it is proved that the act was done or omitted to be done dishonestly.

Clause 106 Appointers and administrators to be liable only for certain acts and omissions

12.2 Clause 106 restates section 2GN of the current Ordinance pursuant to the recommendation in the *Report*.¹¹⁴ It sets out the liability of persons who appoint an arbitral tribunal or a mediator or who exercise or perform administrative functions in connection with arbitral or mediation proceedings and the liability of their agents or employees for acts done or omitted to be done in the exercise or performance of those functions. Liability arises only if it is proved that an act was done or omitted to be done dishonestly.

12.3 **Views are sought as to whether Clauses 105 and 106 should apply to mediators.**

Clause 107 Rules of court

12.4 Clause 107 is modelled on the proposed section 49 to be introduced into the current Ordinance by clause 12 of the CJMA Bill. It provides that the power to make rules of court under section 54 of the

¹¹³ See para 8.37 of the *Report*.

¹¹⁴ See paras 8.36-8.37 of the *Report*.

High Court Ordinance (Cap 4) includes the power to make rules of court for the making and service out of jurisdiction of an application for, inter alia, an interim measure.

Clause 108 Making an application under this Ordinance

12.5 Clause 108 states that an application to the Court of First Instance under the new Ordinance shall be made in accordance with Order 73 of the Rules of the High Court (Cap 4 sub. leg. A) unless otherwise expressly provided.

PART 13

REPEAL, SAVINGS AND TRANSITIONAL PROVISIONS

Clause 109 Repeal

13.1 Clause 109 provides for the repeal of the current Ordinance.

Clause 110 Effect of repeal on subsidiary legislation

13.2 Clause 110 preserves existing subsidiary legislation made under the current Ordinance so far as it is not inconsistent with the draft Bill.

Clause 111 Savings and transitional provisions

13.3 Clause 111 states that the savings and transitional provisions are set out in Schedule 4.

PART 14

CONSEQUENTIAL AND RELATED AMENDMENTS

Clause 112 Consequential and related amendments

14.1 Clause 112 provides that the consequential and related amendments are set out in Schedule 5.

SCHEDULE 1

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

1. The full text of the Model Law is set out in Schedule 1 for easy reference.

SCHEDULE 2

APPLICATION OF ORDINANCE TO JUDGE-ARBITRATORS AND JUDGE-UMPIRES

1. As recommended in the *Report*, the existing provisions under the Fourth Schedule to the current Ordinance are retained under Schedule 2 to the draft Bill with necessary modifications.¹¹⁵ This Schedule deals with the application of the draft Bill to a judge who has been appointed as sole arbitrator or umpire under Clause 31(1). The purpose and functions of this Schedule have been set out in Clause 31(5).

¹¹⁵ See paras 48.5-48.6 of the *Report*.

SCHEDULE 3

PROVISIONS THAT MAY BE EXPRESSLY OPTED FOR OR AUTOMATICALLY APPLY

Section 1 Sole arbitrator

1. Where an arbitration agreement expressly provides pursuant to Clause 100 that section 1 of Schedule 3 to the draft Bill shall apply to that arbitration agreement or where section 1 of this Schedule automatically applies to the arbitration agreement by virtue of the operation of Clause 101 or 102, any dispute arising from that arbitration agreement shall be referred to a sole arbitrator.

2. Although the parties to an arbitration agreement are free to determine the number of arbitrators pursuant to Article 10(1) of the Model Law in Clause 23(1) and, according to Clause 23(3), if they fail to agree then the number of arbitrators will be either 1 or 3 as decided by the HKIAC, section 1 of this Schedule allows the parties to an arbitration agreement to refer the dispute to a sole arbitrator by means of the automatic opt-in mechanism under Clause 101. It will also be deemed to apply automatically to any arbitration agreement included in a subcontract that falls within the description of Clause 102.

Section 2 Consolidation of arbitrations

3. As recommended in the *Report*, section 2 of this Schedule is another opt-in provision which provides for the application and grant of orders for consolidation of arbitral proceedings and other relevant orders.¹¹⁶

4. Section 2(1), (2)(b) and (3) of this Schedule is adapted from section 6B of the current Ordinance. Section 2(1) retains the power of the Court of First Instance to make an order for arbitral proceedings to be consolidated on such terms as it thinks just, or to be heard at the same

¹¹⁶ See paras 23.1-23.7 of the *Report*.

time, or to be heard one immediately after another, or for any of those arbitral proceedings to be stayed until after the determination of any other of them under the circumstances specified in section 2(1)(a) to (c) of this Schedule. Such orders may only be made by the Court upon application by a party to the arbitral proceedings.

5. Where the Court orders arbitral proceedings to be consolidated, section 2(2)(a) of this Schedule empowers the Court to make consequential directions as to the payment of costs in the arbitral proceedings. The arbitral tribunal is given the power to make orders as to the costs of the consolidated arbitral proceedings under section 2(4) of this Schedule.¹¹⁷

6. Section 2(6) of this Schedule provides that an order, direction or decision of the Court of First Instance made under this section shall not be subject to appeal.

Costs orders relating to arbitral proceedings ordered to be heard at the same time or one immediately after another

7. Section 2(5) deals with the power of the arbitral tribunal to make costs orders in relation to those arbitral proceedings that are heard by it at the same time or one immediately after another. **There are two alternative proposals on which views are sought:**

- (a) The recommendation in the *Report* is that the arbitral tribunal should only have the power to make order as to costs in each arbitration and should not have the power to order a party to any of those arbitral proceedings that are heard at the same time or one immediately after another to pay the costs of a party to any other of those proceedings.¹¹⁸
- (b) The alternative proposal, with the wording being put in square brackets under section 2(5) of this Schedule, is that where the arbitral tribunal is the same tribunal hearing all of those proceedings that have been ordered to be heard at the

¹¹⁷ See paras 43.31-43.32 of the *Report*.

¹¹⁸ See para 43.31 of the *Report*.

same time or one immediately after another, the tribunal should be empowered to make orders as to costs in respect of different parties to all those arbitral proceedings heard by it.

8. Arguments, however, have been put forward against the alternative proposal under paragraph 7(b) above:

- (a) It would be difficult to make costs orders on the basis of different evidence that may have been adduced in arbitral proceedings that are conducted separately even if they are heard by the same arbitral tribunal.
- (b) It would be difficult for an arbitral tribunal which is not constituted by legal practitioners or where the arbitrators are less experienced to make an appropriate decision on orders for costs against different parties involved in separate arbitral proceedings.
- (c) It would cause great hardship to a party in a relatively weaker financial position such as a subcontractor if he is required to pay the costs of other parties to other arbitral proceedings in which he is not involved.

Power of Court to appoint same arbitrator to hear arbitral proceedings ordered to be heard at the same time or one immediately after another

9. **Another issue upon which views are sought is whether the Court of First Instance should be given the power to appoint the same arbitrator to hear arbitral proceedings that have been ordered by the Court to be heard at the same time or one immediately after another.**

10. The arguments in support of giving the Court such power to appoint the same arbitrator are stated below:

- (a) It would save costs to have the same arbitrator hearing those arbitral proceedings that have been ordered to be heard at the

same time or one immediately after another.

- (b) There are sufficient procedural safeguards as such power of appointment of the same arbitrator would only be exercised by the Court if it is satisfied that there is a need to do so and that other parties to those arbitral proceedings may object to the application for the appointment of the same arbitrator or to any particular person being appointed as the arbitrator.
- (c) As section 2 of this Schedule is an opt-in provision, the parties to the arbitral proceedings that have been ordered to be heard at the same time or one immediately after another would be fully aware of the implication or consequence of the application of this provision.

11. On the other hand, there are arguments against the proposal to empower the Court to appoint the same arbitrator to hear arbitral proceedings that have been ordered to be heard at the same time or one immediately after another:

- (a) The choice of the parties in the appointment of an arbitrator is of great importance. Such appointment should not be dictated by the Court.
- (b) A provision in the legislation that allows the Court to decide on or to override the choice of the parties over the appointment of an arbitrator should only be invoked if there is agreement from all the parties.

Section 3 Determination of preliminary question of law by Court

12. Section 3 of this Schedule is an opt-in provision which deals with the power of the Court of First Instance to determine a question of law arising in the course of the arbitral proceedings.

13. As recommended in the *Report*, section 3 of this Schedule is adapted from section 45 of the UK Arbitration Act and replaces section

23A of the current Ordinance.¹¹⁹ The purpose of the inclusion of section 3 as an opt-in provision in Schedule 3 is to minimise the intervention of the Court in arbitral proceedings.

14. Section 3(2) of this Schedule states that an application for the Court to determine a question of law may only be made by a party to the arbitral proceedings if the agreement of all the other parties to the arbitral proceedings has been obtained or where permission is given by the arbitral tribunal.

15. Pursuant to section 3(4) of this Schedule, the Court shall only entertain an application under this provision if it is satisfied that the determination of the application might produce substantial savings in costs to the parties. The additional condition under section 23A(2)(b) of the current Ordinance, which requires that the question of law be one in respect of which leave to appeal would be likely to be given under section 23(3)(b) of the current Ordinance, is not retained.

16. It is further provided under section 3(6) of this Schedule that no appeal shall lie from a decision of the Court unless the leave of the Court is granted.

Section 4 Challenging arbitral tribunal's award on ground of serious irregularity

17. Section 4 of this Schedule is another opt-in provision which allows a party to arbitral proceedings to apply to the Court of First Instance to challenge an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

18. Serious irregularity is defined in section 4(2) of this Schedule as an irregularity of one or more of the kinds listed in subsection (2)(a) to (i) and which the Court considers has caused or will cause substantial injustice to the applicant.

¹¹⁹ See paras 35.5-35.9 of the *Report*.

19. Pursuant to section 4(3) of this Schedule, where there is shown to be serious irregularity affecting the arbitral tribunal, the proceedings or the award, the Court may remit the award to the arbitral tribunal, in whole or in part, for reconsideration; set aside the award, in whole or in part; or declare the award to be of no effect, in whole or in part.

20. It is stipulated under section 4(6) of this Schedule that leave of the Court of First Instance is required for any appeal from its decision under this provision.

Section 5 Appeal against arbitral award on question of law

21. As recommended in the *Report*, the right of a party to arbitral proceedings to appeal to the Court of First Instance on a question of law arising out of an award made in the proceedings which is presently provided for under section 23 of the current Ordinance is retained as an opt-in provision in section 5 of this Schedule.¹²⁰

22. Section 5(1) to (8) sets out the procedures for determination of the substantive appeal on the question of law by the Court of First Instance. The Court of First Instance shall determine the question of law on the basis of the findings of fact in the award as provided for in section 5(3) of this Schedule. As specified under section 5(5) of this Schedule, on hearing an appeal, the Court may confirm or vary the award; remit the award to the arbitral tribunal in whole or in part for reconsideration; or set aside the award in whole or in part.

23. Section 5(9) of this Schedule provides that leave of the Court of Appeal is required for any further appeal against a decision of the Court of First Instance on the appeal. The conditions that need to be satisfied for leave to further appeal to be granted by the Court of Appeal are set out in section 5(10) of this Schedule.

¹²⁰ See paras 44.7-44.10 of the *Report*.

Section 6 Application for leave to appeal against arbitral award on question of law

24. Section 6(1) of this Schedule provides that an appeal under section 5 of this Schedule on a question of law arising out of an award made in the arbitral proceedings may not be brought except with the agreement of all the other parties to the proceedings or where leave to appeal has been granted by the Court of First Instance.¹²¹

25. Section 6(3) of this Schedule provides that the Court shall determine an application for leave to appeal without a hearing unless it appears to the Court that a hearing is required. This is to avoid applications for leave to be turned into long and expensive court hearings.

26. The conditions that need to be satisfied for leave to be granted by the Court are set out in section 6(4) of this Schedule. The criteria stipulated in section 6(4)(c) are generally in accord with the principles laid down by the Court of Final Appeal in *Swire Properties Ltd v Secretary for Justice*.¹²² It is to be noted that the wording “general importance” are used under section 6(4)(c)(ii) in place of “general public importance” as the question of law may only be of general importance to a particular industry or profession and not to the general public.

27. As stipulated under section 6(5) of this Schedule, leave of the Court of First Instance is required for an appeal from a decision of the Court to grant or refuse leave to appeal. The conditions that need to be satisfied for leave to be granted by the Court to appeal against such

¹²¹ The requirements set out in section 6(1) of Schedule 3 are adapted from section 69(2) of the UK Arbitration Act and are similar to those found in section 23(3) of the current Ordinance.

¹²² [2003] 3 HKC 347. The principles governing the grant of leave by the Court of First Instance to appeal on a question of law arising out of an arbitral award have been stated by Bokhary PJ, at paras 43, 44 and 46 of the judgment: “Where a question of law of general public importance or the construction of a standard clause is involved, I think that our courts should normally grant leave to appeal from an arbitral award when, but only when, there is at least a serious doubt as to its correctness. ...Where the construction of a ‘one-off’ clause is involved, I think that our courts should normally grant leave to appeal from an arbitral award when, but only when, the arbitral tribunal’s construction appears to be obviously wrong. Then, but only then, would it normally be just and proper to permit an appeal in a ‘one-off’ case. ... Of course none of the foregoing is to deny that each case – whether it concerns a question of law of general public importance, the construction of a standard clause or the construction of a ‘one-off’ clause – will have its own particular features bearing upon the discretion to grant or refuse leave to appeal from an arbitral award.”

decision of the Court are set out in section 6(6) of this Schedule.

Section 7 Supplementary provisions on challenge to or appeal against arbitral award

28. This provision deals with supplementary matters on challenge to or appeal against an arbitral award.

29. Section 7(1) of this Schedule sets out the requirement that any available recourse under Clause 70 and any available arbitral process of appeal or review should be exhausted before an application or appeal under sections 4, 5 or 6 of this Schedule may be brought.

30. Section 7(2) of this Schedule empowers the Court of First Instance to order an arbitral tribunal to state the reasons for its award in sufficient detail to enable the Court to properly consider an application or appeal relating to the award.

31. Pursuant to section 7(4) of this Schedule, the Court of First Instance may order an applicant or appellant to give security for costs in respect of an application or appeal relating to an arbitral award.

32. It is further provided under section 7(9) of this Schedule that an order made under this section shall be subject to no appeal.

SCHEDULE 4

SAVINGS AND TRANSITIONAL PROVISIONS

Section 1 Conduct of arbitral and related proceedings

1. Section 1(1) of Schedule 4 to the draft Bill provides that an arbitration commenced or deemed to be commenced before the commencement of the new Ordinance shall be governed by the repealed Ordinance.

2. Section 1(2) of this Schedule further provides that an arbitration commenced under any other Ordinance before the commencement of the new Ordinance shall be governed by that other Ordinance in force immediately before the commencement of the new Ordinance.

Section 2 Appointment of arbitrators

3. Section 2(1) of this Schedule states that the appointment of an arbitrator made before the commencement of the new Ordinance shall continue to have effect after the commencement of the new Ordinance.

4. As stated under section 2(2) of this Schedule, the enactment of the new Ordinance does not revive the appointment of an arbitrator whose mandate has terminated before the commencement of the new Ordinance.

Section 3 Appointment of members of the Appointment Advisory Board

5. Section 3 of this Schedule states that the appointment of a member of the Appointment Advisory Board established under Rule 3 of the Arbitration (Appointment of Arbitrators and Umpires) Rules (Cap 341 sub. leg. B) made before the commencement of the new Ordinance shall continue to have effect after the commencement of the new

Ordinance until the expiry of the term of that appointment.

SCHEDULE 5

CONSEQUENTIAL AND RELATED AMENDMENTS

1. The proposed consequential and related amendments to other Ordinances and subsidiary legislation have been set out in Schedule 5 to this draft Bill. The Ordinances and subsidiary legislation proposed to be amended are:

High Court Ordinance (Cap 4),
Rules of the High Court (Cap 4 sub. leg. A),
Labour Relations Ordinance (Cap 55),
Control of Exemption Clauses Ordinance (Cap 71),
Ferry Services Ordinance (Cap 104),
Telecommunications Ordinance (Cap 106),
Telecommunications Regulations (Cap 106 sub. leg. A),
Tramway Ordinance (Cap 107),
Buildings Ordinance (Cap 123),
Quarantine and Prevention of Disease Ordinance (Cap 141),
Public Bus Services Ordinance (Cap 230),
Mining Ordinance (Cap 285),
Hong Kong Airport (Control of Obstructions) Ordinance (Cap 301),
Arbitration (Appointment of Arbitrators and Umpires) Rules (Cap 341 sub. leg. B),
Limitation Ordinance (Cap 347),
Kowloon-Canton Railway Corporation Ordinance (Cap 372),
Tate's Cairn Tunnel Ordinance (Cap 393),
Western Harbour Crossing Ordinance (Cap 436),
Air Transport (Licensing of Air Services) Regulations (Cap 448 sub. leg. A),
Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Cap 474),
Merchant Shipping (Liner Conferences) Ordinance (Cap 482),
Copyright Ordinance (Cap 528),
Electronic Transactions Ordinance (Cap 553),
Mass Transit Railway Ordinance (Cap 556),

Broadcasting Ordinance (Cap 562),
Securities and Futures (Leveraged Foreign Exchange
Trading)(Arbitration) Rules (Cap 571 sub. leg. F),
Tung Chung Cable Car Ordinance (Cap 577).

2. Order 73 of the Rules of the High Court (Cap 4 sub. leg. A) is amended by sections 10 to 19 of this Schedule. According to Clause 108, this revised Order will apply in making an application, request or appeal under the new Ordinance to the Court of First Instance.
Comments on the amendments made to this Order are invited.

3. A proposal is made under Section 38 of this Schedule to add the “President of the Hong Kong Construction Association” to the list of persons and organizations set out in Rule 3(2) of the Arbitration (Appointment of Arbitrators and Umpires) Rules (Cap 341 sub. leg. B). A person or organization referred to in Rule 3(2) will be invited by the Council of HKIAC to nominate one person each to be a member of the Appointment Advisory Board established by the Council of HKIAC. **Views are sought on the above proposal.**

Annex A

**Consultation draft
of
Arbitration Bill**

ARBITRATION BILL

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A BILL

To

Amend the law relating to arbitration, and to provide for related and consequential matters.

Enacted by the Legislative Council.

PART 1

PRELIMINARY

1. Short title and commencement

(1) This Ordinance may be cited as the Arbitration Ordinance.

(2) This Ordinance shall come into operation on

[].

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires -

"arbitral tribunal" (仲裁庭) means a sole arbitrator or a panel of arbitrators, and includes an umpire;

"arbitration" (仲裁) means any arbitration, whether or not administered by a permanent arbitral institution;

"arbitration agreement" (仲裁協議) has the same meaning as in section 19;

"arbitrator" (仲裁員), except in sections 23, 24, 30, 31, 33 and 66, Schedule 2 and section 1 of Schedule 3, includes an umpire;

"claimant" (申索人) means a person who makes a claim or a counter-claim in an arbitration;

"Commission" (委員會) means the United Nations Commission on

International Trade Law;

"Convention award" (公約裁決) means an arbitral award made in a State or the territory of a State, other than China or any part thereof, which is a party to the New York Convention;

"Court" (原訟法庭) means the Court of First Instance of the High Court;

"dispute" (爭議) includes a difference;

"function" (職能) includes a power and a duty;

"HKIAC" (香港國際仲裁中心) means the Hong Kong International Arbitration Centre, a company incorporated in Hong Kong under the Companies Ordinance (Cap. 32) and limited by guarantee;

"interim measure" (臨時措施) -

(a) where it is granted by an arbitral tribunal, has the same meaning as in section 36(1) and (2); or

(b) where it is granted by a court, has the same meaning as in section 46(8),

and "interim measure of protection" (臨時保護措施) is to be construed accordingly;

"the Mainland" (內地) means any part of China other than Hong Kong, Macao and Taiwan;

"Mainland award" (內地裁決) means an arbitral award made in the Mainland by a recognized Mainland arbitral authority in accordance with the Arbitration Law of the People's Republic of China;

"mediation" (調解) includes conciliation;

"New York Convention" (紐約公約) means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958;

"party" (一方) -

(a) means a party to an arbitration agreement; or

(b) in relation to any arbitral or court proceedings,
means a party to the proceedings;

"recognized Mainland arbitral authority" (認可內地仲裁當局) means an arbitral authority that is specified in the list of recognized Mainland arbitral authorities published by the Secretary for Justice under section 98;

"repealed Ordinance" (被廢除條例) means the Arbitration Ordinance (Cap. 341) repealed under section 109;

"respondent" (應訴人) means a person against whom a claim or a counter-claim is made in an arbitration;

"UNCITRAL Model Law" (聯合國國際貿易法委員會示範法) means the UNCITRAL Model Law on International Commercial Arbitration as adopted by the Commission on 21 June 1985 and as amended by the Commission on 7 July 2006, the full text of which is set out in Schedule 1.

(2) Where a provision of this Ordinance -

(a) refers to the fact that the parties have agreed, or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement; or

(b) provides that the parties may agree, any such agreement may include any arbitration rules by referring to those rules in that agreement.

(3) Where -

(a) a provision of this Ordinance (other than sections 54 and 69) refers to a claim, that provision also applies to a counter-claim; and

(b) a provision of this Ordinance (other than section 54) refers to a defence, that provision also applies to a defence to a counter-claim.

(4) A note located in the text of this Ordinance, a section heading of any provision of this Ordinance or a heading of any provision of the UNCITRAL Model Law is for reference only and has no legislative effect.

3. Object and principles of Ordinance

(1) The object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense.

(2) This Ordinance is based on the principles -

- (a) that, subject to the observation of such safeguards as are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved; and
- (b) that the Court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance.

4. UNCITRAL Model Law to have force of law in Hong Kong

The provisions of the UNCITRAL Model Law that are expressly stated in this Ordinance as having effect have the force of law in Hong Kong subject to the modifications and supplements as expressly provided for in this Ordinance.

5. Application of Ordinance

(1) Subject to subsection (2), this Ordinance applies to an arbitration under an arbitration agreement (whether or not it is entered into in Hong Kong) where the place of arbitration is in Hong Kong.

(2) Where the place of arbitration is outside Hong Kong, only sections 20, 21, 46, 61 and 62 and Part 10 apply to the arbitration.

(3) Where any other Ordinance provides that this Ordinance applies to an arbitration under that other Ordinance, this Ordinance (other than sections 20(2) to (4), 22(1), 59 and 75(8) and (9)) applies to an arbitration under that other Ordinance, subject to the following -

- (a) a reference in article 16(1) of the UNCITRAL Model Law, given effect to by section 35, to any objections with respect to the existence or validity of the arbitration agreement is to be construed as a reference to any objections with respect to the application of that other Ordinance to the dispute in question;
- (b) that other Ordinance is deemed to have expressly provided that, subject to paragraph (c), all the provisions in Schedule 3 apply; and
- (c) section 2 of Schedule 3 (where applicable) only applies so as to authorize 2 or more arbitral proceedings under the same Ordinance to be consolidated or to be heard at the same time or one immediately after another.

(4) Subsection (3) has effect, in relation to an arbitration under any other Ordinance, only in so far as this Ordinance is consistent with -

- (a) that other Ordinance; and
- (b) any rules or procedures authorized or recognized by that other Ordinance.

6. Ordinance to apply to arbitration agreements and arbitrations to which Government is party

This Ordinance applies to -

- (a) any arbitration agreement to which the Government is a party; and
- (b) any arbitration to which the Government is a party.

PART 2

GENERAL PROVISIONS

7. Article 1 of UNCITRAL Model Law (Scope of application)

Section 5 has effect in substitution for article 1 of the UNCITRAL Model Law.

8. Article 2 of UNCITRAL Model Law (Definitions and rules of interpretation)

(1) Section 2 has effect in substitution for article 2 of the UNCITRAL Model Law.

(2) For the purposes of subsection (1), a reference to this Ordinance in section 2 is to be construed as including a reference to the UNCITRAL Model Law.

(3) In interpreting and applying the provisions of the UNCITRAL Model Law -

- (a) a reference to this State is to be construed as a reference to Hong Kong;
- (b) a reference to a State is to be construed as including a reference to Hong Kong;

- (c) a reference to different States is to be construed as including a reference to Hong Kong and any other place;
- (d) a reference to an article is to be construed as a reference to an article of the UNCITRAL Model Law; and
- (e) a reference to this Law (other than in article 2A of the UNCITRAL Model Law, given effect to by section 9) is to be construed as a reference to this Ordinance.

9. Article 2A of UNCITRAL Model Law (International origin and general principles)

Article 2A of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 2A. International origin and general principles

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

10. Article 3 of UNCITRAL Model Law (Receipt of written

communications)

(1) Article 3 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings."

(2) Without prejudice to subsection (1), where a written communication (other than communications in court proceedings) is sent by any means by which information can be recorded and transmitted to the addressee, the communication is deemed to have been received on the day it is so sent.

(3) Subsection (2) applies only if there is a record of receipt of the communication by the addressee.

**11. Article 4 of UNCITRAL Model Law
(Waiver of right to object)**

Article 4 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 4. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object."

**12. Article 5 of UNCITRAL Model Law
(Extent of court intervention)**

Article 5 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law."

**13. Article 6 of UNCITRAL Model Law (Court
or other authority for certain
functions of arbitration
assistance and
supervision)**

(1) Subsections (2) to (5) have effect in substitution for Article 6 of the UNCITRAL Model Law.

(2) The functions of the court or other authority referred to in article 11(3) or (4) of the UNCITRAL Model Law, given effect to by section 24, shall be performed by the HKIAC.

(3) The HKIAC may, with the approval of the Chief Justice, make rules to facilitate the performance of its functions under section 24 or 33(1).

(4) The functions of the court or other authority referred to in article 13(3) of the UNCITRAL Model Law, given effect to by section 26, and article 14(1) of the UNCITRAL Model Law, given effect to by section 27, shall be performed by the Court.

(5) The functions of the court referred to in article 16(3) of the UNCITRAL Model Law, given effect to by section 35, and article 34(2) of the UNCITRAL Model Law, given effect to by section 82, shall be performed by the Court.

(6) The functions of the competent court referred to in article 27 of the UNCITRAL Model Law, given effect to by section 56, shall be performed by the Court.

14. Application of Limitation Ordinance and other limitation enactments to arbitrations

(1) The Limitation Ordinance (Cap. 347) and any other Ordinance relating to the limitation of actions ("limitation enactments") apply to arbitrations as they apply to actions in the court.

(2) For the purposes of subsection (1), a reference in a limitation enactment to bringing an action is to be construed as, in relation to an arbitration, a reference to the commencement of the arbitral proceedings.

(3) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be submitted to arbitration until an award is made under the agreement, the cause of action is, for the purposes of the limitation enactments (whether in their application to arbitrations or to other proceedings), to be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

(4) Where a court orders that an award shall be set aside, the court may further order that the period between -

(a) the commencement of the arbitration; and

(b) the date of the order of the court,

shall be excluded in computing the time prescribed by a limitation enactment for the commencement of proceedings (including arbitration) with respect to the matter submitted to arbitration.

15. Reference of interpleader issue to arbitration by court

(1) Where -

(a) relief by way of interpleader is granted by a court; and

(b) any issue between the claimants in the interpleader proceedings is one in respect of which there is an arbitration agreement between them,

the court granting the relief shall direct that the issue shall be determined in accordance with the agreement, unless the circumstances are such that legal proceedings brought by a claimant in respect of the issue would not be stayed.

(2) If, in the case referred to in subsection (1), the court does not direct that the issue shall be determined in accordance

with the arbitration agreement, any provision of an agreement that an award is a condition precedent to the bringing of legal proceedings in respect of such issue does not affect the determination of that issue by the court.

16. Proceedings to be heard in open court unless otherwise ordered

(1) Proceedings under this Ordinance in the court shall, subject to subsection (2), be heard in open court.

(2) Upon application of any party, the court shall order those proceedings to be heard otherwise than in open court unless, in any particular case, the court is satisfied that those proceedings ought to be heard in open court.

(3) An order of the court under subsection (2) shall be subject to no appeal.

17. Restrictions on reporting of proceedings heard otherwise than in open court

(1) This section applies to proceedings under this Ordinance in the court heard otherwise than in open court ("closed court proceedings").

(2) A court in which closed court proceedings are being heard shall, upon application of any party, make a direction as to what information, if any, relating to the proceedings may be published.

(3) A court shall not make a direction permitting information to be published unless -

(a) all parties agree that such information may be published; or

(b) the court is satisfied that the information, if published, would not reveal any matter (including

the identity of any party) that any party reasonably wishes to remain confidential.

(4) Notwithstanding subsection (3), where -

(a) a court gives a judgment in respect of closed court proceedings; and

(b) the court considers that judgment to be of major legal interest,

the court shall direct that reports of the judgment may be published in law reports and professional publications.

(5) Where a court directs under subsection (4) that reports of a judgment may be published, but any party reasonably wishes to conceal any matter in those reports (including the fact that he was such a party), the court shall -

(a) make a direction as to the action to be taken to conceal that matter in those reports; and

(b) if it considers that a report published in accordance with the direction made under paragraph (a) would still be likely to reveal that matter, direct that no report is to be published until after the end of such period as it may direct, not exceeding 10 years.

(6) A direction of the court under this section shall be subject to no appeal.

18. Disclosure of information relating to arbitral proceedings and awards prohibited

(1) Unless otherwise agreed by the parties, a party shall not publish, disclose or communicate any information relating to -

(a) the arbitral proceedings under the arbitration agreement; or

(b) an award made in those proceedings.

(2) Nothing in subsection (1) prevents the publication, disclosure or communication of information referred to in that subsection by a party -

- (a) if the publication, disclosure or communication is contemplated by this Ordinance;
- (b) if the publication, disclosure or communication is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make such publication, disclosure or communication; or
- (c) if the publication, disclosure or communication is made to a professional or any other adviser of any of the parties.

PART 3

ARBITRATION AGREEMENT

**19. Article 7 of UNCITRAL Model Law
(Definition and form of
arbitration agreement)**

(1) Option I of Article 7 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Option I

*Article 7. Definition and form of arbitration
agreement*

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An

arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document

containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract."

(2) Without prejudice to subsection (1), an arbitration agreement is in writing if -

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

(b) 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.

(3) A reference in an agreement to a written form of arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

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

(1) Article 8 of the UNCITRAL Model Law, the text of which is set out below, has effect -

*"Article 8. Arbitration agreement and substantive
claim before court*

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to

arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

(2) Where a dispute in the matter which is the subject of an arbitration agreement involves a claim or other dispute that is made pursuant to or arises under an employment contract, the court may, if a party so requests, refer the parties to arbitration if it is satisfied that -

- (a) there is no sufficient reason why the parties should not be referred to arbitration in accordance with the arbitration agreement; and
- (b) the party requesting arbitration was ready and willing at the time the action was brought to do all things necessary for the proper conduct of the arbitration, and remains so.

(3) Subsections (1) and (2) have effect subject to section 15 of the Control of Exemption Clauses Ordinance (Cap. 71) (Arbitration agreements).

(4) If the court refuses to refer the parties to arbitration, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

(5) Where the court refers the parties in an action to

arbitration, it shall make an order staying the legal proceedings in that action.

(6) In the case of Admiralty proceedings -

(a) the reference of the parties to arbitration and an order for the stay of those proceedings may, notwithstanding subsections (1) and (5), be made conditional on the giving of security for the satisfaction of any award made in the arbitration; or

(b) (if property has been arrested, or bail or other security has been given to prevent or obtain release from arrest, in those proceedings) where the court makes an order under subsection (5) staying those proceedings, the court may order the property arrested or the bail or security given be retained as security for the satisfaction of any award made in the arbitration.

(7) Subject to any provision made by rules of court and to any necessary modifications, the same law and practice apply to the property retained in pursuance of an order under subsection (6) as would apply if the property retained were held for the purposes of proceedings in the court making the order.

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

Article 9 of the UNCITRAL Model Law, the text of which is set out below, has effect -

*"Article 9. Arbitration agreement and interim
measures by court*

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

22. Whether agreement discharged by death of a party

(1) Unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representatives of that party.

(2) Subsection (1) does not affect the operation of any enactment or rule of law by virtue of which a substantive right or obligation is extinguished by death.

PART 4

COMPOSITION OF ARBITRAL TRIBUNAL

Division 1 - Arbitrators

**23. Article 10 of UNCITRAL Model Law
(Number of arbitrators)**

(1) Article 10(1) of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 10. Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) [*Not applicable.*]"

(2) For the purposes of subsection (1), the freedom of the

parties to determine the number of arbitrators includes the right of the parties to authorize a third party, including an institution, to make that determination.

(3) Subject to section 1 of Schedule 3 (where applicable), if the parties fail to agree on the number of arbitrators, the number of arbitrators is to be either 1 or 3 as decided by the HKIAC in the particular case.

**24. Article 11 of UNCITRAL Model Law
(Appointment of arbitrators)**

(1) Article 11 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(2) and (3) -

"Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the

two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other

authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties."

- (2) In an arbitration with an even number of arbitrators -
- (a) where the parties have not agreed on a procedure for appointing the arbitrators under article 11(2) of the UNCITRAL Model Law, given effect to by subsection (1), each party shall appoint the same number of arbitrators; or
 - (b) if -
 - (i) a party fails to act as required under an appointment procedure agreed upon by the parties; or
 - (ii) in the case of paragraph (a), a party fails to appoint the appropriate number of arbitrators under that paragraph within 30 days of receipt of a request to do so from the other party,
the HKIAC shall make the necessary appointment upon a request to do so from any party.
- (3) In an arbitration with an uneven number of arbitrators

greater than 3 -

(a) where the parties have not agreed on a procedure for appointing the arbitrators under article 11(2) of the UNCITRAL Model Law, given effect to by subsection (1) -

(i) each party shall appoint the same number of arbitrators; and

(ii) unless otherwise agreed by the parties, the HKIAC shall appoint the remaining arbitrator or arbitrators; or

(b) if -

(i) a party fails to act as required under an appointment procedure agreed upon by the parties; or

(ii) in the case of paragraph (a), a party fails to appoint the appropriate number of arbitrators under that paragraph within 30 days of receipt of a request to do so from the other party,

the HKIAC shall make the necessary appointment upon a request to do so from any party.

(4) In any other case (in particular, if there are more than 2 parties) article 11(4) of the UNCITRAL Model Law, given effect to by subsection (1), applies as in the case of a failure of the agreed appointment procedure.

(5) Where any appointment of an arbitrator is made by the HKIAC by virtue of this Ordinance, such appointment -

(a) has effect as if it were made with the agreement of all parties; and

(b) is subject to article 11(5) of the UNCITRAL Model

Law, given effect to by subsection (1).

**25. Article 12 of UNCITRAL Model Law
(Grounds for challenge)**

Article 12 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."

**26. Article 13 of UNCITRAL Model Law
(Challenge procedure)**

(1) Article 13 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(4) -

"Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award."

(2) During the period that a request for the Court to decide on a challenge is pending, the Court may refuse to grant leave under section 85 for the enforcement of any award made during that period by the arbitral tribunal that includes the challenged arbitrator.

(3) An arbitrator who is challenged under article 13(2) of the UNCITRAL Model Law, given effect to by subsection (1), is entitled, if he considers it appropriate in the circumstances of the challenge, to withdraw from his office as an arbitrator.

(4) The mandate of a challenged arbitrator terminates under article 13 of the UNCITRAL Model Law, given effect to by subsection (1), if -

- (a) he withdraws from his office;
- (b) the parties agree to the challenge;
- (c) the arbitral tribunal upholds the challenge and no request is made for the Court to decide on the challenge; or
- (d) the Court, upon request to decide on the challenge, upholds the challenge.

(5) Where the Court upholds the challenge, the Court may set aside the award referred to in subsection (2).

**27. Article 14 of UNCITRAL Model Law
(Failure or impossibility to
act)**

Article 14 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(4) -

"Article 14. Failure or impossibility to act

- (1) If an arbitrator becomes *de jure* or *de facto*

unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).".

**28. Article 15 of UNCITRAL Model Law
(Appointment of substitute
arbitrator)**

Article 15 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed

according to the rules that were applicable to the appointment of the arbitrator being replaced.".

29. Death of arbitrator or person appointing him

(1) The authority of an arbitrator is personal and his mandate terminates on his death.

(2) Unless otherwise agreed by the parties, the death of the person by whom an arbitrator was appointed does not revoke the arbitrator's authority.

30. Appointment of umpire

In an arbitration with an even number of arbitrators, the arbitrators may, unless otherwise agreed by the parties, appoint an umpire at any time after they are themselves appointed.

31. Functions of umpire in arbitral proceedings

(1) The parties are free to agree what the functions of an umpire are to be and, in particular -

(a) whether he is to attend the arbitral proceedings;
and

(b) when, and the extent to which, he is to replace the arbitrators as the arbitral tribunal with the power to make orders, directions and awards.

(2) If or to the extent that there is no such agreement of the parties, the arbitrators are free to agree on the functions of the umpire.

(3) Subsections (4) to (11) apply subject to any agreement of the parties or the arbitrators.

(4) After an umpire is appointed, he shall attend the arbitral proceedings.

(5) The umpire shall be supplied with the same documents and other materials as are supplied to the arbitrators.

(6) Orders, directions and awards shall be made by the arbitrators unless and until, subject to subsection (9), the arbitrators cannot agree on a matter relating to the dispute submitted to arbitration.

(7) Where the arbitrators cannot agree on a matter relating to the dispute submitted to arbitration, they shall forthwith give notice of that fact in writing to the parties and the umpire, whereupon the umpire shall replace them as the arbitral tribunal with the power to make orders, directions and awards, in respect of that matter only, subject to subsection (9)(b), as if he were the sole arbitrator.

(8) If the arbitrators cannot agree on a matter relating to the dispute submitted to arbitration but -

(a) they fail to give notice of that fact; or

(b) any of them fails to join in the giving of notice, any party may apply to the Court which may decide that the umpire shall replace the arbitrators as the arbitral tribunal with the power to make orders, directions and awards, in respect of that matter only, as if he were the sole arbitrator.

(9) Notwithstanding that the umpire has replaced the arbitrators as the arbitral tribunal in respect of a matter, on which they cannot agree, relating to the dispute submitted to arbitration, the arbitrators may -

(a) still make orders, directions and awards in respect of the other matters relating to the dispute if they consider that it would save costs by doing so; or

(b) refer the entirety of the dispute to the umpire for

arbitration.

(10) For the purposes of this section, the arbitrators cannot agree on a matter relating to the dispute submitted to arbitration if any one of them is of the view that he disagrees with the other arbitrator or any of the other arbitrators over that matter.

(11) The leave of the Court is required for any appeal from a decision of the Court under this section.

32. Judges, etc. may be appointed as arbitrators

(1) Subject to subsections (2) to (6), a judge, District Judge, magistrate or public officer may, if in all the circumstances he thinks fit, accept appointment as a sole arbitrator.

(2) A judge, District Judge or magistrate shall not accept appointment as such an arbitrator unless the Chief Justice has informed him that, having regard to the state of business in the courts, he can be made available to do so.

(3) A public officer shall not accept appointment as such an arbitrator unless the Secretary for Justice has informed him that he can be made available to do so.

(4) The fees payable for the services of a judge, District Judge, magistrate or public officer as such an arbitrator shall be paid into the general revenue.

(5) Schedule 2 has the effect of -

(a) modifying the provisions of this Ordinance relating to arbitration by a judge as a sole arbitrator;

(b) in certain cases, replacing the provisions of this Ordinance relating to arbitration by a judge as a sole arbitrator; and

(c) in particular, substituting the Court of Appeal for the Court in the provisions of this Ordinance whereby arbitrators, their proceedings and awards are subject to control and review by the Court.

(6) Any jurisdiction which is exercisable by the Court in relation to arbitrators otherwise than under this Ordinance shall, in relation to a judge appointed as a sole arbitrator, be exercisable instead by the Court of Appeal.

Division 2 - Mediators

33. Appointment of mediator

(1) Where -

(a) any written agreement provides for the appointment of a mediator by a person who is not one of the parties; and

(b) that person -

(i) refuses to make the appointment; or

(ii) does not make the appointment within the time specified in the arbitration agreement or, if no time is so specified, within a reasonable time after being requested by any party to make the appointment,

the HKIAC may, upon application of any party, appoint a mediator.

(2) An appointment made by the HKIAC under subsection (1) shall be subject to no appeal.

(3) Where any written agreement provides for the appointment of a mediator and further provides that the person so appointed shall act as an arbitrator in the event that no settlement

acceptable to the parties can be reached in the mediation proceedings -

- (a) no objection may be made against the person's acting as an arbitrator, or to his conduct of the arbitral proceedings, solely on the ground that he had acted previously as a mediator in connection with some or all of the matters relating to the dispute submitted to arbitration; or
- (b) if such person declines to act as an arbitrator, any other person appointed as an arbitrator shall not be required first to act as a mediator unless it is otherwise expressed in the written agreement.

34. Power of arbitrator to act as mediator

(1) If all parties consent in writing, and for so long as no party withdraws his consent in writing, an arbitrator may act as a mediator after the arbitral proceedings have commenced.

(2) Where an arbitrator acts as a mediator, the arbitral proceedings shall be stayed to facilitate the conduct of the mediation proceedings.

(3) An arbitrator who is acting as a mediator -

- (a) may communicate with the parties collectively or separately; and
- (b) shall treat the information obtained by him from a party as confidential, unless otherwise agreed by that party or unless subsection (4) applies.

(4) Where -

- (a) confidential information is obtained by an arbitrator from a party during the mediation

proceedings conducted by him as a mediator; and

(b) those mediation proceedings terminate without reaching a settlement acceptable to the parties, the arbitrator shall, before resuming the arbitral proceedings, disclose to all other parties as much of that information as he considers is material to the arbitral proceedings.

(5) No objection shall be made against the conduct of the arbitral proceedings by an arbitrator solely on the ground that he had acted previously as a mediator in accordance with this section.

PART 5

JURISDICTION OF ARBITRAL TRIBUNAL

35. Article 16 of UNCITRAL Model Law (Competence of arbitral tribunal to rule on its jurisdiction)

(1) Article 16 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(5) -

*"Article 16. Competence of arbitral tribunal to
rule on its jurisdiction*

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

(2) The power of the arbitral tribunal to rule on its own jurisdiction under subsection (1) includes the power to decide as to -

(a) whether the tribunal is properly constituted; or

(b) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(3) If a dispute is submitted to arbitration in accordance with an arbitration agreement and a party -

(a) makes a counter-claim arising out of the same dispute; or

(b) relies on a claim arising out of that dispute for the purposes of a set-off,

the arbitral tribunal has jurisdiction to decide on the counter-claim or the claim so relied on only to the extent that the subject matter of that counter-claim or that claim falls within the scope of the same arbitration agreement.

(4) A ruling of the arbitral tribunal that it does not have jurisdiction to decide a dispute shall be subject to no appeal.

(5) Notwithstanding section 20, if the arbitral tribunal rules that it does not have jurisdiction to decide a dispute, the court shall, if it has jurisdiction, decide that dispute.

PART 6

INTERIM MEASURES AND PRELIMINARY ORDERS

Division 1 - Interim measures

36. Article 17 of UNCITRAL Model Law (Power of arbitral tribunal to order interim measures)

(1) Article 17 of the UNCITRAL Model Law, the text of which is set out below, has effect -

*"Article 17. Power of arbitral tribunal to order
interim measures*

(1) Unless otherwise agreed by the parties, the

arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute."

(2) An interim measure referred to in article 17 of the UNCITRAL Model Law, given effect to by subsection (1), is to be construed as including an injunction but not including an order under section 57.

(3) Where the arbitral tribunal has granted an interim measure, the tribunal may, upon application of any party, make an award to the same effect as the interim measure.

**37. Article 17A of UNCITRAL Model Law
(Conditions for granting interim
measures)**

Article 17A of the UNCITRAL Model Law, the text of which is

set out below, has effect -

"Article 17A. Conditions for granting interim measures

(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs 1(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate."

Division 2 - Preliminary orders

**38. Article 17B of UNCITRAL Model Law
(Applications for preliminary
orders and conditions for
granting preliminary
orders)**

Article 17B of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 17B. Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not."

**39. Article 17C of UNCITRAL Model Law
(Specific regime for preliminary orders)**

Article 17C of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 17C. Specific regime for preliminary

orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the

parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award."

Division 3 - Provisions applicable to interim measures and preliminary orders

**40. Article 17D of UNCITRAL Model Law
(Modification, suspension,
termination)**

Article 17D of the UNCITRAL Model Law, the text of which is set out below, has effect -

*"Article 17D. Modification, suspension,
termination*

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative."

**41. Article 17E of UNCITRAL Model
Law (Provision of security)**

Article 17E of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 17E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so."

42. Article 17F of UNCITRAL Model Law (Disclosure)

Article 17F of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 17F. Disclosure

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply."

43. Article 17G of UNCITRAL Model Law (Costs and damages)

Article 17G of the UNCITRAL Model Law, the text of which is

set out below, has effect -

"Article 17G. Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings."

Division 4 - Recognition and enforcement of interim measures

44. Article 17H of UNCITRAL Model Law (Recognition and enforcement)

Section 62 has effect in substitution for article 17H of the UNCITRAL Model Law.

45. Article 17I of UNCITRAL Model Law (Grounds for refusing recognition or enforcement)

Article 17I of the UNCITRAL Model Law does not have effect.

Division 5 - Court-ordered interim measures

46. Article 17J of UNCITRAL Model Law (Court-ordered interim measures)

(1) Article 17J of the UNCITRAL Model Law does not have effect.

(2) The Court may, in relation to any arbitral proceedings,

whether in or outside Hong Kong, grant an interim measure.

(3) The powers conferred by this section may be exercised by the Court irrespective of whether or not similar powers may be exercised by an arbitral tribunal under section 36 in relation to the same dispute.

(4) In relation to arbitral proceedings outside Hong Kong, the Court may grant an interim measure under subsection (2) only if -

- (a) the arbitral proceedings are capable of giving rise to an arbitral award (whether interim or final) which may be enforced in Hong Kong under this Ordinance or any other Ordinance; and
- (b) the interim measure sought belongs to a type or description of interim measures that may be granted in Hong Kong in relation to arbitral proceedings by the Court.

(5) Subsection (4) applies notwithstanding that -

- (a) the subject matter of the arbitral proceedings would not, apart from that subsection, give rise to a cause of action over which the Court would have jurisdiction; or
- (b) the order sought is not ancillary or incidental to any arbitral proceedings in Hong Kong.

(6) In exercising the power under subsection (2) in relation to arbitral proceedings outside Hong Kong, the Court shall have regard to the fact that the power is -

- (a) ancillary to arbitral proceedings outside Hong Kong; and
- (b) for the purposes of facilitating the process of a court or arbitral tribunal outside Hong Kong that

has primary jurisdiction over the arbitral proceedings.

(7) The Court has the same power to make any incidental order or direction for the purposes of ensuring the effectiveness of an interim measure granted in relation to arbitral proceedings outside Hong Kong as if the interim measure were granted in relation to arbitral proceedings in Hong Kong.

(8) An interim measure referred to in subsection (2) means an interim measure referred to in article 17(2) of the UNCITRAL Model Law, given effect to by section 36(1), as if -

- (a) a reference to the arbitral tribunal in that article were a reference to the court; and
- (b) a reference to arbitral proceedings in that article were a reference to court proceedings,

and is to be construed as including an injunction but not including an order under section 61.

PART 7

CONDUCT OF ARBITRAL PROCEEDINGS

47. Article 18 of UNCITRAL Model Law (Equal treatment of parties)

(1) Subsections (2) and (3) have effect in substitution for Article 18 of the UNCITRAL Model Law.

(2) The parties shall be treated with equality.

(3) When conducting arbitral proceedings or exercising any of the powers conferred on an arbitral tribunal by this Ordinance or by the parties to any such proceedings, the arbitral tribunal is required -

- (a) to be independent;

- (b) to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents; and
- (c) to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the proceedings relate.

**48. Article 19 of UNCITRAL Model Law
(Determination of rules of
procedure)**

(1) Article 19(1) of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) [*Not applicable.*]"

(2) If or to the extent that there is no such agreement of the parties, the arbitral tribunal may, subject to the provisions of this Ordinance, conduct the arbitration in such manner as it considers appropriate.

(3) When conducting arbitral proceedings, an arbitral tribunal is not bound by the rules of evidence and may receive any

evidence that it considers relevant to the proceedings, but it shall give such weight to the evidence adduced in the proceedings as it considers appropriate.

**49. Article 20 of UNCITRAL Model Law
(Place of arbitration)**

Article 20 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 20. Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents."

**50. Article 21 of UNCITRAL Model Law
(Commencement of arbitral proceedings)**

Article 21 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

**51. Article 22 of UNCITRAL Model Law
(Language)**

Article 22 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 22. Language

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal."

**52. Article 23 of UNCITRAL Model Law
(Statements of claim and defence)**

Article 23 of the UNCITRAL Model Law, the text of which is

set out below, has effect -

"Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it."

**53. Article 24 of UNCITRAL Model Law
(Hearings and written
proceedings)**

Article 24 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the

parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties."

**54. Article 25 of UNCITRAL Model Law
(Default of a party)**

(1) Article 25 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it."

(2) Unless otherwise agreed by the parties, subsections (3) and (4) apply except in relation to an application for security for costs.

(3) If, without showing sufficient cause, a party fails to comply with any order or direction of the arbitral tribunal, the tribunal may make a peremptory order to the same effect, prescribing such time for compliance with it as the arbitral tribunal considers appropriate.

(4) If a party fails to comply with a peremptory order, then without prejudice to section 62, the arbitral tribunal may -

- (a) direct that the party in default is not entitled to rely on any allegation or material which was the subject matter of the peremptory order;
- (b) draw such adverse inferences from the act of non-compliance as the circumstances may justify;
- (c) make an award on the basis of any materials which

have been properly provided to the arbitral tribunal; or

- (d) make such order as the arbitral tribunal thinks fit as to the payment of the costs of the arbitration incurred in consequence of the non-compliance.

**55. Article 26 of UNCITRAL Model Law
(Expert appointed by arbitral tribunal)**

(1) Article 26 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at

issue."

(2) Without prejudice to article 26 of the UNCITRAL Model Law, given effect to by subsection (1), in assessing the amount of the costs of the arbitral proceedings (other than the fees and expenses of the tribunal) under section 75 -

(a) the arbitral tribunal may -

(i) appoint experts or legal advisers to report to it and the parties; or

(ii) appoint assessors to assist it on technical matters,

and may allow any such expert, legal adviser or assessor to attend the proceedings; and

(b) the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such expert, legal adviser or assessor.

**56. Article 27 of UNCITRAL Model Law
(Court assistance in taking
evidence)**

(1) Article 27 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 27. Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking

evidence.".

(2) The Court may order a person to attend proceedings before an arbitral tribunal to give evidence or to produce documents or other evidence.

(3) The Court may also order a writ of habeas corpus ad testificandum to be issued requiring a prisoner to be taken before an arbitral tribunal for examination.

(4) The powers conferred by this section may be exercised by the Court irrespective of whether or not similar powers may be exercised by an arbitral tribunal under section 57 in relation to the same dispute.

(5) A decision or order of the Court made in the exercise of its power under this section shall be subject to no appeal.

57. General powers exercisable by arbitral tribunal

(1) Unless otherwise agreed by the parties, when conducting arbitral proceedings, an arbitral tribunal may make an order -

- (a) requiring a claimant to give security for the costs of the arbitration;
- (b) directing the discovery of documents or the delivery of interrogatories;
- (c) directing evidence to be given by affidavit; or
- (d) in relation to any relevant property -
 - (i) directing the inspection, photographing, preservation, custody, detention or sale of the relevant property by the arbitral tribunal, a party to the arbitral proceedings or an expert; or

- (ii) directing samples to be taken from, observations to be made of, or experiments to be conducted on the relevant property.

(2) An arbitral tribunal shall not make an order under subsection (1)(a) only on the ground that the claimant is -

- (a) a natural person who is ordinarily resident outside Hong Kong;
- (b) a body corporate -
 - (i) incorporated under the law of a place outside Hong Kong; or
 - (ii) the central management and control of which is exercised outside Hong Kong; or
- (c) an association -
 - (i) formed under the law of a place outside Hong Kong; or
 - (ii) the central management and control of which is exercised outside Hong Kong.

(3) An arbitral tribunal -

- (a) shall, when making an order under subsection (1)(a), specify the period within which the order has to be complied with; and
- (b) may extend that period or an extended period.

(4) An arbitral tribunal may make an award dismissing a claim or stay a claim if it has made an order under subsection (1)(a) and the order has not been complied with within the period specified or extended under subsection (3)(a) or (b), as the case may be.

(5) Notwithstanding section 36(2), sections 40 to 43 apply, where appropriate, to an order under subsection (1)(d) as if a

reference to an interim measure in those sections were a reference to an order under that subsection.

(6) A property is a relevant property for the purposes of subsection (1)(d) if -

- (a) the property is owned by or is in the possession of a party to the arbitral proceedings; and
- (b) the property is the subject of the arbitral proceedings, or any question relating to the property has arisen in the arbitral proceedings.

(7) Unless otherwise agreed by the parties, an arbitral tribunal may, when conducting arbitral proceedings, decide whether and to what extent it should itself take the initiative in ascertaining the facts and the law relevant to those proceedings.

(8) Unless otherwise agreed by the parties, an arbitral tribunal may -

- (a) administer oaths to, or take the affirmations of, witnesses and parties;
- (b) examine witnesses and parties on oath or affirmation; or
- (c) direct the attendance before the arbitral tribunal of witnesses in order to give evidence or to produce documents or other evidence.

(9) A person shall not be required to produce in arbitral proceedings any document or other evidence that the person could not be required to produce in civil proceedings before a court.

58. Arbitral tribunal may limit amount of recoverable costs

(1) Unless otherwise agreed by the parties, an arbitral tribunal may direct that the recoverable costs of arbitral

proceedings before it are limited to a specified amount.

(2) Subject to subsection (3), the arbitral tribunal may, either on its own initiative or upon application of any party, make or vary such a direction.

(3) Such a direction may be made or varied at any stage of the arbitral proceedings, but, for the limit of the recoverable costs to be taken into account, this must be done sufficiently in advance of -

- (a) the incurring of the costs to which the direction or the variation relates; or
- (b) the taking of the steps in the arbitral proceedings which may be affected by the direction or the variation.

(4) In this section -

- (a) a reference to costs is to be construed as a reference to the parties' own costs; and
- (b) a reference to arbitral proceedings includes a reference to any part of those proceedings.

59. Power to extend time for arbitral proceedings

(1) This section applies to an arbitration agreement that provides for a claim to be barred or for a claimant's right to be extinguished unless the claimant, before the time or within the period specified in the agreement, takes a step -

- (a) to commence arbitral proceedings; or
- (b) to commence any other dispute resolution procedures that must be exhausted before arbitral proceedings may be commenced.

(2) Upon application of any party to such an arbitration agreement, an arbitral tribunal may make an order extending the

time or period referred to in subsection (1).

(3) An application may be made only after a claim has arisen and after exhausting any available arbitral procedures for obtaining an extension of time.

(4) An arbitral tribunal may make an order under this section extending the time or period referred to in subsection (1) only if it is satisfied -

(a) that -

(i) the circumstances were such as to be outside the reasonable contemplation of the parties when they entered into the arbitration agreement; and

(ii) it would be just to extend the period; or

(b) that the conduct of any party makes it unjust to hold the other party to the strict terms of the agreement.

(5) An arbitral tribunal may extend the time or period referred to in subsection (1), or the time or period extended under subsection (4), for such further period and on such terms as it thinks fit, and may do so even though such time or period has expired.

(6) This section does not affect the operation of section 14 or any other enactment that limits the period for commencing arbitral proceedings.

(7) The power conferred on an arbitral tribunal by this section is exercisable by the Court if at the relevant time there is not in existence an arbitral tribunal that is capable of exercising that power.

60. Order to be made in case of delay

in pursuing claims in arbitral proceedings

(1) Unless otherwise expressed in an arbitration agreement, a party who has a claim under the agreement shall, after the commencement of the arbitral proceedings, pursue his claim without unreasonable delay.

(2) The arbitral tribunal -

(a) may make an award dismissing a party's claim; and

(b) may make an order prohibiting the party from commencing further arbitral proceedings in respect of the claim,

if it is satisfied that the party has unreasonably delayed in pursuing the claim in the arbitral proceedings.

(3) Such an award or order may be made either -

(a) on the initiative of the arbitral tribunal; or

(b) upon application of another party.

(4) For the purposes of subsection (2), delay is unreasonable if -

(a) it gives rise, or is likely to give rise, to a substantial risk that the issues in the claim will not be resolved fairly; or

(b) it has caused, or is likely to cause, serious prejudice to any other party.

(5) The power conferred on an arbitral tribunal by this section is exercisable by the Court if there is not in existence an arbitral tribunal that is capable of exercising that power.

61. Special powers of Court in relation to arbitral proceedings

(1) The Court may, in relation to any arbitral proceedings, whether in or outside Hong Kong, make an order -

- (a) directing the inspection, photographing, preservation, custody, detention or sale of any relevant property by the arbitral tribunal, a party to the arbitral proceedings or an expert; or
- (b) directing samples to be taken from, observations to be made of, or experiments to be conducted on any relevant property.

(2) A property is a relevant property for the purposes of subsection (1) if the property is the subject of the arbitral proceedings, or any question relating to the property has arisen in the arbitral proceedings.

(3) The powers conferred by this section may be exercised by the Court irrespective of whether or not similar powers may be exercised by an arbitral tribunal under section 57 in relation to the same dispute.

(4) The Court may decline to make an order under this section in relation to a matter referred to in subsection (1) on the ground that -

- (a) the matter is currently the subject of arbitral proceedings; and
- (b) the Court considers it more appropriate for the matter to be dealt with by the arbitral tribunal.

(5) If the Court so orders, an order made by it under this section ceases to have effect, in whole or in part, on the order of the arbitral tribunal.

(6) In relation to arbitral proceedings outside Hong Kong, the Court may make an order under subsection (1) only if the arbitral proceedings are capable of giving rise to an arbitral award (whether interim or final) that may be enforced in Hong Kong under this Ordinance or any other Ordinance.

(7) Subsection (6) applies notwithstanding that -

- (a) the subject matter of the arbitral proceedings would not, apart from that subsection, give rise to a cause of action over which the Court would have jurisdiction; or
- (b) the order sought is not ancillary or incidental to any arbitral proceedings in Hong Kong.

(8) In exercising the power under subsection (1) in relation to arbitral proceedings outside Hong Kong, the Court shall have regard to the fact that the power is -

- (a) ancillary to arbitral proceedings outside Hong Kong; and
- (b) for the purposes of facilitating the process of a court or arbitral tribunal outside Hong Kong that has primary jurisdiction over the arbitral proceedings.

(9) The leave of the Court is required for any appeal from a decision of the Court under this section.

62. Enforcement of orders and directions of arbitral tribunal

(1) An order or direction made, whether in or outside Hong Kong, in relation to arbitral proceedings by an arbitral tribunal is enforceable in the same way as an order or direction of the court that has the same effect, but only with the leave of the court.

(2) Leave to enforce an order or direction made outside Hong Kong shall not be granted, unless the party seeking to enforce it can demonstrate that it belongs to a type or description of orders or directions that may be made in Hong Kong in relation to

arbitral proceedings by an arbitral tribunal.

(3) If leave is granted under subsection (1), the court may enter judgment in terms of the order or direction.

(4) A decision of the court to grant or refuse to grant leave under subsection (1) shall be subject to no appeal.

(5) An order or direction referred to in this section includes an interim measure.

63. Power of Court to order recovery of arbitrator's fees

(1) Where an arbitrator's mandate terminates under article 13 of the UNCITRAL Model Law, given effect to by section 26, or under article 14 of the UNCITRAL Model Law, given effect to by section 27, then upon application of any party, the Court, in its discretion and having regard to the conduct of the arbitrator and any other relevant circumstances -

(a) may order that the arbitrator is not entitled to receive the whole or part of his fees or expenses; and

(b) may order that the arbitrator shall repay the whole or part of the fees or expenses already paid to him.

(2) An order of the Court under subsection (1) shall be subject to no appeal.

64. Representation and preparation work

For the avoidance of doubt, it is hereby declared that section 44 (Penalty for unlawfully practising as a barrister or notary public), section 45 (Unqualified person not to act as solicitor) and section 47 (Unqualified person not to prepare certain instruments, etc.) of the Legal Practitioners Ordinance

(Cap. 159) do not apply to -

- (a) arbitral proceedings;
- (b) the giving of advice and the preparation of documents for the purposes of arbitral proceedings;
or
- (c) any other thing done in relation to arbitral proceedings, except where it is done in connection with court proceedings -
 - (i) arising out of an arbitration agreement;
or
 - (ii) arising in the course of, or resulting from, arbitral proceedings.

PART 8

MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

65. Article 28 of UNCITRAL Model Law (Rules applicable to substance of dispute)

Article 28 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 28. Rules applicable to substance of dispute

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its

conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

**66. Article 29 of UNCITRAL Model Law
(Decision making by panel of
arbitrators)**

Article 29 of the UNCITRAL Model Law, the text of which is set out below, has effect -

*"Article 29. Decision making by panel of
arbitrators*

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal."

67. Article 30 of UNCITRAL Model Law (Settlement)

(1) Article 30 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case."

(2) If, in a case other than that referred to in article 30 of the UNCITRAL Model Law, given effect to by subsection (1), the parties to an arbitration agreement settle their dispute and enter into an agreement in writing containing the terms of settlement (the "settlement agreement") -

(a) the settlement agreement -

(i) shall, for the purposes of its enforcement, be treated as an award on an arbitration agreement; and

(ii) may, with the leave of the court, be

enforced in the same manner as a judgment or order to the same effect; and

- (b) where leave is so granted, judgment may be entered in terms of the settlement agreement.

**68. Article 31 of UNCITRAL Model Law
(Form and contents of award)**

(1) Article 31 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of

this article shall be delivered to each party."

(2) Article 31(4) of the UNCITRAL Model Law, given effect to by subsection (1), has effect subject to section 78.

**69. Article 32 of UNCITRAL Model Law
(Termination of proceedings)**

Article 32 of the UNCITRAL Model Law, the text of which is set out below, has effect -

"Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4)."

**70. Article 33 of UNCITRAL Model Law
(Correction and interpretation
of award; additional award)**

(1) Article 33 of the UNCITRAL Model Law, the text of which is set out below, has effect -

*"Article 33. Correction and interpretation of award;
additional award*

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award."

(2) The arbitral tribunal shall have the power to make other changes to an arbitral award which are necessitated by or consequential upon -

- (a) the correction of any error in the award; or
- (b) the interpretation of any point or part of the award,

under article 33 of the UNCITRAL Model Law, given effect to by subsection (1).

(3) The arbitral tribunal may review an award of costs within 30 days of the date of the award if, when making the award, the tribunal was not aware of any information relating to costs

(including any offer for settlement) which it should have taken into account.

(4) Upon a review under subsection (3), the arbitral tribunal may confirm, vary or correct the award of costs.

71. Award of remedy or relief

(1) Subject to subsection (2), an arbitral tribunal may, in deciding a dispute, award any remedy or relief that could have been ordered by the Court if the dispute had been the subject of civil proceedings in the Court.

(2) Unless otherwise agreed by the parties, the arbitral tribunal shall have the same power as the Court to order specific performance of any contract, other than a contract relating to land or any interest in land.

72. Awards on different issues, etc.

Unless otherwise agreed by the parties, the arbitral tribunal may make more than one award at different times on different aspects of the matters to be determined.

73. Time for making award

(1) Unless otherwise agreed by the parties, the arbitral tribunal shall have power to make an award at any time.

(2) The time, if any, limited for making an award, whether under this Ordinance or otherwise, may from time to time be extended by order of the Court, whether that time has expired or not.

(3) An order of the Court under subsection (2) shall be subject to no appeal.

74. Effect of award

(1) Unless otherwise agreed by the parties, an award made by an arbitral tribunal pursuant to an arbitration agreement is final and binding both on -

- (a) the parties; and
- (b) any person claiming through or under them.

(2) Subsection (1) does not affect the right of a person to challenge the award -

- (a) as provided for in section 26 or 82 of, section 4 or 5 of Schedule 3 to, or any other provision of this Ordinance; or
- (b) otherwise by any available arbitral process of appeal or review.

75. Arbitral tribunal may award costs of arbitral proceedings

(1) An arbitral tribunal may include in an award directions with respect to the costs of arbitral proceedings (including the fees and expenses of the tribunal).

(2) The arbitral tribunal may, having regard to all relevant circumstances (including the fact, where appropriate, that a written offer of settlement of the dispute concerned has been made), direct in the award under subsection (1) to whom and by whom and in what manner the costs are to be paid.

(3) The arbitral tribunal may also order costs (including the fees and expenses of the tribunal) to be paid by a party in the case where -

- (a) that party makes or opposes a request to the tribunal for any order or direction (including an interim measure); and
- (b) the tribunal is satisfied that the request or

opposition is without merit.

(4) The arbitral tribunal may direct that the costs ordered under subsection (3) shall be paid forthwith or at such time as the tribunal may otherwise specify.

(5) Subject to section 76, the arbitral tribunal shall -

- (a) assess the amount of costs to be awarded or ordered to be paid under this section (other than the fees and expenses of the tribunal); and
- (b) award or order such costs (including the fees and expenses of the tribunal).

(6) Subject to subsection (7), the arbitral tribunal is not obliged to follow the scales and practices adopted by the court on taxation when assessing the amount of costs (other than the fees and expenses of the tribunal) under subsection (5).

(7) The arbitral tribunal -

- (a) shall only allow such costs that are reasonable having regard to all the circumstances; and
- (b) unless otherwise agreed by the parties, may allow costs incurred in the preparation of the arbitral proceedings prior to the commencement of the arbitration.

(8) A provision of an arbitration agreement to the effect that the parties, or any of the parties, must pay their own costs in respect of arbitral proceedings arising under the agreement is void.

(9) A provision referred to in subsection (8) is not void if it is part of an agreement to submit to arbitration a dispute that had arisen before the agreement was made.

76. Taxation of costs of arbitral

**proceedings (other than fees
and expenses of arbitral
tribunal)**

(1) Without prejudice to section 75(1) and (2), where the parties have agreed that the costs of arbitral proceedings are taxable by the court, the arbitral tribunal shall direct in an award that the costs (other than the fees and expenses of the arbitral tribunal) -

(a) are taxable by the court; and

(b) are to be paid on any basis on which the court can award costs in civil proceedings before the court.

(2) In the case of taxation by the court, the arbitral tribunal shall make an additional award of costs reflecting the result of such taxation.

(3) Such taxation by the court shall be subject to no appeal.

(4) This section does not apply to costs ordered to be paid under section 75(3).

**77. Costs in respect of unqualified
person**

Section 50 of the Legal Practitioners Ordinance (Cap. 159) (No costs for unqualified person) does not apply to the recovery of costs in an arbitration.

**78. Determination of arbitral tribunal's
fees and expenses in case
of dispute**

(1) The arbitral tribunal may refuse to deliver an award to the parties except upon full payment of the fees and expenses of the tribunal.

(2) If the arbitral tribunal refuses to deliver an award under subsection (1), a party may apply to the Court, which -

(a) may order that the tribunal shall deliver the award

upon the payment into the Court by the applicant of the fees and expenses demanded, or such lesser amount as the Court may specify;

(b) may order that the amount of the fees and expenses payable shall be determined by such means and upon such terms as the Court may direct; and

(c) may order that, out of the money paid into the Court, there shall be paid out such fees and expenses as determined under paragraph (b) to be payable, and that the balance of the money (if any) shall be paid out to the applicant.

(3) For the purposes of subsection (2) -

(a) the amount of fees and expenses payable is the amount which the applicant is liable to pay -

(i) under section 79; or

(ii) under any agreement relating to the payment of the arbitrators; and

(b) the fees and expenses of -

(i) an expert appointed under article 26 of the UNCITRAL Model Law, given effect to by section 55(1); or

(ii) an expert, legal adviser or assessor appointed under section 55(2),

shall be regarded as fees and expenses of the tribunal.

(4) No application under subsection (2) may be made if -

(a) there is any available arbitral process for appeal or review of the amount of the fees or expenses demanded; or

(b) the total amount of the fees and expenses demanded

has been fixed by a written agreement between a party and the arbitrators.

(5) Subsections (1) to (4) also apply to any arbitral or other institution or person vested by the parties with powers in relation to the delivery of the arbitral tribunal's award.

(6) Where subsections (1) to (4) so apply under subsection (5), the references to the fees and expenses of the arbitral tribunal are to be construed as including the fees and expenses of that institution or person.

(7) Where an application is made to the Court under subsection (2), enforcement of the award, but only in so far as it relates to the fees or expenses of the arbitral tribunal, shall be stayed until the application has been disposed of under this section.

(8) An arbitrator is entitled to appear and be heard on any determination under this section.

(9) Where the amount of fees and expenses determined under subsection (2)(b) is different from the amount previously awarded by the arbitral tribunal, the tribunal shall amend the previous award to reflect the result of the determination.

(10) An order of the Court under this section shall be subject to no appeal.

79. Liability to pay fees and expenses of arbitral tribunal

(1) The parties to proceedings before an arbitral tribunal are jointly and severally liable to pay to the tribunal such reasonable fees and expenses (if any) of the tribunal as are appropriate in the circumstances.

(2) Subsection (1) has effect subject to any order of the

Court made under section 63 or any other relevant provision of this Ordinance.

(3) This section does not affect -

- (a) the liability of the parties as among themselves to pay the costs of the proceedings; or
- (b) any contractual right or obligation relating to payment of the fees and expenses of the arbitral tribunal.

(4) In this section, a reference to an arbitral tribunal includes -

- (a) a reference to a member of the tribunal who has ceased to act; and
- (b) a reference to an umpire who has not yet replaced members of the tribunal.

80. Arbitral tribunal may award interest

(1) Unless otherwise agreed by the parties, an arbitral tribunal may, in arbitral proceedings before it, award simple or compound interest from such dates, at such rates, and with such rests as the tribunal considers appropriate for any period ending not later than the date of payment -

- (a) on money awarded by the tribunal in the proceedings;
- (b) on money claimed in, and outstanding at the commencement of, the proceedings but paid before the award is made; or
- (c) on costs awarded or ordered by the tribunal in the proceedings.

(2) Subsection (1) does not affect any other power of an

arbitral tribunal to award interest.

(3) A reference in subsection (1)(a) to money awarded by the tribunal includes a reference to an amount payable in consequence of a declaratory award by the tribunal.

81. Rate of interest on money awarded or costs in arbitral proceedings

(1) Interest is payable on money awarded by an arbitral tribunal from the date of the award at the judgment rate, except when the award otherwise provides.

(2) Interest is payable on costs awarded or ordered by an arbitral tribunal from the date of the award or order on costs at the judgment rate, except when the award or order on costs otherwise provides.

(3) In this section, "judgment rate" (判定利率) means the rate of interest determined by the Chief Justice under section 49(1)(b) of the High Court Ordinance (Cap. 4).

PART 9

RECOURSE AGAINST AWARD

82. Article 34 of UNCITRAL Model Law (Application for setting aside as exclusive recourse against arbitral award)

(1) Article 34 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(5) -

"Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award

may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to

arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
- (ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award,

may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."

(2) Subsection (1) does not affect -

- (a) the power of the Court to set aside an arbitral award under section 26(5);
- (b) the right to challenge an arbitral award under section 4 of Schedule 3 (where applicable); or
- (c) the right to appeal against an arbitral award on a question of law under section 5 of Schedule 3 (where applicable).

(3) Subject to subsection (2)(c), the Court does not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award.

PART 10

RECOGNITION AND ENFORCEMENT OF AWARDS

Division 1 - Enforcement of arbitral awards

83. Article 35 of UNCITRAL Model Law (Recognition and enforcement)

Article 35 of the UNCITRAL Model Law does not have effect.

84. Article 36 of UNCITRAL Model Law

**(Grounds for refusing
recognition or
enforcement)**

Article 36 of the UNCITRAL Model Law does not have effect.

85. Enforcement of arbitral awards

(1) Subject to section 26(2), an award, whether made in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal is enforceable in the same way as a judgment of the court that has the same effect, but only with the leave of the court.

(2) No leave shall be granted under subsection (1) in respect of an award made outside Hong Kong, which is neither a Convention award nor a Mainland award, unless the party seeking to enforce the award can demonstrate that the court in the place where the award is made will act reciprocally in respect of awards made in Hong Kong in arbitral proceedings by an arbitral tribunal.

(3) If leave is granted under subsection (1), the court may enter judgment in terms of the award.

**86. Evidence to be produced for enforcement
of arbitral awards**

The party seeking to enforce an arbitral award, whether made in or outside Hong Kong, which is neither a Convention award nor a Mainland award, must produce -

- (a) the duly authenticated original award or a duly certified copy of it;
- (b) the original arbitration agreement or a duly certified copy of it; and
- (c) where the award or agreement is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

87. Refusal of enforcement of arbitral awards

(1) Enforcement of an award referred to in section 86 may be refused if the person against whom it is invoked proves -

- (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
- (b) that the arbitration agreement was not valid -
 - (i) under the law to which the parties subjected it; or
 - (ii) (failing any indication thereon) under the law of the country where the award was made;
- (c) that he -
 - (i) was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings; or
 - (ii) was otherwise unable to present his case;
- (d) subject to subsection (3), that the award -
 - (i) deals with a difference not contemplated by or not falling within the terms of the submission to arbitration; or
 - (ii) contains decisions on matters beyond the scope of the submission to arbitration;
- (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with -
 - (i) the agreement of the parties; or
 - (ii) (failing such agreement) the law of the country where the arbitration took place;

or

(f) that the award -

(i) has not yet become binding on the parties; or

(ii) has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(2) Enforcement of such award may also be refused if -

(a) the award is in respect of a matter which is not capable of settlement by arbitration;

(b) it would be contrary to public policy to enforce the award; or

(c) for any other reason the court considers it just to do so.

(3) An award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(4) Where an application for the setting aside or suspension of an award has been made to such a competent authority as is mentioned in subsection (1)(f), the court before which enforcement of the award is sought -

(a) may, if it thinks fit, adjourn the proceedings for the enforcement of the award; and

(b) may, upon application of the party seeking to enforce the award, order the person against whom the enforcement is invoked to give security.

88. Enforcement of Convention awards

(1) A Convention award shall, subject to this Division, be enforceable either by action or in the same manner that an award by an arbitral tribunal is enforceable by virtue of section 85.

(2) Any Convention award which is enforceable under this Division shall be treated as binding for all purposes on the persons between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Hong Kong.

(3) A reference in this Division to enforcing a Convention award is to be construed as including a reference to relying on a Convention award.

89. Evidence to be produced for enforcement of Convention awards

The party seeking to enforce a Convention award must produce -

- (a) the duly authenticated original award or a duly certified copy of it;
- (b) the original arbitration agreement or a duly certified copy of it; and
- (c) where the award or agreement is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

90. Refusal of enforcement of Convention awards

(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.

(2) Enforcement of a Convention award may be refused if the

person against whom it is invoked proves -

- (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
- (b) that the arbitration agreement was not valid -
 - (i) under the law to which the parties subjected it; or
 - (ii) (failing any indication thereon) under the law of the country where the award was made;
- (c) that he -
 - (i) was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings; or
 - (ii) was otherwise unable to present his case;
- (d) subject to subsection (4), that the award -
 - (i) deals with a difference not contemplated by or not falling within the terms of the submission to arbitration; or
 - (ii) contains decisions on matters beyond the scope of the submission to arbitration;
- (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with -
 - (i) the agreement of the parties; or
 - (ii) (failing such agreement) the law of the country where the arbitration took place;or
- (f) that the award -
 - (i) has not yet become binding on the parties; or

(ii) has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Enforcement of a Convention award may also be refused if -

- (a) the award is in respect of a matter which is not capable of settlement by arbitration; or
- (b) it would be contrary to public policy to enforce the award.

(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which enforcement of the award is sought -

- (a) may, if it thinks fit, adjourn the proceedings for the enforcement of the award; and
- (b) may, upon application of the party seeking to enforce the award, order the person against whom the enforcement is invoked to give security.

91. Order for declaring party to New York Convention

(1) The Chief Executive may, by order in the Gazette, declare that any State or territory that -

- (a) is a party to the New York Convention; and
- (b) is specified in the order,

is a party to that Convention.

(2) An order under subsection (1), while in force, is conclusive evidence that the State or territory specified in it is a party to the New York Convention.

(3) Subsections (1) and (2) are without prejudice to any other method of proving that a State or territory is a party to the New York Convention.

**92. Saving of rights to enforce
Convention awards**

Nothing in this Division shall prejudice any right to enforce or rely on an award otherwise than under this Division.

Division 3 - Enforcement of Mainland awards

93. Enforcement of Mainland awards

(1) A Mainland award shall, subject to this Division, be enforceable in Hong Kong either by action in the Court or in the same manner that an award by an arbitral tribunal is enforceable by virtue of section 85.

(2) Any Mainland award which is enforceable under this Division shall be treated as binding for all purposes on the persons between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Hong Kong.

(3) A reference in this Division to enforcing a Mainland award is to be construed as including a reference to relying on a Mainland award.

**94. Restrictions on enforcement of
Mainland awards**

(1) A Mainland award shall not, subject to subsection (2),

be enforceable under this Division if an application has been made on the Mainland for enforcement of the award.

(2) Where -

- (a) an application has been made on the Mainland for enforcement of a Mainland award; and
- (b) the award has not been fully satisfied by way of that enforcement,

then, to the extent that the award has not been so satisfied, the award may be enforceable under this Division.

95. Evidence to be produced for enforcement of Mainland awards

The party seeking to enforce a Mainland award must produce -

- (a) the duly authenticated original award or a duly certified copy of it;
- (b) the original arbitration agreement or a duly certified copy of it; and
- (c) where the award or agreement is in a language or languages other than either or both of the official languages, a translation of it in either of the official languages certified by an official or sworn translator or by a diplomatic or consular agent.

96. Refusal of enforcement of Mainland awards

(1) Enforcement of a Mainland award shall not be refused except in the cases mentioned in this section.

(2) Enforcement of a Mainland award may be refused if the person against whom it is invoked proves -

- (a) that a party to the arbitration agreement was

(under the law applicable to him) under some incapacity;

- (b) that the arbitration agreement was not valid -
 - (i) under the law to which the parties subjected it; or
 - (ii) (failing any indication thereon) under the law of the Mainland;
- (c) that he -
 - (i) was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings; or
 - (ii) was otherwise unable to present his case;
- (d) subject to subsection (4), that the award -
 - (i) deals with a difference not contemplated by or not falling within the terms of the submission to arbitration; or
 - (ii) contains decisions on matters beyond the scope of the submission to arbitration;
- (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with -
 - (i) the agreement of the parties; or
 - (ii) (failing such agreement) the law of the Mainland; or
- (f) that the award -
 - (i) has not yet become binding on the parties; or
 - (ii) has been set aside or suspended by a competent authority of the Mainland or under the law of the Mainland.

(3) Enforcement of a Mainland award may also be refused if -

- (a) the award is in respect of a matter which is not capable of settlement by arbitration under the law of Hong Kong; or
- (b) it would be contrary to public policy to enforce the award.

(4) A Mainland award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

97. Mainland awards to which certain provisions of this Division do not apply

(1) Subject to subsection (2), this Division has effect with respect to the enforcement of Mainland awards.

(2) Where -

- (a) a Mainland award was at any time before 1 July 1997 a Convention award within the meaning of Part IV of the repealed Ordinance as then in force; and
- (b) the enforcement of that award had been refused at any time before the commencement of section 5 of the Arbitration (Amendment) Ordinance 2000 (2 of 2000) under section 44 of the repealed Ordinance as then in force,

then sections 93 to 96 have no effect with respect to the enforcement of that award.

98. Publication of list of recognized Mainland arbitral authorities

(1) The Secretary for Justice shall, by notice in the Gazette, publish a list of the recognized Mainland arbitral authorities supplied from time to time for the purposes of this

Ordinance to the Government by the Legislative Affairs Office of the State Council of the People's Republic of China through the Hong Kong and Macao Affairs Office of the State Council.

(2) A list published under subsection (1) is not subsidiary legislation.

99. Saving of certain Mainland awards

Notwithstanding that enforcement of a Mainland award had been refused in Hong Kong at any time during the period between 1 July 1997 and the commencement of section 5 of the Arbitration (Amendment) Ordinance 2000 (2 of 2000), the award may, subject to section 97(2), be enforceable under this Division as if enforcement of the award had not previously been so refused.

PART 11

PROVISIONS THAT MAY BE EXPRESSLY OPTED FOR OR
AUTOMATICALLY APPLY

100. Arbitration agreements may provide expressly for opt-in provisions

An arbitration agreement may provide expressly that any or all of the following shall apply -

- (a) section 1 of Schedule 3;
- (b) section 2 of Schedule 3;
- (c) section 3 of Schedule 3;
- (d) sections 4 and 7 of Schedule 3;
- (e) sections 5, 6 and 7 of Schedule 3.

101. Opt-in provisions automatically apply in certain cases

All the provisions in Schedule 3 apply, subject to section 103,
to -

- (a) an arbitration agreement entered into before the commencement of this Ordinance which has provided that arbitration under the agreement shall be a domestic arbitration; or
- (b) an arbitration agreement entered into at any time within a period of 6 years after the commencement of this Ordinance which provides that arbitration under the agreement shall be a domestic arbitration.

102. Opt-in provisions that automatically apply under section 101 deemed to apply in subcontracting cases

(1) Where all the provisions in Schedule 3 apply to an arbitration agreement under section 101(a) or (b), if -

- (a) the whole or any part of the subject matter of the contract that includes the arbitration agreement in any form referred to in section 19 ("relevant subject matter") is subcontracted to any person under a contract ("subcontract"); and
- (b) that subcontract also includes an arbitration agreement ("subcontracting parties' arbitration agreement") in any form referred to in section 19,

then all the provisions in Schedule 3 also apply to the subcontracting parties' arbitration agreement.

(2) Unless the subcontracting parties' arbitration agreement is an arbitration agreement referred to in section 101(a) or (b), subsection (1) does not apply if -

- (a) the person to whom the whole or any part of the relevant subject matter is subcontracted under the subcontract is -

- (i) a natural person who is ordinarily resident outside Hong Kong;
 - (ii) a body corporate -
 - (A) incorporated under the law of a place outside Hong Kong; or
 - (B) the central management and control of which is exercised outside Hong Kong; or
 - (iii) an association -
 - (A) formed under the law of a place outside Hong Kong; or
 - (B) the central management and control of which is exercised outside Hong Kong;
- (b) the person to whom the whole or any part of the relevant subject matter is subcontracted under the subcontract has no place of business in Hong Kong; or
- (c) a substantial part of the relevant subject matter which is subcontracted under the subcontract is to be performed outside Hong Kong.

(3) Where all the provisions in Schedule 3 apply to a subcontracting parties' arbitration agreement under subsection (1), if -

- (a) the whole or any part of the relevant subject matter that is subcontracted under the subcontract is further subcontracted to another person under another contract ("other subcontract"); and
- (b) that other subcontract also includes an arbitration agreement in any form referred to in section 19,

subsection (1) has effect subject to subsection (2), and all the provisions in Schedule 3 apply to the arbitration agreement so included in that other subcontract as if that other subcontract were a subcontract under subsection (1).

103. Circumstances under which opt-in provisions not automatically apply

Sections 101 and 102 do not apply if -

- (a) the parties to the arbitration agreement concerned so agree in writing; or
- (b) the arbitration agreement concerned has provided expressly that -
 - (i) section 101 or 102 shall not apply; or
 - (ii) any of the provisions in Schedule 3 shall apply or shall not apply.

104. Application of provisions under this Part

Where there is any conflict or inconsistency between any provision that applies under this Part and any other provision of this Ordinance, the first-mentioned provision prevails, to the extent of the conflict or inconsistency, over that other provision.

PART 12

MISCELLANEOUS

105. Arbitral tribunal or mediator to be liable for certain acts and omissions

(1) An arbitral tribunal or mediator is liable in law for an act done or omitted to be done by the tribunal or mediator, or by its employees or agents, in relation to the exercise or

performance or the purported exercise or performance of the tribunal's arbitral functions or the mediator's functions only if it is proved that the act was done or omitted to be done dishonestly.

(2) An employee or agent of an arbitral tribunal or mediator is liable in law for an act done or omitted to be done by the employee or agent in relation to the exercise or performance or the purported exercise or performance of the tribunal's arbitral functions or the mediator's functions only if it is proved that the act was done or omitted to be done dishonestly.

106. Appointors and administrators to be liable only for certain acts and omissions

(1) A person -

- (a) who appoints an arbitral tribunal or mediator; or
- (b) who exercises or performs any other function of an administrative nature in connection with arbitral or mediation proceedings,

is liable in law for the consequences of doing or omitting to do an act in the exercise or performance or the purported exercise or performance of the function only if it is proved that the act was done or omitted to be done dishonestly.

(2) Subsection (1) does not apply to an act done or omitted to be done by the parties to the arbitral or mediation proceedings, or to their legal representatives or advisers, in the exercise or performance or the purported exercise or performance of a function of an administrative nature in connection with those proceedings.

(3) An employee or agent of a person who has done or omitted to do an act referred to in subsection (1) is liable in law for the consequence of the act done or omission only if it is proved

that -

- (a) the act or omission was committed dishonestly; and
- (b) the employee or agent was a party to the dishonesty.

(4) Neither a person referred to in subsection (1) nor an employee or agent of the person is liable in law for the consequences of any act or omission of the arbitral tribunal or mediator concerned, or by its employees or agents, in the exercise or performance or the purported exercise or performance of the tribunal's arbitral functions or the mediator's functions merely because the person, employee or agent has exercised or performed a function referred to in that subsection.

(5) In this section, "appoint" (委任) includes nominate and designate.

107. Rules of court

(1) The power to make rules of court under section 54 of the High Court Ordinance (Cap. 4) includes power to make rules of court for -

- (a) the making of an application for an interim measure under section 46(2) or an order under section 61(1); and
- (b) the service out of the jurisdiction of an application for such interim measure or order.

(2) Any rules made by virtue of this section may include such incidental, supplementary and consequential provisions as the authority making the rules considers necessary or expedient.

108. Making an application under this Ordinance

An application, request or appeal to the Court under this

Ordinance shall, unless otherwise expressed, be made in accordance with Order 73 of the Rules of the High Court (Cap. 4 sub. leg. A).#

PART 13

REPEAL, SAVINGS AND TRANSITIONAL PROVISIONS

109. Repeal

The Arbitration Ordinance (Cap. 341) is repealed.

110. Effect of repeal on subsidiary legislation

Any subsidiary legislation made under the repealed Ordinance and in force at the commencement of this Ordinance is, so far as it is not inconsistent with this Ordinance, to continue in force and have the like effect for all purposes as if made under this Ordinance.

111. Savings and transitional provisions

Schedule 4 provides for the savings and transitional arrangements that apply on, or relate to, the commencement of this Ordinance.

PART 14

CONSEQUENTIAL AND RELATED AMENDMENTS

112. Consequential and related amendments

The enactments specified in Schedule 5 are amended as set out in that Schedule.

UNCITRAL MODEL LAW ON INTERNATIONAL
COMMERCIAL ARBITRATION

(As adopted by the United Nations Commission on
International Trade Law on 21 June 1985, and
as amended by the United Nations
Commission on International
Trade Law on 7 July 2006)

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application*

(1) This Law applies to international commercial** arbitration,
subject to any agreement in force between this State and any other
State or States.

(2) The provisions of this Law, except articles 8, 9, 17H, 17I,
17J, 35 and 36, apply only if the place of arbitration is in the
territory of this State.

*(Article 1(2) has been amended by the Commission at its thirty-ninth
session, in 2006)*

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the
time of the conclusion of that agreement, their places of business
in different States; or

(b) one of the following places is situated outside the
State in which the parties have their places of business:

(i) the place of arbitration if determined in, or
pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

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

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

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

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

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

[Note : See section 7 of this Ordinance.]

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

[Note : See section 8 of this Ordinance.]

Article 2A. International origin and general principles

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

[Note : See section 9 of this Ordinance.]

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

(a) any written communication is deemed to have been

received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

[Note : See section 10 of this Ordinance.]

Article 4. Waiver of right to object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

[Note : See section 11 of this Ordinance.]

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

[Note : See section 12 of this Ordinance.]

Article 6. Court or other authority for certain functions of
arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14,
16(3) and 34(2) shall be performed by ...[Each State enacting this
model law specifies the court, courts or, where referred to
therein, other authority competent to perform these functions.]

[Note : See section 13 of this Ordinance.]

CHAPTER II. ARBITRATION AGREEMENT

Option I

Article 7. Definition and form of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

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

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7. Definition of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

[Note : See section 19 of this Ordinance. Option I of this article is adopted.]

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

[Note : See section 20 of this Ordinance.]

Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

[Note : See section 21 of this Ordinance.]

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

[Note : See section 23 of this Ordinance.]

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure,

or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

[Note : See section 24 of this Ordinance.]

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible

appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

[Note : See section 25 of this Ordinance.]

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

[Note : See section 26 of this Ordinance.]

Article 14. Failure or impossibility to act

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

[Note : See section 27 of this Ordinance.]

Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

[Note : See section 28 of this Ordinance.]

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter

alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

[Note : See section 35 of this Ordinance.]

CHAPTER IVA. INTERIM MEASURES AND PRELIMINARY ORDERS

(As adopted by the Commission at its thirty-ninth session, in 2006)

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

[Note : See section 36 of this Ordinance.]

Article 17A. Conditions for granting interim measures

(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

[Note : See section 37 of this Ordinance.]

Section 2. Preliminary orders

*Article 17B. Applications for preliminary orders and conditions
for granting preliminary orders*

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

[Note : See section 38 of this Ordinance.]

Article 17C. Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in

relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

[Note : See section 39 of this Ordinance.]

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17D. Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own

initiative.

[Note : See section 40 of this Ordinance.]

Article 17E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

[Note : See section 41 of this Ordinance.]

Article 17F. Disclosure

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

[Note : See section 42 of this Ordinance.]

Article 17G. Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings. [Note : See section 43 of this Ordinance.]

Section 4. Recognition and enforcement of interim measures

Article 17H. Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third

parties.

[Note : See section 44 of this Ordinance.]

Article 17I. Grounds for refusing recognition or enforcement***

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement

of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

[Note : See section 45 of this Ordinance.]

Section 5. Court-ordered interim measures

Article 17J. Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

[Note : See section 46 of this Ordinance.]

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

[Note : See section 47 of this Ordinance.]

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

[Note : See section 48 of this Ordinance.]

Article 20. Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

[Note : See section 49 of this Ordinance.]

Article 21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

[Note : See section 50 of this Ordinance.]

Article 22. Language

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

[Note : See section 51 of this Ordinance.]

Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to

the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

[Note : See section 52 of this Ordinance.]

Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on

which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

[Note : See section 53 of this Ordinance.]

Article 25. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

[Note : See section 54 of this Ordinance.]

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so

requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

[Note : See section 55 of this Ordinance.]

Article 27. Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

[Note : See section 56 of this Ordinance.]

CHAPTER VI. MAKING OF AWARD AND TERMINATION
OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which

it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.
[Note : See section 65 of this Ordinance.]

Article 29. Decision making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

[Note : See section 66 of this Ordinance.]

Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the

provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

[Note : See section 67 of this Ordinance.]

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

[Note : See section 68 of this Ordinance.]

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2)

of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

[Note : See section 69 of this Ordinance.]

*Article 33. Correction and interpretation of award;
additional award*

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

[Note : See section 70 of this Ordinance.]

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State;

or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from

which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

[Note : See section 82 of this Ordinance.]

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in

writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.****

(Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)

[Note : See section 83 of this Ordinance.]

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by

or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the

award, order the other party to provide appropriate security.

[Note : See section 84 of this Ordinance.]

* Article headings are for reference purposes only and are not to be used for purposes of interpretation.

** The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

*** The conditions set forth in article 17I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

**** The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

Note: The full text of the UNCITRAL Model Law is reproduced in

this Schedule for information only. Provisions which are not applicable under this Ordinance are underlined. A note is added after each article to indicate the provision in this Ordinance which makes direct reference to that article. However, substituting provisions and other supplemental provisions to which the UNCITRAL Model Law are subject have not been shown in this Schedule. Reference shall therefore be made to this Ordinance which determines the extent to which the UNCITRAL Model Law applies.

SCHEDULE 2

[ss. 2 & 32]

APPLICATION OF ORDINANCE TO JUDGE-ARBITRATORS AND JUDGE-UMPIRES

1. In this Schedule -

- (a) "judge-arbitrator" (法官仲裁員) means a judge appointed as sole arbitrator; and
- (b) "judge-umpire" (法官公斷人) means a judge appointed as an umpire.

2. Section 31(8) of this Ordinance does not apply to a judge-umpire; but a judge-umpire may, upon application of any party and notwithstanding anything to the contrary in the arbitration agreement, replace the arbitrators as the arbitral tribunal as if he were the sole arbitrator.

3. (1) The powers conferred on the Court by section 61 of this Ordinance shall be exercisable in the case of arbitration by a judge-arbitrator or judge-umpire as in the case of any other arbitration, but shall in any such case be exercisable also by the judge-arbitrator or judge-umpire himself.

(2) Anything done by an arbitrator or umpire in the exercise of powers conferred by this section shall be done by him in his capacity as a judge of the Court and have effect as if done by that Court; but nothing in this section shall prejudice any power vested in the arbitrator or umpire in his capacity as such.

4. Section 73(2) of this Ordinance does not apply to arbitration by a judge-arbitrator or judge-umpire; but a judge-arbitrator or judge-umpire may extend any time limited for making his award (whether under this Ordinance or otherwise), whether that time has expired or not.

5. (1) Section 78 of this Ordinance does not apply with respect to the award of a judge-arbitrator or judge-umpire.

(2) The fees and expenses of a judge-arbitrator or judge-umpire shall be paid into the Court.

(3) A judge-arbitrator or judge-umpire may withhold his award until the fees and expenses have been paid into the Court.

(4) Subject to subsection (5), the fees and expenses paid into the Court under this section shall be paid out in accordance with the rules of the Court.

(5) Any party to the arbitration may apply, in accordance with the rules of the Court, for any fee or expenses (not being a fee or expense which has been fixed by written agreement between that party and the judge-arbitrator or judge-umpire) to be taxed.

(6) A taxation under this section may be reviewed in the same manner as a taxation of the costs of an award.

(7) Upon a taxation under this section, or upon a review thereof, a judge-arbitrator or judge-umpire is entitled to appear and be heard.

6. The leave required by section 85 of this Ordinance for an award on an arbitration agreement to be enforced may, in the case of an award by a judge-arbitrator or a judge-umpire, be granted by the judge-arbitrator or judge-umpire himself.

7. In sections 26, 27, 35 and 82 of this Ordinance, in their application to a judge-arbitrator or judge-umpire, and to arbitration by him and to his award thereon, the Court of Appeal shall be substituted for the Court, the court or other authority; and section 13(4) and (5) of this Ordinance is to be construed accordingly.

8. Section 3 of Schedule 3 to this Ordinance (where applicable) does not apply to arbitration by a judge-arbitrator or judge-umpire.

9. In sections 4 to 7 of Schedule 3 to this Ordinance (where applicable), in their application to a judge-arbitrator or judge-umpire, and to arbitration by him and to his award thereon, the Court of Appeal shall be substituted for the Court.

SCHEDULE 3 [ss. 2, 5, 23, 74, 82,
100, 101, 102 & 103
& Sch. 2]

PROVISIONS THAT MAY BE EXPRESSLY OPTED FOR OR
AUTOMATICALLY APPLY

1. **Sole arbitrator**

Notwithstanding anything in section 23 of this Ordinance, any dispute arising between the parties to an arbitration agreement

shall be submitted to a sole arbitrator for arbitration.

2. Consolidation of arbitrations

(1) Where, in relation to 2 or more arbitral proceedings, it appears to the Court -

(a) that a common question of law or fact arises in both or all of them;

(b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or

(c) that for any other reason it is desirable to make an order under this section,

the Court may, upon application of any party to the arbitral proceedings -

(d) order those arbitral proceedings -

(i) to be consolidated on such terms as it thinks just; or

(ii) to be heard at the same time, or to be heard one immediately after another; or

(e) order any of those arbitral proceedings to be stayed until after the determination of any other of them.

(2) Where the Court orders arbitral proceedings to be consolidated under subsection (1)(d)(i), the Court shall have the power -

(a) to make consequential directions as to the payment of costs in those proceedings; and

(b) if -

(i) all parties to the consolidated arbitral proceedings are in agreement as to the

choice of arbitrator for those proceedings, to appoint that arbitrator; or

- (ii) all parties cannot agree as to the choice of arbitrator for those proceedings, to appoint an arbitrator for those proceedings.

(3) Where the Court makes an appointment under subsection (2) of an arbitrator for the consolidated arbitral proceedings, any appointment of any other arbitrator that has been made for any of the arbitral proceedings forming part of the consolidation shall for all purposes cease to have effect on and from the appointment under subsection (2).

(4) The arbitral tribunal shall have the power under sections 75 and 76 of this Ordinance in relation to the costs of the arbitral proceedings that are consolidated under subsection (1)(d)(i).

(5) In the case where 2 or more arbitral proceedings are heard at the same time or one immediately after another under subsection (1)(d)(ii), the arbitral tribunal -

- (a) shall have the power under sections 75 and 76 of this Ordinance only in relation to the costs of those arbitral proceedings that are heard by it; and

- (b) accordingly, does not have the power to order a party to any of those arbitral proceedings that are heard at the same time or one immediately after another to pay the costs of a party to any other of those proceedings unless the arbitral tribunal is the same tribunal hearing all of those proceedings.

(6) An order, direction or decision of the Court under this

section shall be subject to no appeal.

3. Determination of preliminary question of law by Court

(1) The Court may, upon application of any party to the arbitral proceedings, determine any question of law arising in the course of the proceedings.

(2) An application under this section shall be made -

(a) with the agreement of all the other parties to the arbitral proceedings; or

(b) with the permission of the arbitral tribunal.

(3) The application shall -

(a) identify the question of law to be determined; and

(b) state the grounds on which it is said that the question should be decided by the Court.

(4) The Court shall not entertain an application under this section unless it is satisfied that the determination of the application might produce substantial savings in costs to the parties.

(5) A decision of the Court on the question of law under subsection (1) shall be treated as a judgment of the Court within the meaning of section 14 of the High Court Ordinance (Cap. 4).

(6) The leave of the Court is required for any appeal from a decision of the Court under subsection (1).

4. Challenging arbitral award on ground of serious irregularity

(1) A party to arbitral proceedings may apply to the Court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

(2) Serious irregularity means an irregularity of one or

more of the following kinds which the Court considers has caused or will cause substantial injustice to the applicant -

- (a) failure by the arbitral tribunal to comply with section 47 of this Ordinance;
- (b) the arbitral tribunal exceeding its powers (otherwise than by exceeding its jurisdiction);
- (c) failure by the arbitral tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- (d) failure by the arbitral tribunal to deal with all the issues that were put to it;
- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- (f) failure by the arbitral tribunal to give an interpretation, under section 70 of this Ordinance, of the award the effect of which is uncertain or ambiguous;
- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
- (h) failure to comply with the requirements as to the form of the award; or
- (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the arbitral tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the arbitral tribunal, the proceedings or the award, the Court

may -

- (a) remit the award to the arbitral tribunal, in whole or in part, for reconsideration;
- (b) set aside the award, in whole or in part; or
- (c) declare the award to be of no effect, in whole or in part.

(4) Where the award is remitted to the arbitral tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted -

- (a) within 3 months of the date of the order for remission; or
- (b) within such longer or shorter period as the Court may direct.

(5) The Court shall not exercise its power to set aside an award or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration.

(6) The leave of the Court is required for any appeal from a decision of the Court under this section.

(7) The provisions in section 7 also apply to an application or appeal under this section.

**5. Appeal against arbitral award
on question of law**

(1) Subject to section 6, a party to arbitral proceedings may appeal to the Court on a question of law arising out of an award made in the proceedings.

(2) An agreement to dispense with reasons for the arbitral tribunal's award shall be considered an agreement to exclude the

Court's jurisdiction under this section.

(3) The Court shall determine the question of law which is the subject of the appeal on the basis of the findings of fact in the award.

(4) The Court shall not have regard to any of the criteria set out in section 6(4)(c)(i) or (ii) when it determines the question of law under subsection (3).

(5) On hearing an appeal under this section, the Court may by order -

- (a) confirm the award;
- (b) vary the award;
- (c) remit the award to the arbitral tribunal, in whole or in part, for reconsideration in the light of the Court's determination; or
- (d) set aside the award, in whole or in part.

(6) Where the award is remitted to the arbitral tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within 3 months of the date of the order for remission or such longer or shorter period as the Court may direct.

(7) The Court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration.

(8) A decision of the Court under subsection (5) shall be treated as a judgment of the Court for the purposes of a further appeal.

(9) The leave of the Court of Appeal is required for any further appeal from a decision of the Court under subsection (5).

(10) Leave to further appeal shall not be granted unless the

Court of Appeal considers that -

- (a) the question is one of general importance; or
- (b) the question is one which for some other special reason should be considered by the Court of Appeal.

(11) The provisions in sections 6 and 7 also apply to an appeal or further appeal under this section.

6. Application for leave to appeal against arbitral award on question of law

(1) An appeal under section 5 on a question of law shall not be brought by a party except -

- (a) with the agreement of all the other parties to the arbitral proceedings; or
- (b) with the leave of the Court.

(2) An application for leave to appeal shall -

- (a) identify the question of law to be determined; and
- (b) state the grounds on which it is alleged that leave to appeal should be granted.

(3) The Court shall determine an application for leave to appeal without a hearing unless it appears to the Court that a hearing is required.

(4) Leave to appeal shall be granted only if the Court is satisfied -

- (a) that the determination of the question will substantially affect the rights of one or more of the parties;
- (b) that the question is one which the arbitral tribunal was asked to determine; and
- (c) that, on the basis of the findings of fact in the award -

- (i) the decision of the arbitral tribunal on the question is obviously wrong; or
- (ii) the question is one of general importance and the decision of the arbitral tribunal is at least open to serious doubt.

(5) The leave of the Court is required for any appeal from a decision of the Court to grant or refuse leave to appeal.

(6) Leave to appeal against such decision of the Court shall not be granted unless -

- (a) the question is one of general importance; or
- (b) the question is one which for some other special reason should not be considered by the Court.

7. Supplementary provisions on challenge to or appeal against arbitral award

(1) An application or appeal under section 4, 5 or 6 may not be brought if the applicant or appellant has not first exhausted -

- (a) any available recourse under section 70 of this Ordinance; and
- (b) any available arbitral process of appeal or review.

(2) If, upon an application or appeal, it appears to the Court that the award -

- (a) does not contain the arbitral tribunal's reasons; or
- (b) does not set out the arbitral tribunal's reasons in sufficient detail to enable the Court properly to consider the application or appeal,

the Court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

(3) Where the Court makes an order under subsection (2), it

may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.

(4) The Court -

(a) may order the applicant or appellant to give security for the costs of the application or appeal; and

(b) may, if the order is not complied with, direct that the application or appeal shall be dismissed.

(5) The power to order security for costs shall not be exercised only on the ground that the applicant or appellant is -

(a) a natural person who is ordinarily resident outside Hong Kong;

(b) a body corporate -

(i) incorporated under the law of a place outside Hong Kong; or

(ii) the central management and control of which is exercised outside Hong Kong; or

(c) an association -

(i) formed under the law of a place outside Hong Kong; or

(ii) the central management and control of which is exercised outside Hong Kong.

(6) The Court -

(a) may order that any money payable under the award shall be brought into the Court or otherwise secured pending the determination of the application or appeal; and

(b) may, if the order is not complied with, direct that the application or appeal shall be dismissed.

(7) The Court or Court of Appeal may grant leave to appeal

subject to conditions to the same or similar effect as an order under subsection (4), (5) or (6).

(8) Subsection (7) does not affect the general discretion of the Court or Court of Appeal to grant leave subject to conditions.

(9) An order under this section shall be subject to no appeal.

SCHEDULE 4

[s. 111]

SAVINGS AND TRANSITIONAL PROVISIONS

1. **Conduct of arbitral and related proceedings**

(1) Where an arbitration -

(a) has commenced under article 21 of the UNCITRAL Model Law as defined in section 2(1) of the repealed Ordinance before the commencement of this Ordinance; or

(b) has been deemed to be commenced under section 31(1) of the repealed Ordinance before the commencement of this Ordinance,

that arbitration and all related proceedings, including (in the case where the award made in that arbitration has been set aside) arbitral proceedings resumed after the setting aside of the award, shall be governed by the repealed Ordinance as if this Ordinance had not been enacted.

(2) Where an arbitration has commenced under any other Ordinance amended by this Ordinance before the commencement of this Ordinance, that arbitration and all related proceedings, including (in the case where the award made in that arbitration has been set aside) arbitral proceedings resumed after the setting

aside of the award, shall be governed by that other Ordinance in force immediately before the commencement of this Ordinance as if this Ordinance had not been enacted.

2. Appointment of arbitrators

(1) Subject to subsection (2), the appointment of an arbitrator made before the commencement of this Ordinance shall, after the commencement of this Ordinance, continue to have effect as if this Ordinance had not been enacted.

(2) The enactment of this Ordinance does not revive the appointment of any arbitrator whose mandate has terminated before the commencement of this Ordinance.

**3. Appointment of members of the
Appointment Advisory Board**

The appointment of a member of the Appointment Advisory Board established under rule 3 of the Arbitration (Appointment of Arbitrators and Umpires) Rules (Cap. 341 sub. leg. B) made before the commencement of this Ordinance shall, after the commencement of this Ordinance, continue to have effect until the expiry of the term of that appointment as if this Ordinance had not been enacted.

SCHEDULE 5

[s. 112]

CONSEQUENTIAL AND RELATED AMENDMENTS

High Court Ordinance

**1. Mode of exercise of Admiralty
jurisdiction**

Section 12B of the High Court Ordinance (Cap. 4) is amended by adding -

"(6A) The Court of First Instance may order a stay of Admiralty proceedings under section 20 of the Arbitration Ordinance (of 2008), subject to such conditions as it may impose, including the making of an order for property arrested in those proceedings to be retained as security for the satisfaction of any award made in the arbitration.".

2. Appeals in civil matters

Section 14(3)(ea) is amended -

(a) by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)";

(b) by repealing subparagraphs (i) and (ii) and substituting -

"(i) under section 16(2) of that Ordinance on an application for proceedings to be heard otherwise than in open court;

(ii) under section 17 of that Ordinance on the publication of information relating to proceedings heard otherwise than in open court;

(iii) under section 26(1) of that Ordinance on a challenge to an arbitrator or umpire;

(iv) under section 27 of that Ordinance on the termination of the mandate of an arbitrator or umpire;

(v) under section 35(1) of that Ordinance on the jurisdiction of the arbitral tribunal;

(vi) under section 56 of that Ordinance on the taking of evidence;

- (vii) under section 61(1) of that Ordinance for the inspection of property or otherwise;
- (viii) under section 62(1) of that Ordinance to grant or refuse leave to enforce an order or direction of an arbitral tribunal made in or outside Hong Kong;
- (ix) under section 63(1) of that Ordinance to disallow the fees or expenses of an arbitrator or umpire;
- (x) under section 73(2) of that Ordinance on the extension of the time limit for making an arbitral award;
- (xi) under section 76 of that Ordinance on the taxation of the costs of arbitral proceedings;
- (xii) under section 78 of that Ordinance on the measures to be taken when an arbitral tribunal refuses to deliver its award except upon full payment of its fees and expenses;
- (xiii) under section 2 of Schedule 3 to that Ordinance to consolidate arbitral proceedings;
- (xiv) under section 7(2) and (3) of Schedule 3 to that Ordinance for an arbitral tribunal to state the reasons for its award and on related costs;
- (xv) under section 7(4) and (6) of Schedule 3 to that Ordinance on the giving of security for the costs of an application

to challenge an arbitral tribunal or an appeal on a question of law arising out of an arbitral award, and for the money payable under the award pending the determination of the application or appeal; or

(xvi) under section 7(7) of Schedule 3 to that Ordinance to grant or refuse leave, subject to conditions, to appeal on a question of law arising out of an arbitral award;".

3. Power of Court of First Instance to impose charging order

Section 20(4) is amended by adding "or umpire" after "arbitrator" where it twice appears.

4. Rules of court

Section 54(2)(j) is amended by repealing everything after "procedure for the payment of money into" and substituting "the Court of First Instance by any party to arbitral proceedings;".

5. Rules concerning deposit, etc. of moneys, etc. in High Court

Section 57(3) is amended by repealing "arbitration proceedings who makes payment of money into the High Court" and substituting "arbitral proceedings who makes payment of money into the Court of First Instance".

6. Applications to the Court of Appeal

Order 59, rule 14 of the Rules of the High Court (Cap. 4 sub. leg. A) is amended -

- (a) in paragraph (5) -
 - (i) by repealing "arbitration" and substituting "arbitral";
 - (ii) by repealing everything after "shall apply" and substituting a full stop;
- (b) in paragraph (6), by repealing everything after "Where an application" and substituting "referred to in paragraph (5) is made to the Court of Appeal under section 5 of Schedule 3 to the Arbitration Ordinance (of 2008) (including any application for leave to appeal), notice thereof must be served on the judge-arbitrator or judge-umpire and on any other party to the arbitral proceedings.";
- (c) in paragraph (6A), by repealing "mean a judge appointed as sole arbitrator or, as the case may be, as umpire by or by virtue of an arbitration agreement" and substituting "have the meanings assigned to them respectively by section 1 of Schedule 2 to the Arbitration Ordinance (of 2008)".

7. Judgments and orders to which section 14AA(1) of the Ordinance not apply

Order 59, rule 21(1)(i) is amended by repealing "Arbitration

Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

8. Interpretation

Order 62, rule 1(1) is amended, in the definition of "contentious business", by repealing "arbitrator appointed under the Arbitration Ordinance (Cap. 341)" and substituting "arbitral tribunal under the Arbitration Ordinance (of 2008)".

9. Powers of taxing masters to tax costs

Order 62, rule 12(1)(b) is amended by repealing "on a reference to arbitration" and substituting "in an arbitration".

10. Arbitration proceedings

Order 73 is amended, in the heading, by repealing "ARBITRATION" and substituting "ARBITRAL".

11. Rule added

Order 73 is amended by adding -

"1. Applications under Arbitration Ordinance (O.73, r. 1)

Subject to the following rules of this Order, an application, request or appeal to the Court under the Arbitration Ordinance (of 2008) must be made by originating summons in Form No. 10 in Appendix A to a single judge in court."

12. Rules substituted

Order 73, rules 2 to 9 are repealed and the following substituted -

"2. Applications in pending actions

(O.73, r. 2)

An application, request or appeal to which rule 1 applies must, where an action is pending, be made by summons in the action.

3. Applications, requests or appeals in proceedings heard otherwise than in open court

(O.73, r. 3)

(1) An application under section 16(2) of the Arbitration Ordinance (of 2008) for proceedings to be heard otherwise than in open court must be made to a judge in chambers.

(2) Where proceedings are ordered to be heard otherwise than in open court under section 16(2) of the Arbitration Ordinance (of 2008), an application, request or appeal in relation to those proceedings must be made to a judge in chambers.

4. Applications for interim measures or other orders in relation to arbitral proceedings outside Hong Kong

(O.73, r. 4)

Where an application for an interim measure under section 46(2) of the Arbitration Ordinance (of 2008) or for an order under section 61(1) of that Ordinance is in relation to any arbitral proceedings outside Hong Kong, rules 1, 2, 3, 4, 7(1), 7A and 8 of Order 29 apply with any necessary modifications to the application as they apply to an application for interlocutory relief in an action or

proceeding in the High Court.

5. Time limits and other special provisions for certain applications under Arbitration Ordinance (O.73, r. 5)

(1) An application to challenge an arbitral award on the ground of serious irregularity under section 4 of Schedule 3 to the Arbitration Ordinance (of 2008) must be made, and the originating summons or summons (as the case may be) must be served, within 30 days after the award is delivered.

(2) An application for leave to appeal on a question of law arising out of an arbitral award under section 6 of Schedule 3 to the Arbitration Ordinance (of 2008) must be made, and the originating summons or summons (as the case may be) must be served, within 30 days after the award is delivered and, where there is a correction or interpretation of the award under section 70 of that Ordinance, the period of 30 days shall run from the date on which the award with the correction made or interpretation given is delivered.

(3) An application to determine any question of law arising in the course of the arbitral proceedings under section 3 of Schedule 3 to the Arbitration Ordinance (of 2008) must be made, and the originating summons or summons (as the case may be) must be served, within 30 days after the arbitral tribunal has given permission in writing for the making of the application or all the other parties to the arbitral proceedings have agreed in writing to the making

of the application.

(4) In the case of an application to which paragraph (1), (2) or (3) applies or an application to set aside an award under section 82 of the Arbitration Ordinance

(of 2008) -

(a) the originating summons or summons (as the case may be) must state the grounds of application; and

(b) where the application -

(i) is founded on evidence by affidavit, a copy of every affidavit intended to be used must be served with the originating summons or summons (as the case may be); or

(ii) is made with the permission of the arbitral tribunal or agreement of all the other parties to the arbitral proceedings, a copy of every permission or agreement in writing must be served with the originating summons or summons (as the case may be).

(5) In the case of -

(a) an application to which paragraph (1) applies;

(b) a request for the Court to decide on a challenge to an arbitrator or umpire under section 26(1) of the Arbitration Ordinance (of 2008) or to decide on the termination of the mandate of an arbitrator or umpire under section 27 of that Ordinance;

- (c) an application for the Court to decide that the umpire shall replace the arbitrators as the arbitral tribunal under section 31(8) of that Ordinance or that the arbitrator or umpire is not entitled to or shall repay his fees or expenses under section 63 of that Ordinance;
- (d) an application to extend the time limit for making an award under section 73(2) of that Ordinance;
- (e) an application to set aside an arbitral award under section 82 of that Ordinance; or
- (f) an appeal on a question of law arising out of an arbitral award or application for leave to appeal under section 5, 6 or 7 of Schedule 3 to that Ordinance,

the originating summons or summons (as the case may be) must be served on the arbitrator or umpire, the arbitral tribunal and on all the other parties to the arbitral proceedings.

(6) An appeal on a question of law arising out of an arbitral award under section 5 of Schedule 3 to the Arbitration Ordinance (of 2008) may be included in the application for leave to appeal, where leave is required.

6. Applications, requests and appeals to be heard in Construction and Arbitration List (O.73, r. 6)

(1) Any application, request or appeal which is required by rule 1 or 3 to be heard by a judge shall be entered in the Construction and Arbitration List unless the

judge in charge of such list otherwise directs.

(2) Nothing in paragraph (1) shall be construed as preventing the powers of the judge in charge of the Construction and Arbitration List from being exercised by any judge of the Court of First Instance.

7. Service out of jurisdiction of originating summons, summons or order (O.73, r. 7)

(1) Subject to paragraphs (2) and (3), service out of the jurisdiction of -

- (a) any originating summons or summons under this Order; or
- (b) any order made on such originating summons or summons,

is permissible with the leave of the Court if the arbitration to which the originating summons, summons or order relates is governed by Hong Kong law or has been, is being, or is to be held within the jurisdiction.

(2) Service out of the jurisdiction of an originating summons or summons (as the case may be) by which an application for leave to enforce an award is made is permissible with the leave of the Court, whether or not the arbitration is governed by Hong Kong law.

(3) Service out of the jurisdiction of an originating summons or summons (as the case may be) by which an application for an interim measure under section 46(2) of the Arbitration Ordinance (of 2008) or an order under section 61(1) of that Ordinance is made is permissible with the leave of the Court.

(4) An application for the grant of leave under this rule must be supported by an affidavit stating -

(a) the grounds on which the application is made;
and

(b) in what place the person to be served is, or probably may be found.

(5) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this rule.

(6) Order 11, rules 5, 5A, 6, 7, 7A, 8 and 8A shall apply in relation to any originating summons, summons or order referred to in paragraph (1) as they apply in relation to a writ."

13. **Enforcement of settlement agreement under section 2C of the Arbitration Ordinance or of award under section 2GG of that Ordinance**

Order 73, rule 10 is amended -

(a) in the heading, by repealing "**under section 2C of the Arbitration Ordinance or of award under section 2GG of that Ordinance**" and substituting "**, etc.**";

(b) in paragraph (1)(a), by repealing "section 2C of the Arbitration Ordinance (Cap. 341) to enforce a settlement agreement, or" and substituting "section 67(2) of the Arbitration Ordinance (of 2008) to enforce a settlement agreement;";

(c) by repealing paragraph (1)(b) and substituting -

"(b) under section 62(1) of that Ordinance to

enforce an order or direction (including an interim measure) of an arbitral tribunal;

(c) under section 85 of that Ordinance to enforce an award made in arbitral proceedings by an arbitral tribunal;

(d) under section 88 of that Ordinance to enforce a Convention award within the meaning of that Ordinance; or

(e) under section 93 of that Ordinance to enforce a Mainland award within the meaning of that Ordinance,";

(d) in paragraph (3)(a) -

(i) in sub-sub-paragraph (i), by repealing "section 2C of the Arbitration Ordinance (Cap. 341)" and substituting "section 67(2) of the Arbitration Ordinance (of 2008)";

(ii) by adding -

"(ia) where the application is under section 62(1) of that Ordinance, the arbitration agreement and the original order or direction or, in either case, a copy thereof;"

(iii) in sub-sub-paragraph (ii), by repealing "section 2GG of the Arbitration Ordinance (Cap. 341), the arbitration agreement and the original award or, in either case, a copy thereof" and substituting "section

85(1) of that Ordinance, the documents required to be produced under section 86 of that Ordinance";

- (iv) in sub-sub-paragraph (iii), by repealing "section 40B(1) or 42(1) of the Arbitration Ordinance (Cap. 341), the documents required to be produced by section 40D or 43, as the case may be, of that Ordinance," and substituting "section 88(1) of that Ordinance, the documents required to be produced under section 89 of that Ordinance; or";

- (v) by adding -

- "(iv) where the application is under section 93(1) of that Ordinance, the documents required to be produced under section 95 of that Ordinance;"

- (e) in paragraph (3)(b), by adding ", order or direction" after "settlement agreement";

- (f) in paragraph (3)(c), by adding ", order or direction" after "settlement agreement";

- (g) in paragraph (5) -

- (i) by adding "made under paragraph (4)" after "Service of the order";

- (ii) by repealing "rules 5, 6 and 8," and substituting "rules 5, 5A, 6, 7, 7A, 8 and 8A";

- (h) in paragraph (6) -

- (i) by repealing "or, if the order" and

substituting "made under paragraph (4) or, if the order made under paragraph (4)";

(ii) by repealing "the order and the settlement agreement" and substituting "that order, and the settlement agreement, order or direction";

(iii) by adding "made under paragraph (4)" after "period to set aside the order";

(i) in paragraph (6A), by adding "made under paragraph (4)" after "to set aside the order";

(j) in paragraph (7), by adding "made under paragraph (4)" after "copy of the order".

14. Other provisions as to applications to set aside an order made under rule 10

Order 73, rule 10A is amended -

(a) in the heading, by repealing "**rule 10**" and substituting "**rule 10(4)**";

(b) by repealing "to set aside an order made under rule 10" and substituting "under rule 10(6) to set aside an order made under rule 10(4)".

15. Rules repealed

Order 73, rules 11 to 18 are repealed.

16. Rule added

Order 73 is amended by adding -

"19. Transitional provision relating to Arbitration Ordinance

(O.73, r. 19)

Where, immediately before the commencement of the Arbitration Ordinance (of 2008), an application, request or appeal by originating motion, summons or notice made under this Order as in force immediately before the commencement of that Ordinance is pending, then the application, request or appeal is to be determined as if that Ordinance had not been enacted."

Labour Relations Ordinance

17. Arbitration Ordinance not to apply

Section 21 of the Labour Relations Ordinance (Cap. 55) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Control of Exemption Clauses Ordinance

18. Arbitration agreements

Section 15(2)(a) of the Control of Exemption Clauses Ordinance (Cap. 71) is repealed.

Ferry Services Ordinance

19. Arbitration

Section 27(1) of the Ferry Services Ordinance (Cap. 104) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Telecommunications Ordinance

20. **Power to place and maintain telecommunications lines, etc., on land, etc.**

Section 14(5)(b)(i) of the Telecommunications Ordinance (Cap. 106) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Telecommunications Regulations

21. **Form of licences**

Schedule 3 to the Telecommunications Regulations (Cap. 106 sub. leg. A) is amended, in the Fixed Telecommunications Network Services Licence, in General Condition 41(2), by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Tramway Ordinance

22. **Attachment**

Section 6(3) of the Tramway Ordinance (Cap. 107) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

23. **Payment for works**

Section 16(4) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Buildings Ordinance

24. Projections on or over streets

Section 31(4) of the Buildings Ordinance (Cap. 123) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Quarantine and Prevention of Disease Ordinance

25. Compensation

Section 17(2) of the Quarantine and Prevention of Disease Ordinance (Cap. 141) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Eastern Harbour Crossing Ordinance

26. Interpretation

Section 2(4) of the Eastern Harbour Crossing Ordinance (Cap. 215) is amended by repealing "Arbitration Ordinance (Cap. 341)" where it twice appears and substituting "Arbitration Ordinance (of 2008)".

**27. Operation of road tunnel area
by Government**

Section 49(2) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

**28. Road Company to charge approved
tolls for use of road tunnel**

Section 55(3)(b) is amended by repealing "Arbitration

Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

29. Liability of companies and amount payable by the Government on the vesting in it of their assets

Section 71(2) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

30. Appeal by the Road Company or the Rail Company

Section 75(2) is amended -

- (a) in paragraph (a), by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)";
- (b) in paragraph (b), by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Public Bus Services Ordinance

31. Grant of franchises

Section 5(8) of the Public Bus Services Ordinance (Cap. 230) is amended -

- (a) by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)";
- (b) by repealing "a reference by an arbitration agreement, as defined for the purposes of that

Ordinance, to" and substituting "arbitration under that Ordinance with".

**32. Determination of compensation
by arbitrator**

Section 25D(2) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Mining Ordinance

**33. Compensation where action is taken
under section 11**

Section 12(3) of the Mining Ordinance (Cap. 285) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

**34. Resumption of land required for
public purposes**

Section 65(5) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Hong Kong Airport (Control of Obstructions) Ordinance

**35. Closure orders in relation to
buildings to be demolished or
reduced in height**

Section 15(9) of the Hong Kong Airport (Control of Obstructions) Ordinance (Cap. 301) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration

Ordinance (of 2008)".

Arbitration (Appointment of Arbitrators and Umpires) Rules

36. Application

Rule 2 of the Arbitration (Appointment of Arbitrators and Umpires) Rules (Cap. 341 sub. leg. B) is amended by repealing "sections 12 and 34C" and substituting "section 13, 23 or 24".

**37. Constitution of Appointment
Advisory Board**

Rule 3(2) is amended -

(a) in paragraph (j), by repealing the full stop at the end and substituting a semicolon;

(b) by adding -

"(k) the President of the Hong Kong
Construction Association.".

**38. Procedure for applying for
appointment of arbitrator
or umpire**

Rule 6(1) is amended by repealing "section 12 of the Ordinance or under article 11 of the UNCITRAL Model Law" and substituting "section 23 or 24 of the Ordinance".

**39. Procedure for applying to HKIAC
for decision as to number
of arbitrators**

Rule 8(1) is amended by repealing "section 34C(5)" and substituting "section 23(3)".

40. Schedule amended

The Schedule is amended -

- (a) in Form 1, by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)";
- (b) in Form 2, by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Limitation Ordinance

41. Long title amended

The long title to the Limitation Ordinance (Cap. 347) is amended by repealing "and arbitrations".

42. Time limit for claiming contribution

Section 6(2)(a) is amended by [].

43. Application of Ordinance and other limitation enactments to arbitrations

Section 34 is repealed.

44. Saving

Section 40 is amended by [].

Kowloon-Canton Railway Corporation Ordinance

45. Second Schedule amended

The Second Schedule to the Kowloon-Canton Railway Corporation Ordinance (Cap. 372) is amended, in paragraph 20, by repealing

"Arbitration Ordinance (Cap. 341) by reference to" and substituting "Arbitration Ordinance (of 2008) by arbitration with".

46. Fifth Schedule amended

The Fifth Schedule is amended, in paragraph 18(1)(a), by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Tate's Cairn Tunnel Ordinance

47. Interpretation

Section 2(4) of the Tate's Cairn Tunnel Ordinance (Cap. 393) is amended by repealing "Arbitration Ordinance (Cap. 341)" where it twice appears and substituting "Arbitration Ordinance (of 2008)".

**48. Operation of tunnel area
by Government**

Section 30(2) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

**49. Company to charge approved tolls
for use of tunnel**

Section 36(3)(b) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

50. Liability of the Company and amount

**payable by the Government on the
vesting in it of its assets**

Section 49(2) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

51. Appeal by the Company

Section 53(2) is amended -

- (a) in paragraph (a), by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)";
- (b) in paragraph (b), by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Western Harbour Crossing Ordinance

52. Interpretation

Section 2(4) of the Western Harbour Crossing Ordinance (Cap. 436) is amended by repealing "A reference in this Ordinance to arbitration under the Arbitration Ordinance (Cap. 341) shall be regarded as a reference to domestic arbitration for the purposes of Part II of that Ordinance and any reference to such arbitration" and substituting "For the purposes of this Ordinance, any reference to arbitration under the Arbitration Ordinance (of 2008)".

53. Operation of tunnel area by Government

Section 27(2) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of

2008)".

54. Liability of the Company and amount payable by the Government on the vesting in the Government of its assets

Section 61(2) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Air Transport (Licensing of Air Services) Regulations

55. Issue of licences

Regulation 5(3)(b) of the Air Transport (Licensing of Air Services) Regulations (Cap. 448 sub. leg. A) is amended, in the proviso, by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Tai Lam Tunnel and Yuen Long Approach Road Ordinance

56. Interpretation

Section 2(4) of the Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Cap. 474) is amended by repealing "domestic arbitration under Part II of the Arbitration Ordinance (Cap. 341)" and substituting "arbitration under the Arbitration Ordinance (of 2008)".

Merchant Shipping (Liner Conferences) Ordinance

57. Restrictions on legal proceedings

Section 8(6) of the Merchant Shipping (Liner Conferences) Ordinance (Cap. 482) is amended by repealing "section 6(1) of, and Article 8(1) of the Fifth Schedule to, the Arbitration Ordinance (Cap. 341) (which provide respectively for the staying of legal proceedings and for the parties to an action to be referred to arbitration)" and substituting "[section 20 of the Arbitration Ordinance (of 2008)]".

Copyright Ordinance

58. General power to make rules

Section 174(2) of the Copyright Ordinance (Cap. 528) is amended by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Electronic Transactions Ordinance

59. The Electronic Transactions Ordinance (Cap. 553) is amended by [].

Mass Transit Railway Ordinance

60. Settlement or determination of claim for compensation

Section 23 of the Mass Transit Railway Ordinance (Cap. 556) is amended -

- (a) in subsection (2), by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)";
- (b) in subsection (3), by repealing "Arbitration

Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Broadcasting Ordinance

61. Domestic free television programme service supplementary provisions

Schedule 4 to the Broadcasting Ordinance (Cap. 562) is amended, in Part 2, in section 9(4), by repealing "Arbitration Ordinance (Cap. 341)" and substituting "Arbitration Ordinance (of 2008)".

Securities and Futures (Leveraged Foreign Exchange Trading)(Arbitration) Rules

62. Applicable law

Section 38(3) of the Securities and Futures (Leveraged Foreign Exchange Trading)(Arbitration) Rules (Cap. 571 sub. leg. F) is amended by repealing "section 2AB of the Arbitration Ordinance (Cap. 341)" and substituting "section 5 of the Arbitration Ordinance (of 2008)".

Tung Chung Cable Car Ordinance

63. Interpretation

Section 2(1) of the Tung Chung Cable Car Ordinance (Cap. 577) is amended, in the definition of "arbitration", by repealing "domestic arbitration under Part II of the Arbitration Ordinance (Cap. 341)" and substituting "arbitration under the Arbitration Ordinance (of 2008)".

Note : Order 73 of the Rules of the High Court (Cap. 4 sub. leg. A) to be set out for reference only.

Explanatory Memorandum

The object of this Bill is to implement, with modifications, the recommendations in the Report of Committee on Hong Kong Arbitration Law issued by the Hong Kong Institute of Arbitrators in 2003 on the reform of arbitration law in Hong Kong. Basically, the Bill seeks to establish a unitary regime for arbitration in Hong Kong, abolishing the distinction between the existing two regimes (i.e. domestic arbitrations and international arbitrations) under the current Arbitration Ordinance (Cap. 341)("current Ordinance").

2. The proposed unitary regime will be based on the UNCITRAL Model Law on International Commercial Arbitration as adopted by the United Nations Commission on the International Trade Law on 21 June 1985 and as amended by that Commission on 7 July 2006 ("Model Law"). The full text of the Model Law is set out in Schedule 1 for reference.

3. The Bill therefore, as stated in clause 4, gives legal effect to those provisions of the Model Law that are to apply in Hong Kong. Some of those provisions are applied with modifications or supplemented by other provisions.

4. Part 1 of the Bill deals with preliminary matters.

5. In particular, clause 2 contains definitions and provides for the interpretation of other references in the Bill. Definitions in article 2 of the Model Law have also been incorporated into this clause. It should be noted in particular that references to an arbitrator in the Bill, except in certain specified provisions,

include references to an umpire.

6. Clause 3 sets out the underlying object and principles of the Bill, which seek to facilitate resolution of disputes by arbitration.

7. Under clause 5, the Bill applies to arbitrations in Hong Kong, whether or not the arbitration agreements are entered into in Hong Kong. However, only certain provisions of the Bill apply if the place of arbitration is outside Hong Kong. The Bill also applies to arbitrations under other Ordinances, and all the provisions set out in Schedule 3 are deemed to apply to those statutory arbitrations.

8. Clause 6 specifies that the Bill applies to arbitration agreements to which the Government is a party as well as to arbitrations to which the Government is a party.

9. Parts 2 to 9 of the Bill follow the structure of the Model Law and apply the Model Law with modifications.

10. Part 2 corresponds to Chapter I of the Model Law and contains general provisions. In particular, clauses 7 to 13 deal with the application of articles 1 to 6 of the Model Law respectively.

11. Clause 7 corresponds to article 1 of the Model Law (Scope of application). It provides that article 1 is not to apply and clause 5 is to have effect instead, as the Bill applies not just to international commercial arbitrations as stated in article 1 but to all those arbitrations referred to in clause 5.

12. Clause 8 corresponds to article 2 of the Model Law (Definitions and rules of interpretation). It provides that clause 2 is to be substituted for article 2, as the definitions in article 2 have been incorporated into that clause.

13. Clause 9 gives effect to article 2A of the Model Law (International origin and general principles) which provides that regard is to be had to the international origin of the Model Law,

the need for uniformity and the observance of good faith while interpreting that Law.

14. Clause 10 applies and supplements article 3 of the Model Law (Receipt of written communication) which stipulates the time when a written communication is deemed to have been received.

15. Clause 11 gives effect to article 4 of the Model Law (Waiver of right to object) which provides that the right to object to any derogation from the Bill or non-compliance with an arbitration agreement will be deemed to have been waived in case of delay in raising the objection.

16. Clause 12 gives effect to article 5 of the Model Law (Extent of court intervention) which provides that no court shall intervene in matters governed by the Bill except where it so provides.

17. Clause 13 corresponds to article 6 of the Model Law (Court or other authority for certain functions of arbitration assistance and supervision). It replaces article 6 by specifying that the function of appointing an arbitrator (referred to in article 11(3) and (4) of the Model Law) is to be performed by the Hong Kong International Arbitration Centre ("HKIAC"), while the functions of deciding on a challenge to an arbitrator (referred to in article 13(3) of the Model Law), deciding on the termination of the mandate of an arbitrator (referred to in article 14(1) of the Model Law), deciding on the jurisdiction of an arbitral tribunal (referred to in article 16(3) of the Model Law), setting aside an arbitral award (referred to in article 34(2) of the Model Law) and assisting in taking evidence (referred to in article 27 of the Model Law) are to be performed by the Court of First Instance. The HKIAC may also make rules, subject to the approval of the Chief Justice, to facilitate the performance of its functions referred

to in clause 24 or 33(1).

18. Clauses 14 to 18 are supplementary provisions for Part 2. In particular -

- (a) clause 14 is modelled on section 34 of the Limitation Ordinance (Cap. 347) and provides that the Limitation Ordinance and any other Ordinance relating to the limitation of actions apply to arbitrations as they apply to actions in the court;
- (b) clause 15 deals with the reference of interpleader issues to arbitration by the court;
- (c) clause 16 provides that court proceedings under the Bill are to be heard in open court unless otherwise ordered by the court upon application;
- (d) clause 17 imposes restrictions on the reporting of court proceedings that are not heard in open court; and
- (e) clause 18 prohibits the disclosure of information relating to arbitral proceedings and awards made in those proceedings.

19. Part 3 corresponds to Chapter II of the Model Law and relates to the arbitration agreement. In particular, clauses 19 to 21 deal with the application of articles 7 to 9 of the Model Law respectively.

20. Clause 19 provides that Option I of article 7 of the Model Law (Definition and form of arbitration agreement) has effect. It requires an arbitration agreement to be in writing and explains how this writing requirement is to be satisfied.

21. Clause 20 gives effect to article 8 of the Model Law (Arbitration agreement and substantive claim before court) so that the court is obliged to refer to arbitration any claim before it

that is the subject of an arbitration agreement, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The court however has a discretionary power to refer to arbitration a claim that arises under an employment contract. Where a claim is referred to arbitration, it is mandatory for the court to stay legal proceedings on the claim. However, the reference of Admiralty proceedings to arbitration and an order for the stay of such proceedings may be made conditional on the giving of security for the satisfaction of any award made in the arbitration. The court may, alternatively, order any property arrested in Admiralty proceedings to be retained as such security when the court orders a stay of those proceedings.

22. Clause 21 gives effect to article 9 of the Model Law (Arbitration agreement and interim measures by court) which provides that it is compatible with an arbitration agreement for any interim measure to be obtained from the court.

23. Clause 22 is a supplementary provision for Part 3 which explains whether an arbitration agreement is discharged by the death of a party. There is a similar provision in the current Ordinance. Basically, it provides that an arbitration agreement is not discharged by the death of a party, but the operation of any law which provides for the extinguishment of any right or obligation by death is not affected.

24. Part 4 corresponds to Chapter III of the Model Law and relates to the composition of the arbitral tribunal. In particular -

- (a) Division 1 of Part 4 is about arbitrators; and
- (b) Division 2 of Part 4 is about mediators.

25. Clauses 23 to 28 in Division 1 of Part 4 deal with the

application of articles 10 to 15 of the Model Law respectively.

26. In particular, clause 23 gives effect to paragraph (1) of article 10 of the Model Law (Number of arbitrators), which enables the parties to determine the number of arbitrators. Paragraph (2) of article 10 is not to apply. This clause then provides that, in case of failure to agree on the number of arbitrators, such number (either 1 or 3) is to be decided by the HKIAC instead.

27. Clause 24 gives effect to article 11 of the Model Law (Appointment of arbitrators). It provides that the parties are free to determine the procedures for the appointment of an arbitrator. Where the parties fail to reach an agreement or any of them fails to follow the appointment procedures specified in that clause, an appointment is to be made by the HKIAC by virtue of clause 13.

28. Clause 25 gives effect to article 12 of the Model Law (Grounds for challenge), which provides that an arbitrator may be challenged if there are justifiable doubts as to his impartiality or independence or if he does not possess the agreed qualifications.

29. Clause 26 gives effect to article 13 of the Model Law (Challenge procedure) which provides that the parties are free to agree on the procedures for challenging an arbitrator. If a challenge under any of the procedures agreed by the parties or specified in article 13 is not successful, the Court of First Instance may, by virtue of clause 13, decide on the challenge if so requested by the challenging party. An award made by the arbitral tribunal while the Court's decision on the challenge is pending may not be enforced. If the Court upholds the challenge, such award may be set aside by the Court. This clause also allows a challenged arbitrator to withdraw from his office.

30. Clause 27 gives effect to article 14 of the Model Law (Failure or impossibility to act) which deals with the termination of the mandate of an arbitrator if he is unable to perform his functions or fails to act without undue delay. The Court of First Instance may, by virtue of clause 13, decide on the termination of the mandate in case of controversy.

31. Clause 28 gives effect to article 15 of the Model Law (Appointment of substitute arbitrator) which deals with the appointment of a substitute arbitrator to replace an arbitrator whose mandate is terminated.

32. Clauses 29 to 32 are supplementary provisions for Division 1 of Part 4. In particular -

- (a) clause 29 provides that the mandate of an arbitrator terminates on his death but not on the death of the person who appoints him;
- (b) clause 30 provides for the appointment of an umpire in an arbitration with an even number of arbitrators;
- (c) clause 31 deals with the functions of an umpire in arbitral proceedings; and
- (d) clause 32 provides that a judge, District Judge, magistrate or public officer may be appointed as sole arbitrator, and the application of the Bill to an arbitrator who is a judge is dealt with in Schedule 2.

33. Division 2 of Part 4 consists of the following supplementary provisions -

- (a) clause 33 which deals with the appointment of a mediator; and
- (b) clause 34 which provides that an arbitrator may act

as a mediator.

34. Part 5 corresponds to Chapter IV of the Model Law and relates to the jurisdiction of the arbitral tribunal. Clause 35 in this Part deals with the application of article 16 of the Model Law (Competence of arbitral tribunal to rule on its jurisdiction). It gives effect to article 16 which enables an arbitral tribunal to rule on its own jurisdiction. The Court of First Instance may, by virtue of clause 13, decide on the matter, upon request, if the arbitral tribunal rules as a preliminary issue that it has jurisdiction. Clause 35 further provides that if the arbitral tribunal rules that it does not have jurisdiction to decide a dispute, the court shall decide that dispute if it has jurisdiction.

35. Part 6 corresponds to Chapter IVA of the Model Law and relates to interim measures and preliminary orders, as follows -

- (a) Division 1 of Part 6 corresponds to section 1 of Chapter IVA which is about interim measures that may be ordered by an arbitral tribunal, and clauses 36 and 37 in this Division deal with the application of articles 17 and 17A of the Model Law respectively;
- (b) Division 2 of Part 6 corresponds to section 2 of Chapter IVA which is about preliminary orders, and clauses 38 and 39 in this Division deal with the application of articles 17B and 17C of the Model Law respectively;
- (c) Division 3 of Part 6 corresponds to section 3 of Chapter IVA which contains provisions applicable to interim measures and preliminary orders, and clauses 40 to 43 in this Division deal with the

application of articles 17D to 17G of the Model Law respectively;

(d) Division 4 of Part 6 corresponds to section 4 of Chapter IVA which is about recognition and enforcement of interim measures, and clauses 44 and 45 in this Division deal with the application of articles 17H and 17I of the Model Law respectively; and

(e) Division 5 of Part 6 corresponds to section 5 of Chapter IVA which is about court-ordered interim measures, and clause 46 in this Division deals with the application of article 17J of the Model Law.

36. In particular, clause 36 gives effect to article 17 of the Model Law (Power of arbitral tribunal to order interim measures) which empowers an arbitral tribunal to grant interim measures. This clause further provides that, where the arbitral tribunal has granted an interim measure, it may make an award to the same effect as such interim measure to facilitate its enforcement.

37. Clause 37 gives effect to article 17A of the Model Law (Conditions for granting interim measures).

38. Clause 38 gives effect to article 17B of the Model Law (Applications for preliminary orders and conditions for granting preliminary orders) which provides for the granting of a preliminary order by an arbitral tribunal upon application to prevent frustration of the purpose of any requested interim measure.

39. Clause 39 gives effect to article 17C of the Model Law (Specific regime for preliminary orders) which requires an arbitral tribunal to give notice after determining an application

for a preliminary order and to hear any objection thereto promptly. The preliminary order is binding on the parties, but it is not enforceable by the court.

40. Clause 40 gives effect to article 17D of the Model Law (Modification, suspension, termination) which provides that an arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order granted by it.

41. Clause 41 gives effect to article 17E of the Model Law (Provision of security) which provides that an arbitral tribunal may require security to be provided in connection with an interim measure, and shall require security to be provided in connection with a preliminary order unless it is inappropriate or unnecessary to do so.

42. Clause 42 gives effect to article 17F of the Model Law (Disclosure) which requires all circumstances relevant to the granting of a preliminary order to be disclosed to the arbitral tribunal. The arbitral tribunal may also require the party requesting an interim measure to disclose any material change in those circumstances.

43. Clause 43 gives effect to article 17G of the Model Law (Costs and damages) which provides that the party requesting an interim measure or applying for a preliminary order shall be liable for any costs or damages caused by the measure or order if that measure or order should not have been granted.

44. Clause 44 provides that article 17H of the Model Law (Recognition and enforcement) does not have effect and clause 62 on enforcement of orders and directions (including interim measures) by an arbitral tribunal applies instead.

45. Clause 45 provides that article 17I of the Model Law (Grounds for refusing recognition or enforcement) does not have effect.

46. Clause 46 provides that article 17J of the Model Law (Court-ordered interim measures) does not have effect. Nevertheless, it empowers the Court of First Instance to grant an interim measure in relation to arbitral proceedings in or outside Hong Kong, whether or not a similar power may be exercised by an arbitral tribunal. For arbitral proceedings outside Hong Kong, the Court may grant the interim measure only if the arbitral proceedings are capable of giving rise to an arbitral award which may be enforced in Hong Kong and the interim measure ought to be of a type or description that may be granted in Hong Kong.

47. Part 7 corresponds to Chapter V of the Model Law and relates to the conduct of arbitral proceedings. In particular, clauses 47 to 56 deal with the application of articles 18 to 27 of the Model Law respectively.

48. Clause 47 replaces article 18 of the Model Law (Equal treatment of parties). It contains a provision requiring the parties to an arbitration to be treated with equality, which is similar to the requirement in article 18. This clause also adopts an existing provision in the current Ordinance which requires an arbitral tribunal to act fairly and impartially, to give a reasonable opportunity for the parties to present their cases and to avoid unnecessary delay or expenses. This clause then provides further that an arbitral tribunal has to be independent.

49. Clause 48 gives effect to paragraph (1) of article 19 of the Model Law (Determination of rules of procedure) which allows the parties to agree on the procedures to be followed in conducting arbitral proceedings. Paragraph (2) of article 19 is not to apply. Yet this clause provides that if there is no agreement, the arbitral tribunal may conduct the arbitration as it considers appropriate, which is similar to the provision in paragraph (2) of

article 19. This clause then further provides, based on an existing provision in the current Ordinance, that an arbitral tribunal is not bound by the rules of evidence and may receive any evidence which it considers appropriate.

50. Clause 49 gives effect to article 20 of the Model Law (Place of arbitration) which provides for the place of arbitration to be agreed by the parties or, where there is no such agreement, to be determined by the arbitral tribunal.

51. Clause 50 gives effect to article 21 of the Model Law (Commencement of arbitral proceedings) which specifies that arbitral proceedings commence on the date the request for reference to arbitration is received by the respondent.

52. Clause 51 gives effect to article 22 of the Model Law (Language) which allows the language to be used in the arbitral proceedings to be agreed by the parties or, where there is no such agreement, to be determined by the arbitral tribunal.

53. Clause 52 gives effect to article 23 of the Model Law (Statements of claim and defence) which requires any statement of claim or defence to be filed within the period agreed by the parties or determined by the arbitral tribunal. Such claim or defence may be amended during the course of arbitral proceedings.

54. Clause 53 gives effect to article 24 of the Model Law (Hearings and written proceedings) which requires an arbitral tribunal to hold oral hearings, if so requested by a party, unless the parties have agreed that no such hearings shall be held.

55. Clause 54 gives effect to article 25 of the Model Law (Default of a party) which allows the arbitral tribunal to continue the arbitral proceedings if there is a failure to submit the statement of defence, but empowers the arbitral tribunal to terminate the proceedings if there is a failure to submit the

statement of claim. This clause further provides that if a party fails to comply with any order or direction of the arbitral tribunal, the tribunal may make a peremptory order requiring compliance within such time as the tribunal considers appropriate.

56. Clause 55 gives effect to article 26 of the Model Law (Expert appointed by arbitral tribunal) which empowers an arbitral tribunal to appoint experts to report on specific issues and allows those experts to participate in a hearing. This clause further provides that the arbitral tribunal may appoint experts, legal advisers or assessors to assist in assessing the costs of the arbitral proceedings.

57. Clause 56 gives effect to article 27 of the Model law (Court assistance in taking evidence) which provides that an arbitral tribunal, or a party with the approval of the arbitral tribunal, may request a competent court to assist in taking evidence. The Court of First Instance may, by virtue of clause 13, give such assistance. This clause also adopts an existing provision in the current Ordinance empowering the Court of First Instance to order a person to attend proceedings before an arbitral tribunal to give evidence.

58. Clauses 57 to 64 are supplementary provisions for Part 7. In particular -

- (a) clause 57 deals with the general powers exercisable by an arbitral tribunal, including ordering security for costs to be given, directing the discovery of document, directing evidence to be given by affidavit, directing the inspection of relevant property etc.;
- (b) clause 58 empowers an arbitral tribunal to limit the amount of costs recoverable in arbitral

- proceedings;
- (c) clause 59 provides for the power of an arbitral tribunal to extend the time limit for commencing arbitral proceedings;
 - (d) clause 60 provides that a party has to pursue his claim in arbitral proceedings without unreasonable delay and that otherwise the arbitral tribunal may make an award dismissing the claim;
 - (e) clause 61 deals with the special powers of the Court of First Instance to order the inspection of relevant property etc. in relation to arbitral proceedings and provides that, if the arbitral proceedings are outside Hong Kong, such powers may be exercised only if those arbitral proceedings are capable of giving rise to an arbitral award that may be enforced in Hong Kong;
 - (f) clause 62 provides that an order or direction (including an interim measure) made in relation to arbitral proceedings by an arbitral tribunal is enforceable with the leave of court and, if the order or direction is made outside Hong Kong, such leave may be granted only if that order or direction belongs to a type or description of orders or directions that may be made in Hong Kong by an arbitral tribunal;
 - (g) clause 63 deals with the power of the Court of First Instance to order recovery of an arbitrator's fees where the arbitrator's mandate has terminated upon challenge or failure to act; and
 - (h) clause 64 provides that section 44 (Penalty for

unlawfully practising as a barrister or notary public), section 45 (Unqualified person not to act as solicitor) and section 47 (Unqualified person not to prepare certain instruments, etc.) of the Legal Practitioners Ordinance (Cap. 159) do not apply in relation to arbitral proceedings, other than things done in connection with court proceedings.

59. Part 8 corresponds to Chapter VI of the Model Law and relates to the making of awards and termination of proceedings. In particular, clauses 65 to 70 deal with the application of articles 28 to 33 of the Model Law respectively.

60. Clause 65 gives effect to article 28 of the Model Law (Rules applicable to substance of dispute) which provides that an arbitral tribunal shall decide a dispute according to such rules of law as are chosen by the parties and, if no such rules of law are chosen, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers appropriate.

61. Clause 66 gives effect to article 29 of the Model Law (Decision making by panel of arbitrators) which provides that any decisions of an arbitral tribunal with more than one arbitrator shall be made by a majority of its members, but those on questions of procedure may be decided by a presiding arbitrator.

62. Clause 67 gives effect to article 30 of the Model Law (Settlement) which requires an arbitral tribunal to terminate the arbitral proceedings if the parties settle the dispute and to make an award on agreed terms. This clause also includes an existing provision of the current Ordinance which provides that the parties' settlement agreement otherwise reached shall be treated as an award and is enforceable with the leave of the court.

63. Clause 68 gives effect to article 31 of the Model Law (Form and contents of award) which requires an award to be made in writing, signed and dated. The award shall also state the place of arbitration and the reasons upon which the award is based. A copy of the award has to be delivered to each party after it is made but an arbitral tribunal may, under clause 78, refuse to deliver an award to the parties except upon full payment of its fees and expenses.

64. Clause 69 gives effect to article 32 of the Model Law (Termination of proceedings) which provides that arbitral proceedings are terminated where a final award is made or where the arbitral tribunal issues an order for the termination of those proceedings.

65. Clause 70 gives effect to article 33 of the Model Law (Correction and interpretation of award; additional award) which allows the correction of clerical errors etc. in an award, the interpretation of a specific point or part of the award, and the making of an additional award to deal with claims that are presented in the arbitral proceedings but omitted from the award. This clause further provides that an arbitral tribunal may review an award of costs.

66. Clauses 71 to 81 are supplementary provisions for Part 8. In particular -

- (a) clause 71 provides that an arbitral tribunal may, in deciding a dispute, award a remedy or relief and may order specific performance of any contract which is not related to land;
- (b) clause 72 allows an arbitral tribunal to make more than one award at different times on different issues;

- (c) clause 73 provides that an arbitral award may be made at any time and the time limit therefor, if any, may be extended by the Court of First Instance;
- (d) clause 74 provides that an award made by an arbitral tribunal is final and binding, but the right to challenge the award according to the procedures in other provisions of the Bill or any available arbitral process of appeal or review is not affected;
- (e) clause 75 empowers an arbitral tribunal to award costs of arbitral proceedings;
- (f) clause 76 provides for the taxation of costs of arbitral proceedings by the court if so agreed by the parties;
- (g) clause 77 provides that section 50 (No costs for unqualified person) of the Legal Practitioners Ordinance (Cap. 159) does not apply to the recovery of costs in an arbitration;
- (h) clause 78 deals with the determination of the fees and expenses of an arbitral tribunal in case of dispute;
- (i) clause 79 provides for the liability of the parties to pay the fees and expenses of the arbitral tribunal;
- (j) clause 80 deals with the power of an arbitral tribunal to award interest; and
- (k) clause 81 provides for the rate of interest on money awarded in arbitral proceedings.

67. Part 9 corresponds to Chapter VII of the Model Law and relates to recourse against an award. Clause 82 in this Part gives

effect to article 34 of the Model Law (Application for setting aside as exclusive recourse against arbitral award) which provides that an arbitral award may be set aside by the Court of First Instance, by virtue of clause 13, on the ground that a party is under incapacity or the arbitration agreement is not valid, proper notice of appointment of an arbitrator or of the arbitral proceedings has not been given or the party concerned is unable to present his case, the award deals with a dispute not covered by the terms of submission to arbitration, the composition of the arbitral tribunal or the conduct of arbitral proceedings is contrary to the effective agreement of the parties or (if there is no such agreement) to the Model Law, the subject matter of the dispute is not capable of settlement by arbitration, or the award is in conflict with the public policy. This clause also includes an existing provision of the current Ordinance which provides that, without prejudice to any right to challenge or appeal to the Court of First Instance, an award may not be set aside or remitted on the ground of errors of fact or law on the face of the award.

68. Part 10 corresponds to Chapter VIII of the Model Law and relates to recognition and enforcement of awards.

69. In particular, Division 1 of Part 10 deals with enforcement of arbitral awards in general. In this Division, clause 83 provides that article 35 of the Model Law (Recognition and enforcement) does not apply, while clause 84 provides that article 36 of the Model Law (Grounds for refusing recognition or enforcement) does not apply. Clauses 85 to 87, which are supplementary provisions for this Division, shall have effect instead.

70. In particular -

(a) clause 85, which is modelled on an existing

provision of the current Ordinance, provides that an arbitral award made in or outside Hong Kong is enforceable with the leave of the court, but no leave may be granted in respect of an award made outside Hong Kong (which is neither an arbitral award made in a State which is a party to the New York Convention ("Convention award") nor an arbitral award made in the Mainland by a recognized Mainland arbitral authority ("Mainland award")) unless the court in the place where the award is made will act reciprocally in respect of arbitral awards made in Hong Kong;

- (b) clause 86 deals with the evidence to be produced for enforcement of such award; and
- (c) clause 87 deals with the grounds for refusing enforcement of such award.

71. Division 2 of Part 10 retains the existing provisions in Part IV of the current Ordinance and relates to the enforcement of Convention awards, in particular -

- (a) the enforceability of Convention awards (clause 88);
- (b) the evidence to be produced for enforcing Convention awards (clause 89);
- (c) the grounds for refusing enforcement of Convention awards (clause 90);
- (d) the making of an order by the Chief Executive to declare any party to the New York Convention to be such a party (clause 91); and
- (e) the saving of other rights to enforce or rely on Convention awards (clause 92).

72. Division 3 of Part 10 retains the existing provisions in Part

IIIA of the current Ordinance and relates to the enforcement of Mainland awards, in particular -

- (a) the enforceability of Mainland awards (clause 93) and certain restrictions on enforcement (clauses 94 and 97);
- (b) the evidence to be produced for enforcing Mainland awards (clause 95);
- (c) the grounds for refusing enforcement of Mainland awards (clause 96);
- (d) the publication of a list of recognized Mainland arbitral authorities by the Secretary for Justice (clause 98); and
- (e) the saving of certain Mainland awards (clause 99).

73. The Bill also allows provisions set out in Schedule 3 ("opt-in provisions") to be opted for inclusion in arbitration agreements and provides for the circumstances under which those provisions will automatically apply. This is dealt with in Part 11.

74. In particular, clause 100 provides that an arbitration agreement may expressly opt for any of the following -

- (a) section 1 of Schedule 3 which requires a dispute to be referred to a sole arbitrator for arbitration;
- (b) section 2 of Schedule 3 which allows 2 or more arbitral proceedings to be consolidated or to be heard at the same time or one immediately after another;
- (c) section 3 of Schedule 3 which empowers the Court of First Instance to determine any question of law arising in the course of arbitral proceedings;
- (d) sections 4 and 7 of Schedule 3 which allow an arbitral award to be challenged on the ground of

serious irregularity affecting the arbitral tribunal, the arbitral proceedings or the award;

- (e) sections 5, 6 and 7 of Schedule 3 which provide for an appeal against an arbitral award on a question of law.

75. On the other hand, clause 101 provides that all the opt-in provisions in Schedule 3 will automatically apply to an arbitration agreement (entered into before, or within 6 years after, the Bill comes into effect) which refers to domestic arbitration.

76. Clause 102 then provides that the opt-in provisions which automatically apply under clause 101 shall continue to apply (if the subject matter of the contract concerned is subcontracted or further subcontracted) to the arbitration agreements of the subcontractors or sub-subcontractors down the line unless they are foreign entities or a substantial part of the subject matter is performed outside Hong Kong. However, if the arbitration agreement of any subcontractor or sub-subcontractor refers to domestic arbitration, that subcontractor or sub-subcontractor will not be excepted from the automatic application of the opt-in provisions even if he is a foreign entity or a substantial part of the subject matter of the contract concerned is performed outside Hong Kong.

77. According to clause 103, the automatic opt-in mechanism will not have effect if the parties so agree in writing, or if they have expressly provided that the automatic opt-in provisions do not apply or have expressly opted for or ousted any of those opt-in provisions in their arbitration agreement.

78. Clause 104 further provides that in the case of inconsistency, provisions that apply under Part 11 prevail over other provisions of

the Bill.

79. Part 12 contains miscellaneous provisions. In particular -

- (a) clause 105, which is based on an existing provision of the current Ordinance, provides that an arbitral tribunal or mediator is liable for certain acts done or omitted to be done dishonestly by the tribunal or mediator, its employees or its agents;
- (b) clause 106, also based on an existing provision of the current Ordinance, provides that a person who appoints an arbitral tribunal or mediator or performs any administrative function in connection with arbitral or mediation proceedings is liable for acts done or omitted to be done only if they are committed dishonestly;
- (c) clause 107 relates to the making of rules of court for the making, and service outside jurisdiction, of an application for an interim measure or an order for the inspection of relevant property etc.; and
- (d) clause 108 specifies that an application, request or appeal to the Court of First Instance shall, unless otherwise expressly provided, be made in accordance with Order 73 of the Rules of the High Court (Cap. 4 sub. leg. A).

80. Part 13 deals with repeal, savings and transitional provisions. In particular -

- (a) clause 109 repeals the current Ordinance;
- (b) clause 110 provides that the subsidiary legislation made under the current Ordinance shall continue in force; and

(c) clause 111 provides that the savings and transitional arrangements set out in Schedule 4 are to apply.

81. Part 14 deals with consequential and related amendments. Clause 112 in this Part specifies that such consequential and related amendments are set out in Schedule 5.

The Hong Kong Arbitration Ordinance –

A Commentary, Robert Morgan,

paras [S.528.14] – [S528.15]

[S5.28.14] General note

This paragraph is the link provision between the majority of cases, where the tribunal decides the case according to law and to the construction of the terms of the contract, and cases where the tribunal decides the case *ex aequo et bono* or as *amiable compositeur*. It was inserted into the Model Law to fulfill party expectations; UNCITRAL perceived that parties choose arbitration over litigation because of the former's emphasis on the wording and history of the underlying contract and on trade customs, practices and usages.

[S5.28.15] Arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur*

Arbitration agreements employing the terms *ex aequo et bono* and *amiable compositeur* are referred to collectively by Mustill & Boyd *Commercial Arbitration* (2nd Ed 1989, Butterworths, London) pp 74-75 as 'equity clauses', viz clauses which excuse the tribunal from the duty to decide the dispute in accordance with the law. Although these terms are often used interchangeably, *ex aequo et bono* and *amiable compositeur/amiabile composition* may to some extent be defined separately as follows:

1. arbitration *ex aequo et bono* entitles the tribunal to decide according to principles of fairness, reasonableness, equity and good conscience, without having to follow strict legal or contractual requirements. This may have a variety of meanings, including (i) to apply relevant rules of law but to dispense with purely formalistic rules (eg as to a form of contract), (ii) to apply relevant rules of law but to dispense with those which operate unfairly or harshly in the particular case, and (iii) to disregard the strict construction of a contract: see, for example, *Eagle Star Insurance Co v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357; *Kansa General Insurance Co Ltd v Bishopsgate Insurance plc* [1988] 1 Lloyd's Rep 503, [1988] 1 FTLR 190; *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63, [1988] 1 FTLR 421; *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (in liq)* [1990] 1 WLR 153, [1989] 3 All ER 74, [1989] 1 Lloyd's Rep 473, CA (Eng); *Hiscox v Outhwaite (No 3)* [1991] 2 Lloyd's Rep 524. It is generally held not to entitle the tribunal to ignore rules of law altogether and decide the dispute on the basis of fairness, equity and good conscience alone; in these circumstances the arbitration clause may be void for uncertainty (see *Orion Cia Espanola de Seguros v Belfort Maatschappij voor Algemene Verzekeringen* [1962] 2 Lloyd's Rep 257; *Home Insurance Co v Administratia Asigurarilor de Stat* [1983] 2 Lloyd's Rep 674) or the entire contract may be held to be void for ousting the jurisdiction of the courts (see *Marine Insurance Co Ltd v Assicuranz-Union von 1865* (1935) 52 Ll L Rep 16). The use of such clauses is limited to reinsurance agreements, where they are often referred to as 'honourable engagement' clauses;
2. *amiabile composition* also involves deciding the dispute on the basis of fairness, reasonableness, equity and good conscience, without having to follow strict legal or contractual requirements, and similar principles apply to those which govern arbitration *ex aequo et bono*. However, (i) in some jurisdictions the *amiabile compositeur* is said to have a mandate primarily to 'settle' the dispute rather than to adjudicate upon it, (ii) may be authorised to fill gaps in the parties' bargain and (iii) may be required to reach a business solution, even if to do so would conflict with his personal conception of equity (see M Rubino-Sammartano *International Commercial Arbitration* (1990, Kluwer, Deventer) pp 273-274; RH Christie *Amiable Composition in French and English Law* (1992) 58 JCLArb 4, 259 at 266).

Both procedures generally aim at the production of a binding and enforceable award. The tribunal exercising such mandates must therefore observe the principles of natural justice and the requirements of public policy.

This is the first clear statement in Hong Kong that references decided *ex aequo et bono* or as *amiable compositeur* by a Hong Kong tribunal will be recognised as valid. This paragraph is, however, of mandatory application in the sense that a tribunal cannot decide a reference on either of these bases without the express authorisation of the parties. Given, however, that there is much uncertainty about what these terms mean and what these types of arbitration entail, it is likely that the parties' authorisation will have to spell out in detailed terms what the tribunal's remit is and the powers it may exercise. The attitude of the courts on 'equity' clauses has not been consistent: see *Rolland v Cassidy* (1888) 13 App Cas 770 at 772-773, PC per the Earl of Selborne LC; *Jager v Tolme & Runge and the London Produce Clearing House* [1916] 1 KB 939 at 957-958, CA (Eng) per Pickford LJ; *Board of Trade v Cuyzer Irvine & Co* [1927] AC 610 at 628-629, HL (Eng) per Lord Phillimore; *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478 at 491, [1922] All ER Rep 45 at 51-52, CA (Eng) per Atkin LJ; *Orion Cia Espanola de Seguros v Belfort Maatschappij voor Algemene Verzekeringen* [1962] 2 Lloyd's Rep 257 at 264 per Megaw J; *River Thames Insurance Co Ltd v Al Ahleia Insurance Co SAK* [1973] 1 Lloyd's Rep 2 at 7, CA (Eng) per Lord Denning MR; *Home & Overseas Insurance Co Ltd v Mentor*

Insurance Co (UK) Ltd (in liq) [1990] 1 WLR 153 at 161, [1989] 3 All ER 74 at 80, [1989] 1 Lloyd's Rep 473 at 485 per Parker LJ (CA) (see also the judgment of Hirst J at first instance: [1989] 1 Lloyd's Rep 473 at 475-486); cf *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357 at 362, CA (Eng) per Lord Denning MR.

For discussion of arbitration *ex aequo et bono*, see A Redfern & JMH Hunter *International Commercial Arbitration* (2nd Ed 1991, Sweet & Maxwell, London) pp 121-122; J Arthur McInnis *Amiable composition: Whither the direction of Hong Kong arbitration law* (1991) 21 HKLJ 343 at 346-347. For discussion of arbitration as *amiable compositeur*, see Redfern & JMH Hunter *op cit* pp 35-38; H Brown & AL Marriott *ADR Principles and Practice* (1993, Sweet & Maxwell, London) pp 62-66; JH Christie *Amiable Composition in French and English Law* (1992) 58 JCI Arb 4, 259; J Arthur McInnis *Amiable composition: Whither the direction of Hong Kong arbitration law* (1991) 21 HKLJ 343, which discusses *amiable composition* with particular reference to the provisions of the Model Law. For discussion of equity clauses generally, see Sir M Kerr 'Equity' *Arbitration in England* (1991) 2 Am Rev Int Arb 377; Steyn J (as he then was) *The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?* (the 1991 Royal Bank of Scotland Law Lecture) (1992) 58 JCI Arb 1, 51 at 52; J Kodwo Bentil *Commercial Arbitrators authorised not to apply strict Rules of Law and Judicial Review* [1992] JBL 26.

This provision does not, however, empower a tribunal to decide the reference on the basis of the *lex mercatoria*, notwithstanding the agreement of the parties (although conversely, an award made on this basis by an arbitration tribunal overseas will be enforced under the New York Convention; see *Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v R'As al-Khaimah National Oil Co* [1987] 3 WLR 1023, [1987] 2 All ER 769, [1987] 2 Lloyd's Rep 246, CA (Eng), *reversd* on other grounds, *sub nom Deutsche Schachtbau- und Tiefbohrergesellschaft mbH v Shell International Petroleum Co Ltd (v/a Shell International Trading Co)* [1990] 1 AC 295, [1988] 3 WLR 230, [1988] 2 All ER 833, [1988] 2 Lloyd's Rep 293, HL (Eng)).