(1) Chinese rendition of "peremptory order" in clause 53(3)

(2) Appointment of experts by arbitral tribunal under clause 54

(3) Procedure for objections before appointment of experts under clause 54

(4) Writ of habeas corpus ad testificandum in clause 55(3)

(5) Evidence to be given by affidavit under clause 56(1)(c)

(6) The meaning of "relevant property" in clause 56(6)

(7) Power to extend time for arbitral proceedings under clause 58(3)

and

(8) Circumstances under which a court's order ceases to have effect on the order of arbitral tribunal under clause 60(5)

I. Introduction

This paper addresses the following requests for information made by Members at the meeting of the Bills Committee of the Legislative Council held on 14 January 2010:

(a) review the Chinese rendition of "peremptory order" in clause 53 of the Arbitration Bill ("the Bill");

(b) explain the considerations for empowering the arbitral tribunal to appoint experts to assist in assessing the amount of costs of arbitral proceedings under clause 54(2), and provide examples of such experts appointed by the arbitral tribunal;

(c) consider if there is a need to provide in clause 54 the procedures for the parties concerned to raise objections

before an arbitral tribunal appoints experts on specific issues;

(d) advise whether "person in custody" is within the meaning of "prisoner" for the purposes of clause 55(3);

(e) advise whether evidence given by affidavit outside Hong Kong is admissible for the purposes of clause 56(1)(c);

(f) advise whether "intellectual property" is within the meaning of "relevant property" for the purposes of clause 56(6);

(g) provide illustrative examples on the available arbitral procedures that must be exhausted before an application can be made for obtaining an extension of time as stipulated in clause 58(3); and

(h) review the drafting of clause 60(5) of the Bill to better explain the circumstances under which the arbitral tribunal may order that an order made by the Court ceases to have effect.

II. Chinese rendition of "peremptory order" in clause 53(3)

2. At the Bills Committee meeting of 14 January 2010, Members expressed reservation on the Chinese rendition of "peremptory order" as "最終命令" on the basis the word "最終" gave the impression that the order was somehow "final" and not subjected to any review which might not actually be the case. It is to be noted that such order, necessarily to be effective, invariably specifies the time limit within which a party must comply with a prior order or direction of the arbitral tribunal. In practice, according to experienced arbitrators, a party would be allowed to show cause as to why that prior order or direction should not be complied with.

3. In order to better reflect the purpose of the peremptory order which is to urge for compliance by a party as required by the order and to avoid the connotation that the peremptory order is a final order, the Administration would suggest an alternative Chinese rendition "敦促遵行令"

for "peremptory order". The dictionary meaning of "敦促" is "urge; press; prompt"[1] and it ties in well with the legal effect of the peremptory order.

III. Appointment of experts by arbitral tribunal under clause 54(2)

4. At the Bills Committee meeting of 14 January 2010, Members were concerned about whether there is a need to empower the arbitral tribunal to appoint experts (including legal experts and assessors) to assist in the assessment of the costs of the arbitral proceedings under clause 54(2).

5. Clause 54(2) is modeled on section 37(1) of the English Arbitration Act 1996. It gives effect to the recommendation of the Hong Kong Institute of Arbitrator's Report of the Committee on Hong Kong Arbitration Law as follows:

> *"[...] [W]e are of the view that the arbitral tribunal should be obliged to assess ... costs [of the arbitral proceedings] but that it should have the power, at its election, to appoint an assessor to assist or, with statutory authority to exercise delegated powers, to assess such costs."*[2]

6. It could be argued that Article 26 of the UNCITRAL Model Law, to be given effect to by clause 54(1) of the Bill, relates to the substantive issues in an arbitration otherwise than on costs. Many arbitrators, especially those who are not lawyers, may have problems in assessing costs themselves. Hence, clause 54(2) was inserted to provide beyond doubt that the arbitral tribunal may appoint assessors to assist it on costs. In any event, according to experienced arbitrators, this power would only be used in complex cases and it should not be used too often in practice.

7. After taken into account Members' views, the Administration agrees with the view that, in practice, it is only necessary to allow the arbitral tribunal to appoint assessors (who would normally be law costs draftsmen) to advise them on questions of costs. The Administration will

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1 Entry on "敦促" in *A New Century Chinese-English Dictionary*, Foreign Language Teaching and Research Press, 2003 on page 410

2 *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, paragraph 43.7

propose an amendment to clause 54(2) to read as follows:

54. 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 affecting article 26 of the UNCITRAL Model Law, given effect to by subsection (1), in assessing the amount of the costs of arbitral proceedings (other than the fees and expenses of the tribunal) under section 74 –

(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 of those ~~experts, legal advisers or~~ assessors to attend the proceedings; and

(b) the parties must be given a reasonable opportunity to comment on any information, opinion or advice offered by any of those ~~experts, legal advisers or~~ assessors.

IV. Procedure for objections before appointment of experts under clause 54

8. Members referred to Article 26 of the UNCITRAL Model Law, to be given effect to by clause 54(1), and raised the question of whether there is a need to provide for the procedures in clause 54(2) for the parties concerned to raise objections before an arbitral tribunal appointed experts on specific issues.

9. According to experienced arbitrators, the arbitral tribunal will always consult the parties on the appointment of experts as the tribunal will wish the parties to be responsible for the fees of the tribunal-appointed expert.

10. In view of the prevalent practice of consulting the parties before experts are appointed by the arbitral tribunal and the desirability to preserve the autonomy of the parties to deal with the procedural matters in arbitration, the Administration does not consider that an express provision in the Bill is necessary.

V. Writ of *habeas corpus ad testificandum* in clause 55(3)

11. Clause 55(3) provides that the court may order a writ of *habeas corpus ad testificandum* to be issued requiring a prisoner to be taken before

an arbitral tribunal for examination. Members asked whether "person in custody" was within the meaning of "prisoner" for the purposes of clause 55(3).

12. We have undertaken research into the legislative history relevant to the writ of *habeas corpus ad testificandum*. This form of writ, together with the form of writ of *habeas corpus ad respondendum* (to bring up a prisoner to face action by a creditor or other claimant), were found to be obsolete and were removed from the Schedule to the Supreme Court Ordinance (now the High Court Ordinance) (Cap. 4) by the Supreme Court (Amendment) Ordinance (95 of 1997).

13. On the other hand, section 81 of the Evidence Ordinance (Cap. 8) provides as follows:

> *"(1) Any judge of the Court of First Instance may, on application or on his own motion, issue a warrant or order for bringing up any person in lawful custody before any court to enable such person to prosecute, pursue, defend or be examined as a witness in, any proceedings, either criminal or civil, before such court*
> *[...]*
> *(3) Such prisoner or person shall be brought under the same care and custody, and be dealt with in like manner in all respects, as a prisoner required by any writ of habeas corpus awarded by the Court of First Instance to be brought before the said court to be examined as a witness in any cause or matter depending before the said court is by law required to be dealt with."* [3]

14 It is noted that the warrant or order to be issued by the judge of the Court of First Instance under this section is for bringing up "any person in lawful custody before any court". In our view, it is no longer necessary to rely on the obsolete writ of *habeas corpus ad testificandum* since the Court of First Instance can now invoke the power given to it by section 81 of the

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[3] The definition of "court" in section 2 of the Evidence Ordinance (Cap. 8) includes any arbitrator having, by law or by consent of parties, authority to hear, receive, and examine evidence with respect to any matter submitted to arbitration.

Evidence Ordinance. Amendments will be proposed to clause 55(3) to make suitable reference to section 81 of the Evidence Ordinance (Cap. 8). We propose that clause 55 be amended as follows:

55. 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.*~~

(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 56 in relation to the same dispute.

(4) A decision or order of the Court made in the exercise of its power under this section is not subject to appeal.

(5) Section 81 (Warrant or order to bring up prisoner to give evidence) of the Evidence Ordinance (Cap. 8) applies as if a reference to any proceedings, either criminal or civil, in that section were any arbitral proceedings.

15. We also find that Order 54, rule 9 of the High Court Rules (Cap. 4 sub. leg. A) refers to the writs of *habeas corpus ad testificandum* and *habeas corpus ad respondendum*. An additional provision in the Bill will be proposed to repeal this obsolete provision.

VI. Evidence to be given by affidavit under clause 56(1)(c)

16. Members enquired whether an affidavit by a witness overseas would be acceptable for the purposes of clause 56(1)(c). According to experienced arbitrators, it is fairly common in shipping arbitrations for written statements by witnesses overseas to be accepted in evidence and arbitral tribunals will sometimes request that such evidence be given on affidavit. Hong Kong case law[4] shows that affidavits and affirmations sworn outside Hong Kong before a Chinese diplomatic or consular official or notary public are admissible in proceedings in Hong Kong. A foreign notary can notarize documents outside Hong Kong for use in Hong Kong, but a Hong Kong notary public cannot notarize a document or otherwise exercise his office as notary outside Hong Kong.

17. The arbitral tribunal has discretion to accept written statements made by an overseas witness under clause 47(3) of the Bill which provides that an arbitral tribunal may receive any evidence that it considers relevant to the arbitral proceedings (but must give the weight that it considers appropriate to the evidence adduced in the arbitral proceedings).

VII. The meaning of "relevant property" in clause 56(6)

18. Members were interested to know whether "relevant property" referred to in clause 56(6) would include intangible property such as intellectual property rights. The Administration would advise that the term

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4 *Top Flying Investment Ltd v. Open Mission Assets Ltd* [2006] HKLRD 83.

"relevant property" includes movable and immovable property and would include intellectual property rights.

VIII. Power to extend time for arbitral proceedings under clause 58(3)

19. Members asked what were the "available arbitral procedures" in clause 58(3) for obtaining an extension of time which must be exhausted before an application might be made under this clause, so that a party might know whether he had exhausted those proceedings.

20. An example of such "available arbitral procedures" can be found in commodity arbitration where the arbitration is often conducted under the rules of one of the organizations such as Gain and Feed Trade Association. The rules of such organizations may provide for a right to appeal to a board of appeal if an arbitral tribunal decides not to admit the claim. The board of appeal has the power in its absolute discretion to overturn the decision not to extend time for bringing arbitral proceedings and to admit the claim.

21. Clause 58(3) reproduces the current section 2GD(3) of the Arbitration Ordinance (Cap. 341). We are not aware of any particular problems in the operation of this section.

IX. Circumstances under which a court's order ceases to have effect on the order of arbitral tribunal under clause 60(5)

22. Members questioned the proper interpretation of clause 60(5) and were concerned that it might be interpreted as providing an arbitral tribunal with the power to order that an order made by the Court under clause 60 should cease to have effect.

23. Clause 60(5) is modelled on section 44(6) of the English Arbitration Act 1996. It was pointed out in a commentary that this section is novel and confers the power to revoke the court's order on the order of the arbitrators. The circumstances which this power will be invoked are as follows:

"What is contemplated is that the court's order will

> *be made at a time at which the arbitrators have not been appointed, and that the order will itself provide that on appointment the arbitrators may revoke the order of the court and replace it – if they think fit – with their own order."*[5]

24. As pointed out in the above commentary, the arbitral tribunal could order that an order made by the court ceases to have effect only if that court has allowed the arbitral tribunal to do so in the original order made by the court. It may also be necessary, for example, to invoke this power in case the court has to hear an emergency application and refers the issue to the arbitrator for full hearing. Therefore it is clear that this power could only be invoked if the court order has empowered or authorized the tribunal to make such an order. The rationale for so providing is to save time and costs because otherwise an application might have to be made to the court again to vary or terminate its own order.

25. To address Members' concern, the Administration agrees to recast clause 60(5) to better reflect the policy intention as follows:

60. Special powers of Court in relation to arbitral proceedings

(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.~~ when the arbitral tribunal makes an order for the cessation.

Department of Justice
May 2010

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5 Robert Merkin, *Arbitration Law* (2009, Informa), paragraph 14.50