

HONG KONG INSTITUTE OF ARBITRATORS

**REPORT
OF
COMMITTEE
ON
HONG KONG ARBITRATION LAW**

30TH APRIL 2003

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A. Introduction

1. Terms of Reference

1.1 The Committee on Hong Kong Arbitration Law was established in 1998 by the Hong Kong Institute of Arbitrators (“H.K.I.Arb.”), in co-operation with Hong Kong International Arbitration Centre. It was established with the support of the Secretary for Justice and was to take forward the work done by the Committee on Arbitration Law of the Hong Kong International Arbitration Centre (“the previous Committee”).

1.2 The previous Committee was appointed in January 1992 at the request of the then Attorney-General. Its Report was published in 1996; in that Report, it identified amendments to the Arbitration Ordinance (Cap.341) that were urgently required and those amendments have been enacted in the Arbitration (Amendment) Ordinance (No. 75 of 1996). It also made recommendations for more fundamental reform of the Arbitration Ordinance (Cap.341) in the longer term.

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1.3 The terms of reference of this Committee were to carry forward the recommendations set out in paragraph 1.1.9 of the report¹ by the previous Committee, which states:-

“The committee therefore proposes that the Arbitration Ordinance, Cap. 341, as amended by the [Arbitration (Amendment) Ordinance (No. 75 of 1996)], should be completely redrawn in order to apply the [UNCITRAL] Model Law equally to both domestic and international arbitrations, and arbitration agreements, together with such additional provisions as are deemed, in the light of experience in Hong Kong and other [UNCITRAL] Model Law jurisdictions, both necessary and desirable. In the process the legislation would keep pace with the needs of the modern arbitration community, domestically and globally, and would free Hong Kong from the outdated and illogically arranged English Arbitration Acts [1950-1979, now repealed], and the large body of case law on which their interpretation depends.”

1.4 It was, however, agreed that this Committee was not bound by the report of the previous Committee.

1 Report of the Hong Kong International Arbitration Centre Committee on Arbitration Law (1996)

2. Membership

2.1 Chairman and Secretary

Robin Peard (a member of the previous Committee) accepted the invitation of H.K.I. Arb. to act as Chairman of the Committee and he has remained as Chairman for the whole period up to the finalisation of this Report.

Robert Morgan accepted the invitation of H.K.I.Arb. to act as Secretary and Member of the Committee and has remained as Secretary up to the finalisation of this Report. Gary Soo became a member of the Committee in 2002 and was largely responsible for the preparation of the Committee's draft Report. The Committee is grateful to them both for their efforts.

2.2 Representation

In order to make the Committee as representative of users and others interested in arbitration in Hong Kong

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as possible, H.K.I.Arb. invited nominations from the

following bodies:-

<u>Nominating body</u>	<u>Committee Representative</u>
Hong Kong SAR Government Works Bureau	Michael Byrne
Law Society of Hong Kong	Christopher Howse Fred Kan
Hong Kong Bar Association	Geoffrey Ma SC (later Francis Haddon-Cave) Russell Coleman
Chartered Institute of Arbitrators (East Asia Branch)	Timothy Hill
Hong Kong International Arbitration Centre	Neil Kaplan SC Christopher To
Hong Kong Institution of Engineers	Dr. John Luk
Hong Kong Institute of Architects	K. S. Kwok
Hong Kong Institute of Surveyors	Michael Charlton
Hong Kong Shipowners Association	Philip Yang
Hong Kong Society of Accountants	Peter Griffiths
Securities and Futures Commission	Alexandra Lo (later Anthony Wood)
Hong Kong Federation of Insurers	Bernard Chan (later Peter Cashin)
Hong Kong General Chamber of Commerce	Peter Caldwell
Chinese General Chamber of Commerce	Ho Sai-chu J.P.
American Chamber of Commerce	Michael Moser

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The Hong Kong Construction Association Limited	Colin Wall
City University of Hong Kong	David Sandborg

In all the Committee had 23 members.

3. Meetings

At an early stage a small seven member working group was formed under the chairmanship of Robin Peard to deal with the detail of the Committee's work and to make recommendations to the full Committee. This group met nine times in all. The full Committee met on a total of six occasions.

4. Consultation

The Committee's draft Report was published for consultation in July 2002. The members of the Committee representing particular organisations were asked to consult their organisations and report back to the Committee with any comments. The Chairman gave a talk about the draft Report to a Joint Seminar of H.K.I.Arb. and the Chartered Institute of Arbitrators (East Asia) Branch on 9th October 2002 and a number of comments on the draft Report were made at that

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Seminar. The Chairman also gave a number of other talks about the Committee's work and wrote an article on the subject in *Asian Dispute Review*.

The consultation period effectively ended in February 2003 and submissions and comments were received from the following:-

1. Hong Kong Construction Association Limited
("HKCA").

HKCA represents a significant part of the construction industry which is the largest user of arbitration in Hong Kong.

Originally HKCA wished to retain a small domestic section of the Ordinance dealing with Section 23 (appeal on point of law), Section 6B (consolidation), one arbitrator in default of agreement and the right to apply to remove the arbitrator for misconduct during the reference. HKCA also drew attention to the need to amend Article 18 of the Model Law to make it

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consistent with Section 2GA(1)(a) of the Arbitration Ordinance.

After discussions with HKCA a compromise solution (described later in this Report) was found which would allow “opt-in” to Section 23, Section 23A, and Section 6B and one arbitrator in default of agreement where current standard forms were used. The Committee also accepted the need for amendment to Article 18 of the Model Law. Removal for misconduct during the reference was not pursued by HKCA.

2. The Hong Kong Federation of Electrical and Mechanical Contractors Limited (“HKFE & MC”).

HKFE & MC supported the unitary regime concept and positive case management by arbitrators. It also wished HKIAC to maintain a “sanitised” register of arbitration decisions to encourage consistency in decision making; as this suggestion does not involve law reform it can best be followed up by HKIAC. Finally HKFE & MC wanted the Court’s powers of consolidation to be

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exercised only by agreement of all parties after a dispute had arisen. This was to avoid weaker parties such as subcontractors being forced to become parties to expensive and complex arbitrations. This submission is dealt with in Section 23 of this Report.

3. Mr. Matthew Gearing (Allen & Overy, Solicitors).
4. Mr. Francis Haddon-Cave (Barrister and member of the Committee).
5. Mr. Wyn Hughes (Denton Wilde Sapte, Solicitors).

Submissions 3 to 5 are dealt with under the relevant subject matter headings in this Report.

The Chairman also had some correspondence with the Law Society of Hong Kong which eventually declined to comment on the detail of the draft Report but merely stated that they were concerned with fundamental issues relating to the appointment of arbitrators. It is understood those issues are being discussed with the Hong Kong International Arbitration Centre and do not involve changes in the law. They have not therefore been considered by this Committee.

5. Statement of Principles

Adopting the UNCITRAL Model Law

- 5.1 Recognising the value of arbitration as a method of settling disputes arising in the international commercial environment, the Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (“UNCITRAL”) on 21 June 1985 as a unified legal framework for the fair and efficient settlement of such disputes². Its aim is to promote the harmonisation and uniformity of national laws regarding international arbitration procedures. It is a system by which international commercial arbitrations can be conducted with a minimum degree of judicial intervention and a significant degree of party autonomy.
- 5.2 As the Model Law is intended to be a mere ‘model’, there is no single definition as to exactly what constitutes the adoption of the Model Law by a

2 See United Nations General Assembly Resolution, A/40/72 of 11 December 1985

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jurisdiction³. An unofficial guide to decide whether the national laws conform with the Model Law has been given as follows:

- “1. When reading the national statute, the impression must be given that the legislator took the Model Law as basis and made certain amendments and additions, but did not simply take the Model Law as one amongst various models or follow only its ‘principles’;*
- 2. The bulk of the Model Law provisions must be included (70 to 80 per cent);*
- 3. The law must contain no provisions incompatible with modern international commercial arbitration (e.g. foreigners*

3 The UNCITRAL never officially states what constitutes full adoption of the Model Law. Yet, in the document titled “Status of Conventions and Model Laws” published on its webpage(<http://www.uncitral.org/>), it is stated that as of 10 July 2001 the following jurisdictions have enacted legislation based on the Model Law: Australia, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Germany, Greece, Guatemala, Hong Kong Special Administrative Region of China, Hungary, India, Iran (Islamic Republic of), Ireland, Kenya, Lithuania, Macau Special Administrative Region of China, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Republic of Korea, Russian Federation, Singapore, Sri Lanka, Tunisia, Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; within the United States of America: California, Connecticut, Oregon and Texas; and Zimbabwe

may not be arbitrators, no-excludable appeal on errors of law).4

5.3 When different jurisdictions adopt the Model Law, there are a multitude of approaches. The two primary methods are (i) incorporation by reference that involves the use of general reference clause to the Model Law stating its applicability and (ii) direct adoption that directly inserts the 36 Articles of the Model Law into the legislation.

5.4 The Model Law is designed to establish a special uniform regime for international cases where disparity between national laws creates difficulties and adversely affects the functioning of the arbitral process. It has, however, been noted that the Model Law can be taken as a model for legislation on domestic arbitration⁵. Indeed, there are quite a number of jurisdictions that have recently enacted their arbitration laws adopting the

4 Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (3rd Ed.), (1999), Sweet & Maxwell, p.642

5 United Nations Document A/CN.9/264, Article 1, paragraph 22

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Model Law for both domestic and international arbitrations.⁶

5.5 There are other advantages for adopting one law for both domestic and international arbitration. One of them is that the issue of whether one or the other regime should apply is avoided. It is also in accord with the recognized international trend in reducing the extent of judicial supervision and intervention in arbitral proceedings, whether domestic or international⁷.

5.6 We note that a significant portion of Hong Kong business community is international in character and that business activities conducted in Hong Kong are likely to continue to become increasingly international in the future. Thus, a unified arbitration regime would have the added beneficial effect of further enabling the Hong Kong business community and the local legal profession to operate an arbitration regime which accords with international arbitration practices and

6 See, for example, Mexico, Hungary, Egypt, Sri Lanka, Kenya, Guatemala, Brazil, Zimbabwe, New Zealand, Oman and Germany.

7 See, for example, Singapore Law Reform Committee Sub-committee on Review of Arbitration Laws (1993), paragraph 13.

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development. In addition, the Model Law is likely to attract disputes which have little connection with Hong Kong since it is familiar to lawyers from civil law as well as common law jurisdictions.

5.7 Therefore, we endorse the concept of a unitary system of arbitration law, with the Model Law governing both domestic and international cases. As such, we agree with the proposal of the previous Committee to completely redraw the Arbitration Ordinance (Cap.341) in order to apply the Model Law equally to both domestic and international arbitrations. We thus **recommend** a unitary regime adopting the Model Law for both domestic and international arbitrations⁸.

5.8 In effecting this, we are of the view that it would be of fundamental importance that Hong Kong should continue to be clearly seen as a Model Law jurisdiction.

8 See also paragraph 47 of the UK Departmental Advisory Committee on Arbitration Law, 1997 Supplementary Report on the Arbitration Act 1996 (1997) which favours the abolition of the distinction between domestic and international arbitration and the application of the international regime throughout.

The Unitary Regime

5.9 When reviewing those jurisdictions adopting the Model Law, there is exhibited a spectrum of legislative techniques. Some create two regimes of arbitration --- international and domestic --- applying the Model Law in the international regime⁹; some adopt the Model Law also for domestic arbitrations¹⁰. In the former category, some provide separate laws for each regime; others choose to contain all provisions in one law and stipulate the provisions applicable to each regime.

5.10 In the Canadian Commercial Arbitration Act, RSC 1985 (C-34.6), Article 1 of the Model Law is modified, thereby applying it to both domestic and international arbitrations; in section 2 of the Kenya Arbitration Act 1995 (No.4 of 1995), it states that, except as otherwise prescribed in a particular case, the provisions of the Act

9 This is the status in Hong Kong, providing for the optional application of the Model Law to domestic arbitrations. Other examples of such a legislative approach include the Scotland Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, the Australia International Arbitration Amendment Act 1989, the Bermuda International Conciliation and Arbitration Act 1993 and the Singapore International Arbitration Act 1994 (Cap.143A).

10 See, for example, the Kenya Arbitration Act 1995 (No.4 of 1995), the India Arbitration and Conciliation Ordinance (No. 8 of 1996), the New Zealand Arbitration Act 1996 and the Zimbabwe Arbitration Act 1996 (No. 6 of 1996).

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shall apply to domestic arbitration and international arbitration while adopting the definition of ‘international’ in Article 1 of the Model Law and adding a definition for ‘domestic’; in the New Zealand Arbitration Act 1996, the Model Law with changes and modifications made to it is reproduced in the First Schedule, and applies to both domestic and international arbitration.

- 5.11 We believe that the status of a Model Law jurisdiction is important to Hong Kong and this can be achieved through adhering as far as possible to the exact wording of the Model Law with ‘add-on’ provisions where necessary. Insofar as a matter has not been dealt with by the Model Law, we recommend that additional provisions should only be put forward where there is good reason for doing so. This includes, for example, situations where a provision in the new Ordinance has been widely accepted in other jurisdictions or where the provision in issue has not been contemplated at the time when the Model Law was adopted. It is not our objective to codify, or to attempt to codify the arbitration law in Hong Kong.

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5.12 Following this approach, the Model Law (annotated to indicate necessary changes) should appear as a Schedule to the new Ordinance. The Ordinance would follow the Model Law Chapter headings as recommended in paragraphs 6.5 and 6.6.

5.13 We consider that this approach is preferable to other approaches in that:-

- a) this would enable users of the new Ordinance to find all relevant provisions under the Model Law Chapter headings;
- b) it would also be inappropriate, in a unitary regime based on the Model Law, for the new Ordinance to treat the Model Law separately.

5.14 The end result should be a new Ordinance providing for a unitary regime that is drafted with as user-friendly a structure as possible. Also, the provisions of the Model Law, enacted as such, in the new Ordinance will be clearly identifiable as Model Law provisions.

6. A New Framework

6.1 At present, different parts of the Arbitration Ordinance applies to ‘domestic arbitration’ and ‘international

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arbitration’, the classification of which is based on Article 1(3) of the Model Law¹¹. There are also provisions enabling the parties to opt in or opt out of the domestic regime or the international regime within this framework¹².

6.2 In the new Ordinance, there should be no further need to define ‘domestic arbitration’ and ‘international arbitration’. Therefore, the present provisions permitting parties to opt in or opt out of either the domestic or the international regime are no longer required. As a result of discussion of the HKCA submission the Committee decided it was appropriate to accommodate the need expressed by HKCA to allow users of standard form contracts to “opt in” to certain provisions of the former domestic regime which they have enjoyed through such contracts. These provisions are appeal on point of law (Section 23 of the current Ordinance), determination of a preliminary point of law by the Court (Section 23A), consolidation provisions (Section 6B) and one arbitrator in default of agreement.

11 See sections 2, 2AD, 2L and 34A, Arbitration Ordinance (Cap.341).

12 See sections 2M and 34B, Arbitration Ordinance (Cap.341).

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HKCA reviewed the relevant standard form contracts and the recommended form of “opt in” wording is:-

“If it is agreed that an arbitration shall be “domestic” or shall be “governed by Part II of the Arbitration Ordinance” or “shall be conducted in accordance with the Domestic Arbitration Rules of HKIAC” the parties shall be deemed to have agreed that the provisions of the Second Schedule shall apply to such arbitration.”

This recommendation is in addition to the Committee’s recommendation that parties should be able to “opt in” to the various parts of the Second Schedule individually.

- 6.3 For clarity, we **recommend** that the new Ordinance is to commence with a section stating expressly that the Model Law, with the modifications as set out, shall have the force of law in Hong Kong in all cases. The original text of the Model Law (annotated to indicate changes) should appear in the First Schedule. The combined effect of these arrangements will be to emphasise that Hong Kong is a Model Law jurisdiction.

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6.4 Also, we note that, with a unitary regime, it would become necessary to define the scope of its application to govern the application of individual provisions. For instance, it would be particularly important to specify which provisions of the new Ordinance are to be applicable for the purposes of exercising the supportive powers of the court where Hong Kong is not the seat of the arbitration. In the circumstances, we **recommend** that there is to be a provision defining the scope of application in the new Ordinance.

6.5 For the new Ordinance, we **recommend** a framework based on the structure and wording of the Model Law as follows:-

- a) Part I - General Provisions
- b) Part II - Arbitration Agreement
- c) Part III - Composition of Arbitral Tribunal
- d) Part IV - Jurisdiction of Arbitral Tribunal
- e) Part V - Conduct of Arbitral Proceedings
- f) Part VI - Making of Award and
Termination of Proceedings
- g) Part VII - Recourse Against Award
- h) Part VIII - Enforcement of Mainland Awards

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- i) Part IX - Enforcement of Convention Awards
- j) Part X - Transitional Provisions
- k) Schedules

6.6 In Chapter I to VII, we **recommend** that the applicable Model Law provisions (including amendments) be referred to by Article number and subject matter at the beginning of the relevant Chapter. This will enable the user to refer to the applicable provisions of the Model Law in Schedule I and make the new Ordinance as user friendly as possible.

6.7 Finally, we make a general **recommendation** that, subject to any specific recommendations made in this Report, the provisions of Sections 2, 2AA, 2AC, 2A, 2B, 2D, 2E, 2F, 2GA, 2GB, 2GC, 2GD, 2GE, 2GF, 2GG, 2GH, 2GI, 2GJ, 2GK, 2GL, 2GM, 2GN, 13A, 41, 42, 43, 44, 45, 46, 47 and 48 of the current Ordinance be retained. This is subject to two provisos:-

- (a) As a result of the submission by Mr. Matthew Gearing the Committee recommends that Section 2GA(1) should refer to independence as well as impartiality in

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order to be consistent with Articles 12 and 13 of the Model Law.

- (b) Section 31(2) of the Singapore Arbitration 2001 was enacted to allow an arbitral tribunal to direct that a Court Order made in support of arbitration proceedings (such as an injunction or an order preserving property) should cease to have effect. This saves the parties the expense of making an application to the Court. It is recommended that Section 2GC be amended to allow this.

7.1 Civil Justice Reform

Section 4.1 to 4.4 of our Draft Report read as follows:-

“4.1 During the preparation of this report, the Chief Justice’s Civil Justice Reform- Interim Report and Consultation Paper (“the Interim Report”) was published.

4.2 As a matter of general principle, we are of the view that proposals for litigation reform, which could appropriately be mirrored in arbitration law reform proposals, or even improved upon, should be considered.

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- 4.3 We have reviewed the following examples of judicial proactivity in the Interim Report:-
- a) Proposal 3 regarding the making of case management orders on the initiative of the Court itself;
 - b) Proposals 25 and 26 regarding the parties' obligations on discovery and disclosure of documents and the parties' agreement regarding the same;
 - c) Proposal 35 regarding directions as to issues on which the Court would require evidence, the nature of such evidence and the manner as to how such evidence should be placed before the arbitral tribunal;
 - d) Proposals 36 and 41 regarding the restrictions on the use of relevant evidence in furtherance of the overriding objective¹³, excluding otherwise

13 Set out at paragraph 226 of the Interim Report and compare section 2GB Arbitration Ordinance (Cap.341).

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admissible evidence and limiting

cross-examination and submissions by counsel¹⁴;

- e) Proposal 38 regarding control of the scope and use of expert evidence; and
- f) Proposal 39 regarding measures aimed at countering lack of independence and impartiality among expert witnesses.

4.4 As regards some of these, for example, Proposal 3, we are of the view that such a power would be subject to the ability of the parties to make agreements which would bind the arbitral tribunal. Views and comments are invited generally as regards the proposals in the Interim Report and particularly on the following distinctive but interrelated issues:-

- a) whether it should be spelt out in the new Ordinance that, the powers of the arbitral tribunal being discretionary, it was therefore at liberty to decline to

14 These would be in line with the dicta per Lord Templeman in *Banque Keyser Ullmann SA v. Skandia (UK) Insurance Co.* [1991] 2 AC 249 at 280, cited with approval in *UBC (Construction) Ltd. v. Sung Foo Kee Ltd.* [1993] 2 HKLR 207, per Kaplan J. at 211-213.

exercise a particular power when it sees fit despite any agreement of the parties;

- b) whether it would be desirable to provide specifically in the new Ordinance for the arbitral tribunal to exercise case management powers on its own initiative¹⁵;
- c) whether it would be desirable for the arbitral tribunal to have and exercise such powers as set out in Proposals 35, 36 and 41¹⁶.

7.1 We received no submissions on Section 4 of our draft Report. We understand that the Chief Justice's Final Report on Civil Justice Reform is unlikely to be published until the last quarter of 2003. Any legislation

15 Effective case management is one of the fundamental aspects of the Woolf Reform. In rule 1.4 of the Civil Procedure Rules 1998, the duty of the court to further the overriding objective in dealing with cases justly under rule 1.1 of the Civil Procedure Rules 1998 has been set out. There are also similar developments occurred in the Hong Kong courts. See *Cheung Yee-mong v. So Kwok-yan* [1996] 2 HKLR 48, per Godfrey JA at 49 and *Cheung Chi Hung v. Konivon Development Ltd* [2000] 2 HKLRD 367, per Rogers JA at 369. There is, however, subject to objections. Professor Zander QC has stated: “[Case management] massively increases discretionary decisions making by judges. This will mean a consequential massive increase also in inconsistent judicial decision.”

16 See Civil Justice Reform: Interim Report and Consultative Paper, pp.177-181 and pp.193-197.

to implement suggested reforms will take a considerable further time to bring into effect.

7.2 An arbitral tribunal's flexibility as to the making of procedural orders (complimented by the general obligation in Section 2GA(1), the other specific powers given by the Arbitration Ordinance and the parties' adoption of particular Rules or procedural directions) appears to have worked without substantial adverse comment since the 1997 reforms. We do not therefore recommend that any changes in Hong Kong's arbitration law be made as a result of the Interim Report. If and when Civil Justice Reforms in Hong Kong are finally implemented (and their efficacy tested in practice) the matter can be looked at afresh.

B. Chapter I - General Provisions

8. Article 1 - Scope of Application

Adoption of Article 1

8.1 Article 1 deals with the scope of the Model Law --- both material¹⁷ and territorial¹⁸.

8.2 It is stated in Article 1(1) that the Model Law applies to international commercial arbitration. Article 1(2) determines that, other than Articles 8, 9, 35 and 36 of the Model Law, the provisions of the Model Law only apply to those arbitrations held in the adopting State. These excluded Articles concern primarily matters before and after the arbitration process, which often are relevant before a place of arbitration has been agreed upon or when the recognition and enforcement of arbitral awards are being sought. The excluded provisions apply even if the place of the arbitration is outside the adopting State. Article 1(3) & 1(4) of the

17 The material scope is governed by Article 1(1), (3) and (4) of the Model Law and covers the substance of the Model Law, that is to say international commercial arbitration.

18 The territorial scope is governed by Article 1(2) of the Model Law.

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Model Law provide a definition of ‘international’, the original ambit of cases that the Model Law is designed for. The question of whether a dispute is arbitrable or not, i.e. its arbitrability, is commonly determined by the national law of individual jurisdictions. It is dealt with, *inter alia*¹⁹, by Article 1(5) of the Model Law which excludes, as a general rule, all those disputes which by law are otherwise excepted from arbitration²⁰.

8.3 The term ‘commercial’ has been left undefined in the Model Law²¹ and a guideline for interpretation of it is provided in a footnote²². Some of the jurisdictions adopting the Model Law directly insert the footnote into their arbitration statutes²³; others omit the footnote and

19 See also Article 34(2)(b)(i) and Article 36(1)(b)(i) of the Model Law.

20 Common examples are bankruptcy, anti-trust, security, patent, trademark and copyright issues. See also United Nations Document A/CN.9/207, paragraph 55.

21 United Nations Document A/CN.9/264, Article 1, paragraph 16

22 The definition in the footnote reads:

“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 co-operation; carriage of goods or passengers by air, sea, rail or road.”

23 See, for example, British Columbia, Egypt, Nigeria and Scotland.

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do not give a description of ‘commercial’ in the text²⁴.

The content of the footnote reflects the legislative intent to construe the term commercial in a wide manner.

8.4 The Law Reform Commission of Hong Kong recommended that, in the interests of giving the law the widest possible scope, reference to ‘commercial’ to be deleted when the Model Law was applied to international arbitration²⁵. At present, section 34C(2) of the Arbitration Ordinance (Cap.341) expressly provides that the application of the Model Law in the context of international cases is not limited to commercial arbitrations.

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. As noted, we **recommend** that there is to be a provision defining the scope of application in the new Ordinance and,

24 See, for example, Alberta, Oman and Peru.

25 The Law Reform Commission of Hong Kong: Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986), Paragraphs 4.11-4.16

therefore, Article 1 of the Model Law should be reviewed in this context. Also, we **recommend** that the existing provisions that enable the parties to opt in or opt out of the domestic regime or the international regime within this present framework should be repealed and there should be a clear statement that the Model Law is to apply not only to domestic and international arbitrations but also to any type of arbitration under an agreement in writing.

Arbitrability

8.6 On the issue of arbitrability, we consider and conclude that a provision along the lines of section 11 of the Singapore International Act 1994 should not be adopted²⁶. In addition, we **recommend** that there should be a new schedule listing all other Ordinances that deal with or impact upon arbitration.

26 Section 11 of Singapore International Arbitration Act (Chapter 143A) (1994) provides:

“(1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy.

(2) The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.”

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- 8.7 At present, section 26(2) of the Arbitration Ordinance (Cap.341) that applies to domestic arbitrations confers a power on the court to order that the arbitration agreement shall cease to be of effect in cases where question of fraud on the part of a party is put in issue. This is modeled upon section 24(2) of the English Arbitration Act 1950. Provision to similar effect has not been re-enacted in the English Arbitration Act 1996.
- 8.8 In our opinion, the question of fraud should be treated in the same manner as any other allegations in the arbitral proceedings. Accordingly, we **recommend** that section 26(2) of the Arbitration Ordinance (Cap.341) should not be repeated in the new Ordinance.

Retaining Section 2AA of Arbitration Ordinance

- 8.9 Section 2AA²⁷ of the Arbitration Ordinance (Cap.341) sets out the objectives and principles and is based on section 1 of the English Arbitration Act 1996.

27 See Morgan, *The Arbitration Ordinance of Hong Kong (1997 Supplement)* Butterworths, pp.21-26 for an overview.

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8.10 It applies to both domestic and international arbitrations²⁸ and is to be read in conjunction with section 2GA of the Arbitration Ordinance (Cap.341) that sets out the general responsibilities of the arbitral tribunal.

8.11 We **recommend** that such a section should be retained.

Retaining Section 2AB of Arbitration Ordinance

8.12 Section 2AB of the Arbitration Ordinance (Cap.341) substantially replicates the earlier repealed section 2J. It has the effect of applying the provisions of the Arbitration Ordinance to arbitration under any other legislation without the need for express application of these provisions by the legislation concerned. At present, such a statutory arbitration will be conducted as if it is one pursuant to a domestic arbitration agreement, though the parties may opt into the Model Law as the governing procedure law.

8.13 We **recommend** that a similar section should be enacted but that the provisions of the new Ordinance are to be carefully considered to expressly exclude those

28 It is, however, not expressed to be to the exclusion of Article 5 of the Model Law that applies to international arbitrations.

provisions which are not suitable for application to statutory arbitrations.

Confidentiality

- 8.14 The Model Law is silent on the issue of confidentiality. Only a few jurisdictions that adopt the Model Law have added a provision in this regard. There are a variety of approaches adopted in the arbitration rules and national laws in dealing with the issue of confidentiality in arbitral proceedings.²⁹ One approach is to use a general provision for all cases that material produced for or generated by an arbitration cannot be disclosed to third parties without the consent of the other party or the leave of the court; another approach is to stipulate in detail the duty of confidentiality with reference to parameters like the material or information to be kept confidential, the persons to whom such a duty extends and applies and the permissible exceptions.
- 8.15 In Hong Kong, at present, section 2D of the Arbitration Ordinance (Cap.341) enables the party to apply for the proceedings before the court to be heard

²⁹ See United Nations Document A/CN.9/460, paragraph 64.

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otherwise than in open court³⁰. This section concerns those applications under Rules of High Court (Cap.4A) Order 73 rule 2.

8.16 Also, section 2E of the Arbitration Ordinance (Cap.341)³¹ restricts the reporting of proceedings otherwise than in open court and seeks to strike a balance between the development of commercial law and the protection of the legitimate interests of the parties as to confidentiality.

8.17 We **recommend** that these 2 sections should be retained in the new Ordinance and made applicable also to relevant proceedings before the Hong Kong Court of Final Appeal.

8.18 In addition, we are of the view that a provision to further safeguard the confidentiality in arbitration should be adopted. Section 14 of the New Zealand Arbitration Act 1996 deems that, unless otherwise agreed, there is a term in the arbitration agreement that

30 See The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17)(1986) paragraph 4.9.

31 Section 23 of the Singapore International Arbitration Act (Chapter 143A) is a similar provision.

the parties shall not publish, disclose or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings. Its application is subject to exceptions and does not cover such publication, disclosure or communication contemplated by the New Zealand Arbitration Act 1996 or made to professional or other advisers of the parties. Nor does this cover the situation where a party is obliged to make such publication, disclosure or communication by virtue of other provisions of the law.

8.19 We **recommend** that a provision along the lines of this should be adopted in the new Ordinance but that a further exception to cover publication, disclosure or communication that a party is obliged to make by virtue of other provisions of the law should be added³².

Representation and Preparation Work

8.20 Section 2F of the Arbitration Ordinance (Cap.341), together with section 2G of the Arbitration Ordinance

32 We note that the New Zealand Law Commission is considering whether to change or abolish Section 14 of the New Zealand Act. No final recommendation has yet been made.

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(Cap.341), allows the parties to appoint advisers and advocates of their choice in arbitral proceedings, whether or not they are legally qualified and whether they are local or foreign. This section does not, however, apply to arbitration-related proceedings before the High Court.

- 8.21 We are of the view that this approach is one of the most liberal among Asian jurisdictions and **recommend** that this section should be retained.

Duties of Parties

- 8.22 Section 40 of the English Arbitration Act 1996 sets out the general duty of the parties. As such, they have a statutory obligation to do all things necessary for the proper and expeditious conduct of the arbitral proceedings. Such an obligation is specifically expressed to be inclusive of complying without delay with any determination of the arbitral tribunal as to procedural or evidential matters, or with any of its other orders or directions. This is a mandatory provision

and it seems that an ability to contract out of it would be a negation of the arbitral process³³.

8.23 Article 18 of the Model Law embodies the fundamental principles of the conduct of the arbitral proceedings³⁴ --- the equal treatment of the parties and the opportunity to present one's case. However, the general duty on the parties to progress arbitrations and to obey the orders and directions of the arbitral tribunal has not been explicitly stated in the Model Law or in the existing Ordinance.

8.24 We **recommend** that such a general duty should be expressly stated and it would be appropriate to adopt a provision modeled on section 40(1) of the English Arbitration Act 1996. This should be incorporated into the part of the new Ordinance dealing with general duties.

Death of Party

8.25 At common law, an arbitration agreement is discharged

33 See Departmental Advisory Committee Arbitration Law 1996 Report on the Arbitration Law (1996) paragraph 204.

34 United Nations Document A/40/17, paragraph 176

by the death of a party. This rule was altered by section 4 of the Arbitration Ordinance (Cap.341)³⁵.

8.26 In section 8 of the English Arbitration Act 1996, the expression and reference to ‘right of action’ is not used but the expression “substantive right or obligation” is substituted. Also, to be in line with party autonomy, it is provided that the parties can agree that death shall have the effect of discharging the arbitration agreement.

8.27 We **recommend** that a provision based on section 8 of the English Arbitration Act 1996 be adopted to replace the existing section 4 of the Arbitration Ordinance (Cap.341).

Bankruptcy of Party

8.28 At present, section 5 of the Arbitration Ordinance (Cap.341) deals with the situation when a party to an arbitration agreement is adjudged bankrupt. The wording of this section is to the same effect as the

35 The wording of this section is the same as section 2 of the Arbitration Act 1950 in UK. As for the right of action that is extinguished by the death of a person, the general rule is that, on the death of a person, all causes of action, other than those for defamation, subsisting against or vested in him survive against or for the benefit of his estate. See section 20, Law Amendment and Reform (Consolidation) Ordinance (Cap.23).

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section 3 of the Arbitration Act 1950 in UK. This section was not repeated in the English Arbitration Act 1996.

- 8.29 We have considered the effect of bankruptcy³⁶ on the right to arbitrate and are of the view that such legislation on insolvency should not be duplicated in the new Ordinance. In our opinion, this subject is more appropriate to be dealt with by legislation on insolvency. We therefore **recommend** that section 5 of the Arbitration Ordinance (Cap.341) should be repealed.

Saving for Matters Governed by Common Law

- 8.30 Section 81 of the English Arbitration Act 1996 provides saving for certain matters governed by common law. Such a provision ensures that such of the old common law rules as are relevant will continue to apply.
- 8.31 We are of the view that it is worthwhile to adopt a provision along this line. As such, we **recommend** that a provision modeled upon section 81 of the English Arbitration Act 1996 should be adopted.

36 See Bankruptcy Ordinance (Cap.6).

Sovereign Immunity

8.32 When a private party initiates arbitral proceedings or seeks recognition and enforcement of an arbitral award against a State, it runs the risk that the State may decline to participate on the grounds of sovereign immunity or put up a plea of sovereign immunity to avoid such recognition or enforcement of the arbitral award.³⁷ In Hong Kong, the concept of the State is given in an inclusive definition³⁸.

8.33 We are of the view that this matter should be left to be dealt with under the other laws of Hong Kong on this aspect and we consider that it is not necessary for the new Ordinance to include provisions dealing with this subject.

Liability for Certain Acts and Omissions

8.34 It is submitted that the reasons for providing immunity to arbitrators are the same as those that apply to judges in courts and that, unless a degree of immunity is

37 See, in general, United Nations Document A/CN.9/460 paragraphs 35 -50.

38 Section 3 of Interpretation and General Clauses Ordinance (Cap.1)

afforded, the finality of the arbitral process would be undermined by the prospect of a losing party attempting to reopen the issues by suing the arbitrator³⁹. Although it seems to be the general view that arbitrators have some immunity, this is not entirely free from doubt. Section 2GM of the Arbitration Ordinance (Cap. 341) deals with this issue of immunity of arbitrators and was introduced in 1996⁴⁰.

8.35 There are considerable variations in the laws dealing with the scope and extent of the immunity of arbitrators in other jurisdictions adopting the Model Law. Some exclude liability for any act or omission in connection with the arbitration, except where the act of omission is shown to have been in bad faith, or done dishonestly, or where there has been conscious and deliberate wrongdoing; others provide that arbitrators are not liable for negligence in respect of anything done or omitted to be done in the capacity as arbitrators;

39 See Departmental Advisory Committee on Arbitration Law 1996 Report on the Arbitration Bill (1996) paragraph 131.

40 This section is the equivalent to section 29 of the English Arbitration Act 1996.

some adopt the opposite approach by specifying that arbitrators may be liable for losses incurred by reason of delay or failure to comply with their obligations as arbitrators⁴¹.

8.36 In UK, by section 74 of the English Arbitration Act 1996, arbitral institutions are not liable for anything done or omitted to be done in the discharge or purported discharge of the function of appointing or nominating the arbitral tribunal unless the act or omission is shown to have been in bad faith. Also, no liability is attached to such institutions for the act or omission of the arbitral tribunal in the discharge or purported discharge of its functions. Employees and agents of the arbitral institutions are also covered and protected. In Hong Kong, the equivalent provision is section 2GN of the Arbitration Ordinance (Cap.341) which, similarly, introduces a separate immunity from legal action for acts or omissions in appointing an arbitral tribunal and for performing any other administrative function in connection with the

41 See, in general, United Nations Document A/CN.9/460, paragraphs 92 -100.

arbitration proceedings. This section was also introduced in 1996 into the Arbitration Ordinance (Cap.341).

8.37 We consider that these matters of immunity have been adequately dealt with in the amendments introduced in 1996. As such, we **recommend** that sections 2GM and 2GN of the Arbitration Ordinance (Cap.1) are to be retained.

9. Article 2 - Definitions and Rules of Interpretation

Adoption of Article 2

9.1 Article 2 of the Model Law concerns certain definitions and rules of interpretation.

9.2 Article 2(a) of the Model Law deals with the term ‘arbitration’ but it does not seek to define the substance of the term⁴².

9.3 The definitions of ‘arbitral tribunal’ and ‘court’ respectively in Article 2(b) and Article 2(c) of the Model

42 It seems that a major concern for having such a definition is the fear of limiting the scope of the law by applying too strict a meaning or by a definition being not complete. See also United Nations Document A/CN.9/233, paragraph 50.

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Law serve to avoid misunderstandings of these terms in languages such as French and Spanish⁴³.

9.4 Article 2(d) of the Model Law sets out the first rule of interpretation that is designed to prevent too literal an interpretation of the references in the Model Law to the parties' freedom to determine an issue. Such a freedom covers the liberty of the parties to decide the issue themselves and to authorize a third body to determine the issue on their behalf⁴⁴. Article 28 of the Model Law is excepted from this rule of interpretation in that it is the fundamental principle of private international law that the freedom to choose the law applicable to the dispute cannot be transferred to a third body⁴⁵.

9.5 In recognition of the common practice for parties to refer in their agreement to arbitration rules instead of negotiating and drafting a 'one-off' arbitration agreement, Article 2(e) of the Model Law provides a

43 For example, in French the term 'tribunal' can mean 'court'.

44 Examples of such issue are the number of arbitrators, the place of arbitration and other procedural points.

45 See United Nations Document A/CN.9/263, paragraph 2.

rule of interpretation explaining that a provision of the Model Law, which allows the parties to agree on a certain issue, must also include any arbitration rules referred to in the arbitration agreement. This is, similarly, to avoid too literal an interpretation of the Model Law.

9.6 Article 2(f) of the Model Law sets out the rule of interpretation that the terms ‘claim’ and ‘defence’ should be read as also including ‘counterclaim’ and ‘defence to counterclaim’. The situations where such an interpretation rule is not appropriate are excluded⁴⁶.

9.7 Most jurisdictions⁴⁷ adopt or follow the definitions and rules of interpretation in Article 2 of the Model Law. The Law Reform Commission of Hong Kong recommended in its report that such definitions and rules of interpretation should be adopted unchanged in international cases⁴⁸. We **recommend** that Article 2

46 See Article 25(a) and Article 32(2)(a) of the Model Law.

47 See, for example, Bermuda, New Zealand and Singapore.

48 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

of the Model Law is to be adopted unchanged and applied in all cases.

Retaining Section 2 of Arbitration Ordinance

9.8 Section 2 of the Arbitration Ordinance (Cap.341) provides for further definitions for interpretation purposes.

9.9 We **recommend** that such a section should be retained but that it is necessary to review its wording in order to reconcile with Article 2 of the Model Law.

10. Article 3 - Receipt of Written Communications

10.1 Article 3 of the Model Law is modeled upon Article 2(1) of the UNCITRAL Arbitration Rules 1976 and lists a variety of instances in which a written communication, by a party or the arbitral tribunal, is deemed to have been received⁴⁹. It allows the parties to agree otherwise and to choose their own procedural rules for receipt of communication⁵⁰.

49 See United Nations Document A/CN.9/264, Article 2, paragraph 6.

50 See, for example, UNCITRAL Notes on Organizing Arbitral Proceedings (1996) paragraphs 35-37 as regards the use of telefax and other electronic means of sending documents.

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- 10.2 No guideline on how to interpret the terms ‘communications’ and ‘written communications’⁵¹ is provided. It is submitted that a too strict interpretation of ‘written communications’ as referring only to a classic letter cannot be supported⁵².
- 10.3 Article 3 of the Model Law seems to be fairly compact and practical and has been widely adopted in other jurisdictions⁵³. The Law Reform Commission of Hong Kong recommended in its report that it should be adopted unchanged in international cases⁵⁴. We **recommend** that Article 3 of the Model Law is to be adopted and applied in all cases.

51 Article 7(2) of the Model Law, however, provides a definition for ‘writing’ in respect of arbitration agreement.

52 Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (2000) Sweet & Maxwell, p.33

53 See, for example, Bermuda, New Zealand, Scotland and Singapore.

54 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

10.4 Yet, we note that, in doing so, it is necessary to consider updating it to take into account new forms of electronic communications.⁵⁵

11. Article 4 - Waiver of Right to Object

11.1 Where a procedural requirement is not complied with, any party has a right to object with a view to getting such a defect cured. Article 4 of the Model Law is modeled on Article 30 of the UNCITRAL Arbitration Rules 1976 and aims at removing reliance by parties on procedural objections of a technical nature. Based on general principles such as ‘estoppel’ or ‘*venire contra factum proprium*’, it implies a waiver of this right to object under the conditions⁵⁶ that:-

- a) the procedural requirement which is not complied with must be contained in either a

55 The UNCITRAL Working Group on Arbitration is working towards the introduction of model legislative provisions in order to align the Model Law with the current practice in international trade in respect of the requirements for written form. The 3 versions of such model legislative provisions should be taken into account in this regard. See United Nations Documents A/CN.9/WG.II/WP.110 paragraphs 15-26 & A/CN.9/WG.II/WP.113 paragraphs 4-8.

56 United Nations Document, A/CN.9/264, Article 4, paragraphs 1-5

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non-mandatory provision of the Model Law or in the arbitration agreement;

- b) the party knew or ought to have known of the non-compliance;
- c) the objection is not stated without delay or within the given time-limit;
- d) the party proceeds with the arbitration without stating the objection.

11.2 It has been noted that the effect of such a waiver is not limited to the arbitral proceedings but should be extended to subsequent court proceedings in the context of Articles 34 and 36 of the Model Law⁵⁷.

11.3 The Law Reform Commission of Hong Kong recommended in its report that it should be adopted unchanged in international cases⁵⁸. Most jurisdictions adopt the text verbatim or with just minor variations⁵⁹.

11.4 We agree that Article 4 of the Model Law in itself is adequate as a valuable tool in reducing delay in

57 See United Nations Documents A/CN.9/264, Article 4, paragraph 6 and A/40/17, paragraph 57.

58 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

59 See, for example, Australia, Bermuda, Kenya, New Zealand, Scotland and Singapore.

arbitration and contributing to the smooth running of the arbitral proceedings. As such, we **recommend** that it is to be adopted unchanged and applies in all cases.

12. Article 5 - Extent of Court Intervention

12.1 Article 5 of the Model Law deals with the crucial and complex issue of the role of the courts with regard to arbitrations. Its purpose is to achieve a certainty as to the maximum extent of court intervention, including assistance, by listing in the Model Law all instances of court intervention⁶⁰. Thus, it isolates the operation of arbitration from court intervention, except when such court intervention is expressly permitted⁶¹.

12.2 It has been noted that the scope of application of Article 5 of the Model Law is limited to those issues which are in fact regulated, whether expressly or impliedly⁶², in the Model Law⁶³. Thus, it does not

60 United Nations Document A/40/17, paragraph 63

61 Provisions dealing with court intervention and assistance are Articles 8, 9, 11, 13, 14, 16, 27, 34, 35 and 36 of the Model Law.

62 The difficulties caused by the words 'or impliedly' are recognised. See, for example, Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (2000) Sweet & Maxwell, p.44.

exclude court intervention in cases not regulated in the Model Law. Examples of such issues include the impact of State immunity, the contractual relations between the parties and the arbitrators or arbitral institution, the fees and other costs of the arbitrators or arbitral institution, including security therefor.

12.3 The Law Reform Commission of Hong Kong reviewed the risk of ambiguity in interpretation and recommended in its report that Article 5 of the Model Law should be adopted unchanged in international cases⁶⁴, leaving the provision untouched. Most jurisdictions adopt it verbatim or with minor textual variations⁶⁵. We **recommend** that it is to be adopted unchanged and applies in all cases.

13. Article 6 - Court or Other Authority for Certain Functions of Arbitration Assistance and Supervision

63 See United Nations Documents A/CN.9/263 Addendum 2, paragraph 24 and A/CN.9/264, Article 5, paragraph 5.

64 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

65 See, for example, Australia, Bermuda, India, Kenya, New Zealand, Scotland and Singapore.

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- 13.1 Article 6 of the Model Law requires each adopting State to designate a particular court or other authority to perform those functions of arbitration assistance and supervision under the Model Law⁶⁶ in respect of the appointment of an arbitrator, the challenge of an arbitrator, the termination of the mandate of an arbitrator, the determination of a question of the jurisdiction of the arbitral tribunal and the setting aside of an arbitral award⁶⁷.
- 13.2 It has been submitted that an adopting State may entrust some of these that are more of an administrative nature to a body outside its court system⁶⁸.
- 13.3 Obviously, the adoption of Article 6 of the Model Law cannot be omitted. Most jurisdictions have a similar provision, either directly added into the text or via a separate provision that refers to this Article; others

66 Article 6 of the Model Law only mentions 5 of the 10 provisions which provide for court intervention. An explanation to this is that it is only in those cases that are mentioned therein that it is possible to designate a specific court or other authority in advance. See United Nations Document A/CN.9/SR.310, paragraph 27.

67 See Articles 11(3)&(4), 13(3), 14, 16(3) and 34(2).

68 United Nations Document A/CN.9/264, Article 6, paragraph 4

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insert the competent court directly into the appropriate places.

- 13.4 In Hong Kong, the functions for the appointment of arbitrators under Article 11(3)&(4) of the Model Law are performed by the Hong Kong International Arbitration Centre and the other functions are to be exercised by the Court of First Instance⁶⁹.
- 13.5 We consider that the existing arrangement as regards the exercise of those functions as set out in section 34C of the Arbitration Ordinance (Cap. 341) should be retained. Thus, we **recommend** that the Article 6 of the Model Law is to be adopted unchanged and applies in all cases and that such a provision should follow the existing arrangement along the lines of section 34C of the Arbitration Ordinance (Cap.341).

⁶⁹ See Section 34C, Arbitration Ordinance (Cap.341).

C. Chapter II - Arbitration Agreement

14. Article 7 - Definition and Form of Arbitration Agreement

14.1 Article 7 of the Model Law concerns the arbitration agreement which is the heart of all arbitration. The definition of ‘arbitration agreement’ is based on that contained in Article II(1) of the New York Convention⁷⁰ and requires that the arbitration agreement is to be in writing.⁷¹ Two useful additions are introduced to such a definition. First, it widens and clarifies the range of means which constitute writing by adding ‘telex or other means of telecommunication which provide a record of the agreement’, in order to cover modern and future means of communication; second, by the last sentence, it seeks to clarify a matter that has led to problems and divergent court decisions

70 Convention of the Recognition and Enforcement of Foreign Arbitral Awards. Done at New York, on 10 June 1958

71 It does not retain the requirement, expressed in Article II(1) of the New York Convention 1958, that the dispute concerns a subject matter capable of settlement by arbitration. See United Nations Documents A/CN.9/264, Article 7, paragraph 5.

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where the parties merely, in their agreement, refer to a document that contains an arbitration clause⁷².

14.2 The resemblance between Article 7 of the Model Law and Article II(1) of the New York Convention is deliberate.

14.3 The jurisdictions worldwide, in adopting this Article of the Model Law, offer a wide variety of improvements to the concept of ‘writing’⁷³.

14.4 The Law Reform Commission of Hong Kong recommended in its report that it should be adopted unchanged and applied in international cases⁷⁴.

14.5 Section 2AC of the Arbitration Ordinance (Cap.341), which requires an arbitration agreement to be in writing before the provisions of the Ordinance become applicable, is based on sections 5 and 6(2) of the English Arbitration Act 1996. Its wording is not the same as Article 7(2) of the Model Law that deals with

72 United Nations Document A/CN.9/264, Article 7, paragraphs 7 - 8

73 See, for example, section 2(1) of the Singapore International Arbitration Act (Cap.143A), article 7(1) of the New Zealand Arbitration Act 1996 and section 1031 of the 1998 German Arbitration Statute.

74 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

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the same subject matter. Yet, the arbitration agreement must be in writing. It sets out a list of alternative criteria for determining whether an arbitration agreement is in writing⁷⁵. The list is exclusive and this seeks to ensure that parties are not forced into arbitration unless it is clear that they have such an agreement⁷⁶. Its provisions modify the last of the alternatives set out in Article 7(2) of the Model Law in that the requirement that the agreement seeks to incorporate an arbitration agreement by reference must itself be in writing is removed and that it is made clear that reference may be made either to a written form of arbitration clause or to a document containing an arbitration clause⁷⁷.

14.6 We **recommend** that Article 7(1) of the Model Law is to be adopted unchanged and applies in all cases and, subject to paragraph 14.7 below,, that section 2AC of the Arbitration Ordinance (Cap.341) should be retained

75 Some of the criteria derive from Article 7(2) of the Model Law; others are from Hong Kong and English case law and the English Arbitration Act 1996.

76 See *William Co. v. Chu Kong Agency Co. Ltd.* [1995] 2 HKLR 139, per Kaplan J at 144.

77 Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary* (1997 Supplement) Butterworths, p.35

and applied to all cases to the exclusion of Article 7(2) of the Model Law.

14.7 As a result of the submission received from Francis Haddon-Cave we have considered whether the definition of “writing” in Section 2AC(4) needs modification in view of the enactment in the year 2000 of the Electronic Transactions Ordinance (Cap.553) which was based on the Uncitral Model Law on Electronic Commerce. It is acknowledged that, since 1996, the means by which information can be recorded has expanded and will continue to do so in future. Rather than leaving the interpretation of “means by which information may be recorded” under the present Section 2AC(4) to the discretion of the arbitrator, it is preferable to tie the definition to the Hong Kong statutory framework. It is recommended that Section 2AC(4) be amended along the following lines:-

“In this section writing (Chinese characters) includes any means by which information can

be recorded and, for this purpose, Section 5(1) of and the definition of “electronic record” in the Electronic Transactions Ordinance (Cap.553) shall apply.”

15. Article 8 - Arbitration Agreement and Substantive Claim before Court

15.1 Article 8 is one of the pillars of the Model Law and requires a court to refer a dispute covered by an arbitration agreement to arbitration unless it finds that the agreement is null and void, inoperative or incapable⁷⁸.of being performed. Its wording is purposely modeled on Article II(3) of the New York Convention 1958⁷⁹.

15.2 It seems clear that Article 8(1) of the Model Law also prevents a party from invoking the arbitration

78 An additional ground, namely where there is no dispute, is in Article 8(1) of the New Zealand Arbitration Act 1996. This further ground has been rejected in England in section 9 of the Arbitration Act 1996.

79 There are 2 deviations. Article 8(1) of the Model Law adds a time element that the request is to be made at the latest with or in the first statement on the substance of the dispute and it is of a non-territorial nature in that it can be relied upon by any party regardless of the law to which the arbitration is subject.

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agreement during the subsequent phases of the court proceedings. By Article 8(2) of the Model Law, the bringing before the court of an action to challenge the arbitration agreement does not constitute a bar to commencing or continuing the arbitral proceedings. Its purpose is to reduce the risk and effect of a dilatory tactic of a party renegeing on its commitment to arbitration⁸⁰.

15.3 The Law Reform Commission of Hong Kong recommended in its report that this Article should be adopted unchanged in international cases⁸¹. Most jurisdictions adopt the text verbatim or with just minor variations⁸².

15.4 We **recommend** that Article 8 of the Model Law is to be adopted unchanged and applies in all cases.

16. Article 9 - Arbitration Agreement and Interim Measures by Court

80 United Nations Document A/CN.9/264, Article 8, paragraph 5

81 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

82 See, for example, Australia, Bermuda and Singapore.

Adoption of Article 9

- 16.1 Article 9 of the Model Law lays down the principle, disputed in some jurisdictions, that resort to a court and subsequent court action with regard to interim measures of protection are compatible with an arbitration agreement.
- 16.2 Interim measures of protection play an important role in every legal system in facilitating the process of dispute resolution. The scope and variety of interim measures of protection available differ from jurisdiction to jurisdiction. The need for effective interim relief on international level is ever growing: this may be partly due to the ease and speed with which assets can be transferred in the modern world to avoid a court judgement or an arbitral award and partly because of the higher expectations of the parties of their ability to enforce their rights⁸³.
- 16.3 It is of particular importance for parties to have effective access to such court assistance before the arbitral tribunal is constituted and, even after the

83 United Nations Document A/CN.9/WG.II/WP.111, paragraph 7

constitution of the arbitral tribunal, a party may have good reason for asking the court to assist.

16.4 On an international level, the effectiveness and availability of interim relief in litigation is a subject of many studies⁸⁴. In arbitration, there are added difficulties in obtaining interim measures of protection. The power of the arbitral tribunal to issue interim measures of protection is often limited to the extent agreed by the parties; the arbitral tribunal may only direct interim measures of protection to the parties; the arbitral tribunal can only act after it has been constituted; and the power of the court over the arbitration process is usually restricted.

16.5 The Law Reform Commission of Hong Kong recommended in its report that this Article should be adopted unchanged in international cases⁸⁵. Most jurisdictions adopt the text verbatim or with just minor

84 See, for example, the International Law Association, Report of the 67th Conference held at Helsinki from 12-17 August 1996 - Committee on International Civil and Commercial Litigation, Second Interim Report on Provisional and Protective Measures in International Litigation (1996).

85 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

variations⁸⁶; some adopting jurisdictions make additions by listing the details and types of court-ordered interim measures available⁸⁷.

16.6 We **recommend** that Article 9 of the Model Law is to be adopted unchanged and applies in all cases.

Scope for Interim Measures

16.7 No definition for ‘interim measures of protection’ is given in Article 9 of the Model Law and details cannot be found regarding the different types of interim measures that are available. This is perhaps due to their multitude and diversity in different jurisdictions.

16.8 Yet, the range of interim measures of protection covered is considerably wider than that under Article 17 of the Model Law that deals with the limited power of the arbitral tribunal to order any party to take an interim measure of protection in respect of the subject matter of the dispute⁸⁸. In contrast, Article 9 of the Model Law deals with the compatibility of the great variety of available possible measures by courts, including not only

86 See, for example, Australia, Bermuda and Singapore.

87 See, for example, India, New Zealand, Scotland and Zimbabwe.

88 United Nations Document A/CN.9/264, paragraph 3

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steps by the parties to conserve the subject matter or to secure evidence but also other measures, possibly required from a third party, and their enforcement⁸⁹.

16.9 We are of the view that a provision to define interim measures would help clarifying the scope of powers available. Thus, we **recommend** that such a provision should be included in the new Ordinance.

16.10 At present, there are other powers exercisable by the court in relation to arbitral proceedings that are of an interim nature. Section 2GC of the Arbitration Ordinance (Cap.341)⁹⁰ sets out in specific forms those powers to order interim measures and to fill gaps in the Model Law as to the mechanics of receiving evidence; section 2GD of the Arbitration Ordinance (Cap.341) provides for power to extend time in arbitral proceedings exercisable before the arbitral tribunal is constituted; section 2GE of the Arbitration Ordinance (Cap. 341) confers power on the court to deal with

89 United Nations Document A/CN.9/264, paragraph 4

90 Part of it is modeled on sections 43 and 44 of the English Arbitration Act 1996.

default on the part of the party before the arbitral tribunal is constituted.

16.11 We are of the view that these provisions are of positive benefits for the conduct of the arbitral proceedings and we **recommend** that they should be retained in the new Ordinance but that they have to be reviewed together with the provisions of the Model Law to ensure that there is no conflict among them.

Security in Admiralty Proceedings

16.12 A party to arbitration may invoke the *in rem* jurisdiction of the admiralty court to arrest a vessel and to obtain security for its claim. In *The Britannia* [1998] 1 HKC 221, it was held that the court has jurisdiction to maintain the arrest of a vessel despite the mandatory stay of proceedings due to an arbitration agreement, provided that the arrest is for the purpose of providing security for the judgment in the action *in rem* itself rather than for an arbitral award⁹¹.

91 See also “*The Tuyuti*” [1984] 2 Lloyd’s LR 51 and “*The Bazias 3*” [1993] QB 673.

16.13 In UK, section 11 of the English Arbitration Act 1996⁹² expressly allows the court, even if a stay of the proceeding is granted, to order the property arrested to be retained as security for the arbitral award or that the stay is conditional on the provision of equivalent security for the satisfaction of such arbitral award. It applies even if the arbitration takes place abroad or its seat has not been designated or determined. The same law and practice applies in relation to property retained in pursuance of an order of the court made thereunder as would apply if the property is held for the purposes of proceedings in the court making the order⁹³.

16.14 A similar provision is set out in section 7 of the Singapore International Arbitration Act (Cap.143A).

16.15 We are of the view that there should be a provision governing the retention of security, at the discretion of the court along the lines of section 11 of the English Arbitration Act 1996, in admiralty cases where there is an arbitration agreement. As such, we **recommend**

92 It merely re-enacts the present statutory position as found in section 26 of the Civil Jurisdiction and Judgments Act 1982 in UK.

93 Section 11(2) of the English Arbitration Act 1996

that such a provision should be included in the new Ordinance.

Interpleader

16.16 Interpleader arises where one party claiming no right himself in the subject matter, is facing conflicting claims from other parties and does not know to which of them he should account. The law allows such a party to seek relief from the court by way of interpleader. If the question in issue falls within the scope of an arbitration agreement to which the competing claimants are parties and such a relief is granted, the court may at its discretion direct the issue to be determined by arbitration and stay the legal proceedings under the present section 7 of the Arbitration Ordinance (Cap.341)⁹⁴.

16.17 Section 10 of the English Arbitration Act 1996 is based on section 5 of the English Arbitration Act 1950 but it makes the stay almost mandatory. Also, if the court does not direct the issue to be determined by arbitration, any condition precedent about obtaining an award

94 The wording of this section is the same as section 5 of the English Arbitration Act 1950 and applies merely to domestic arbitration.

before bringing legal proceedings will not affect the determination of the issue by the court⁹⁵.

16.18 We are of the view that the existing section 7 of the Arbitration Ordinance (Cap.341) should be repealed and we **recommend** that it should be replaced by a provision modeled on section 10 of the English Arbitration Act 1996.

Payment into Court

16.19 At present, Rules of High Court (Cap.4A) Order 73 rule 11 provides that any party to any arbitration may at any time pay into court a sum of money in satisfaction of any claim against it in the arbitration. There is no equivalent provision in the English Rules of Supreme Court Order 73.

16.20 We also note that, as regards Order 73 rule 11 of Rules of High Court made under the High Court Ordinance (Cap.4), it has been submitted that, as a matter of

95 This concerns situations where there is a *Scott v Avery* clause. See *Scott v Avery* (1856) 5 HL Cas 11.

principle⁹⁶, an arbitrator exercising his decision on costs judicially should not make reference to an offer made by way of a letter where that offer could have been, but was not, backed by a payment in.

16.21 We are of the view that other forms of offer or costs protection procedures, like a *Calderbank* offer⁹⁷, work well outside Hong Kong. Payment into court is not familiar to parties from other jurisdictions. Further, it seems to us that such payment into court procedure is not widely used and, despite paragraph 3.20 above, there is no case determining whether payment into Court procedures in arbitration must be used in similar circumstances as they must be used in Court proceedings. We conclude that such a procedure for payment into court in arbitration should not be retained and the matter should be left to the arbitral tribunal to decide, as a matter of discretion, whether an offer put forward is a genuine one. This is also in accord with

96 See, generally, *Choy Bing Wing v. Hong Kong Shanghai Hotels Limited (No. 2)* [1999] 1 HKLRD 473 and Hong Kong Civil Procedure 2002 Vo.1 1, para.73/11/3.

97 See *Calderbank v. Calderbank* [1976] Fam 93.

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the view expressed by the Government of Hong Kong SAR in this regard.

16.22 We therefore recommend that the existing provisions for payment into court in arbitration are to be abolished and that there should be an express provision that an appropriate written offer should be taken into account by the arbitral tribunal when dealing with costs.

D. Chapter III - Composition of Arbitral Tribunal

17. Article 10 - Number of Arbitrators

17.1 Article 10 of the Model Law grants the parties autonomy to determine the number of arbitrators and provides, in keeping with the tradition of international arbitrations⁹⁸, that the number shall be three where the parties do not determine the number of arbitrators.

17.2 The Law Reform Commission of Hong Kong recommended in its report that it should be adopted unchanged in international cases⁹⁹. Some jurisdictions¹⁰⁰ follow the default number of three in adopting the Model Law; others¹⁰¹ provide for a single arbitrator as the default rule.

17.3 In Hong Kong, in default of agreement, the number of arbitrators is to be one in domestic arbitration and either

98 The number three is adopted, as in the Article 5 of the UNCITRAL Arbitration Rules 1976, in view of the fact that it seems to be the most common number in international commercial arbitration. See United Nations Document A/CN.9/264, Article 10, paragraph 3.

99 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

100 See, for example, Australia, Bermuda, New Zealand and Peru.

101 See, for example, India, Kenya, Mexico, Scotland and Singapore.

one or three, as decided by the Hong Kong International Arbitration Centre, in international arbitration¹⁰². This arrangement has worked well since its introduction in 1997.

- 17.4 We **recommend** that Article 10(1) of the Model Law is to be adopted unchanged and applied in all cases and that the existing arrangement under section 34C of the Arbitration Ordinance (Cap.341) should be retained and applied in all cases to the exclusion of Article 10(2) of the Model Law.

18. Article 11 - Appointment of Arbitrators

Adoption of Article 11

- 18.1 Article 11 of the Model Law deals with the appointment procedure for the arbitrators, allowing the parties the freedom to agree on that procedure and also supplying default rules in case such an agreement by the parties does not exist or is not forthcoming.
- 18.2 Article 11(1) of the Model Law aims to overcome the national bias in some jurisdictions that preclude

102 See sections 8 and 34C of the Arbitration Ordinance (Cap.341).

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foreigners from acting as arbitrators even in international cases. It is not intended to prohibit the parties from specifying that nationals of certain countries may, or may not, be appointed as arbitrators¹⁰³.

18.3 Article 11(2) of the Model Law grants freedom to the parties in choosing the procedure in the appointment of the arbitral tribunal. A wide interpretation of such a freedom is given and the parties may authorise a third body to determine the appointment procedure¹⁰⁴. This freedom, however, has some limitations¹⁰⁵.

18.4 Article 11(3) of the Model Law supplies a procedure for appointing either three arbitrators or one arbitrator when the parties have not agreed on a procedure for such appointment¹⁰⁶. A last resort to the court is envisaged in order to avoid any deadlock in the appointment process.

103 United Nations Document A/CN.9/264 Article 11, paragraph 1

104 See also Article 2(c)&(d) of the Model Law.

105 This is subject to the mandatory provisions in Article 11(4)&(5) of the Model Law.

106 It is said not to be desirable in the Model Law to list the appointing procedure for any possible number of arbitrators which the parties can select due to their unlimited freedom. See also United Nations Document A/CN.9/WG.II/WP.37, Article 16, n.28.

18.5 Article 11(4) of the Model Law deals with three situations: (1) the situation where the parties fail to reach agreement on a matter covering the appointment procedure; (2) the situation where a party fails to act as required by the parties' agreed appointment procedure; and (3) the situation where a third party fails to perform the functions entrusted by the parties. In these situations, the parties are allowed to seek assistance from the designated court or authority to take the necessary measure, thereby avoiding any deadlock or undue delay.

18.6 Article 11(5) of the Model Law prohibits an appeal against the decision of the court or other authority relating to the appointment procedure and sets out the considerations that the court or other authority should apply when appointing an arbitrator. The finality of such a decision is essential to the rapid constitution of the arbitral tribunal¹⁰⁷ and the considerations are similar to those set out in Article 6(4) of the UNCITRAL Arbitration Rules 1976.

107 See United Nations Document A/CN.9/264 Article 11, paragraph 7.

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- 18.7 The Law Reform Commission of Hong Kong recommended in its report that this Article should be adopted unchanged in international cases¹⁰⁸.
- 18.8 By Section 34C of the Arbitration Ordinance (Cap.341), the Hong Kong International Arbitration Centre is the designated court or authority for the purpose of Article 11(3) &(4) of the Model Law.
- 18.9 Most jurisdictions adopt the text of the Article verbatim or with just minor variations¹⁰⁹. We **recommend** that Article 11 of the Model Law is to be adopted unchanged and applied to all cases.
- 18.10 There is no provision in Article 11 of the Model Law that deals with the situations where the appointment of two or more than three arbitrators is required. In our opinion, a provision to deal with such situations is necessary. It seems to us that, in the case of a two or other even-numbered tribunal, the equal treatment of the parties¹¹⁰ will permit each side to choose the same

108 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

109 See, for example, Australia, Bermuda India, Kenya, Scotland and Singapore.

110 See Article 18 of the Model Law.

number of arbitrators and that when the number of arbitrators is uneven and is five or more, the parties may each choose an equal number of arbitrators, leaving the appointment of the last one to the other members of the arbitral tribunal¹¹¹. We therefore **recommend** that such a provision should be added.

18.11 We have also considered the desirability of a provision along the lines of section 17 of the English Arbitration Act 1996 that deals with the appointment of the first party appointed arbitrator as the sole arbitrator in default of appointment of the other arbitrator to a 2-arbitrator tribunal under the arbitration agreement.

We note that:-

- a) forcing a sole arbitrator on parties that have agreed to an arbitral tribunal of two or more has been argued to be potentially prejudicial to the enforcement of the subsequent arbitral award under the New York Convention;

111 See also Binder *International Commercial Arbitration in UNCITRAL Model Law Jurisdiction* (2000) Sweet & Maxwell, p.81.

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- b) for parties in jurisdictions¹¹² accustomed to a contractual right to appoint their own arbitrator, they would be disagreeably surprised to find that an arbitrator appointed by the other side can become sole arbitrator; this may render Hong Kong a less attractive place to arbitrate for parties from such jurisdictions;
- c) arguably, such a provision is contrary to party autonomy and is therefore incompatible with the philosophy of the Model Law.

18.12 We also note that the Hong Kong International Arbitration Centre Maritime Arbitration Group has adopted a model arbitration clause providing that, if a party fails to appoint its arbitrator, the other side can, after 14 days, appoint its arbitrator as the sole arbitrator. We have noted that this clause has had positive benefits in maritime arbitrations and, parties may adopt this clause in their arbitration agreement relating to maritime or other disputes.

112 See, for example, Mainland China.

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18.13 On balance, we do not recommend to add a provision along the lines of section 17 of the English Arbitration Act 1996.

18.14 In sections 17(3) and 18(3)(c) of the English Arbitration Act 1996, the court is given the power to revoke any appointments already made. This is to cover the situation where, unless the court takes this step, it may be suggested that the parties have not been fairly treated since one has his own choice of arbitrator while the other has an arbitrator imposed on him by the court especially in circumstances when there has been no fault of the party¹¹³. We consider that a provision to expressly state that any appointment by the Hong Kong International Arbitration Centre under the new Ordinance is deemed to have been made with the agreement of the parties is desirable. We **recommend** that a suitable provision should be added.

Umpires

18.15 There are no provisions in the Model Law dealing with the appointment of umpires.

113 This situation has arisen in France in the *Dutco* case where an award has been invalidated for this reason.

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18.16 Section 10¹¹⁴ of the Arbitration Ordinance (Cap.341) provides, subject to contrary agreement, for the appointment of umpires in a 2-arbitrator tribunal.

18.17 We **recommend** that provisions on this subject matter should be retained and that such provisions should be added principally to those provisions governing the composition of the arbitral tribunal. In our opinion, there should be detailed consideration of matters such as whether and when umpires should sit in the arbitral proceedings conducted by the appointed arbitrators, the type of disagreements that trigger entry upon the reference and the challenge and replacement of the umpires.

18.18 We have considered whether the new Ordinance should deal specifically with such matters as whether and when umpires should sit in the arbitral proceedings conducted by the appointed arbitrators and the type of disagreements that trigger entry upon the reference. However, we are of the view that these kinds of matters could be and should be decided by the arbitrators in

114 Its wording is the same as section 8 of the English Arbitration Act 1950, as amended by section 6(1) of the Arbitration Act 1979.

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default of agreement from the parties, except that provision should be made in the new Ordinance for disagreement to be deemed to arise when one arbitrator is of the view that he is in disagreement with the other over any matter relating to the reference. We further recommend that there should be provisions in the new Ordinance giving specific power to the arbitrators to refer particular issues to an umpire if they disagree while retaining jurisdiction over other issues if they consider this would save costs.

18.19 In this regard, we are of the view that a provision modeled on section 21 of the English Arbitration Act 1996 should be considered, while the new Ordinance can follow Article 12 to Article 15 of the Model Law with respect to the challenge and replacement of umpires.

18.20 We also note that the section 16(6)(b) of the English Arbitration Act 1996 provides that the two party-appointed arbitrators may appoint an umpire at any time after they themselves are appointed and shall do so before any substantive hearing or forthwith if they cannot agree on matter relating to the arbitration.

18.21 We consider that the wordings and effect of this is different from the present version of section 10 of the Arbitration Ordinance. As such, we are of the view that a provision similar to section 16(6)(b) of the English Arbitration Act 1996 should be included in the new Ordinance.

18.22 The above recommendations should not only apply when there are two arbitrators but also when there are an even number of arbitrators and, where appropriate, they are equally divided on any issue.

Multiple Respondents

18.23 There are many forms of multi-party arbitration and there may be multiple parties on one side or on both sides. Questions may exist on the appointment of the arbitral tribunal and on conflicting arbitral decisions on the subject matter. It has been said that there seems to be no easy solution to the problem of multi-party arbitration¹¹⁵.

115 Craig, Park and Paulsson (2nd Ed. 1990) *International Chamber of Commerce Arbitration*, p.155

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18.24 As a partial solution to the situation where there are multiple respondents, Article 7 of the Hong Kong International Arbitration Centre Securities Arbitration Rules provides:

“...

2. *In any arbitration in which there is more than one respondent, the claimant shall initially only nominate his arbitrator pending the appointment of one arbitrator as joint appointee of one of the respondents. If all of the respondents are unwilling to concur in the appointment of one arbitrator as their joint appointee and any one of them so notifies HKIAC within thirty days after receipt of the claimant's notification of the nomination of an arbitrator all three arbitrators shall be appointed by HKIAC...*”

18.25 We are of the view that such a provision is desirable in the appointment of joint arbitrators in multiple respondent cases. Thus, we **recommend** that a power along the lines of the above should be added and exercisable by the Hong Kong International Arbitration Centre for the purposes of its function under Article 11 of the Model Law.

Judge Arbitrators

18.26 Section 13A and the fourth Schedule of the current Ordinance should be retained subject to the exact definition of provisions applicable to such arbitrations.

19. Article 12 - Grounds for Challenge

19.1 Article 12¹¹⁶ of the Model Law implements the principle that arbitrators shall be impartial and independent. It requires the prospective or appointed arbitrator to disclose promptly any circumstances likely to cast doubt on his impartiality or independence and further lays the basis for securing impartiality and independence by recognizing those circumstances that give rise to justifiable grounds in this regard as reasons for a challenge¹¹⁷. It is also a ground for challenge if the arbitrator does not possess qualifications agreed by the parties. These are the only grounds to launch a challenge. However, the prior knowledge of a ground for challenge may preclude the appointing party from later challenging the arbitrator on such a ground.

116 It is modeled upon Articles 9&10 of the UNCITRAL Arbitration Rules 1976.

117 United Nations Document A/CN.9/264, Article 12, paragraph 1

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19.2 The Law Reform Commission of Hong Kong recommended in its report that Article 12 of the Model Law should be adopted unchanged in international cases¹¹⁸. Most jurisdictions adopt the text verbatim or with just minor variations¹¹⁹. We **recommend** that Article 12 of the Model Law is to be adopted unchanged and applied to all cases.

19.3 In our opinion, there are relatively few occasions where an arbitrator would so seriously misconduct an arbitration that a party would be justified in seeking his removal. An open-ended provision allowing the removal of an arbitrator for failing to properly conduct the arbitral proceedings can be used by one party to delay the arbitration. For these reasons, we are of the view that the challenge and removal of an arbitrator has been sufficiently covered in Article 12 of the Model Law bearing in mind recourse against the award is available under Article 34 (see particularly Article 34(2)(a)(ii)).

118 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

119 See, for example, Australia, Bermuda India, Kenya, Scotland and Singapore.

20. Article 13 - Challenge Procedure

20.1 Article 13 of the Model Law deals with the procedure for a challenge to the appointment of an arbitrator on the grounds contained in Article 12 of the Model Law (justifiable doubts as to his impartiality or independence or lack of agreed qualifications). The parties are granted a general freedom to choose a challenge procedure.

20.2 This freedom is subject to two exceptions: first, if a challenge under the parties' agreed procedure is rejected by the arbitral tribunal, the challenging party can ask the court for a final decision on this very issue¹²⁰; second, the equal treatment of the parties must also extend to the challenge procedure¹²¹.

20.3 Article 13(2) of the Model Law assists those parties who have not agreed on a challenge procedure by setting out the rules on challenge procedure in default of agreement. Under such rules, the challenge will first be decided by the arbitral tribunal. It may seem that to let

120 See Article 13(1) of the Model Law.

121 See Article 18 of the Model Law.

the arbitral tribunal decide on the challenge is of little practical relevance in the case of a sole arbitrator who does not resign when facing a challenge. Yet, we are of the view that a challenged arbitrator should still have an opportunity to consider the full reasons for the challenge before deciding whether to resign or not. In this regard, we note that there may be cases where it would be in the interests of the parties for an arbitrator facing such a challenge to resign in order to save unnecessary costs.

20.4 Article 13(3) of the Model Law, which is a mandatory provision, provides for an immediate court review of the unsuccessful challenge with safeguards¹²² installed to reduce the risk of delay.

20.5 We are of the view that Article 13(3) of the Model Law has expressed with sufficient clarity that the court may substitute its own decision for that of the arbitral tribunal in this regard. The Law Reform Commission of Hong Kong recommended in its report that Article 13 of the Model Law should be adopted unchanged in

122 First, there is a time limit of 30 days; second, there is no appeal; and third, the arbitral proceedings may be continued.

international cases¹²³. Most jurisdictions adopt the text verbatim or with just minor variations¹²⁴.

20.6 We **recommend** that Article 13 of the Model Law is to be adopted unchanged and applied to all cases. We also **recommend** that it should be expressly stated in the new Ordinance that an arbitrator facing a challenge, particularly in the early part of the arbitration, should carefully consider whether it would be in the interests of the parties to resign in order to save unnecessary costs.

21. Article 14 - Failure or Impossibility to Act

Adoption of Article 14

21.1 Article 14¹²⁵ of the Model Law deals with the termination of the mandate of an arbitrator on two grounds: when he becomes *de jure* or *de facto* unable to perform his functions and when he for other reasons fails to act without undue delay.

123 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

124 See, for example, Australia, Bermuda, Kenya, Scotland and Singapore.

125 This is modeled upon Article 13(2) of the UNCITRAL Arbitration Rules 1976.

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21.2 By Article 14(1) of the Model Law, his mandate terminates if he withdraws from his office or if the parties agree on the termination. It further stipulates that if the arbitrator does not withdraw or the parties do not reach agreement on his removal, any party may request the court to decide on the termination of the mandate.

21.3 Article 14(2) of the Model Law expressly provides that if an arbitrator withdraws from his office, either for the reasons in Article 14(1) of the Model Law or the grounds in Article 13(2) of the Model Law, this shall not imply that he accepts the validity of those matters. It is designed to facilitate the necessary withdrawal or consent in order to prevent lengthy controversies¹²⁶.

21.4 For similar reasons as set out in respect of Article 12 of the Model Law, we are of the view that this subject is sufficiently covered in Article 14 of the Model Law.

21.5 The Law Reform Commission of Hong Kong recommended in its report that Article 14 of the Model Law should be adopted unchanged in international

126 United Nations Document A/CN.9/264, Article 14 bis, paragraph 2

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cases¹²⁷. Most jurisdictions adopt the text verbatim or with just minor variations¹²⁸. We **recommend** that Article 14 of the Model Law is to be adopted unchanged and applied to all cases.

21.6 At present, section 3¹²⁹ of the Arbitration Ordinance (Cap.341) provides that, in domestic arbitrations, the mandate of the arbitrators shall be irrevocable except by leave of the court. In adopting Article 14 of the Model Law, this section is inappropriate and we **recommend** that it should be repealed.

21.7 In respect of Articles 13 and 14 of the Model Law, we have also considered whether the court should also have a discretionary power to disentitle the arbitrator to his fees¹³⁰. We note that whereas an arbitrator has substantial immunity from legal action for the parties' loss (section 2GM of the Arbitration Ordinance), such immunity does not explicitly extend to legal actions for

127 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

128 See, for example, Australia, Kenya, New Zealand, Scotland and Singapore.

129 Its wording is the same as section 1 of the English Arbitration Act 1950 which has been substantially changed by section 23 of the English Arbitration Act 1996.

130 A recent example in this regard is *Kailay Engineering Co (HK) Ltd. v. Farrance* [1999] 2 HKC 765.

recovering fees already paid to him. In our opinion, it should be made clear that the court can order repayment by the arbitrator of fees already paid. We are further of the view that the court should have a discretionary power to disentitle an arbitrator to his unpaid fees where there is a successful application to court in those circumstances set out in Articles 13 and 14 of the Model Law. However, clear grounds based on personal fault of the arbitrator should be shown by the applicant before repayment of disentanglement to fees can be ordered. Thus, we **recommend** that a provision in the new Ordinance to effect the above should be adopted.

Death of Arbitrator

21.8 Section 26¹³¹ of the English Arbitration Act 1996 makes specific provision for the death of an arbitrator.

21.9 We are of the view that such a section complements section 8 of the English Arbitration Act 1996 which we have recommended to be adopted.

131 Section 26(1) of the English Act 1996 is a mandatory section and provides that the authority of an arbitrator is personal and ceases on his death. It is difficult to see how parties could agree otherwise.

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21.10 As such, we **recommend** that a provision based on section 26 of the English Arbitration Act 1996 be included in the new Ordinance.

22. Article 15 - Appointment of Substitute Arbitrator

22.1 Article 15 of the Model Law deals primarily with the question how a substitute arbitrator is to be appointed. It covers the appointment of a substitute arbitrator in the following circumstances¹³² where the mandate of an arbitrator terminates:-

- a) under Articles 13 or 14 of the Model Law; or
- b) by withdrawal from office for any other reason;
or
- c) by agreement of the parties; or
- d) in any other case.

22.2 The Law Reform Commission of Hong Kong recommended in its report that Article 15 of the Model Law should be adopted unchanged in international

132 It endeavours to embrace all possible cases where the need to appoint a substitute arbitrator can arise. See United Nations Documents A/CN.9/264 Article 15, paragraph 1.

cases¹³³. Most jurisdictions adopt the text verbatim or with just minor variations¹³⁴.

22.3 We **recommend** that Article 15 of the Model Law is to be adopted unchanged and applied to all cases.

23. Consolidation of Arbitral Proceedings

23.1 There are a variety of situations when consolidation of the arbitral proceedings is considered desirable. An obvious situation is where more than one arbitration arises out of the same set of facts or involves the same parties¹³⁵. One of the advantages of consolidation is avoidance of inconsistent decisions. Where more than one arbitral tribunal deliberates on matters arising out of the same set of facts, it is possible for each tribunal to arrive at a different conclusion.

23.2 There are contrasting views on how far the legislative efforts should go in this regard. Some consider that

133 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

134 See, for example, Australia, Bermuda, Nigeria, Scotland and Singapore.

135 An example common in construction cases is where there exists an arbitration agreement between the developer and its main contractor, and other arbitration agreements exists between the main contractor and its various subcontractors to which the developer is not a party.

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such legislation should be limited to facilitating implementation of agreements of the parties to consolidate cases; other are of the view that the court should be authorised to order consolidation where it appears appropriate even in the absence of agreement among the parties¹³⁶.

23.3 At present, section 6B¹³⁷ of the Arbitration Ordinance (Cap.341) deals with the consolidation of arbitrations, empowering the court to order consolidation when:-

- a) some common question of law or fact arises;
- b) the rights to relief claimed concern the same transaction or series of transactions; or
- c) there are other desirable reasons.

23.4 The Model Law does not provide for the consolidation of arbitral proceedings. The Hong Kong Commission recommended¹³⁸ that no consolidation provision be included in the Model Law for the following reasons:

136 See, in general, United Nations Document A/CN.9/460 paragraphs 51-61.

137 There is no equivalent provision in the English Arbitration Act 1950. This section is introduced to implement the recommendations in paragraph 10.23 of the Law Reform Commission of Hong Kong Report on Commercial Arbitration (1981).

138 The Law Reform Commission of Hong Kong: Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986), Paragraph 4.40

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- a) It would introduce an element of court control into the arbitration process, whilst a prominent feature of the Model Law is that it seeks to avoid such intervention and control.
- b) In the international context, it is much more difficult to devise a workable procedure for consolidation than in the domestic context, since the parties may not all be subject to the jurisdiction of the Hong Kong courts.
- c) A compulsory consolidation provision may discourage international parties from selecting Hong Kong as a venue as they could misunderstand the provision and read it to mean that courts could interfere where disputes were unrelated except for the legal question concerned.
- d) Parties who are concerned with secrecy would view a consolidation procedure as a threat to their secrecy.

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- e) There are some suggestions that awards in consolidation arbitrations may not be enforceable under the New York Convention.

In the light of our later recommendation that Section 6B should be an “opt-in” provision we have the following comments on these reasons:-

- (a) we view consolidation as Court assistance to the arbitration process rather than control.
- (b) as consolidation will have to be agreed by all parties involved in the consolidation process it will be difficult for non-Hong Kong parties to question the Hong Kong Court’s jurisdiction.
- (c) to (e) the requirement that all parties must agree to consolidation means that these points are not significant.

23.5 Section 35 of the English Arbitration Act 1996 provides for the consolidation and concurrent hearings if the parties agree to confer such a power on the arbitral tribunal. The New Zealand Arbitration Act 1996 also

contains optional provisions enabling the consolidation of arbitral proceedings¹³⁹.

23.6 We consider that the Court's existing powers under Section 6B can be useful and there are occasions when such powers are appropriate in international as well as domestic arbitrations. We do not agree with HKFE & MC's view that the powers should only be exercisable with the agreement of all parties after a dispute had arisen. The "opt-in" requirement should be a sufficient safeguard; that such a provision may appear in standard form sub-contracts is not sufficient reason for requiring an "opt-in" agreement to be made after the dispute has arisen as this will have the effect of excluding consolidation in practically all cases. The Court is best left to decide whether to exercise such power in a particular case.

23.7 We are of the view and, thus, **recommend** that section 6B of the Arbitration Ordinance (Cap.341) should be available to parties who want to adopt it as an opt-in provision in the new Ordinance. The question of

139 Article 2, Second Schedule, Arbitration Act 1996 (New Zealand)

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costs in consolidated arbitrations is dealt with in Section 43 of this Report.

E. **Chapter IV – Jurisdiction of the Arbitral Tribunal**

24. Article 16 – Competence of the Arbitral Tribunal To Rule on its Jurisdiction

Adoption of Article 16

24.1 Each of the three paragraphs of Article 16 deals with separate aspects of the arbitral tribunal's jurisdiction.

Article 16(1) sets out highly important principles in international commercial arbitration, namely the doctrines of "Kompetenz-Kompetenz"¹⁴⁰ and "separability"¹⁴¹. It deals with the issue of who is to rule on the arbitral tribunal's jurisdiction. These two principles are in line with international trends¹⁴² and enable the arbitral tribunal to independently determine

140 The principle of "Kompetenz-Kompetenz", which is also referred to as "*Compétence-Compétence*" or "*Compétence de la compétence*", is that an arbitral tribunal may rule on its own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement.

141 The principle of "separability" means that an arbitral clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. See also *Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance Co. Ltd.* [1992] 1 Lloyd's Rep 81 (Com Ct.); [1993] 3 All ER 897 (CA).

142 Holtzmann H M & Neuhaus J E, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989 Ed.) Kluwer Deventer

its power to resolve the dispute without having to apply to a court for authorization. As for Article 16(2), two types of plea of lack of jurisdiction, each of which is with different time-limits for raising objections¹⁴³, are in issue: the first type of plea is the non-existence of the jurisdiction of the arbitral tribunal; the second type is that the tribunal is exceeding the scope of its authority. Article 16(3) regulates control by the court and it sets out the procedure to be followed when raising one of the pleas in Article 16(2).

24.2 As noted, the competence of the arbitral tribunal to rule on its own jurisdiction, i.e. the very foundation of its mandate and power, is subject to control by the court. There are a number of relevant concerns where the arbitral tribunal has to determine whether immediately

143 The plea that the tribunal has no jurisdiction shall be raised “no later than the submission of the statement of defence”. This also applies in the case of the defence to counterclaim pursuant to Article 2(f) of the Model Law. A plea that the arbitral tribunal has exceeded the scope of its authority shall be raised as soon as the matter which is alleged to exceed this authority is dealt with in the arbitral proceedings. In both of these pleas, the arbitral tribunal may admit a late plea if it considers the delay to be justified.

to rule on such a plea or whether to postpone the decision until the award stage.

24.3 There are differences in opinions on what the extent of court control should be in such situations. One view is that any court interference should have to await the tribunal's award on the merits. To allow an earlier review creates the opportunity for delaying tactics. The main argument in favour of an immediate right to apply to the court for review is that if the objection to jurisdiction is upheld, the continuation of the arbitration proceedings after the tribunal held that it had jurisdiction will represent wasted expenditure of time, effort and costs¹⁴⁴.

24.4 Article 16(3) also sets out three procedural safeguards to reduce the risk and effect of delay tactics. The time-period for resort to court is only of 30 days; the decision of the court is not appealable; and there is discretion on the arbitral tribunal to continue the

144 United Nations Document A/40/17 paragraphs 157-163

proceedings and make an arbitral award while the matter is pending with the court. If the arbitral tribunal decides to postpone the decision until the award stage, Article 34 will become applicable.

24.5 We are of the view that the Model Law expresses with sufficient clarity the principle underlying Article 16(1), enabling control by the court in substituting its decision, i.e. by way of rehearing, for that of the arbitral tribunal.

24.6 At present, Article 16 applies to both domestic and international arbitration¹⁴⁵ in Hong Kong. Most Model Law jurisdictions have adopted Article 16 verbatim or by using similar wording¹⁴⁶. We **recommend** that Article 16 is to be adopted unchanged¹⁴⁷.

Jurisdiction Over Claims Raised for the Purpose of

145 See section 13B and section 34C of the Arbitration Ordinance (Cap.341).

146 See, for instances, New Zealand and Singapore. Other jurisdictions that offer a number of essential variations to the Model Law provision include Bulgaria, Nigeria, Egypt and Oman.

147 See also the earlier recommendation in The Law Reform Commission of Hong Kong: Report on the Adoption of the UNCITRAL Model Law of Arbitration [Topic 17] (1986), paragraph 4.9.

Set-off

24.7 It is not uncommon that the respondent in an arbitration case invokes a claim that the respondent has against the claimant, in addition to merely responding to the matters in the claimant's claim. This may be raised as a counter-claim; this may also be invoked as a defence for the purpose of a set-off. If raised as a counter-claim, it is to be treated by the arbitral tribunal essentially in the same manner as if it were an original claimant's demand and is to be decided upon independently of decision on the claimant's claim, irrespective of the outcome of the same. On the other hand, as a set-off defence, it needs to be decided upon only if and to the extent the claimant's claim is well founded.

24.8 An issue in practice is the conditions under which the arbitral tribunal may take into consideration a disputed claim relied on for the purpose of a set-off.¹⁴⁸ There

148 United Nations Document A/CN.9/460, paragraphs 72-79

are divergent and controversial views internationally on whether the arbitral tribunal is competent to consider the merits of a claim raised for the purpose of a set-off if that claim, which may or may not be covered by any other arbitration agreement, is not covered by the arbitration agreement in respect of the principal claim.

24.9 This question has not been expressly addressed in the Model Law¹⁴⁹. Yet, the analytical commentary on the draft text of the Model Law takes the position that, if the respondent raises a claim for the purpose of a set-off (or as a counter-claim), that claim must not exceed the scope of the arbitration agreement and notes also that this restriction seems self-evident since the jurisdiction of the arbitral tribunal is based and limited on that arbitration agreement¹⁵⁰.

149 This question may be settled by agreement of the parties. See, for example, Article 19 the UNCITRAL Arbitration Rules (1976) and Article 27 of the International Arbitration Rules of the Zurich Chamber of Commerce (1989).

150 United Nations Document A/CN.9/264, paragraphs 5 & 8

24.10 We agree with the above views expressed in the analytical commentary on this aspect. Further, we are of the view that the current law in Hong Kong on raising set-off as a defence in arbitration is sufficiently clear and that a claim has to fall within the ambit of an arbitration agreement in order to be raised as a set-off. We consider that it is not desirable to vest a general discretion on the arbitral tribunal to admit and deal with any claim for set-off whatsoever. We consider that it is not necessary to recommend that the law of Hong Kong on this aspect be restated. Yet, we **recommend** that, for the avoidance of doubt, a general provision is be added to reflect limitation on the jurisdiction of the arbitral tribunal for matters referable within the ambit of the arbitration agreement.

Ruling of No Jurisdiction by Arbitral Tribunal

24.11 The Model Law consciously provides a regulation only in case of an affirmative ruling on jurisdiction of the arbitral tribunal. Article 16 does not regulate the case

where the arbitral tribunal rules that it has no jurisdiction. Such a ruling does not settle the question whether the substantive claim is to be decided by a court or by an arbitral tribunal. Thus, a party is not necessarily precluded from obtaining a court decision on whether a valid arbitration agreement exists. Yet, a ruling by the arbitral tribunal that it lacks jurisdiction should be final as regards its proceedings since it seems inappropriate to compel that arbitral tribunal to continue the proceedings.

24.12 The arbitration laws of some jurisdictions that are not based on the Model Law deal with this negative ruling jointly with the affirmative ruling.¹⁵¹ In some cases, the court regains jurisdiction without the possibility of any recourse from the decision of the arbitral tribunal; in others, there is remedy for setting aside of the arbitral

151 See, for example, Article 1052 of the Netherlands Arbitration Act 1986 which provides that “*Unless the parties have agreed otherwise, the court shall have jurisdiction to try the case if the arbitral tribunal declares it lacks jurisdiction*”.

award for both the affirmative and negative ruling¹⁵².

However, it seems contestable whether an action for setting aside can be instituted against a negative ruling, which by its nature is not an arbitral award.

24.13 In practice, a ruling of the arbitral tribunal that it has no jurisdiction marks the end of the arbitration; in law, there are two possible legislative solutions: first, the decision of the arbitral tribunal terminates the arbitral proceedings; second, the law introduces review by court in the same manner as that in Article 16.¹⁵³

24.14 We are of the view that a ruling of the arbitral tribunal that it has no jurisdiction should be final and the court should then have exclusive jurisdiction to decide and resolve the dispute.

24.15 We **recommend** a provision which may be modeled on Article 1052 of the Netherlands Arbitration Act 1986 to effect the above.

152 *Cremades*, National Report in ICCA Handbook

153 Pieter Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice* (1999) Kluwer Law International, pp.180-186

25. Article 17 – Power of the Arbitral Tribunal to Order Interim Measures

25.1 There is growing general recognition that interim measures of protection are increasingly being found in the practice of commercial arbitration and that the effectiveness of arbitration as a method of settling commercial disputes depends closely on the possibility of enforcing such interim measures.

Scope of Interim Measures by Arbitral Tribunal

25.2 Arbitral tribunals, in response to requests of parties, not uncommonly order interim measures of protection before issuing an arbitral award in the dispute. Such measures, directed to one or both of the parties, are referred to by expressions such as "interim measures of protection", "provisional orders", "interim awards", "conservatory measures" or "preliminary injunctive measures". The purposes of such measures differ but they include the following types:-

- a) measures aimed at facilitating the conduct of arbitral proceedings;
- b) measures to avoid loss or damage and measures aimed at preserving a certain state of affairs until the dispute is resolved; and
- c) measures to facilitate later enforcement of the arbitral award.

25.3 In practice, interim measures of protection, often not defined in the rules providing for their issuance, can encompass a wide variety of measures and common examples include orders for not removing goods or assets from a place or jurisdiction; orders for preserving evidence or for selling goods; and orders for posting monetary guarantees. As a result of the variety of different interim measures available worldwide, the Model Law is silent as to the types of interim measures it envisages. This gap is overcome by the *travaux préparatoires*, which give numerous examples of the types of interim measures covered by Article 17. These

given examples include measures for the preservation, custody or sale of goods that are the subject matter of the dispute; *modus vivendi* orders to provisionally determine and stabilise the relationship of the parties in a long-term ongoing setting to prevent irreparable harm; securing evidence; protection of trade secrets and proprietary information; and posting of a monetary guarantee.¹⁵⁴

25.4 An interim measure may be imposed for the duration of the arbitration or it may be of a more temporary nature and expected to be modified as matters evolve. The measure may be in the form of an order by the arbitral tribunal or in the form of an the interim award¹⁵⁵.

25.5 At its thirty-second session in March 2000, the UNCITRAL Working Group on Arbitration considered

154 See United Nations Document A/CN.9/264, Art.18, paragraph 2; United Nations Document A/40/17, paragraph 167; and United Nations Document A/CN.9/460, paragraph 116. See also United Nations Document A/CN.9/WG.II/WP.119.

155 Some rules, like Article 26 of the UNCITRAL Arbitration Rules of 1976, provide that such interim measures may be established in the form of an interim award.

the desirability and feasibility of preparing a harmonized text and the accompanying procedural rules that deal with the issuance of interim measures by arbitral tribunals. In that discussion, wide support was expressed for the preparation of a non-legislative text, such as guidelines or practice notes, which would discuss issues like the types of interim measures of protection that the arbitral tribunal might order; the discretion for ordering such measures; and the guidelines on how the discretion was to be exercised or the conditions under which, or circumstances in which, such measures might be ordered. It was also suggested that inspiration could be drawn from the Principles on Provisional and Protective Measures in International Litigation that are adopted in 1996 by the Committee on International Civil and Commercial Litigation of the International Law Association¹⁵⁶.

156 See United Nations Document A/CN.9/WG.II/WP.108, paragraphs 105-108; United Nations Document A/CN.9/468, paragraphs 80-84; and United Nations Document A/CN.9/WG.II/WP.111, paragraphs 30-32. As indicated in United

Adoption of Article 17

- 25.6 Article 17 deals with the issue of interim measures issued by the arbitral tribunal and enables the arbitral tribunal to order any party, at the request of a party, to take interim measures of protection in respect the subject matter of the dispute. This is subject to agreement to the contrary by the parties.
- 25.7 The general purpose of such orders is to prevent or minimize any disadvantage which may be due to the duration of the arbitral proceedings until the final settlement of the dispute and the implementation of its result.
- 25.8 Interim measures under Article 17 are considerably narrower than those that are exercisable by the court under Article 9¹⁵⁷. The character of Article 9 differs in

Nations Document A/CN.9/508, p.14, whether the interim measures had to be with respect to the subject matter of the dispute was still being considered.

157 United Nations Document A/CN.9/264, p.90

principle from that of Article 17, mainly because it does not expressly state whether or to what extent such court-ordered measures are available.

25.9 Legislative solutions regarding the power of the arbitral tribunal to order interim measures of protection are not uniform. In some jurisdictions, the power is implied; in many others, there are broad formulations empowering the arbitral tribunal to order interim measures of protection. Some jurisdiction have adopted Article 17 verbatim or by using similar wording¹⁵⁸; some have more specific formulations, for example, empowering arbitrators to issue attachment orders or to order property in dispute to be deposited with a third party; others have restrictive formulations, for example, providing that the arbitral tribunal does not have the power to issue attachments of property.¹⁵⁹

158 See, for example, International Arbitration Act 1994 (Singapore).

159 United Nations Document A/CN.9/WG.II/WP.108, paragraph 103

25.10 The Law Commission of Hong Kong in its report recommended¹⁶⁰ that Article 17 is be adopted unchanged in international arbitration. We **recommend** that Article 17 should apply in all cases and is to be adopted unchanged¹⁶¹.

Security for Costs

25.11 The Model Law does not have an express provision dealing with security for costs of the arbitration.

25.12 Under the present laws in Hong Kong, the arbitral tribunal is compulsorily conferred with the statutory power to require a claimant to give security for costs in both domestic and international arbitration¹⁶². This negatives the rule stated in *Re Unione Stearinerie Lanza and Weiner*¹⁶³ that security for costs is a matter which is not essential to the exercise of the primary function of the

160 The Law Reform Commission of Hong Kong: Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986), Paragraph 4.9

161 See also the earlier recommendation in The Law Reform Commission of Hong Kong: Report on the Adoption of the UNCITRAL Model Law of Arbitration [Topic 17] (1986), paragraph 4.9.

162 Section 2GB, Arbitration Ordinance (Cap.341)

163 [1917] 2 KB 558

arbitral tribunal in ascertaining facts and law and is therefore not within the powers of the arbitral tribunal.

25.13 The scheme in the Singapore International Arbitration Act (Cap.143A) is similar to that in Hong Kong in respect of the power on the arbitral tribunal in ordering security for costs¹⁶⁴. Thus, the arbitral tribunal always has the power to grant security for costs, regardless of the agreement of the parties.

25.14 Adopting the 3 suggestions¹⁶⁵ of Donaldson LJ in *Hitachi Shipbuilding & Engineering Co. Ltd. v. Viafiel Cia Naviera SA*¹⁶⁶, the English Arbitration Act 1996 confers upon the arbitral tribunal the power to order security for costs, unless the parties otherwise agree¹⁶⁷. This may avoid the situation that can otherwise easily arise that no one has the power to order security for costs in a case

164 Section 12(1)(a), Singapore International Arbitration Act (Cap.143A)

165 The 3 suggestions are the vesting of power in the arbitral tribunal to order security for costs, the right of the parties to exclude such a power, and the removal from the Court of that power.

166 [1981] 2 Lloyd's Rep 498, 505

167 Section 38, Arbitration Act 1996 (England)

where it is highly desirable that the respondent should be able to obtain such security.

25.15 In New Zealand, the parties are taken as having agreed to confer upon the arbitral tribunal the power to order the giving of security for costs, unless the parties agree otherwise¹⁶⁸.

25.16 We consider the present mandatory nature of the power on the arbitral tribunal should be modified and we **recommend** that the parties should be allowed to opt out of this power that should otherwise be conferred upon the arbitral tribunal.

Power to Make Provisional Awards

25.17 An optional power to make provisional awards is conferred upon the arbitral tribunal in England¹⁶⁹.

Such a power is in the form of an opt-in provision and is not available without agreement. The power, if conferred, enables the arbitral tribunal to order on a

168 Article 3(1)(d), Second Schedule, Arbitration Act 1996 (New Zealand)

169 Section 39, Arbitration Act 1996 (England)

provisional basis any relief that it can order in a final award. It is clear under the scheme in England that any provisional relief is subject to the final decision of the tribunal on that case and this power does not affect another available power to make more than one award¹⁷⁰. It must therefore be taken into account and finally determined in a subsequent award or awards of the arbitral tribunal dealing with the merits of the dispute or costs. The word “provisional” is purposely chosen to avoid the use of the word “interim”, with its connotation of an interim award, which is nevertheless final in respect of the matters that it determines.

25.18 Obviously, the inclusion or exclusion of such a power can have a considerable effect in arbitration where a large sum might be awarded at an early stage or in respect of trades and industries where cash flow is of particular importance.¹⁷¹

170 Section 47, Arbitration Act 1996 (England)

171 U.K. Departmental Advisory Committee on Arbitration Law, Report on Arbitration Bill of February 1996, paragraph 203

25.19 Under the legislative solution in England, it seems that the parties could also, if they so wish, confer a more limited power in relation to provisional awards¹⁷².

25.20 There is no comparable provision in the Model Law. We are of the view that such a power can cover those useful matters like payment of money on account, disposition and/or delivery up of property and interim payment of wasted costs of the arbitration. We are of the view that there is no need for including a power similar to section 39 of the English Arbitration Act 1996; the parties could agree to adopt such a power by, for example, agreeing to a suitable set of arbitration rules. In any case, we note that we have separately recommended a power to make an order for interim payment on account of the costs of the arbitration under the general provisions about costs relating to unmeritorious interlocutory applications.

Powers of Arbitral Tribunal On Party's Default

172 Russell on Arbitration (21st Ed), paragraph 6-019

25.21 The present laws in Hong Kong deals with the default of a party in complying interlocutory orders of the arbitral tribunal by the mandatory provisions in section 23 of the Arbitration Ordinance (Cap. 341) and the arbitral tribunal may apply to the Court for powers to, *inter alia*, act *ex parte*, dismiss a claim peremptorily or make a default award¹⁷³. This is considered an effective power for countering delay tactics¹⁷⁴ and is intended to strengthen the powers of the arbitral tribunal to deal with party defaults without risking its removal or the setting aside of its arbitral award on the ground of misconduct. However, in practice, this section is little used as it requires an application to the court.

25.22 Specific optional powers are available to the arbitral tribunal in case of default of a party in England¹⁷⁵.

173 See Robert Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary* (1997), pp.259 & *Sumitomo Heavy Industries Ltd. v. Oil and Natural Gas Commission* [1994] 1 Lloyd's Rep 45.

174 Hong Kong Law Reform Commission's *Report on Commercial Arbitration* (1981) paragraph 10.10

175 Section 41, Arbitration Act 1996 (England)

These powers appear as opt-in provisions and are not available without agreement. They fall into 3 categories. First, there is a power to dismiss the claim for want of prosecution; second, there is a power to proceed *ex parte* to continue the proceedings; third, there are powers exercisable by the arbitral tribunal where a failure to comply with an order it has made. Under this scheme in England, there are also remedies available from the court in the event of failure of a party to comply with the order of the arbitral tribunal¹⁷⁶.

25.23 Further, if a defaulting party cannot satisfy the arbitral tribunal that there are justifiable reasons for the failure to comply the order, i.e. showing sufficient cause, then the tribunal may make a preemptory order¹⁷⁷. That preemptory order must stipulate the time for compliance and must be to the same effect as the order which has been disobeyed.

176 Section 42, Arbitration Act 1996 (England)

177 Section 41(5), Arbitration Act 1996 (England)

25.24 Under this scheme, if a claimant party fails to comply with a peremptory order of the arbitral tribunal to provide security for costs, the arbitral tribunal may make an arbitral award dismissing his claim, and if a party fails to comply with any other kind of peremptory order the arbitral tribunal may direct that the party in default shall not be entitled to rely on any allegation or material which is the subject-matter of the order; the arbitral tribunal may draw adverse inferences from the act of non-compliance; it may make an arbitral award on the basis of the materials provided; it may also make an order as to the payment of costs¹⁷⁸. The arbitral tribunal may even apply to the court for a peremptory order requiring a party to comply with a peremptory order made by the arbitral tribunal.¹⁷⁹

25.25 Procedures set out in such a scheme is familiar from the practice of the courts in making “unless” orders,

178 Section 41(7), Arbitration Act 1996 (England)

179 Section 42, Arbitration Act 1996 (England)

so-called as they set out the consequences to the party concerned unless it complies within a specified time.

Powers under such a scheme is wider than those available under Article 25(a). Indeed, the Model Law does not provide for what is to happen in the event of procedural defaults, other than in respect of statements of claim and defence, non-appearance or the non-production of evidence.

25.26 There is no positive indication given as to how the arbitral tribunal should exercise its discretion on whether or not to make such an order. It is suggested that, apart from observing its underlying duties, the arbitral tribunal should generally be cautious about any such given power for fear of causing injustice in the long term¹⁸⁰.

25.27 We **recommend** that the existing section 23C of the Arbitration Ordinance (Cap.341) should be replaced by

180 B. Harris, R. Planterose & J. Tecks, *The Arbitration Act 1996: A Commentary* (1996 Ed.) Blackwell Science, pp.163-164

a new section, extending the power of the arbitral tribunal in case of party defaults along the approach in section 41(5)&(7) of the English Arbitration Act 1996. This will effectively extend the default powers of the arbitral tribunal under Article 25 of the Model Law.

Enforceability of Interim Measures of Protection

25.28 Interim measures are, according to Article 17, granted by *order* of the arbitral tribunal. An order of the arbitral tribunal is as such not enforceable. In practice, an order is usually voluntarily complied with by the party concerned as it may be afraid that non-compliance with the order may have an adverse impact on the ultimate decision of the arbitral tribunal.

Circumstances fostering the effectiveness of such measures are, for example, that the party does not wish to displease the arbitral tribunal, whom the party wishes to convince that its position is justified; that the arbitral tribunal may draw adverse inferences from a refusal to comply with the measure; that the arbitral tribunal may

proceed to make an arbitral award on the basis of materials before it; and that the arbitral tribunal might hold the recalcitrant party liable for costs or damages arising from its non-compliance with the measure and include that liability in the arbitral award.

25.29 Also, the need for efficient court-assisted enforceability of interim measures is not the same for all types of interim measures that may be issued by the arbitral tribunal¹⁸¹.

25.30 It may be noted that, during the preparation of the Model Law, a 1982 draft version of Article 17 does contain the following wording that is missing from the final text of the Model Law:

*"If enforcement of any such interim measure becomes necessary, the arbitral tribunal may request [a competent court] [the court specified in article V] to render executory assistance."*¹⁸²

181 United Nations Document A/CN.9/WG.II/WP.108, paragraphs 78-80

182 United Nations Document A/CN.9/WG.II/WP.40, Article XIV

25.31 At that time, the UNCITRAL Working Group on Arbitration, after deliberation, decided to delete that sentence since it dealt in an incomplete manner with a question of national procedural law and court competence and was unlikely to be accepted by many jurisdictions. Yet, the deletion of the sentence should not be read as precluding executory assistance in those cases where a jurisdiction was prepared to render such assistance under its procedural law.¹⁸³

25.32 In recent years, practitioners have argued in various forums that the question of enforceability of interim measures of protection is an issue to be considered by legislators. The need for enforceability is usually supported by arguments such as that the final award may be of little value to the successful party if actions of the recalcitrant party have rendered the outcome of the proceedings largely useless; or that preventable loss

183 United Nations Document A/CN.9/245, paragraph 72

or damage should not be allowed to happen.¹⁸⁴ In such cases, it is argued that an interim order may in practice be as important as the arbitral award.

25.33 There are suggestions that arbitration in need of enforceable interim measures should resort to the judicial process. Yet, this may pose practical difficulties. For instance, obtaining a court measure may be a lengthy process, in particular, because the court may require arguments on the issue or because the court decision is open to appeal. Also, it has been pointed out that international arbitrations are often held in places where neither party has assets or commercial operations. Thus, a court in another jurisdiction may have to be approached with a request to consider and issue a measure.

25.34 It should be noted that there are also special features of interim measures of protection that distinguish them from arbitral awards and call for a degree of flexibility in

184 United Nations Document A/CN.9/WG.II/WP.108, paragraphs 73-80

enforcement. These include the temporary nature of interim measures and the resulting possibility that the measures might have to be modified or terminated; the need to adapt the interim measures to the enforcement procedures of the enforcing court; the possibility that the measure would affect the interests of third parties; and the possibility that the measure might have been issued *ex parte* and that the requirement that both parties be heard would have to be complied with after the issuance of the interim measure.

25.35 In respect of the enforceability of interim measures issued by an arbitral tribunal, a variety of legislative approaches have been taken. These vary from equating the order to an arbitral award to conferring court assistance to make the order enforceable.

25.36 The most common approach is to extend Article 35 and

Article 36 to the enforcement of interim measures¹⁸⁵.

This is applied, for example, in the arbitration laws of

185 There is considerable support for the view that this approach is too rigid and did not take into account the special features of interim measures of protection, which distinguish them from arbitral awards. Yet, the advantage of this approach may be that it takes as a basis a regime that has been tested in practice and backed up by existing international jurisprudence.

Australia¹⁸⁶, Bermuda¹⁸⁷, New Zealand¹⁸⁸ and Scotland¹⁸⁹.

The provincial arbitration laws in Canada contain different provisions: in Ontario¹⁹⁰, it is provided that an order under Article 17 is treated as if it were an arbitral award; in Quebec¹⁹¹, it provides that interim measures before or during arbitration proceedings can only be made by the court. In Germany¹⁹², provisions are added to Article 17 to enable the court to, upon request, enforce, repeal or amend the order of the arbitral tribunal and to provide for compensation for damage in case the interim measure ordered by the arbitral tribunal is proved to have been unjustified from the outset.

25.37 In considering the elements of a regime of enforcement of such measures, the UNCITRAL Working Group on

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- 186 Section 23, Australia International Arbitration Amendment Act 1989
187 Section 26, Bermuda International Conciliation and Arbitration Act 1993
188 Article 17(2) of the First Schedule, New Zealand Arbitration Act 1996
189 Article 17(2) of Schedule 7 to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990
- 190 Section 9, International Commercial Arbitration Law 1990
191 Article 940.4, Code of Civil Procedure of Quebec 1986
192 Section 1041, German Code of Civil Procedure 1998, Tenth Book

Arbitration broadly agreed that such a regime should be based on the assumption that the court should not repeat the decision-making process in the arbitral tribunal that led to the issuance of the measure; in particular, the court should not review the factual conclusions of the arbitral tribunal or substance of the measure.¹⁹³ Thus, the discretion of the court should be limited to procedural aspects of the enforcement of the measure.

25.38 At the time of this report, there are two proposed drafts¹⁹⁴ of the model legislative provisions on the enforcement of interim measures of protection tabled for discussion at UNCITRAL. One of the proposed drafts is prepared on the basis of Article 35 and Article 36 but is adapted to the specific features of interim measures as opposed to final awards¹⁹⁵; the other is

193 United Nations Document A/CN.9/WG.II/WP.108/Add.1, paragraphs 60-79

194 United Nations Document A/CN.9/WG.II/WP.110, paragraphs 55 –57; United Nations Document A/CN.9/485, paragraph 79

195 This is Variant 1 as set out in United Nations Document A/CN.9/WG.II/WP.110 which provides as follows:

based on the idea that the court being endowed with a discretionary power as to whether or not to grant enforcement is more in line with the provisional nature of interim measures¹⁹⁶.

25.39 In Bermuda, the arbitration laws adopt the most common approach by extending Article 35 and Article 36 to the enforcement of interim measures¹⁹⁷. Such an extension only applies if the parties have agreed thereon.

“An interim measure of protection referred to in article 17, irrespective of the country in which it was made, shall be enforced, upon application by the interested party to the competent court of this State, unless
Application for a corresponding interim measure has already been made to a court;
If the arbitration agreement referred to in article 7 was not valid;
The party against whom the interim measure is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case [with respect to the interim measure];
The interim measure has been set aside or amended by the arbitral tribunal;
The court or an arbitral tribunal in this State could not have ordered the type of interim measure that has been presented for enforcement [or that the interim measure is manifestly disproportionate];
or
The recognition or enforcement of the interim measure would be contrary to the public policy of this State.”

See also United Nations Document A/CN.9/WG.II/WP.119.

196 This is Variant 2 as set out in United Nations Document A/CN.9/WG.II/WP.110 which provides as follows:

“The court may, upon application by the interested party, order enforcement of an interim measure of protection referred to in article 17, irrespective of the country in which it was made.”

See also United Nations Document A/CN.9/WG.II/WP.119.

197 Section 26, International Conciliation and Arbitration Act 1993

Article 35 and Article 36 are made directly applicable to orders under Article 17, including orders to provide security in connection with such measures.

25.40 We note however that this legislative solution is not the one among the three that is being developed and considered by the UNCITRAL Working Group¹⁹⁸.

Some of the reasons supporting this approach are that:-

- a) this is based on an established and tested regime;
- b) this is backed up by existing international jurisprudence in relation to Article 35 and Article 36;
- c) it being the most common approach adopted, this is further backed up by jurisprudence in such jurisdictions which had adopted this approach¹⁹⁹.

25.41 However, there are equally other reasons against the extension of Article 35 and Article 36 in such a manner.

These include that, even when the interim measure has

198 United Nations Document A/CN.9/468, paragraphs 70-77

199 United Nations Document A/CN.9/468, paragraph 72

been issued by the arbitral tribunal in the State where it is to be enforced, the court may have to deal with measures that are not known or are unusual in that State and that in those cases the court may be reticent to enforce such measures whether they are issued in the State of the enforcing court or outside the State.

Examples that may be problematic are *ex parte* measures, peremptory interim measures and interim measures ordered without reasons stated for assessment of the implicated public policy considerations.

25.42 Also, we note that it could be doubtful whether adopting section 26 of the Bermuda International Conciliation and Arbitration Act 1993 in this way would be effective to enable orders granting interim measures of protection by an arbitral tribunal in Hong Kong to be enforced outside Hong Kong. We are of the view that one way of achieving such a result is to provide in the new Ordinance that an arbitral tribunal, when granting interim measures of protection, may on the application

of any of the parties, issue an award in doing so. In such cases, it would then be up to the courts outside Hong Kong to decide whether such an award is to be recognized for the purposes of enforcement either under the New York Convention or under some other provisions of its domestic law.

25.43 Thus, we **recommend** that such a provision along the lines described in paragraph 22.42 should be included in the new Ordinance.

F. **Chapter V - Conduct of Arbitral Proceedings**

26. **Article 18 - Equal Treatment of Parties**

26.1 Article 18²⁰⁰ of the Model Law sets out the two fundamental principles: equal treatment of the parties and opportunity to present one's case. The former means that no party shall be given an advantage over the other; the latter establishes a 'right to fair trial'²⁰¹.

This article is a mandatory provision that limits both the powers of the parties and the arbitral tribunal to determine the arbitral procedure.

26.2 At present, section 2GA(1)(a)²⁰² of the Arbitration Ordinance (Cap.341), which applies to both domestic and international arbitrations, sets out the general responsibilities of the arbitral tribunal and derives in principle from Article 18 of the Model Law although it

200 This originates from Article 15(1) of the UNCITRAL Arbitration Rules 1976. See also United Nations Document A/CN.9/WG.II/WP.37 Article 19, n.34.

201 The 'full opportunity of presenting one's case' does not, however, entitle a party to obstruct the proceedings by dilatory tactics. See United Nations Document A/CN.9/264 Article 19, paragraph 8.

202 This is modeled closely on section 33 of the English Arbitration Act 1996.

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refers to a “reasonable” opportunity rather than a “full” opportunity. It is a mandatory provision.

26.3 The Law Reform Commission of Hong Kong recommended in its report that Article 18 of the Model Law should be adopted unchanged in international cases²⁰³. Most jurisdictions adopt the text verbatim or with just minor variations²⁰⁴.

26.4 However, we accept that Article 18 of the Model Law may it difficult for an arbitrator to prevent a party from calling unnecessary factual witnesses, an excessive number of expert witnesses or making repetitive submissions as such arbitrator may be accused of partiality and/or his award may be set aside under Article 36(1)(a)(ii). It is important, as confirmed by the submission from HKCA and the experience of Committee members who sit as arbitrators, that the arbitrator should have the power to control

203 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

204 See, for example, Australia, Bermuda, India, Kenya, Nigeria, Scotland and Singapore.

unreasonable conduct by a party. We therefore recommend that Article 18 of the Model Law be amended by substituting “reasonable” for “full”. This will make Article 18 consistent with Section 2GA(1)(a) of the Arbitration Ordinance.

27. Article 19 - Determination of Rules of Procedure

27.1 Article 19(1) of the Model Law upholds the autonomy²⁰⁵ of the parties to determine the procedure to be followed. This is yet subject to those mandatory provisions that are aimed at ensuring fairness²⁰⁶.

27.2 Article 19(2) regulates the default procedure to be followed in case of failure by the parties to agree on the procedural rules and the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate. This is also subject to those mandatory provisions that are aimed at ensuring fairness. It

205 This is recognised as being probably one of the most important principle on which the Model Law should be based. See United Nations Document A/CN.9/207, paragraph 7.

206 These include Articles 18, 23(1), 24(2)&(3), 27, 30(2), 31(1),(3)&(4), 32, 33(1)(a), (2), (4)&(5) of the Model Law.

further deals with the power of the arbitral tribunal to determine the admissibility, relevance, materiality and weight of evidence, thereby recognising a discretion upon the arbitral tribunal that is not affected by the choice of law applicable to the substance of the dispute²⁰⁷.

27.3 The Law Reform Commission of Hong Kong recommended in its report that Article 19 of the Model Law should be adopted unchanged in international cases²⁰⁸. Most jurisdictions adopt the text verbatim or with just minor variations²⁰⁹.

27.4 Section 34 of the English Arbitration Act 1996 follows the principles in Article 19 of the Model Law and provides a non-exhaustive checklist that is considered to be helpful both to arbitrating parties and the arbitrators.

27.5 In our opinion, Article 19 of the Model Law is, in itself, sufficient to vest the necessary procedural authority upon the arbitral tribunal and, as such, there is no need

207 United Nations Document A/40/17, paragraph 174

208 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

209 See, for example, Australia, Bermuda, India, Scotland and Singapore.

for a detailed list of procedural matters along the lines of section 34 of the English Arbitration Act 1996. We recommend that it is to be adopted unchanged and applied to all cases. In effecting this, we note that it is essential to ensure that provisions in the new Ordinance dealing with procedural and interlocutory matters will not conflict with other relevant provisions, namely Articles 17, 19, 23, 24 and 27 of the Model Law.

28. Article 20 - Place of Arbitration

28.1 Article 20 of the Model Law deals with the place of the arbitration²¹⁰. It sets out²¹¹ the freedom and autonomy of the parties to choose the place of arbitration and provides, further 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.

28.2 The place of arbitration is of legal relevance in material aspects²¹². It determines the procedural law applicable

210 The Model Law does not contain a definition of the 'place of arbitration'.

211 See Article 20(1) of the Model Law.

212 United Nations Document A/CN.9/264 Article 20, paragraph 2

to the arbitration; it affects the court from which assistance may be sought; and it regulates the court to which application for the setting aside of the arbitral award may be made.

28.3 Article 20(2) of the Model Law recognises that there may be good reasons for holding hearings or conducting the arbitral proceedings elsewhere than the place of arbitration and empowers the arbitral tribunal to meet at any place it considers appropriate.

28.4 The Law Reform Commission of Hong Kong recommended in its report that Article 20 of the Model Law should be adopted unchanged in international cases²¹³. Most jurisdictions adopt the text verbatim or with just minor variations²¹⁴. We recommend that it is to be adopted unchanged and applied to all cases.

29. Article 21 - Commencement of Arbitral Proceedings

213 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

214 See, for example, Australia, Bermuda, India, New Zealand, Nigeria, Scotland and Singapore.

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29.1 Article 21²¹⁵ of the Model Law provides a rule which is relevant to time limitation in arbitration by stating when an arbitration has begun. The relevant time is the date on which a request for the particular dispute to be referred to arbitration is received by the respondent²¹⁶. The request must identify the particular dispute and make clear that arbitration is resorted to and not, for example, indicate merely the intention of later initiating arbitral proceedings²¹⁷.

29.2 The Law Reform Commission of Hong Kong recommended in its report that Article 21 of the Model Law should be adopted unchanged in international cases²¹⁸. Most jurisdictions adopt the text verbatim or with just minor variations²¹⁹.

29.3 In this context, we note that section 34 of the Limitation Ordinance (Cap.347) applies to arbitration in Hong Kong. Subsection (2) thereof is related to the

215 This is modeled on Article 3 of the UNCITRAL Arbitration Rules 1976.

216 See Article 3 as to what constitutes ‘receipt’ and when a communication is received or deemed to be received.

217 United Nations Document A/CN.9/264, Article 21, paragraph 2

218 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

Scott v. Avery situation. In this regard, we **recommend** that, save that the reference to imperial enactment in subsection (1) thereof should be deleted, section 34 subsections (1), (2) and (5) should appear in the new Ordinance instead so as to make it more user-friendly. We are of the view that subsection (3) thereof is not compatible with Article 21 of the Model Law and, as such, should not be retained and that, similarly, subsection (6) thereof should not be retained. As to subsection (4) which deals with the service of notice as to commencement of arbitration, we note that there is a conflict between this subsection and Article 21 of the Model Law and are of the view that specific provision as to mode of service of process should be included in the new Ordinance. We **recommend** that subsection (4) should be repealed and be replaced by a provision based on section 76 of the English Arbitration Act 1996.

29.4 In the circumstances, save that Article 21 should be amended to provide for service in manner provided for

219 See, for example, Australia, Bermuda, India, New Zealand, Nigeria, Scotland and Singapore.

by section 76 of the English Arbitration Act 1996, we are of the view that Article 21 of the Model Law has otherwise adequately expressed the requirements for commencing an arbitration. We therefore **recommend** that it is to be adopted with the above addition and applied to all cases.

30. Article 22 - Language

30.1 The issue of language can be of great practical importance in an arbitration, particularly if parties speaking different languages are involved²²⁰. Article 20 allows the parties to determine the language or languages of the arbitral proceedings and, in default of such an agreement, enables the arbitral tribunal to make a decision on this. Apart from the principles in Article 18 of the Model Law, there is no guidance provided as to how the arbitral tribunal should determine the most suitable language²²¹. It seems that one point to be

220 It, on the one hand, influences the way a party presents its case and, on the other hand, directly affects the translation and interpretation that may constitute vital costs factors.

221 See, however, United Nations Document A/CN.9/264, Article 22, paragraph 4 as an illustration.

taken account of should be the language used by the arbitral tribunal.

30.2 We are of the view that the parties should be free to choose the language of the arbitration and that, in the absence of an agreement, the arbitral tribunal shall decide the language of the arbitration having regard to all relevant factors including the following:-

- a) the language of the contract which is the subject matter of the arbitration;
- b) the language predominantly used in the negotiations leading to the contract including the language of any tender documents;
- c) the language predominately used by the parties during the course of the contract;
- d) the language predominately used by the parties in written communications during the course of the contract;
- e) the language predominately used by experts employed by either party to supervise or manage the contract;
- f) the cost of translation of documents;

g) the language skills of the members of the arbitral tribunal.

30.3 The Law Reform Commission of Hong Kong recommended in its report that Article 22 of the Model Law should be adopted unchanged in international cases²²². Most jurisdictions adopt the text verbatim or with just minor variations²²³.

30.4 In the circumstances, we **recommend** that it is to be adopted unchanged and applied to all cases.

31. Article 23 - Statement of Claim and Defence

31.1 Article 23²²⁴ of the Model Law states the rules to be applied when the parties submit their statements of claim and defence²²⁵. Article 23(1) of the Model Law lays down basic principles of arbitral procedure in

222 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

223 See, for example, Australia, Bermuda, India, Kenya, New Zealand, Nigeria, Scotland and Singapore.

224 This is modeled upon Articles 18 to 20 of the UNCITRAL Arbitration Rules 1976.

225 The statement of claim sets out the factual assertions relied upon to support the case which the party starting the arbitration arises; the statement of defence describes the point of view of the other party and the factual assertions supporting its case.

respect of the statements of claim and defence which are subject to the agreement of the parties²²⁶; Article 23(2) of the Model Law leaves it to the discretion of the arbitral tribunal to determine whether a party may amend or supplement his statement of claim or defence²²⁷.

31.2 The Law Reform Commission of Hong Kong recommended in its report that Article 23 of the Model Law should be adopted unchanged in international cases²²⁸. Most jurisdictions adopt the text verbatim or with just minor variations²²⁹. We **recommend** that it is to be adopted unchanged and applied to all cases.

32. Article 24 - Hearings and Written Proceedings

226 United Nations Documents A/40/17, paragraph 196 and A/CN.9/264 Article 23, paragraph 3

227 This is subject to some basic criteria, such as the extent and reason for delay or prejudice to the other party. See United Nations Document A/CN.9/264 Article 23, paragraph 4.

228 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

229 See, for example, Australia, Bermuda, India, Kenya, New Zealand, Nigeria, Scotland and Singapore.

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32.1 Article 24²³⁰ of the Model Law gives, subject to any agreement of the parties, the arbitral tribunal the power²³¹ to determine, if, when and where oral hearings are to be held and further provides a number of additional rules covering issues related to the conduct of the proceedings.

32.2 By requiring sufficient advance notice of any oral hearing²³², it implements the fundamental principle of being able to present one's case as set out in Article 18 of the Model Law. Procedural fairness is further ensured by requiring²³³ all information furnished to the arbitral tribunal by one party to be communicated to the other side and any expert report or evidentiary

230 It is based on Articles 15, 25 and 27 of the UNCITRAL Arbitration Rules 1976.

231 The exercise of this power is restricted in the sense that, if a party request oral hearings, the arbitral tribunal must hold such hearings. See also United Nations Document A/CN.9/264 Article 24, paragraph 4.

232 Article 24(2) of the Model Law

233 Article 24(3) of the Model Law

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document on which the arbitral tribunal intends to rely in its award to be communicated to all parties²³⁴.

32.3 The Law Reform Commission of Hong Kong recommended in its report that Article 24 of the Model Law should be adopted unchanged in international cases²³⁵. Most jurisdictions adopt the text verbatim or with just minor variations²³⁶. We **recommend** that it is to be adopted unchanged and applied to all cases.

33. Article 25 - Default of Party

33.1 Article 25 of the Model Law gives the arbitral tribunal certain powers in the event of default of a party, in particular the default of the respondent. Such powers are subject to any agreement of the parties.

33.2 Where the claimant fails to communicate his statement of claim after initiating the arbitral proceedings, the

234 It has been noted that not all materials used by the arbitral tribunal to reach its decision have to be communicated to the parties. These, for example, include those materials commonly used by arbitral tribunals when reaching decisions. See United Nations Documents A/40/17, paragraph 211 and A/CN.9/SR.324, paragraph 11.

235 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

236 See, for example, Australia, Bermuda, India, Scotland and Singapore.

arbitral proceedings shall be terminated²³⁷; where the respondent fails to communicate its statement of defence, the arbitral tribunal may proceed with the arbitral proceedings and make an award²³⁸; where a party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal is empowered to proceed with the arbitral proceedings and make an award²³⁹. All of these must be read together with the procedural safeguards set out in Article 24 of the Model Law.

33.3 The Law Reform Commission of Hong Kong recommended in its report that Article 25 of the Model Law should be adopted unchanged in international cases²⁴⁰. Most jurisdictions adopt the text verbatim or with just minor variations²⁴¹. We **recommend** that it is to be adopted unchanged and applied to all cases.

34. Article 26 - Expert Appointed by Arbitral Tribunal

237 Article 25(a) of the Model Law

238 Article 25(b) of the Model Law

239 Article 25(c) of the Model Law.

240 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

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- 34.1 Article 26²⁴² of the Model Law deals with experts appointed by the arbitral tribunal, not expert witnesses that a party may put forward. It empowers, subject to any agreement of the parties, the arbitral tribunal to appoint an expert to report to it on specific issues and contains stipulations in respect of the appointment of the expert²⁴³, the duties of the parties towards the expert²⁴⁴ and the duty of the expert to participate in a hearing on request²⁴⁵.
- 34.2 There are two specific safeguards in Article 26 of the Model Law: first, its application may be excluded by agreement of the parties; second, a party may request the expert to participate in a hearing and to be questioned by the parties²⁴⁶.
- 34.3 The Law Reform Commission of Hong Kong recommended in its report that Article 26 of the Model Law should be adopted unchanged in international

241 See, for example, Australia, Bermuda, Egypt, India, Nigeria, Scotland and Singapore.

242 It is modeled upon Article 27 of the UNCITRAL Arbitration Rules 1976.

243 Article 26(1)(a) of the Model Law

244 Article 26(1)(b) of the Model Law

245 Article 26(2) of the Model Law

246 See also Articles 18 and 24(3) of the Model Law.

cases²⁴⁷. Most jurisdictions adopt the text verbatim or with just minor variations²⁴⁸. A similar provision can be found in section 37 of the English Arbitration Act 1996.

34.4 We **recommend** that it is to be adopted unchanged and applied to all cases.

35. Article 27 - Court Assistance in Taking Evidence

Adoption of Article 27

35.1 An arbitral tribunal lacks the power at common law to enforce procedural decisions as regards the taking of evidence. This may range from the calling of a witness to requiring the production of a document. Article 27²⁴⁹ of the Model Law sets out who may request court assistance and deals with the execution of the request by the designated court. It is complemented by the

247 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

248 See, for example, Australia, Bermuda, New Zealand, Nigeria, Scotland and Singapore.

249 Article 27 of the Model Law does not have extra-territorial effect and applies only when the place of arbitration is within the territory of the adopting State. See United Nations Document A/40/17, paragraphs 223-225 and Holtzmann & Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) Kluwer Deventer, p.738.

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relevant provisions of sections 2GB, 2GC and 2GG of the current Ordinance.

35.2 Section 44 of the English Arbitration Act 1996 gives powers to the court in respect of evidence intended to be used when the arbitral tribunal cannot act or act effectively and stipulates that, except in cases of urgency with regard to the preservation of assets or evidence, the court can only act when parties agree or the arbitral tribunal permits. A provision to similar effect is Article 27(2) Schedule 1 of the New Zealand Arbitration Act 1996.

35.3 The Law Reform Commission of Hong Kong recommended in its report that Article 26 of the Model Law should be adopted unchanged in international cases²⁵⁰. Most jurisdictions adopt the text verbatim or with just minor variations or additions²⁵¹.

35.4 We are of the view that this matter has been adequately dealt with in Article 27 of the Model Law and we

250 The Law Reform Commission of Hong Kong Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986) Paragraph 4.9

251 See, for example, Australia, Kenya and Singapore.

therefore **recommend** that it is to be adopted unchanged and applied to all cases.

Determination of Preliminary Point of Law

35.5 At present, section 23A of the Arbitration Ordinance (Cap.341), which applies to domestic arbitrations, allows the determination of preliminary point of law by the court, if with the agreement of all the parties or of the arbitral tribunal. Further safeguards against abuse of the use of this section is provided by stipulating that:-

35.6 The court shall not assume jurisdiction unless it is satisfied that the determination of the point of law may produce substantial savings in costs to the parties and the point of law is one which leave to appeal would likely be given under section 23(3)(b)²⁵² of the Arbitration Ordinance (Cap.341); and there is no appeal unless with leave of the court or the appeal court²⁵³.

252 See *In re P.T. Dover Chemical Com. and Lee Chang Yung Chemical Industry Corporation* [1990] 2 HKLR 257 and *Kwan Lee Construction Co. Ltd. v. Elevator Parts Engineering Co. Ltd.* [1997] 1 HKC 97.

253 Section 23A(2)&(3) of the Arbitration Ordinance (Cap.341)

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- 35.7 In the English Arbitration Act 1996, section 45 provides for the determination of a preliminary point of law subject to a number of conditions.
- 35.8 We do not consider that such a provision is compatible with the general purpose of the Model Law that court intervention should be minimised. A lay arbitrator can appoint a legal assessor to deal with questions of law.
- 35.9 In our opinion, a provision based on section 45 of the English Arbitration Act 1996 enabling the determination by the court of a preliminary point of law should be retained but only as an opt-in provision and we so recommend.

G. Chapter VI – Making of the Award and Termination of Proceedings

36. Article 28 – Rules Applicable to the Substance of the Dispute

36.1 It is an advantage of arbitration to have the option of choosing the substantive rules of law applicable in the case of a dispute. This question of which law or rules the arbitral tribunal shall apply is dealt with by Article 28. It provides guidance on this important point that meets the needs of international arbitration²⁵⁴. As in the case of procedural matters, it grants full autonomy on the parties to determine this issue and, failing agreement, entrusts the arbitral tribunal with that determination.

36.2 Article 28(1) requires the arbitral tribunal to decide the dispute in accordance with such rules of law as are chosen by the parties. By adopting the term "rules of law", it allows parties to designate portions of legal systems from different jurisdictions to govern different

254 United Nations Document A/CN.9/264, Article 28, paragraphs 1-2

aspects of their relationships and it is understood that parties may agree in their contracts to apply rules such as those in international conventions not yet in force.²⁵⁵ Failing such a designation, as set out in Article 28(2), the powers of the arbitral tribunal are more limited in that it must then apply the system of national law determined with reference to the conflict of law rules considered applicable²⁵⁶.

36.3 Under Article 28(3), the arbitral tribunal may, if with the express authorization of the parties, decide *ex aequo et bono* or as *amiable compositeur*. The precise meaning of the terms "*ex aequo et bono*" or "*amiable compositeur*" is unclear²⁵⁷. The arbitral tribunal is yet subject to restrictions in doing so. First, as set out in Article 28(4), it shall take into account the uses of the trade applicable to the transaction; second, it may not infringe

255 United Nations Document A/40/17, paragraphs 232-234

256 Article 28(2) is followed in section 46(3) of the English Arbitration Act 1996.

257 Holtzmann H M & Neuhaus J E, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989), Kluwer Deventer, p.770

the fundamental rights of the parties in respect of party equality and opportunity to present one's case; and, third, its decision may not violates public policy.²⁵⁸

36.4 The Law Commission of Hong Kong in its report recommended²⁵⁹ that Article 28 is to be adopted unchanged in international arbitration. Other jurisdictions²⁶⁰ have also adopted these terms in the Model Law as they are. We **recommend** that Article 28 is to be adopted unchanged and applies in all cases.

37. Article 29 – Decision-making by a Panel of Arbitrators

Adoption of Article 29

37.1 Article 29²⁶¹ deals with the decision-making process when the arbitral tribunal consists of more than one arbitrator, while leaving out other aspects relating to the

258 Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (2000) Sweet & Maxwell, paragraph 6-016

259 The Law Reform Commission of Hong Kong: Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986), Paragraph 4.9

260 For example Australia, Bermuda, British Columbia, Scotland and Zimbabwe.

261 The whole provision is modeled on Article 31 of the UNCITRAL Arbitration Rules 1976.

mechanics of how a decision is arrived at. It is not a mandatory provision but it applies to any decision of the arbitral tribunal. The majority principle adopted in Article 29, as compared with requiring unanimity, is considered to be more conducive to reaching the necessary decisions and the final settlement of the dispute.²⁶²

37.2 As such, it provides for majority decisions by multiple member tribunals, where unanimity cannot be achieved, unless the parties otherwise agree.

37.3 The Law Commission of Hong Kong in its report recommended²⁶³ that Article 29 is be adopted unchanged in international arbitration. Most other jurisdictions²⁶⁴ have also adopted Article 29 verbatim or only with minor deviations. We **recommend** that

262 United Nations Document A/CN.9/264, Article 29, paragraph 2

263 The Law Reform Commission of Hong Kong: Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986), Paragraph 4.9

264 For example Australia, Bermuda, Canada, India, Kenya, Malta, New Zealand, Nigeria, Singapore, Scotland and Zimbabwe.

Article 29 is to be adopted unchanged and applies in all cases.

- 37.4 As Article 29 only makes provision for a majority vote, the situation where such a majority vote cannot be reached is left unresolved. These situations include: when an even-numbered arbitral tribunal is equally divided on the issues; and when odd numbers of arbitrators or the default rule in Article 10(2) applies, all arbitrators are of a different opinion (e.g. on matters of quantum).
- 37.5 We are of the view that this latter situation does not arise as a problem in practice and, in case the arbitral tribunal consists of two arbitrators, an umpire may help breaking this deadlock²⁶⁵.

265 In a number of institutional rules, such as Article 26.3 of the London Court of International Arbitration Rules, Article 25(1) of the International Chamber of Commerce Court of Arbitration Rules and Article 61 of the World Intellectual Property Organisation Arbitration Rules, the presiding arbitrator is authorised to cast the decisive vote in such a case.

Decisions by "Truncated" Arbitral Tribunals

- 37.6 Arbitrators, having agreed to act, have a right and a duty to participate in the proceedings and the deliberations of the arbitral tribunal and to sign the arbitral award. Sometimes, it happens that an arbitrator, in particular a party-appointed arbitrator, resigns or refuses to participate in the proceedings or the deliberations of the arbitral tribunal. These situations are usually addressed in national laws and arbitration rules by providing that the arbitrator who fails to act is to be replaced by a substitute arbitrator²⁶⁶. Regardless of the reason for resignation or inaction, an arbitrator's failure to act and the appointment of a substitute arbitrator is likely to cause delay, costs and inconvenience. Cases are particularly problematic where such resignation or refusal to act occurs at a late stage of the proceedings.
- 37.7 As a rule, there is little difficulty caused where the refusal to cooperate occurs after the arbitral tribunal has

266 See, for example, Article 14 of the UNCITRAL Arbitration Rules.

concluded its deliberations on the substance of the arbitral award and the failure to cooperate is limited to the arbitrator's refusal to sign the arbitral award. The solution that is generally accepted in laws and arbitration rules is that the signature of the majority of all members of the arbitral tribunal suffices, provided that the reason for any omitted signature is stated²⁶⁷.

37.8 In recent years, there are lively discussions in respect of whether, when an arbitrator resigns late in the proceedings, the remaining majority arbitrators are permitted to complete the proceedings and render an arbitral award.²⁶⁸ Such decisions are often referred to as "truncated" tribunal decisions.²⁶⁹

267 See, for example, Article 31(1) of the UNCITRAL Model Law and Article 32(4) of the UNCITRAL Arbitration Rules.

268 For example, the Xth International Arbitration Congress, Stockholm, 28-31 May 1990; Proceedings of the Congress: ICCA Congress Series No.5, International Council for Commercial arbitration, I; Preventing delay and disruption of arbitration, II; Effective proceedings in construction cases, General Editor Albert Jan van den Berg, p.26

269 See, generally, United Nations Document A/CN.9/460, paragraphs 80-91.

37.9 In response to these, some arbitral institutions have adopted rules that determine the conditions under which a truncated arbitral tribunal may validly proceed and make an arbitral award. For example, one solution is for arbitral institutions to adopt rules setting out the guideline factors for the truncated arbitral tribunal to follow if it so desires to render the arbitral award²⁷⁰. In the arbitration laws of some jurisdictions, the above approach is included; in others, the national laws restrict the possibility of an arbitral award from the "truncated" tribunal only to cases where the arbitrator refuses to take part in the vote of a decision and, sometimes, require that notice of such a refusal is to be given to the parties.

37.10 In respect of bad-faith withdrawals of arbitrators from the arbitral proceedings, there is at least one potential detrimental consequence that requires consideration: the

270 See, for example, American Arbitration Association International Arbitration Rules (1991), Article 11 and World Intellectual Property Organization Arbitration Rules (1994), Article 32.

extent to which the parties should be able by agreement to put beyond doubt the validity of an arbitral award issued by a truncated tribunal.

37.11 There are provisions in the Model Law that deal with truncated arbitral proceedings. Article 14 enables the mandate of the arbitrator to be terminated if he fails to act without undue delay. The legislative solution in the English Arbitration Act 1996 is similar. There is stated general principle that the object of arbitration is to obtain the fair resolution of disputes by an impartial arbitral tribunal without unnecessary delay or expenses²⁷¹; there is express provision that the arbitral tribunal shall adopt procedures avoiding unnecessary delay or expenses²⁷²; and, a party may apply to the Court to remove an arbitrator if, *inter alia*, he fails to use all reasonable dispatch in conducting the arbitral proceedings or making an arbitral award²⁷³.

271 Section 1, Arbitration Act 1996 (England)

272 Section 33, Arbitration Act 1996 (England)

273 Section 24, Arbitration Act 1996 (England)

37.12 We are of the view that the further proceeding of the arbitral proceedings in case of a "truncated" arbitral tribunal situation is already laid down in Article 14 and Article 15 of the Model Law. We note that an alternative to this is to confer specific power on the "truncated" arbitral tribunal to proceed in such situation. Yet, we consider that a statutory power in such a situation may place an unduly heavy burden on arbitral tribunals to judge whether one of their members is acting unreasonably. Thus, it will be better to proceed under the Model Law and simply get a substitute arbitrator appointed.

37.13 We thus **recommend** that the matter of decisions by "truncated" arbitral tribunals is more appropriate to be dealt with by arbitration rules rather than a statutory provision.

37.14 However, having said that, we are of the view that it would still be beneficial to arbitral tribunals in such circumstances to have some guidance on the further

proceedings of the arbitration. For this purpose, we note that useful guidance can be drawn from Article 11 of the American Arbitration Association International Arbitration Rules²⁷⁴, which requires the consideration of the stage of the arbitration, the reason (if any) of the non-participation of the concerned arbitrator and such other matters as the rest of the arbitral tribunal considers appropriate in the circumstances of the case.

38. Article 30 – Settlement

Adoption of Article 30

274 This is amended and is effective from 01.11.2001. Article 11 thereof provides that:-

“If an arbitrator on a three-person tribunal fails to participate in the arbitration for reasons other than those identified in Article 10, the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision, ruling or award, notwithstanding the failure of the third arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such nonparticipation, and such other matters as they consider appropriate in the circumstances of the case. In the event that the two other arbitrators determine not to continue the arbitration without the participation of the third arbitrator, the administrator on proof satisfactory to it shall declare the office vacant, and a substitute arbitrator shall be appointed pursuant to the provisions of Article 6, unless the parties otherwise agreed.”

- 38.1 Article 30 deals with the not infrequent situation that the parties themselves settle the dispute during, and often induced, by the arbitral proceedings. The provision itself is modeled on Article 34(1) of the UNCITRAL Arbitration Rules²⁷⁵.
- 38.2 A first condition for Article 30(1) to come into application, thereby rendering the recording of the settlement as an arbitral award on agreed terms, is a request by the parties. The second condition for enabling the arbitral award so recorded is that the arbitral tribunal does not object to that request. The arbitral tribunal should have this discretion as a recorded award on agreed terms may include something it considers inappropriate²⁷⁶.
- 38.3 Equating an arbitral award on agreed terms with an arbitral award rendered by the arbitral tribunal is relevant to future enforcement and recognition

275 United Nations Document A/CN.9/WG.II/WP.38, Article 33, n.28.

276 United Nations Document A/CN.9/SR.328, paragraph 6

procedures and to possible setting-aside procedures.

Article 30(2) of the Model Law deals with the issue of the arbitral award on agreed terms, requiring that such an arbitral award must comply with the form requirements of Article 31 and providing that it has the same status and effect as any other award rendered on the merits of the case.

38.4 The Law Commission of Hong Kong in its report recommended²⁷⁷ that Article 30 is to be adopted unchanged in international arbitration. A similar non-mandatory provision has been included in the English Arbitration Act 1996²⁷⁸. We **recommend** that Article 30 is to be adopted unchanged and applies in all cases. We are of the view that, in case an award on agreed terms had been procured by fraud, it should be capable of being set aside under Article 34(2)(b)(ii) in that it is in conflict with the public policy.

277 The Law Reform Commission of Hong Kong: Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986), Paragraph 4.9

278 Section 51, Arbitration Act 1996 (England)

Settlement Agreement in Writing

38.5 The settlement in arbitration proceedings must be distinguished from the settlement in conciliation proceedings. Indeed, settlement may often be reached before the appointment of the arbitral tribunal.

38.6 The present laws in Hong Kong gives the quality of an arbitral award to the settlement agreement in writing of parties to an arbitration agreement and enables it to be enforced, with leave of the court, in the same manner as a judgement²⁷⁹.

38.7 Yet, as such, this provides a straightforward approach, avoiding the need for instituting arbitral proceedings to convert the settlement agreements into an arbitral award²⁸⁰.

279 Section 2C, Arbitration Ordinance (Cap.341)

280 This is provided for, for example, in Article 34(1) of the UNCITRAL Arbitration Rules. However, there is a possible obstacle that once a settlement has been reached and the dispute has thereby been eliminated, it is not possible to institute arbitral proceedings.

38.8 We are of the view that section 2C of the Arbitration Ordinance (Cap. 341), in itself, is a positive provision and we **recommend** that it should be retained.

Provisions for Conciliation

38.9 The term "conciliation" includes mediation, according to the present laws in Hong Kong²⁸¹. It is, however, generally agreed that the term "conciliation" should be understood as a broad notion encompassing various types of proceedings in which a person or a panel of persons is invited by the parties in dispute to assist them in an independent and impartial manner to reach an amicable settlement of that dispute²⁸².

38.10 Conciliation in the above sense is being increasingly used for settling commercial disputes. In practice, such conciliation may be referred to by other expressions, among which "mediation" or terms of similar meaning are frequently used.

281 Section 2, Arbitration Ordinance (Cap.341)

282 United Nations Document A/CN.9/468, paragraphs 19

38.11 It was agreed that section 2A(1) of the Arbitration Ordinance (Cap.341) was useful and should be retained. Section 2A(2) and section 2B of the Arbitration Ordinance (Cap. 341) embody the Chinese approach to the relationship between conciliation and arbitration²⁸³, for both domestic and international arbitration. Section 2A(1) of the Arbitration Ordinance (Cap.341) is based on section 10(2) of the English Arbitration Act 1950 but there are no provisions equivalent to section 2A(2) and section 2B of the Arbitration Ordinance (Cap.341) in the English Arbitration Act 1996. There are similar provisions in the Singapore International Arbitration Act 1995²⁸⁴ .

38.12 As observed in the UNCITRAL Notes on Organizing Arbitral Proceedings, attitudes differ as to whether it is appropriate for the tribunal to bring up the possibility

283 See Robert Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary*, pp.47-48 & *The Law Reform Commission of Hong Kong: Report on Commercial Arbitration (Topic 1)* (1981), paragraph 10.25-10.31.

284 Section 16 & section 17, *Singapore International Arbitration Act 1995* (Cap.143A)

of settlement. There are strong views against retaining these sections during our discussion²⁸⁵.

However, the majority view was that section 2A(2) and section 2B should not be repealed as they can also encourage the use of alternative dispute resolution mechanism like Med-Arb in Hong Kong. Whilst these sections were seldom put into used, in the absence of any genuine mischief, there was not sufficient reason for repealing them. Section 2B of the Arbitration Ordinance must, in any event, be adopted by the parties.

38.13 We **recommend** section 2A and 2B should be retained.

39. Article 31 – Form and Content of Award

Adoption of Article 31

39.1 Article 31 deals with the form and content requirements, which are mostly mandatory, of an arbitral award.

285 The Hong Kong Mediation Council was against retaining section 2A(2) and section 2B of the Arbitration Ordinance (Cap.341) and was of the view that these sections were alien to the way in which mediation was generally conducted in Hong Kong.

39.2 Article 31(1) is modeled upon Article 32(4) of the UNCITRAL Arbitration Rules of 1976²⁸⁶ and requires that an arbitral award must be made in writing and signed by the arbitrators. Further, in line with the "majority approach" in Article 29, it provides that the failure by a minority to sign the arbitral award will not invalidate it, if the reason for the omission is stated.

39.3 Article 31(2) requires the reasons upon which the arbitral award is based to be stated but there are two exceptions. First, it allows the parties to waive this requirement by agreeing otherwise; second, it does not apply in the case of an arbitral award on agreed terms under Article 30. It should be noted that the practice of stating reasons is more common in certain jurisdictions than in others and it varies from one type of arbitration system to another. If an arbitral award lacks the statement of reasons, without there being an appropriate party agreement or an arbitral award on

286 United Nations Document A/CN.9/216, paragraph 78

agreed terms, the award can be set aside according to Article 34(2)(a)(iv) on the ground that the arbitral procedure was not in accordance with Article 31(2).

- 39.4 We note that, under the present laws in Hong Kong concerning domestic arbitrations, the power²⁸⁷ of the court to require reasons to be given are limited to those cases where the court is considering an appeal of the arbitral award on a point of law and where the court considers that the arbitral award does not or does not sufficiently set out the reasons for the arbitral award²⁸⁸. We are of the view that, although the duty under Article 31(2) on the arbitral tribunal to give reasons can be flouted by it, to allow redress against it would undermine the overall approach of the Model Law that parties should abide by the choice they had made unless the arbitral tribunal had committed a serious injustice.

287 See section 23(5)&(6), Arbitration Ordinance (Cap.341)

288 See also section 23(6) of the Arbitration Ordinance (Cap.341).

39.5 The date and the place at which the arbitral award is made are of considerable importance in various respects, in particular, as far as procedural consequences are concerned, in the context of recognition and enforcement and any possible recourse against the arbitral award. Article 31(3) requires that an arbitral award shall state the date and place of the arbitration as determined by Article 20(1) and states that the arbitral award shall be deemed²⁸⁹ to have been made at the place stated in it. This helps avoiding situations like that in *Hiscox v. Outthwaite* (No.1)²⁹⁰.

39.6 Article 31(4) requires a signed copy of the arbitral award to be delivered to each party. Receipt of the arbitral award is relevant for the purposes of Article 33(1)&(3), Article 34(3) and Article 35(2).

289 This presumption should be regarded as irrebuttable. See United Nations Document A/CN.9/245, paragraph 115.

290 [1991] 3 ALL ER 641 (HL)

39.7 The Law Commission of Hong Kong in its report recommended²⁹¹ that Article 31 is to be adopted unchanged in international arbitration. Most other jurisdictions²⁹² have also adopted Article 31 verbatim or only with minor deviations. A comparison of the additions made by the adopting jurisdictions to Article 31 shows that the most popular additions are provisions that costs and interest be stated in the arbitral award. We **recommend** that Article 31 is to be adopted unchanged and applies in all cases.

Provision for Awards on Different Issues

39.8 An arbitral award may dispose of only some of the issues in the arbitration, leaving others to be determined in a subsequent award or awards. In some jurisdictions and in some sets of arbitration rules, these are referred to as "partial awards". In England, section 14 of the

291 The Law Reform Commission of Hong Kong: Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986), Paragraph 4.9

292 For example, Australia, Bermuda, Ireland, Malta, Nigeria, Scotland, Singapore and United States

Arbitration Act 1950 used the term "interim award" and gives an express power to grant interim awards in the absence of agreement to the contrary. This is replaced by section 47 of the English Arbitration Act 1996 which provides that, subject to agreement otherwise by the parties, the arbitral tribunal may make more than one award at different times on different aspects of the matters to be determined. The term "interim award" is avoided as it is thought to be confusing in suggesting a temporary decision²⁹³.

39.9 Section 47 of the English Arbitration Act 1996 is drafted not so as to alter the existing powers of the arbitral tribunal to make several awards, but rather to emphasize how these powers should be exercised in appropriate cases.²⁹⁴ Subject to its general duty, the arbitral tribunal has a complete discretion in this

293 See paragraph 233 of the Report of Departmental Advisory Committee on Arbitration Laws.

294 See paragraph 231 of the Report of Departmental Advisory Committee on Arbitration Laws and also *Minerals and Metals Trading Corp'n of India Ltd. v. Encounter Bay Shipping Co. Ltd. (The "Samos Glory")* (No. 2) [1988] 1 Lloyd's Rep. 51.

matter²⁹⁵. Yet, guidelines²⁹⁶ have been given which indicate that such a power should be used in large, complex cases where commercially, if not legally, determinative issues may be selected for early decision.

39.10 There is no comparable provision in the Model Law, although it is clearly contemplated by Article 32(1) that there may be more than one award. Article 32(1) of the UNCITRAL Arbitration Rules of 1976 expressly provides that, in addition to making a final award, the arbitral tribunal is entitled to make interim, interlocutory or partial awards.

39.11 We **recommend** that a provision similar to section 47(1) of the English Arbitration Act 1996 should be adopted and that the use of the terms "partial final award" and "final award" should be used and defined to avoid possible confusion.

295 *Exmar BV v. National Iranian Tanker Co. (The "Trade Fortitude")* [1992] 1 Lloyd's Rep. 169

296 See paragraphs 226-233 of the Report of Departmental Advisory Committee on Arbitration Laws.

Effect of Award

39.12 By the non-mandatory provision of section 58²⁹⁷ of the English Arbitration Act 1996, the law as to the final and binding effect of an arbitral award made pursuant to an arbitration agreement as between the parties and those claiming through or under them is restated. This implies that neither party may subsequently re-open an issue decided in an arbitral award by bring further arbitral or court proceedings against the other party.

39.13 At present, section 18²⁹⁸ of the Arbitration Ordinance (Cap.341) which applies to domestic arbitration provides that, unless a contrary intention is expressed in the arbitration agreement, it shall be deemed that the arbitral award to be made shall be final and binding on the parties and the persons claiming under them. Article 35 of the Model Law also provides that an arbitral award shall be recognized as binding.

297 This section derives from section 16 of the English Arbitration Act 1950.

298 The wording of this section is the same as section 16 of the English Arbitration Act 1950.

39.14 We consider that it is not necessary to retain the provision in section 18 of the Arbitration Ordinance (Cap.341) which deems, subject to contrary intention of the parties in the arbitration agreement, that the arbitral award shall be final and binding. We are of the view that a provision along the approach of section 58 of the English Arbitration Act 1996 goes merely to restate the existing law²⁹⁹. We **recommend** that such a provision is not necessary.

39.15 Since the publication of the Committee's draft Report the Committee has been informed of the provisions of Section 44 of the Singapore Arbitration Act 2001. This was enacted to nullify a decision of the Singapore Court of Appeal that, by reference to the documents of UNCITRAL and its working group, an award was final only when all the issues in the arbitration have been dealt with. This can have the practical effect of

²⁹⁹ See para.262 of the UK Departmental Advisory Committee on Arbitration Law, Report on The Arbitration Bill (Feb. 1996).

allowing an arbitrator to change an award after publication to the parties which is most undesirable.

We recommend a provision similar to Section 44 be included in the new Ordinance and that it should apply to all cases.

39.16 Section 15(2) of the Arbitration Ordinance allows the Court to extend the time for making an award where the arbitration agreement limits such time. We recommend that a similar provision be included in the new Ordinance and that it should apply in all cases.

40. Article 32 – Termination of Proceedings

40.1 Article 32 sets out the cases in which the arbitral proceedings are considered to be terminated. Three purposes of this are identified³⁰⁰. First, it is to provide guidance in the final part of the arbitral proceedings, which is the last, but not unimportant, phase of the proceedings; second, it purports to regulate the

300 United Nations Document A/CN.9/264, Article 32

termination of the mandate of the arbitral tribunal;

third, it is to provide certainty as to the point of time at

which the proceedings are terminated.

40.2 The Law Commission of Hong Kong in its report

recommended³⁰¹ that Article 32 is be adopted

unchanged in international arbitration. Most other

jurisdictions³⁰² have also adopted Article 32 verbatim or

only with minor deviations. We **recommend** that

Article 32 is to be adopted unchanged and applies in all

cases.

41. Article 33 – Correction and Interpretation of Awards;

Additional Award

41.1 Article 33 is modeled on Articles 35-37 of the

UNCITRAL Arbitration Rules of 1976³⁰³. According

301 The Law Reform Commission of Hong Kong: Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986), Paragraph 4.9

302 An example in which addition is made to Article 32 is Article 32(4) in the First Schedule of the New Zealand Arbitration Act 1996, providing that the death of a party does not terminate the arbitral proceedings.

303 United Nations Document A/CN.9/216, paragraph 28

to Article 32(2), the mandate of the arbitral tribunal ends with the termination of the arbitral proceedings, which is achieved by *inter alia* a final arbitral award.

Article 33 extends the mandate of the arbitral tribunal beyond the making of the arbitral award and regulates the correction, interpretation and addition to an arbitral award by the arbitral tribunal after the arbitral award is made. This is to help preventing continuing disputes or even setting aside proceedings.

- 41.2 Its application covers 3 possible scenarios. First, this is to correct any error in computation or any clerical, typographical or similar error, either acting at request of a party or on its own initiative; second, this is to give an interpretation to the arbitral award; third, this is to make an additional award as to any claim presented in the arbitral proceedings but omitted from the arbitral award, irrespective of whether any further hearing or taking of evidence is required for that purpose³⁰⁴.

304 United Nations Document A/CN.9/264, Article 33, paragraph 1

41.3 In respect of correction of errors, Article 33(1)(a) is mandatory in application. The parties do have the option of agreeing a different time limit for requesting a correction. Article 33(2) enables the arbitral tribunal to correct errors independent from a request of the party.

41.4 Article 33(1)(b) permits the interpretation of specific points or parts of the arbitral award by the arbitral tribunal, but only if the parties agree.

41.5 Article 33(3), which is subject to agreement of the parties to the contrary, seems to be a logical solution in light of the fact that, the arbitral tribunal not having entirely fulfilled its mandate, the parties can still set aside either the whole (if the points cannot be separated) or the relevant part of the arbitral award³⁰⁵.

41.6 Also, time limits³⁰⁶ are imposed; however, the arbitral tribunal may extend the time limits if considered

305 United Nations Document A/CN.9/WG.II/WP.50, paragraph 22

306 The standard time-limits is 30-days from the receipt of the arbitral award for the party to make a request in each case but, in the case of additional award, the time-limit is 60-days for the arbitral tribunal to make the additional award.

necessary by the arbitral tribunal. Thus, the powers given to the arbitral tribunal under Article 33 are subject to safeguards and they compensate for the more limited role of remittal under Article 34(4).

41.7 The Law Commission of Hong Kong in its report recommended³⁰⁷ that Article 33 is be adopted unchanged in international arbitration. Similar provisions are included in section 57 of the English Arbitration Act 1996. We **recommend** that Article 33 is to be adopted and applied in all cases.

41.8 We however note that it should be made clear that Article 33 also applies to other changes to the arbitral award that are necessitated by and consequential upon the correction of any such errors.

42. Interest

42.1 The Model Law does not provide for awards of interest by the arbitral tribunal on amounts awarded by it. This

307 The Law Reform Commission of Hong Kong: Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986), Paragraph 4.9

may possibly be due to the reasons that, in many jurisdictions, interest is regarded as a matter of substantive law or that it would have been difficult to achieve consensus on what the Model Law should provide on the subject of interest because of the divergent approach on interest in national systems³⁰⁸.

42.2 Such provisions are added by a number of national arbitration laws, especially by common law jurisdictions, and the legislative solutions vary greatly in scope, particularly as regards the level of detail and the issues included. It is also widely accepted that the purpose of interest is not to punish the paying party but to compensate the other party for being kept out of the use of his money³⁰⁹ and, as such, the arbitral tribunal must exercise its discretion by applying the relevant principles in terms of Article 28.

308 Butler DW, "*The Recovery of Interest in Arbitration Proceedings: an Agenda for Lawmakers*" (1995) 6 Stel LR 291, 308

309 See, for example, Bernstein R, Tackaberry J & Marriott A L *Handbook of Arbitration Practice* (3 Ed.) Sweet & Maxwell, p.234.

- 42.3 The Singapore Sub-Committee on Review of Arbitration Laws states³¹⁰ that, based on the principle of party autonomy, commercial rates of interest should apply equally to pre-award and post-award sums and, as such, the determination of appropriate rates from time to time should be left to the arbitral tribunal³¹¹.
- 42.4 The Australia International Arbitration Act contains two optional provisions in respect of interest, providing that interest, excluding interest on interest (i.e. compound interest), up to the making of the arbitral award may be awarded at such reasonable rate as the arbitral tribunal determines and that the arbitral tribunal may award interest from the day of the making of the arbitral award or such other day as the tribunal specifies at the rate it deems reasonable.³¹²

310 Report of Law Reform Committee Sub-Committee on Review of Arbitration Laws, paragraph 41

311 See also section 20, Singapore International Arbitration Act 1995 (Cap.143A).

312 See section 25 and section 26 of the Australia International Arbitration Act 1989.

42.5 In England, and Hong Kong as well, in the absence of a statutory provision, there is no power to award interest as general damages in arbitration³¹³. There is a power to award interest under section 49 of the English Arbitration Act 1996. This section, which expressly provides that the parties are at liberty to agree what powers the arbitral tribunal should have regarding the arbitral award of interest, deals with the power of the arbitral tribunal up to the date of the arbitral award and beyond that date. While preserving the power in section 19A of the Arbitration Act 1950, it also confers power on the arbitral tribunal to award compound interest³¹⁴.

313 See *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.* [1893] AC 429 and *Air A Richmond, Interest* (1988) 54 JCI Arb 3, 167.

314 In the House of Lords decision in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] 2 WLR 961, it is recently confirmed that the courts do not have the power to award compound interest except under their equitable jurisdiction in very limited circumstances. In *A-G v Shimizu Corp. (formerly known as Shimizu Construction Co. Ltd.) (No. 2)* [1997] 1 HKC 453, the Court of Appeal held that the arbitral tribunal had no jurisdiction to award compound interest on common law obligations.

42.6 In Hong Kong, the matter of interest is dealt with by section 2GH³¹⁵ and section 2GI³¹⁶ of the Arbitration Ordinance (Cap.341). These sections are substantially similar to those in the English Arbitration Act 1996. It also confers statutory power on the arbitral tribunal to award compound interest.

42.7 We consider that the legislative solution should only state the very general principles in respect of award of interest and that more detailed guidance should be a matter left for the Courts or rules issued by arbitration institutions. We are of the view that this matter had been sufficiently dealt with in the present version of section 2GH and section 2GI of the Arbitration Ordinance (Cap.341). We **recommend** that section 2GH and section 2GI are to be retained without amendment.

315 Section 2GH of the Arbitration Ordinance (Cap. 341) applies subject to any agreement of the parties to the contrary.

316 Section 2GI of the Arbitration Ordinance (Cap.341) applies except when the arbitral award provides otherwise.

42.8 However, we note that section 49(5) of the English Arbitration Act 1996 provides that the arbitral tribunal has a power to award interest on amounts that are the subject matter of a declaratory award. We are of the view that this can be of relevance in (eg) rent review arbitration and, as such, we **recommend** that a provision similar to that should be included in the new Ordinance.

43. Costs

Overview

43.1 The Model Law is silent on the award of costs by the arbitral tribunal³¹⁷. During the drafting of the Model Law, there was wide support for the view that questions concerning fees and costs of arbitration were not appropriate matters to be dealt with in the text of the Model Law. It was preferred that this issue should be

317 This can be contrasted with Articles 38-41 of the UNCITRAL Arbitration Rules.

left to the individual States to regulate their enactment of the Model.³¹⁸

43.2 In Hong Kong, the issues of costs are at present regulated in section 2GJ, section 2GK and section 2GL of the Arbitration Ordinance (Cap.341).

43.3 We are of the view that the term “assessment” should be used in preference to “taxation”. As such, we **recommend** that the term “assessment” should be used in the new Ordinance wherever appropriate.

Assessment of Costs of Arbitral Proceedings

43.4 In England, a traditional distinction is drawn between “costs of the reference” and “costs of the arbitral award”, the former being in broad terms the costs incurred by the parties in putting their respective cases in the arbitration and the latter being the administration costs of the reference, including the fees of the arbitral tribunal. This distinction is rendered unnecessary by

318 United Nations Document A/CN.9/216, paragraph 99

the term “costs of the arbitration” used and defined in section 59(1) of the English Arbitration Act 1996.

43.5 In Hong Kong, the term “costs of arbitration proceedings” is used. Section 2GJ³¹⁹ of the Arbitration Ordinance (Cap.341) deals with the costs of arbitration proceedings in both international and domestic arbitration by the arbitral tribunal. This section replaces section 20 of the Arbitration Ordinance (Cap.341) by re-enacting the provisions in simpler terms and with little substantive amendment³²⁰. The phrase “costs of the relevant arbitration proceedings (including the fees and expenses of arbitral tribunal)” is to the same effect as the costs of the reference and the costs of the arbitral award. The basis on which such costs may be awarded and taxed are on a party and party

319 Its application is subject to section 2GK and section 21 of the Arbitration Ordinance (Cap.341) which respectively deals with the liability to pay fees of arbitral tribunal and taxation of fees of arbitrators or umpires.

320 A comparison between section 2GJ and the repealed section 20 is set out in Robert Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary (1997 Supplement)*, Butterworths, pp.87-90.

basis³²¹, on a common fund basis³²² or on an indemnity basis³²³, though the arbitral tribunal is not obliged to adopt these bases of taxation.

43.6 The Law Commission of Hong Kong in its report is of the view that³²⁴ these matters in respect of costs depends on the rules chosen by the parties and the discretion of the arbitral tribunal and, as such, they are best left on that basis.

43.7 Furthermore, in respect of assessment of costs of the arbitral proceedings, other than its fees or expenses, by the arbitral tribunal we are of the view that the arbitral tribunal should be obliged to assess such costs 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.

321 See Rules of High Court (Cap.4A), Order 62 rule 28(2).

322 See Rules of High Court (Cap.4A), Order 62 rule 28(4).

323 See Rules of High Court (Cap.4A), Order 62 rule 28(4A).

324 The Law Reform Commission of Hong Kong: Report on the adoption of the UNCITRAL Model Law of Arbitration (Topic 17) (1986), Paragraph 4.49

43.8 The power of the arbitral tribunal to appoint an assessor is given by section 37 of the English Arbitration Act 1996 and Article 26 of the Model Law.

43.9 In these situations, we consider that there should be express guidance as to how such costs should be assessed (i.e. the arbitral tribunal shall only award reasonable costs having regard to all the circumstances including the amount in dispute and the complexity of the case), with the emphasis that the arbitral tribunal is not obliged to follow the costs scales or approaches in court. In addition, we are of the view that it should be made clear in the new Ordinance that the arbitral tribunal can award costs incurred in the preparation of the case prior to the service of the notice of arbitration. Mr. Wyn Hughes suggested that the UK Civil Procedure Rules about assessment of costs should be adopted in the new Ordinance. After careful consideration we have decided to concentrate on the concept of reasonableness alone as the tribunal may well have to

assess costs of foreign lawyers as well as Hong Kong lawyers and parties to Hong Kong arbitrations and their advisers are unlikely to be familiar with the UK Civil Procedure Rules.

43.10 Only if the parties agree should the tribunal be able to direct in its award that a party's recoverable costs of the reference be assessed by the Court. In such a case, there should be provision for the tribunal to make a costs award based on the Court's assessment in view of the relative ease with which awards can be enforced as compared with Court judgments.

43.11 We **recommend** that section 2GJ and section 21 of the Arbitration Ordinance (Cap. 341) should be reviewed to effect the above.

43.12 Save and except the above, we are of the view that the matter of costs has been sufficiently dealt with in the 1996 amendment to the Arbitration Ordinance. We **recommend** that, subject to paragraphs 43.7 to 43.11

above, section 2GJ in its current form is otherwise satisfactory and it should be retained accordingly.

Power on Arbitral Tribunal to Review Award of Costs

43.13 There are situations when the arbitral tribunal would not be in a position to make an appropriate order with regard to the issues of costs as it could not be aware of relevant matters. An example of this sort of situation may be when the payment in to court under Order 73 of the Rules of High Court is accepted³²⁵.

43.14 We are of the view that the arbitral tribunal should have a residual power to review its arbitral award of costs in such circumstances if any matter which had not been revealed in advance prevented it from making an appropriate order on costs. We **recommend** that such a power should be expressly conferred on the arbitral tribunal and its mechanism would be modeled upon Article 33 to amend the arbitral award as to costs already made.

325 See Rule of High Court (Cap.4A), Order 73, rr.13(4)&17.

Assessment of Costs for Interlocutory Hearings

43.15 It is generally agreed that there is a power on the arbitral tribunal in Hong Kong to order the costs of any interlocutory hearings held to be paid forthwith, having heard the parties.

43.16 We are of the view that, coupled with the powers under Article 17, it would be important to enable the arbitral tribunal to assess, apart from to order, the immediate payment of costs of an unmeritorious interlocutory application leading to wasted costs in appropriate circumstances.

43.17 We, hence, **recommend** that such a power for assessing and ordering the forthwith payment of interlocutory costs should be made explicit in the new Ordinance.

Liability to Pay Arbitral Tribunal Fees

43.18 Section 2GK of the Arbitration Ordinance (Cap.341) is similar in effect to the comparable provisions³²⁶ in the English Arbitration Act 1996.

326 Section 28(1)&(4)-(6), Arbitration Act 1996 (England)

43.19 It is mandatory in application and expresses the principle that the parties are jointly and severally liable for the reasonable fees of the arbitral tribunal. As such, it has to operate in collaboration with section 21 of the Arbitration Ordinance (Cap. 341)³²⁷.

43.20 We are of the view that this matter has been sufficiently dealt with in the 1996 amendment to the Arbitration Ordinance. We **recommend** that, subject to paragraph 8.3 in the above, section 2GK in its current form is satisfactory and should be retained unchanged.

Power of Arbitral Tribunal to Limit Recoverable Costs

43.21 Section 2GL of the Arbitration Ordinance (Cap.341) in its existing form deals with the power of arbitral tribunal to limit the amount of recoverable costs in both domestic and international arbitration. This enables the arbitral tribunal to impose an upper limit on the recoverable costs. The parties may of course still incur

327 Robert Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary* (1997 Supplement), Butterworths, p.92

costs beyond the limit imposed, but the knowledge that they will not recover such costs from the other parties may deter them from doing so.

43.22 This section is similar to section 65 of the English Arbitration Act 1996 and it applies subject to contrary agreement of the parties.

43.23 The rationale is twofold: to promote cost effective arbitration by discouraging excessive expenditure on the costs of the reference, and to prevent a wealthy or more powerful party from intimidating the other through threats of insolvency or the prospect of a prohibitively high bill of costs³²⁸.

43.24 There is no comparable provision in the Model Law and, obviously, this power must be exercised by the arbitral tribunal judicially and fairly.

43.25 Section 2GL of the Arbitration Ordinance (Cap.341) is different from section 65 of the English Arbitration Act

328 Robert Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary* (1997 Supplement), Butterworths, pp.95-96

1996 in that the arbitral tribunal is not required to make such a capping order sufficiently in advance of the costs to which it applies are being incurred.

43.26 We are of the view that it cannot have been the intention of the legislature that the arbitral tribunal should have the power to limit costs already incurred and that such a power will in any case be unreasonable. Further, it is not clear whether the arbitral tribunal may exercise such a power on its own initiative or whether such a power applies only to the parties' costs.

43.27 We **recommend** that this section is to be retained but should be amended to:

- a) make it in line with section 65(2) of the English Arbitration Act 1996;
- b) make it clear that such a power can be exercised on the own initiative of the arbitral tribunal; and
- c) make it clear that such a power should apply only to the parties' own costs.

Costs of Unqualified Persons

43.28 In Hong Kong, section 2G of the Arbitration Ordinance (Cap.341), which was previously section 20(2A), of the Arbitration Ordinance (Cap.341) was added to implement a recommendation of the Law Reform Commission of Hong Kong Report on Commercial Arbitration (1981) in paragraph 10.23. There is no equivalent in the English Arbitration Acts 1950-1979 and 1996. It provides that the costs of unqualified person³²⁹ for acting in relation to arbitration proceedings may be recovered as directed by the arbitral award and that the arbitral tribunal or the Court of First Instance may tax these costs. This is similar to the common law position in England & Wales³³⁰.

43.29 We consider that there is an anomaly where an unqualified person wishing to argue the taxation of his

329 Non-lawyers or foreign lawyers

330 See *Piper Double Glazing Ltd. v. David Caulfield (t/a DC Contracts) (1992) Co. Ltd.* [1994] 1 WLR 777.

bills of costs before the Taxing Master in the Court of First Instance.

43.30 We are of the view that section 2G of the Arbitration Ordinance (Cap.341) is a positive provision in that it facilitates the recovery of the costs of such unqualified persons in arbitration and that, as such, those unqualified persons should be entitled to appear in the taxation proceedings in addition to qualified lawyers and law costs draftsmen. It is noted that to achieve this would require a change to the Rules of the High Court (Cap.4A)³³¹. We **recommend** that such a change to the Rules of High Court (Cap.4A) should be made and that section 2G of the Arbitration Ordinance (Cap. 341) should be retained unchanged.

Costs of Consolidated Arbitrations

43.31 We are of the view that the arbitral tribunal should have the power to make costs orders in respect of arbitration proceedings that are consolidated and, in respect of

331 Rules of High Court (Cap.4A), Order 5, rule 6(1)

arbitrations being heard concurrently, the arbitral tribunal should only have the power to make order as to costs in each arbitration, but not the power to order a party to reference to pay the costs of a party to another reference. We are also of the view that the Court of First Instance should have power to make consequential directions as to the payments of costs in such cases when making orders under section 6B of the Arbitration Ordinance (Cap.341).

43.32 We **recommend** as mentioned in Section 23 of this Report that section 6B of the Arbitration Ordinance (Cap.341) should be retained, with provisions to effect the above added, as an opt-in provision and should be applicable in all cases.

Assessment of Arbitrator's or Umpires Fees

43.33 Where the recoverable fees and expenses of the arbitral tribunal are disputed, it would be inappropriate for the arbitral tribunal to have the responsibility of deciding the reasonableness of its own fees.

43.34 The existing laws of Hong Kong provide for the assessment of such costs by the Court of First Instance in a case when a party disputes the fees of the arbitral tribunal³³².

43.35 We are of the view that there should be a system for the assessment of the fees of the arbitral tribunal along the approach of section 21 of the Arbitration Ordinance (Cap.341), where its fees are disputed and challenged by a party. Sections 56, 63 and 64 of the English Arbitration Act 1996 can be referred to but the system should be as simple as possible with a strict time limit within which a party has to make a challenge. In case where such an arbitral award has been made, the arbitral tribunal should further be given the power to amend its arbitral award to incorporate the assessment by the court if the court assesses its fees at a different amount. If the award of the arbitral tribunal as to its own fees

332 See section 21 of the Arbitration Ordinance (Cap.341), the wording of which is the same as section 19 of the English Arbitration Act 1950 which has been replaced in substance by section 56 of the English Arbitration Act 1996.

and expenses is challenged, such part of the award should not be enforceable until the challenge is disposed of. An arbitral award incorporating the assessment by the court of such fees would be more easily enforceable than a judgment of the court to the same effect, particular in international cases, in view of wide spread application of the New York Convention in comparison with the limited ability to obtain overseas enforcement of court judgements.

43.36 We note that, since precise information and records would be required for this purpose, the court should be empowered to request an advisory opinion as to the reasonableness of the fees charged by the arbitral tribunal in the particular case. We consider that that person should be one nominated by the Hong Kong International Arbitration Centre with the role as a court-appointed expert, whose fees would be charged to the costs of the assessment. After discussion, we have agreed that such assessment function which is judicial in

nature should be exercised by the court and not by the Hong Kong International Arbitration Centre.

43.37 Furthermore, with the same system set out in the above, we are of the view that the arbitral tribunal should be given a power, at its election, to refer the assessment of its fees and expenses to the court and, then, to make an arbitral award incorporating the result of that assessment.

43.38 We are further of the view that, where the court has assessed the fees of the arbitral tribunal and, if the parties so required, the arbitral tribunal should be given the power to convert such an assessment of the court into an arbitral award in order to facilitate enforcement in the international context.

43.39 We **recommend** that section 2GJ and section 21 of the Arbitration Ordinance (Cap. 341) should be reviewed to effect the above.

Deprivation of Fees of Removed Arbitrator

43.40 Article 13 of the Model Law sets out the procedure for challenging the appointment of an arbitrator on the grounds contained in Article 12 of the Model Law.

43.41 Under Article 14 of the Model Law, there are two alternative grounds on which the mandate of an arbitrator may be terminated --- (a) if the arbitrator becomes *de jure* or *de facto* unable to perform the functions of that office; (b) if the arbitrator for other reasons fails to act without undue delay³³³.

43.42 We are of the view that, where there is a successful application for removal under Article 13 of the Model Law or under the delay provisions of Article 14 of the Model Law, the court should have a discretion to disentitle the removed arbitrator to the whole or part of his fees. We are further of the view that, in respect of the fees of the removed arbitrator, the Court should

333 See *Kailay Engineering Co. (HK) v. Farrance* [1999] 2 HKC for an example.

have a discretion to order repayment of such fees that are already paid.

43.43 We **recommend** that provisions to effect the above should be added.

Right to Withhold Award in case of Non-payment

43.44 We have considered whether there should be an express right on the arbitral tribunal to withhold the arbitral award in case of non-payment of the reasonable or agreed fees.

43.45 The issue, whether arbitral tribunals may refuse to deliver its arbitral award until its fees are paid or payment is secured, is not an unfamiliar problem in the practice of arbitration, international and domestic. Section 21 of the Arbitration Ordinance presents a legislative solution³³⁴ through the intervention of the Court (see paragraphs 8.35 to 8.41 above).

334 A similar legislative solution can be found in Article 4, Second Schedule of the New Zealand Arbitration Act 1996.

43.46 We are of the view that this matter is sufficiently dealt with in section 21 of the Arbitration Ordinance (Cap.341) and further provisions for such a right are not necessary.

Terms as to Costs

43.47 Section 30 of the Arbitration Ordinance (Cap.341) vests in the Court of First Instance and the Court of Appeal with discretion as to the arbitral award of costs in relation to arbitration related appeals and applications. The wording of the section is broadly to the same effect as section 28 of the English Arbitration Act 1950 that has been repealed and not reenacted in the English Arbitration Act 1996.

43.48 We are of the view that section 30 of the Arbitration Ordinance (Cap.341) should be made applicable to all cases. Further, we consider that where arbitration was held in Hong Kong, the court should be empowered to deal with the repayment of the arbitrator's or umpire's

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fees (including the amount to be repaid) in the event of a successful application under Article 34.

43.49 As such, we **recommend** that section 30 of the Arbitration Ordinance (Cap.341) should be retained to effect the above.

H. **Chapter VII - Recourse Against Award**

44. Article 34 - Application for Setting Aside as Exclusive

Recourse Against Arbitral Award

Adoption of Article 34

44.1. It has been said that the issues relating to setting aside or annulment of arbitral awards are amongst the most difficult ones to be settled in the Model Law³³⁵. Such issues are of utmost importance in the delicate balance between the autonomy of arbitration on the one hand and judicial control on the other.

44.2. Article 34 of the Model Law is designed to ameliorate the situation where various national laws provide a variety of actions or remedies available to a party for attacking the award and provides only one means of recourse that is available during a fairly short period of time and for a rather limited numbers of reasons³³⁶.

335 United Nations Document A/CN.9/207, paragraph 107

336 United Nations Document A/CN. 264 Article 34, paragraph 1

44.3. Applying to the court for setting aside the arbitral

award³³⁷ is the only³³⁸ way in which recourse against an arbitral award can be made³³⁹. There is yet no definition for ‘arbitral award’ in the Model Law³⁴⁰. The application for setting aside is to be made in accordance with Articles 34(2)&(3) of the Model Law. Though not expressly stated, a court in such an application is restricted to the reasons for recourse set out in Article 34(2) of the Model Law and may not review the arbitral award on the merits³⁴¹.

337 Article 34(1) of the Model Law

338 The rationale behind this is to oppose the negative implications that the wide variety of national types of recourse has in respect of international arbitration. This also mirrors the clear trend towards further limiting the control function of the courts in the international context. See also United Nations Document A/CN.9/207, paragraph 103.

339 Article 34(1) of the Model Law

340 See United Nations Documents A/CN.9/246, paragraph 192 and A/40/17, paragraph 49.

341 See United Nations Document A/CN.9/246, paragraph 107. This does not affect a party’s right under other provisions of the Model Law over the arbitral award, for example those under Articles 33, 35 & 36 of the Model Law.

44.4. Article 34³⁴² of the Model Law sets out an exclusive and comprehensive list of grounds³⁴³ for recourse against an arbitral award. Such a list of grounds is essentially the same as those in Article 36(1) of the Model Law and is taken from Article V of the New York Convention 1958³⁴⁴.

44.5. By Article 34(3) of the Model Law, an application for setting aside an arbitral award can only be made during the three months following the date on which the party making the application has received the arbitral award³⁴⁵.

44.6. Article 34(4) sets out a procedure similar to the ‘remission’ of the arbitral award that is known in various forms in most common law jurisdictions³⁴⁶. It enables

342 Article 34(2) of the Model Law

343 The existence of those grounds under Article 34(2)(a) of the Model Law has to be established by one of the parties; the grounds under Article 34(2)(b) of the Model Law are to be examined by the court *ex officio*.

344 See, for example, United Nations Document A/CN.9/264 Article 34, paragraphs 2& 6.

345 Such a time limit does not begin to run, if there is an application under Article 33 of the Model Law, until such an application is disposed of.

346 See United Nations Documents A/CN.9/264 Article 34, paragraph 13 and A/40/17, paragraph 305.

the court, at the request of the party and where it is appropriate, to suspend the setting aside proceedings, thereby providing 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.

Appeal on a Point of Law

44.7. At present, section 23³⁴⁷ of the Arbitration Ordinance (Cap.341) deals with the judicial review of arbitral awards in domestic cases. An appeal on a question of law arising out of an arbitral award lies to the Court of First Instance and can be brought with the consent of all the parties or with leave of the court³⁴⁸. There is a further condition to be satisfied before leave of the court can be granted: the determination of the question of law concerned must substantially affect the rights of

347 See also section 1 of the English Arbitration Act 1979.

348 By section 23B of the Arbitration Ordinance (Cap.341), the right to appeal against an arbitral award on a question of law can be excluded if the parties have entered into an agreement in writing to that effect.

one or more of the parties to the arbitration agreement³⁴⁹.

44.8. As with preliminary points of law, such a right of appeal is incompatible with the general purpose of the Model Law. However, when the previous Committee obtained views on its retention, opinion was almost equally divided on the subject. The Government of the Hong Kong SAR wishes to retain the right of appeal and drew attention to the fact that arbitration clauses were incorporated in Bills of Lading and Bills of Sales where consumers were involved.

44.9. Bills of lading disputes would normally be international and attract no right of appeal on a point of law under the present law. Bills of Sale and other consumer cases are protected by section 15 of the Control of Exemption Clauses Ordinance (Cap.71).

349 See section 23(4) of Arbitration Ordinance (Cap.341) and also, *Pioneer Shipping Ltd. v. BTP Tioxide Ltd, The Nema* [1982] AC 724, *Antalios Compania Naviera S.A. v. Salen Rederierna A.B., The Antaios* [1985] AC 191, and *Petraco (Bermuda) Ltd. v. Petromed International Ltd., The Petraco* [1988] 1 WLR 896, and *In re P.T. Dover Chemical Com. and Lee Chung Yung Chemical Industry Corporation* [1990] 2 HKLR 257.

44.10. In the end, having taken into account of the above, we are in favour of retaining such a right of appeal only as an opt-in provision in a schedule to the new Ordinance to enable parties to adopt such right if they wish to do so together with the special “opt-in” arrangements described in Section 6 of this Report. We therefore **recommend** accordingly³⁵⁰ together with a recommendation to the High Court Rules Committee to resolve the conflict described in the footnote.

350 We note that Order 73 Rule (2)(1) RHC is in conflict with Order 73 Rule 3(3) RHC. See *Carl International (HK) Limited v. Ernest Komrowski & Co.* (1996) 2 HKC 490 at 494 (Leonard J.) and *China Link Construction Co. Ltd. v. China Insurance Co. Ltd.* (2002) 1 HKLRD 844 at 847-848 (Ma. J.).

I. **Recognition and Enforcement of Awards**

45. Section 2GG of Arbitration Ordinance

Articles 35 & 36 of the Model Law

45.1. Article 35 of the Model Law deals with the recognition³⁵¹ and enforcement of arbitral awards in an international commercial arbitration; Article 36 of the Model Law sets out the grounds on which an enforcement court can refuse the recognition and enforcement of an arbitral award. The court is obliged to recognize and enforce such an arbitral award unless one of the grounds for refusing recognition and enforcement referred to in Article 36 of the Model Law is established.

45.2. The similarities between the recognition and enforcement provisions of the Model Law and the New

351 While an arbitral award will be enforced only upon application by a party, recognition is an abstract legal concept which can obtain automatically without necessarily being requested by a party. This distinction between recognition and enforcement is of importance for the so-called *res judicata* effect. See United Nations Documents A/CN.9/246 paragraph 146 and A/CN.9/264 Article 35, paragraph 4.

York Convention are apparent and intentional³⁵². By comparing the jurisdictions that adopt Articles 35 & Article 36 of the Model Law, it seems that preference is given to the provisions on the recognition and enforcement in the New York Convention over those of the Model Law³⁵³.

45.3. When the Model Law was applied to international arbitrations in Hong Kong in 1990, it was not thought appropriate to give effect to Articles 35 and 36 of the Model Law as reciprocity was not mentioned. It was considered more appropriate to continue New York Convention enforcement of foreign awards under Part IV of the Arbitration Ordinance as this was based on reciprocity. For domestic awards, section 2H (the predecessor to section 2GG) was to continue to apply.

352 See United Nations Document A/CN.9/246, paragraph 146. While the New York Convention in general only deals with foreign arbitral awards, Article 36 of the Model Law extends its ambit to all arbitral awards rendered in an international commercial arbitration and, more importantly, irrespective of the country in which they were made.

353 Binder *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions* (2000) Sweet & Maxwell, p.217

Enforcement Framework in Hong Kong

45.4. The present section 2GG³⁵⁴ of the Arbitration Ordinance (Cap.341) replaces the earlier version of enforcement provision³⁵⁵. It now applies not only to enforcement of domestic awards but also to foreign awards which are not covered by the New York Convention or Part IIIA (Mainland awards). Thus, section 2GG applies to awards made in Taiwan, Macau and other jurisdictions which have not acceded to the New York Convention. In addition to arbitral awards, it provides for the enforcement of orders and directions of arbitral tribunals, whether they are made in or outside Hong Kong³⁵⁶.

354 This is first introduced by section 8 of the Arbitration (Amendment) Ordinance 1996. It was generally thought that section 2GG of the Arbitration Ordinance (Cap.341) in its 1996 wording should have the same effect as the replaced provision in that it allows the summary enforcement of any arbitral award made either in or outside Hong Kong. Yet, in *Ng Fong Hong Ltd. v. ABC* [1998] 1 HKC 213, Findlay J. held that it applied only to arbitral awards made in Hong Kong. The Arbitration (Amendment) (No.2) Ordinance (No. 38 of 2000) amends the section to make it clear that it is applicable to arbitration both in or outside Hong Kong.

355 Section 2H of the Arbitration Ordinance (Cap.341)

356 The counterpart provisions in England are sections 42& 66 of the English Arbitration Act 1996. The wording is substantially different.

45.5. We recognize that section 2GG of the Arbitration Ordinance (Cap.341) is desirable in supporting the process of arbitration and the arbitral tribunals, however, we consider the effect of such a provision in its present form is far reaching. The Government of the Hong Kong SAR introduced this provision with very little consultation and the Bill which become the Ordinance passed through the Legislative Council on the nod. Further, this provision is contrary to the approach of the New York Convention, which does not contemplate cross-border enforcement of interlocutory orders and directions. Although a provision to enable enforcement of interlocutory orders was considered at the previous Committee's meeting held on 14 June 1999, it was not contemplated that such enforcement would include any orders or directions whatsoever.

45.6. Section 2GG of the Arbitration Ordinance (Cap.341) is an enabling provision which vests power in the court to grant or refuse leave to enforce such arbitral awards,

orders and directions and, as such, the court has a discretion in this regard.

45.7. Also, it is questionable whether this section will apply to an order or direction which does not have an equivalent effect to an order or direction in Hong Kong. Such examples include those US-style orders for discovery and depositions, to which it is unlikely that this section is intended to apply.

45.8. There is further no requirement of reciprocity before enforcement is allowed from an order or direction made outside Hong Kong. This is not in accordance with the usual practice of the court in seeking reciprocity for enforcement in practice.

45.9. Moreover, there are no expressed safeguards or balances that are applicable in cases where the order or direction comes from an arbitral tribunal outside Hong Kong.

45.10. Furthermore, the subject of enforceability of interim measures of protection is still being worked on by the UNCITRAL³⁵⁷.

45.11. In our opinion, guidance as to the types of orders and directions that can be enforced thereunder and the grounds to be demonstrated in support of such enforcement are required. We are of the view that, at most, this section should apply to interim measures of protection and certain evidentiary orders, such as *Mareva* injunctions or *Anton Piller* orders.

45.12. We consider that the courts in Hong Kong should not have such a wide-ranging discretion to enforce, in general, orders or directions of foreign tribunals and that such enforcement should not be permitted in an individual case unless the party seeking enforcement can demonstrate that:-

357 See United Nations Documents A/CN.9/468 paragraphs 60-79, A/CN.9/WG.II/WP.113 & A/CN.9/487 paragraphs 64-87. A draft article on the enforcement of interim measures of protection can be found in United Nations Document A/CN.9/WG.II/WP.119, p.26.

- a) a court in the corresponding place of arbitration will act reciprocally in respect of such orders or directions made in a Hong Kong arbitration; and
- b) that type of order or direction can be made in Hong Kong arbitration.

45.13. Likewise, in keeping with the concept of reciprocity, the court should be given a discretion to refuse enforcement of a foreign award which is not covered by Part IIIA or Part IV if it is not shown that the place in which the award was made extends reciprocal enforcement to Hong Kong awards.

45.14. We therefore recommend that section 2GG of the Arbitration Ordinance (Cap.341) be amended along these lines.

Enforcement of Nullified Arbitral Awards

45.15. Article V(1)(e) of the New York Convention has left over a problem: whether an arbitral award that has been set aside in its place of origin can still be enforced in another jurisdiction under the discretion granted to the

enforcing court. The recent cases³⁵⁸ indicate that this is a matter of practical importance rather than mere academic interest.

45.16. We are of the view that this should be a matter to be dealt with under any proposal and discussion for amending the New York Convention in this regard rather than by the local law.

46. Enforcement of Convention Award

46.1. Hong Kong is a party to the New York Convention, by being part of the People's Republic of China after reunification.

46.2. Part IV of the Arbitration Ordinance contains provisions³⁵⁹ that largely³⁶⁰ replicate those of the New York Convention³⁶¹. It applies to arbitral awards made

358 See *Société Hilmarton v. Société Omnimium de Traitement et de Valorisation*, Cass. Civ.1^{ère}, 1994 Rev. Arb. 327 and *In the Matter of the Arbitration of Certain Controversies Between Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F.Supp.907 (D.D.C. 1996).

359 Sections 41 to 46 of the Arbitration Ordinance (Cap.341)

360 Matters not covered include provisions as to existence, form and validity of arbitration agreement, enforcement of awards.

361 This is reproduced in Schedule 3 of the Arbitration Ordinance (Cap.341).

in pursuance of an arbitration agreement in a State or territory, other than China or any part thereof, which is a party to the New York Convention³⁶².

46.3. We are of the view that Part IV of the Arbitration Ordinance (Cap.341) in its present form should be retained and we recommend accordingly.

47. Enforcement of Mainland Award

47.1. Part IIIA of the Arbitration Ordinance (Cap.341) applies to Mainland awards that are defined as arbitral awards made on the Mainland³⁶³ by a recognized Mainland arbitral authority³⁶⁴ in accordance with the Arbitration Law of the People's Republic of China.

47.2. This Part is introduced³⁶⁵ to give effect to the agreement reached between the Mainland of China and

362 See section 2 of the Arbitration Ordinance (Cap.341).

363 Mainland here means any part of China other than Hong Kong, Macau and Taiwan.

364 A list of such recognized arbitration authority is provided from time to time by the Legislative Affairs Office of the State Council of the People's Republic of China via the Hong Kong and Macau Affairs Office.

365 Arbitration (Amendment) Ordinance (no. 2 of 2000)

the Hong Kong SAR on the arrangement for the reciprocal enforcement of arbitral awards³⁶⁶.

47.3. The provisions³⁶⁷ in this part are similar in effect with those corresponding provisions in Part IV of the Arbitration Ordinance (Cap.341) in relation to the recognition and enforcement of arbitral awards under the New York Convention.

47.4. We are of the view that Part IIIA of the Arbitration Ordinance (Cap.341) in its present form should be retained and we recommend accordingly.

366 Memorandum of understanding on the an arrangement for the reciprocal enforcement of arbitral awards between the Mainland and the Hong Kong SAR signed by the Secretary for Justice and the Vice-President of the Supreme People's Court on 21 June 1999

367 Sections 40A-40G of the Arbitration Ordinance (Cap.341)

J. Schedules to New Ordinance

48. First to Fourth Schedules

Model Law

48.1. At present, the Model Law³⁶⁸ appears as the Fifth Schedule of the Arbitration Ordinance (Cap.341).

48.2. We see no reason why the Model Law, in its original form, should not continue to appear as a separate schedule in the new Ordinance and **recommend** that it should be retained and appears as the First Schedule of the new Ordinance.

New York Convention

48.3. At present, the New York Convention³⁶⁹ appears as the Third Schedule of the Arbitration Ordinance (Cap.341).

48.4. We **recommend** that it should be retained and appears as the Third Schedule of the new Ordinance.

368 UNCITRAL Model Law on International Commercial Arbitration (As adopted by the United Nations Commission on International Trade Law on 21 June 1985)

369 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Done at New York, on 10 June 1958

Judge-Arbitrators

48.5. The Fourth Schedule of the Arbitration Ordinance (Cap.341) was added in 1982 to implement recommendations by the Law Reform Committee of Hong Kong³⁷⁰.

48.6. We **recommend** that the existing provisions should be retained as the Forth Schedule of the new Ordinance with necessary modifications to ensure consistency with other provisions of the same.

Travaux preparatoires

48.7. The Sixth Schedule of the Arbitration Ordinance (Cap.341) was added in 1990³⁷¹ and makes additional provisions as to the interpretation and application of the Model Law. It sets out a number of *travaux preparatoires* and other documents.

48.8. We **recommend** that the existing documents listed therein should be retained, with the previous

370 The Law Reform Commission of Hong Kong: Report on Commercial Arbitration (Topic 1) (1981), paragraphs 10.37-10.39

371 Section 25, Arbitration (Amendment) (No.2) Ordinance 1989 (64 of 1989)

Committee's report and this report added thereto,
thereby forming the Fifth Schedule of the new
Ordinance.

49. Opt-in provisions

49.1. As set out in the above, there will be provisions in the
new Ordinance that would apply if the parties agree to
opt-in to the same.

49.2. In the New Zealand Arbitration Act 1996, such
provisions appear as the Second Schedule therein.

49.3. We **recommend** that such provisions should
comprehensively appear in the form of a schedule, the
Second Schedule, in the new Ordinance.

50. Ordinances Dealing with or Impacting Upon Arbitration

50.1. There are various Ordinances in Hong Kong that deal
with or impact upon arbitration. These include the
Control of Exemption Clauses Ordinance (Cap.71) and
the Labour Tribunal Ordinance (Cap.25).

50.2. For easy reference, we **recommend** that a list of such Ordinances should appear in the form of a schedule, the Sixth Schedule, in the new Ordinance.

K. Other Treaties

51. We note that the People's Republic of China has acceded to the Convention on Establishing the Multilateral Investment Guarantee Agency 1986 and that implementation of that Convention and the Settlement of International Investment Disputes between States and Nationals of other States 1965 has been recommended by the Joint Liaison Group.
52. We draw attention to the need to enact provisions to implement the above.

Dated 30th April 2003.

ROBIN PEARD
Chairman