

Rationale and Justifications for the Drafting Approach of the Arbitration Bill

I. Introduction

Following request of Members at the first meeting of the Bills Committee of the Legislative Council held on 28 July 2009, this paper sets out the following matters:

- (a) Rationale and justifications for adopting the current approach in drafting the Arbitration Bill (“the Bill”) to apply the UNCITRAL Model Law (“the Model Law”) in Hong Kong;
- (b) Legislative precedent adopted in domestic legislation which implements an international agreement; and
- (c) Consequential amendments to the new ordinance in the event the Model Law is amended.

II. UNCITRAL Model Law

2. UNCITRAL Model Law is defined in Clause 2 of the Bill as ‘the UNCITRAL Model Law on International Commercial Arbitration as adopted by the Commission on 21 June 1985 and as amended by the Commission on 7 July 2006, the full text of which is set out in Schedule 1’.

3. The Model Law 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 international commercial disputes. The aim of the Model Law is to promote the harmonisation and uniformity of national laws regarding international arbitration procedures.

4. The Model Law differs from an international agreement in the following manner:

As its name suggests, the Model Law is only a “model”, i.e., a prototype of a law on international commercial arbitration, which can be adopted verbatim or only partially. This consequence crucially distinguishes it from a convention, which – apart from certain “reservations” – can generally only be ratified verbatim”¹.

In other words, the Model Law has no binding legal effect on the member states of the United Nations. Each state may adopt the text as such or may modify the text of some articles or add other provisions to the text in its own exercise to modernise the arbitration law.

5. The basic structure of the Arbitration Bill is that the different clauses stipulating the application of specific articles of the Model Law are provided in the body of the Bill, and that the text of the Model Law is reproduced in Schedule 1 to the Bill for information only. Provisions in the Model Law which are not applicable under the Bill are underlined in Schedule 1. A note is added after each article to indicate the provision in the Bill which makes direct reference to that article. However, substituting provisions and other supplemental provisions to which the Model Law are subject have not been shown in Schedule 1. The readers of the Bill are also reminded that reference has to be made to the body of the Bill which determines the extent to which the Model Law applies.

III. Deliberations of the Working Group on the structure of the Bill

6. The Departmental Working Group to implement the Report of the Committee on Hong Kong Arbitration Law (“the Working Group”) has given detailed consideration to the appropriate structure for the application of specific articles of the Model Law and how useful information on the text of the Model Law can be provided to the users of the new ordinance.

¹ Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, (2nd ed., Sweet & Maxwell, London, 2005), at para 1-008.

7. The guiding objective of the reform of the law of arbitration in Hong Kong is that there should be a new ordinance providing for a unitary regime that would be drafted with as user-friendly a structure as possible².

8. There was general consensus in the Working Group that it was necessary to map out a more user-friendly ordinance. It was pointed out that the current Arbitration Ordinance (Cap. 341) is not user-friendly and users have to turn to its Fifth Schedule to find out the provisions of the Model Law. In order to make the new ordinance more user-friendly, the Working Group considered that the Model Law provisions should be set out in the main body of the new ordinance and shall have force of law in Hong Kong, with appropriate add-ons and/or modifications.

9. It is believed that the proposed structure of the new ordinance will achieve the important objective that Hong Kong is to be seen as conforming to the Model Law³. It was observed that as the number of amendments to the Model Law would be small, there would not be major problems with setting out the Model Law provisions in the main body of the new ordinance.

10. Members of the Working Group have deliberated on the issue of whether it is necessary to reproduce the Model Law in the Schedule. It was pointed out that since most of the provisions of the Model Law are applicable to Hong Kong, a large part of the Model Law will have to be

² Hong Kong Institute of Arbitrators, 30 April 2003, *Report of Committee on Hong Kong Arbitration Law*, para 5.14.

³ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, (4th ed., Sweet & Maxwell, London, 2004), p.633 stated that the following unofficial definition of what could constitute “Model Law conformity” has been used:

- “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); and
3. The law must contain no provision incompatible with modern international commercial arbitration (e.g. foreigners may not be arbitrators, no-excludable appeal on errors of law).”

repeated in both the main body of the new ordinance and its Schedule. Members of the Working Group however generally agreed that the main purpose of reproducing the Model Law should be for information. The Working Group therefore came to the conclusion that the whole of the Model Law should be reproduced in the Schedule of the new ordinance, highlighting the parts which had been omitted. To avoid repetitions, it was decided that the parts of the Model Law that are modified and the substitutive provisions would not be re-produced in the Schedule. This is made clear in the note to Schedule 1.

IV. Legislative precedent adopted in domestic legislation which implements international agreement

11. We have set out in Section II above the key difference between the Model Law and an international agreement. Pursuant to Members' request, we set out below the approaches that are used in domestic legislation which implements an international agreement⁴:

(a) The text of an international agreement may be incorporated into the implementing legislation by being set out in the legislation, usually in a Schedule. In many cases, the implementing legislation needs to set out additional provisions to supplement the incorporated agreement text.

(b) In cases where the wording and terminology of an agreement may not conform to the normal usage in our domestic context, or where an international agreement simply requires signatory parties to achieve certain results without prescribing the detailed implementation methods, the Administration will have considerable room to draft the legislative provisions to implement the agreement provisions. This approach is also common where the existing legislation is largely consistent with the provisions of an international agreement, and can be adapted to fully implement the international agreement.

(c) The implementing legislation may make reference to the

⁴ LegCo AJLS Panel information paper on "Implementation of international agreements in the Hong Kong SAR" (LC Paper No. CB(2)1398/06-07(4) from page 3 onwards.

requirements under an international agreement without setting out the text. This approach has been used where the relevant agreement provisions are technical.

12. The Administration considered that different methods have been employed to implement international agreements in our domestic system. This suits different types of international agreements and different policy needs. In practice, the precise method to be adopted to implement an international agreement will be decided on a case by case basis having regard to its policy objectives and requirements and the nature and substance of the international agreement in question.

13. Dr Peter Binder surveyed 61 jurisdictions that have incorporated the Model Law (according to the official Model Law list as at 2005) and came to the conclusion that there are two main methods of the legislative adoption of the Model Law as follows⁵:

(a) Incorporation by reference – the first type of adoption involves the use of a general reference clause to the Model Law (stating its applicability), e.g.: Article 3(1) of the Singapore International Arbitration Act 1994 (amended 2001) provides that ‘Subject to this Act the Model Law ... shall have the force of law in Singapore.’

(b) Direct adoption – the second type of adoption directly inserts the articles of the Model Law into the national law, either as part of an existing civil procedure law or as an independent statute.

14. Having considered the views of the Working Group set out in Section III above, in particular the prime objective of having a structure that is as user-friendly as possible, the Administration decided to adopt the current approach in the Bill. Relevant parts of the Model Law that are to have the force of law in Hong Kong have been expressly set out in the main body of the Bill with appropriate local adaptations. This is in line with the objective of enhancing the perception that Hong Kong is a Model Law jurisdiction.

⁵ Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, (2nd ed., Sweet & Maxwell, London, 2005), at pp. 15-16.

15. The following examples illustrate the adoption of a similar approach in other ordinances where the whole of the international agreement is reproduced in the ordinance, highlighting the parts which had been omitted.

16. Section 4 of the Consular Relations Ordinance, Cap 557 empowers the Chief Executive in Council to make an order to declare that the additional privileges and immunities accorded to a State under an international agreement shall have the force of law in Hong Kong.

17. By the Consular Relations (Additional Privileges and Immunities) (Vietnam) Order (Cap 557 sub. leg. C) (“the Order”) (extract at Annex I), it is declared that the additional privileges and immunities accorded to the consular post of the Socialist Republic of Vietnam (“Vietnam”) or to persons connected with the consular post under the relevant provisions of the Consular Convention between Vietnam and the People’s Republic of China (“the Convention”) shall have the force of law in Hong Kong. The relevant provisions of the Convention are set out in the Schedule to the Order. Those articles of the Convention which are not applicable to Hong Kong are not included in the Schedule to the Order but are indicated by “...” in the text. For example paragraphs 2, 8 and 11 of Article 1 of the Convention are not included in the Schedule to the Order and they do not have legal effect in Hong Kong.

18. Section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525 empowers the Chief Executive in Council to direct that the Ordinance shall, subject to such modifications as may be specified in the order to any arrangement for mutual legal assistance, apply as between Hong Kong and a foreign place. The Ordinance was modified by Schedule 2 of the Mutual Legal Assistance in Criminal Matters (Germany) Order (Cap. 525 sub. leg U) (Annex II). Under Schedule 2 of the Order, those words shown as underlined are those added to the Ordinance and those words shown as crossed out are those deleted from the Ordinance. It is stated in the footnotes to Schedule 2 that the underlining and the crossing out are for ease of identifying the modification only.

V. Amendments to the new ordinance upon amendments made to the Model Law

19. The Bill does not follow some implementing legislation where the international agreement is defined to mean the agreement “as amended from time to time and as applied to Hong Kong”. If the UNCITRAL Model Law is amended in future and it is thought that the amendments should apply to Hong Kong, legislative amendment to the Ordinance would be made. We do not expect that amendments to the UNCITRAL Model Law will be made frequently. It should be noted that the Model Law was published in 1985. More substantive amendments were made in 2006, which is more than two decades after the date when it was first published.

20. In these circumstances, the Administration is of the view that it is not necessary to include a general reference clause on the Model Law requirements, including any subsequent amendments. The future amendments of the Model Law may go beyond matters of technical nature and require consideration from a legal policy point of view, bearing in mind the need to adhere to uniform international practice.

21. For example, the recently approved revision to Article 7 of the Model Law aimed to update domestic laws on the policy question of whether the writing requirement for the arbitration agreement should be amended, while preserving the enforceability of such agreement as foreseen in the New York convention. Two different options were adopted by the UNCITRAL.

22. The Administration is of the view that it is prudent for the Hong Kong SAR Government to consider and decide whether or not to incorporate future revisions to the Model Law, having regard to the views of stakeholders and the business community. In case where incorporation is considered necessary, amendments to the Arbitration Ordinance will be proposed.

Department of Justice
September 2009

#349627v4

[附屬法例]

[Subsidiary]

領事關係 (增補特權及豁免) (越南) 令 *

CONSULAR RELATIONS (ADDITIONAL PRIVILEGES AND IMMUNITIES) (VIETNAM) ORDER*

(第 557 章第 4(1) 條)

(Cap. 557, section 4(1))

[2005 年 7 月 11 日]

[11 July 2005]

1. (已失時效而略去)

1. (Omitted as spent)

2. 釋義

2. Interpretation

在本命令中——

In this Order—

*“《條約》”(Convention) 指於 1998 年 10 月 19 日在北京簽訂的《中華人民共和國和越南社會主義共和國領事條約》；

*“Convention” (《條約》) means the Consular Convention between the Socialist Republic of Vietnam and the People’s Republic of China done at Beijing on 19 October 1998;

“《條約》有關條文”(relevant provisions of the Convention) 指附表列出的《條約》第十二條第一款、第十三條、第十六條第二及三款、第十七及十八條、第十九條第一及三款、第二十五條(第一款第(一)及(二)項及第三款除外)以及第二十八條的條文。

“relevant provisions of the Convention” (《條約》有關條文) means the provisions of paragraph 1 of Article 12, Article 13, paragraphs 2 and 3 of Article 16, Articles 17 and 18, paragraphs 1 and 3 of Article 19, Article 25 (except sub-paragraphs (a) and (b) of paragraph 1 and paragraph 3), and Article 28, of the Convention as set out in the Schedule.

3. 增補特權及豁免

3. Additional privileges and immunities

現宣布越南社會主義共和國的領館、與該領館相關的人或上述兩者根據《條約》有關條文(該等條文是與附表列出的《條約》第一條(第二、八、十一、十四及十五款除外)、第二十、二十九及三十條及第三十三條第二款的條文一併理解的)所享有的增補特權及豁免,在香港具有法律效力。

It is declared that the additional privileges and immunities accorded to a consular post of the Socialist Republic of Vietnam, or to persons connected with the consular post, or to both, under the relevant provisions of the Convention, as read with the provisions of Article 1 (except paragraphs 2, 8, 11, 14 and 15), Articles 20, 29 and 30, and paragraph 2 of Article 33, of the Convention as set out in the Schedule, shall have the force of law in Hong Kong.

* 中華人民共和國和越南社會主義共和國於 2000 年 6 月 26 日在河內互換了《中華人民共和國和越南社會主義共和國領事條約》的批准書。該條約自 2000 年 7 月 26 日起正式生效。

* The People’s Republic of China and the Socialist Republic of Vietnam exchanged instruments of ratification in respect of the Consular Convention between the Socialist Republic of Vietnam and the People’s Republic of China on 26 June 2000 at Hanoi. That Convention came into force on 26 July 2000.

[附屬法例]

[Subsidiary]

附表

[第 2 及 3 條]

SCHEDULE

[ss. 2 & 3]

本命令所提述的《條約》條文

PROVISIONS OF THE CONVENTION REFERRED TO IN THIS ORDER

第一章

Part I

定義

Definitions

第一條

Article 1

定義

Definitions

就本條約而言，下列用語的含義是：

(一) “領館”指總領事館、領事館、副領事館或領事代理處；

.....

(三) “領館館長”指派遣國委派領導一個領館的總領事、領事、副領事或領事代理人；

(四) “領事官員”指總領事、副總領事、領事、副領事、領事隨員及領事代理人；

(五) “領館僱員”指在領館內從事領館行政、技術工作的人員；

(六) “領館服務人員”指受僱在領館內從事服務工作的人員；

(七) “領館成員”指領事官員、領館僱員和領館服務人員；

.....

(九) “私人服務人員”指領館成員私人僱傭的服務人員；

(十) “領館館舍”指專供領館使用的建築物或部分建築物及其附屬的土地，不論其所有權屬誰；

.....

(十二) “公文”指有關領館及其職務的一切來往文件；

For the purposes of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

1. “Consular post” means any consulate-general, consulate, vice-consulate or consular agency;

.....

3. “Head of consular post” means the consul-general, consul, vice-consul or consular agent who is charged by the sending State to head a consular post;

4. “Consular officer” means a consul-general, vice consul-general, consul, vice-consul, consular attache or consular agent;

5. “Consular employee” means any person who performs administrative and technical service at a consular post;

6. “Member of the service staff” means any person employed in the domestic service of a consular post;

7. “Members of the consular post” means consular officers, consular employees and members of the service staff;

.....

9. “Member of the private staff” means any person who is employed in the private service of a member of the consular post;

10. “Consular premises” means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post;

.....

12. “Official correspondence” of a consular post means all the correspondence relating to a consular post and its functions;

[附屬法例]

[Subsidiary]

(十三) “家庭成員”指與領館成員共同生活的配偶和未成年子女；

13. “Member of the family” means the spouse of a member of the consular post and their minor children who live with them in the same household;

第三章

Part III

便利、特權和豁免

Facilities, privileges and immunities

第十二條

Article 12

領館館舍和領事官員的住宅不受侵犯

Inviolability of the consular premises and the residences of consular officers

一、領館館舍和領事官員的住宅不受侵犯。接受國當局人員未經領館館長或派遣國駐接受國使館館長或以上兩人中一人指定人員的同意，不得進入領館館舍和領事官員的住宅。

1. Consular premises and the residences of consular officers shall be inviolable. The authorities of the receiving State shall not enter the consular premises and the residences of consular officers without the consent of the head of the consular post or the head of the diplomatic mission of the sending State in the receiving State or of a person designated by one of them.

第十三條

Article 13

領館館舍和領館財產免稅

Exemption from taxation of consular premises and consular properties

一、接受國應免徵下列捐稅：

(一) 以派遣國或其代表名義獲得的領館館舍和領館成員住宅及有關的交易和契據；

(二) 領館公務專用設備及交通工具，以及他們的獲得、擁有或維修。

二、本條第一款的規定不適用於：

(一) 對特定服務的收費；

(二) 與派遣國或其代表訂立契約的人按照接受國法律規章應繳納的捐稅。

1. The receiving State shall exempt the followings from all dues and taxes:

(a) consular premises and residences of the members of the consular post acquired in the name of the sending State or its representative and transactions or instruments thereto;

(b) consular facilities and means of transport acquired exclusively for official purposes as well as their acquisition, possession or maintenance.

2. The provisions of paragraph 1 of this Article shall not apply in respect of:

(a) charges levied for specific services;

(b) dues and taxes collectable under the laws and regulations of the receiving State from a person who concludes a contract with the sending State or its representative.

對本條例作出的變通

1. 本條例第 5(1)(c) 條須予變通至如下所示——

“(e) 該項請求關乎因外地罪行而對某人進行的檢控，而——*

 - (i)* 該人已就該外地罪行或由構成該外地罪行的同一作為或不作為所構成的另一外地罪行，被有關地方或香港* 的管轄法院或其他當局定罪、裁定無罪或赦免—**；* 或
 - (ii) 該人已就該外地罪行或由構成該外地罪行的同一作為或不作為所構成的另一外地罪行，* 已** 接受該地方或香港的* 法律所規定的懲罰；”。
2. 本條例第 17(1) 條須予變通，刪去第 (ii) 段。
3. 本條例第 17(3)(b) 條須予變通至如下所示——

“(b) 該人在** 有機會離開香港的情況下**，並接獲通知他已無須為下述任何目的逗留，但他在接獲通知的日期起計連續 15 天內* 仍留在香港——但並非為下述目的而留在香港**——

 - (i) 該項請求所關乎的目的；或**
 - (ii) 為給予香港刑事事宜方面的協助的目的，而該刑事事宜屬律政司司長以書面證明適宜由該人就該事宜給予協助的。”。
4. 本條例第 23(2)(a) 條須予變通——
 - (a) 在第 (i) 節的末處加入“或”；
 - (b) 刪去第 (ii) 節。

* 劃上底線的字句屬增訂部分。(劃上底線是為了使該項變通易於識別)。

** 劃上橫線的字句屬刪除部分。(劃上橫線是為了使該項變通易於識別)。

MODIFICATIONS TO THE ORDINANCE

1. Section 5(1)(c) of the Ordinance shall be modified to read as follows—

“(e) the request relates to the prosecution of a person for an external offence in a case where the person—*

 - (i)* has been convicted, acquitted or pardoned by a competent court or other authority in the place—** or Hong Kong in respect of that offence or of another external offence constituted by the same act or omission as that offence;* or
 - (ii)* has undergone the punishment provided by the law of that place or Hong Kong*—** in respect of that offence or of another external offence constituted by the same act or omission as that offence;”.
2. Section 17(1) of the Ordinance shall be modified by deleting paragraph (ii).
3. Section 17(3)(b) of the Ordinance shall be modified to read as follows—

“(b) the person has had an opportunity of leaving Hong Kong and has remained in Hong Kong for a period of 15 consecutive days from the date of being notified that his presence is no longer required for any of the following purposes* otherwise than for**—

 - (i) the purpose to which the request relates, or**
 - (ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a criminal matter in relation to which it is desirable that the person give assistance.”.
4. Section 23(2)(a) of the Ordinance shall be modified—
 - (a) by adding “or” at the end of subparagraph (i);
 - (b) by deleting subparagraph (ii).

* The words underlined are added. (The underlining is for ease of identifying the modification).

** The words crossed out are deleted. (The crossing out is for ease of identifying the modification).