



The Law Society of Hong Kong
Submissions on the Arbitration Bill 2009

The Law Society has reviewed the provisions in the Arbitration Bill gazetted on 26 June 2009 ("Bill") and notes a significant number of the comments on the consultation exercise on the Reform of the Law of Arbitration in Hong Kong and draft Arbitration Bill were adopted. However, we have the following comments on the Bill Draft Bill and invite the Administration to reconsider the following provisions:

Proposals in Draft Bill	Law Society's Comments on draft Bill	Provisions in Gazetted Bill	Comments on the Bill
1. Reference of interpleader issue to arbitration by court			
Para 2.26 Where an interpleader issue is covered by an arbitration agreement, a court before which an action is brought may refuse to refer the parties to arbitration under Clause 15(1) where it finds that an arbitration agreement is null and void, inoperative or incapable of being performed. Views are sought as to whether a direction of the court under Clause 15(1) should be subject to appeal with leave of the	(1) There should be a right of appeal; and (2) Clause 15(1) should be moved and renumbered as Clause 21 otherwise the Bill as drafted is difficult to follow.	Numbering of Clause 15 the same as the Draft Bill	We note our comments have been partially but not fully adopted and recommend our earlier submissions at (2) be reconsidered. We re-iterate that moving and renumbering Clause 15 to come after 20 would make the new legislation more logical.

court.			
2. Article 17J of UNCITRAL Model Law (Court-ordered interim measures); Enforcement of orders and directions of arbitral tribunal			
<p>Para 6.17 - Propose that a decision of the CFI to grant or refuse to grant an interim measure shall be subject to appeal with leave of court as such a decision would be a matter of great significance to the parties. Views are sought on this proposal.</p>	<p>We agree the provisions for the enforcement of arbitral orders and directions in draft Clauses 46 and 62 be accepted without further amendment.</p>	<p>Clause 45(10): A decision, order or direction of the Court under this section is not subject to appeal.</p>	<p>We submit that in many cases, granting of interim measures (e.g. injunction) would affect the substantive rights of the parties and therefore disagree with the addition of the new clause 45(10). We submit that there should be a right of appeal (with leave).</p>
3. Order to be made in case of delay in pursuing claims in arbitral proceedings			
<p>Para 7.25 Clause 60(5) stipulates that the power of an arbitral tribunal to dismiss a claim or to prohibit a party from commencing further arbitral proceedings in respect of a claim for unreasonable delay in pursuing the claim is exercisable by the CFI if no arbitral tribunal which is capable of exercising that power exists at the relevant time. An appeal procedure where leave of the court is required in respect of decisions by the CFI under clause 60(5) as such a decision is likely to affect the substantive rights of the</p>	<p>There should be a right of appeal with leave.</p>	<p>Clause 59(6): An award or order made by the Court in exercise of its power conferred by subsection (5) is not subject to appeal.</p>	<p>We note our earlier comments have not been adopted and instead the right to appeal has been expressly excluded. We submit that this matter affects the substantive rights of the parties, we submit that there should be a right of appeal (with leave).</p>

parties. Views are sought on such proposal.			
4. Enforcement of arbitral awards			
Para 10.8 - Whether a decision of the court to grant or refuse leave to enforce an arbitral award made outside Hong Kong, which is neither a Convention award nor a Mainland award, should be subject to appeal with leave.	There should be a right of appeal but we disagree with the requirement for leave.	There is a right of appeal, and the requirement in draft Clause 85(2) of the Draft Bill is deleted.	<p>We note Clause 85(2) (renumbered as Clause 84) of the Draft Bill has been deleted. However, in Division I there should be a definition of "arbitral awards". Otherwise, as drafted, non-Convention awards will fall within this Division and can be enforced in the same manner as Convention and Hong Kong arbitral awards. We do not consider this to be the legislative intention.</p> <p>We also note that in relation to Mainland Awards in Division III there is an additional provision in Clause 93(2) such that treatment of Mainland awards is different. We are unsure of the necessity for the same.</p>
5. Enforcement of Convention awards			
Para 10.12 - Whether a decision of the court to grant or refuse leave to enforce a Convention award should be subject to appeal with leave.	There should be a right of appeal but we disagree with the requirement for leave.	Clause 88 is renumbered and is the same as Clause 87 in Draft Bill	We repeat our observation that enforcement of a Convention award involves the substantive rights of the parties, and we submit that there should be a right to appeal without leave being required.

6. Enforcement of Mainland awards			
Para 10.18 - Whether a decision of the court to grant or refuse leave to enforce a Mainland award should be subject to appeal with leave.	There should be a right of appeal but we disagree with the requirement for leave.	Clause 93 is renumbered, and is the same as Clause 93 in Draft Bill	We repeat our observation that enforcement of a Mainland award involves the substantive rights of the parties, and we submit that there should be a right to appeal without leave being required.
7. Applications for interim measures or other orders in relation to arbitral proceedings outside Hong Kong			
Order 73 New Rule 4	Propose to include Order 29, rule 6 (Recovery of personal property subject to lien, etc.) This new rule applies to arbitral proceedings outside Hong Kong. Should explore if this rule should be applied to arbitral proceedings in Hong Kong as well.	Amended Order 73 Rule 4 same in the Bill	Order 73 r.4 refers to Sections 45(2) and 60(1) and applies to both arbitrations commenced in or outside Hong Kong. The reason why r.4 only applies to arbitrations commenced outside Hong Kong is unclear.
8. Time limits and other special provisions for certain applications under Arbitration Ordinance			
Order 73 New Rule 5	The commencement date for reckoning the appeal time limit for various applications is proposed to run " <i>after the award is delivered</i> ", vis-à-vis " <i>after the award has been made and published to the parties</i> " in the current rule 5. It appears that the adoption of the words " <i>after the</i>	Amended Order 73 Rule 5 same in the Bill	There is a possibility that the award may not be delivered to the parties on the same day, or one party may not collect the award, deliberately or otherwise. The law draftsman has consistently adopted the use of the word

	<p><i>award is delivered</i>" may create problems as an arbitral award may not be delivered to the parties on the same day in every instance. We suggest amending the draft to "made available to the parties".</p>		<p>"deliver" throughout the Bill (e.g. Clause 77) but in our view it fails to resolve the practical problems mentioned in (a) above. We repeat our recommendation that it would be clearer to adopt the words "made available to the parties".</p> <p>We note there is also a possibility of a loophole as the 30-day appeal time limit could restart if a correction to an award is made by the arbitrator, and the award is then "delivered" again to the parties. There is a possibility of parties seeking to take advantage of time being so extended for making an appeal by say requesting the arbitral tribunal to correct an insignificant typo under Clause 69 of the Bill.</p>
<p>9. Rules repealed</p>			
<p>Order 73 Rules 11 to 18 (proposed to be repealed)</p>	<p>The existing payment into court provisions are to be abolished. Under the principle held in <i>Hong Kong & Shanghai Hotels Ltd. v. Choy Bing Wing</i>, an arbitrator exercising his discretion 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.</p>	<p>Order 73 Rules 11 to 18 repealed in the Bill</p>	<p>We note that under Clause 74 of the Bill, the arbitral tribunal may, having regard to all relevant circumstances (including the fact, if appropriate, that a written offer of settlement of the dispute concerned has been made), determine issues as to costs.</p> <p>We note the removal of payment-in provisions should make "Calderbank" offers more effective</p>

	<p>As the law remains unsettled as to whether a <i>Calderbank</i> offer should be taken into account when considering costs, it is suggested the payment-in provisions be retained.</p>		<p>as the offer could no longer be backed by a payment in. However, the successful party will not have the comfort of an actual "payment-in" (thereby avoiding the situation where the award is for a sum less than that contained in a Calderbank offer, so the defendant benefits re costs, but then fails to pay on the award such that the letter proves to be an empty letter which was solely sent to protect the other party on costs). The payment-in mechanism is in existence and we see no real advantage to changing it.</p> <p>We therefore submit that the existing mechanism for payment into court be retained.</p>
--	---	--	---

10. Constitution of Appointment Advisory Board

<p>A proposal is made under section 37 of Schedule 5 to add the "President of the Hong Kong Construction Association" to the list of persons and organizations set out in Rule 3(2) of the Arbitration (Appointment of Arbitrators and Umpires) Rules.</p>	<p>The function of the Appointment Advisory Board is set out in rule 5 of the Arbitration (Appointment of Arbitrators and Umpires) Rules: "Before making a final decision on the appointment of an arbitrator or umpire or on the number of arbitrators that are appropriate for any particular dispute, HKIAC shall consult with at least 3 available members of the Appointment Advisory Board and shall consider their advice but is not bound by it."</p>	<p>No change; section 36 of Schedule 4 of the Bill same as section 37 of Schedule 5 of the Draft Bill.</p>	<p>We note that many sectors are turning to arbitration and therefore the composition of the Advisory Board should be reconsidered and expanded generally. E.g. Financial institutions and those involved in commodities are turning to arbitration. The current members of the Advisory Board do not represent a sufficiently wide cross section of the business community. The opportunity should be taken to widen the representation.</p>
--	---	--	---

	<p>The members of the Hong Kong Construction Association are solely main contractors in the Hong Kong construction industry. Whilst main contractors are the main users of arbitration, the Association may have inherent interest / inclination in nomination of arbitrators. Therefore, it is not recommended the President of the Association should be included in the Appointment Advisory Board.</p>		
--	--	--	--

The Law Society of Hong Kong
Working Party on Arbitration Law
15 September 2009
128445