Comments on Consultation Paper

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

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Objective of the Reform

1. Comments made herein are based upon the stated purpose of the Reform that is to make the law on arbitration "***more user friendly***", which in turn is based on the perception that "*an arbitration regime that accords with widely accepted international arbitration practices*" would attract more arbitrations to Hong Kong and promote Hong Kong as a regional center for legal and dispute resolution services[1].

2. Some proponents of reform champion an unitary scheme under the pinning of UNCITRAL Model Law ("Model Law") as the way forward. This entails the doing away of the distinction between "*domestic*" and "*international*" arbitration[2]. It is said that "*Hong Kong should also be clearly seen as a Model Law jurisdiction as the Model Law is familiar to practitioners from civil law as well as common law jurisdictions...*"[3].

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[1] ¶3 of the Executive Summary of the Consultation Paper
[2] Report of the Committee on Arbitration Law issued in April 1996
[3] ¶11 of Introduction of the Consultation Paper

3. Further, in line with the above, national court intervention, be it for the assistance or for the supervision of arbitration should be reduced to the minimum to accord with the need to "*delocalize*" international arbitrations[4]. So, as a corollary to the need to attract more international arbitrations, court supervision to ensure the integrity of the arbitral process and the award is to be ousted or reduced to a minimum to promote finality of the award.

Is the draft bill ("the Bill") "*more user friendly*"?

4. The Bill comes in with 112 provisions and 5 schedules in which non model law provisions are inserted before and after model law provisions. Further the Model Law provisions are only applied to the extent and subject to such modifications and supplements as expressly provided in the Bill.

5. As such, it is not an easy task to go through the Bill in order to apprise and familiarize one self with the Bill. It is certainly not a straight application of the Model Law. In that sense, the Bill may have failed to achieve its stated primary objective: that is to be "more user friendly".

6. I have prepared a table (annexed hereto) classifying the provisions of the Bill into non model law provisions, model law provisions, supplements (modifications) to model law provisions, substitutes to model law provisions and others. It

[4] Arbitration Unbound: Award detached from the Law of its Country of origin by Jan Paulsson Vol. 30, International and Comparative Law Quarterly April 1981

is obvious that one would have to take some time to navigate through the Bill: certainly not so easy for those unfamiliar with the drafting directions and background of the Bill; not easy for foreign lawyers and more difficulty for those not legally trained.

7. In fact, this was a concern expressed in ¶ 4.25 of the 1987 Law Reform Commission Report[5] that modification of the Model Law provisions would "*detract from the recognisability of the Model Law*". This is perceptive: long hours of labour have produced a hybrid: combining provisions in the Ordinance and the Model Law, with such modifications, supplements and variations as recommended by the Report[6] and the Working Group[7].

8. If being a Model Law jurisdiction is so important to attracting users of international arbitration to Hong Kong, one would only have to compare Part IIA "International Arbitration" of the existing Arbitration Ordinance Cap 341("the Ordinance") with the Bill. One would inexorably come to the conclusion that Part IIA "International Arbitration" of the Ordinance, in which there are only 3 sections, namely s 34A, s 34B and s 34C, is more user friendly and the Model Law provisions therein more recognizable. Clearly and succinctly, s. 34C(1) states:

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[5] 1987 Report of the Hong Kong Law Reform Commission on Adoption of UNCITRAL Model Law
[6] Report of Committee on Arbitration Law issued in 2003 by the Hong Kong Institute of Arbitrators in co-operation with the Hong Kong International Arbitration Center
[7] The Departmental Working Group to implement the Report

"An arbitration agreement and an arbitration to which this part applies are governed by Chapters I to VII of the UNCITRAL Model Law".

9. The entire Model Law provisions are then reproduced at the Fifth Schedule to the Ordinance.

10. In attempting to put everything under one roof, the drafters and those instructing them have muddied the water. Many provisions that would be of little or no relevance to international arbitrations are all lumped into this single Bill. This is not so in other jurisdictions.

11. Our arch rival in this region, Singapore, has divided up its arbitration law into two acts: the International Arbitration Act Cap 143A with 35 sections in which it is stated that Model Law shall have the force of law in Singapore [8] and the Arbitration Act Cap 10 with 65 sections for arbitrations where the International Arbitration Act does not apply. A copy of the two Singapore Acts are annexed hereto as for easy perusal[9].

Whether it is desirable to have a unitary scheme?

12. The relevant question is whether doing away with the distinction between domestic and international arbitration

[8] Section 3 of the International Arbitration Act of Singapore Cap 143A
[9] http://statutes.agc.gov.sg

would produce the desired result of drawing more international arbitrations to Hong Kong?

13. Looking amongst common law jurisdictions in the region, one can see that the distinction is maintained in Singapore, New Zealand and Malaysia, all common law jurisdictions that have adopted the Model Law. As averted to earlier, Singapore has divided its law to have a separate and easy to use International Arbitration Act for enticing users to Singapore. In New Zealand, another Model Law jurisdiction, its Arbitration Act of 1996 adopted the Model Law in its 1st Schedule, to apply to all arbitrations generally, with the additional provisions of its 2nd Schedule to apply to every other arbitration not being an international arbitration within the definition of the Model Law unless the parties so agree. A copy of the New Zealand Act 1996 is annexed hereto for easy reference[10].

14. Hence, it is not a strong ground, even though it is arguable, that doing away the distinction between domestic and international arbitration may make the Ordinance more user friendly. The end result in the Bill, however, tells us otherwise.

Distinction between Domestic and International Arbitration

10 http://www.legislation.govt.nz/act/public/1996/0099/latest/DLM403277.html

15. Article 1 of the Model Law at Art. 1(3) defined what is an international arbitration agreement. The definition is clear and tested and most, if not all practitioners, know the distinction[11]. Pursuant to section 2, the Interpretation section of the Ordinance, an arbitration agreement that is not an international arbitration agreement is a domestic arbitration agreement.

16. It is for the elimination of the distinction between domestic and international arbitration that by section 8 of the Bill, section 2 of the Bill substituted Art. 1 of Model Law.

The provisions of Schedule 3

17. But, for transition and for the option of including certain features provided to users of Domestic Arbitration under Part II of the Ordinance, certain provisions are inserted into Bill. They are sections 100-104 of the Bill.

18. Section 100 of the Bill provides that:

"an arbitration agreement may provide expressly that any or all of the following shall apply:

(a) section 1 of Schedule 3;

[11] Sol International Limited and Guangzhou Dong-Jun Real Estate interest Company Limited CACV 50/1998

(b) section 2 of Schedule 3;

(c) section 3 of Schedule 3;

(d) sections 4 and 7 of Schedule 3;

(e) *sections 5, 6 and 7 of Schedule 3".*

19. Schedule 3 of the Bill incorporated certain provisions Part II of the Ordinance for domestic arbitrations with modifications:

(1) Section 1 of Schedule 3 is for opting into a sole arbitrator[12];

(2) Section 2 of is for consolidation of arbitrations[13];

(3) Section 3 is for determination of preliminary question of law by court[14];

(4) Section 4 is for challenging arbitral award on grounds of serious irregularity;

(5) Section 5 is for appeal against an arbitral award on question of law;

[12] c/f section 8 of Part II of the Ordinance
[13] c/f section 6B of Part II of the Ordinance
[14] c/f section 23A of Part II of the Ordinance

(6) Section 6 is for leave to appeal against arbitral award on question of law; and

(7) Section 7 contains supplementary provisions on challenge to or appeal against arbitral awards.

20. Before going into details of the provisions of Schedule 3, one can immediately see it would not be easy for a lawyer, let alone a lay businessman, to opt into various combinations of the five options under section 100 of the Bill at the time of entering into a contract with an arbitration clause.

21. This makes the Bill, as I have suggested, difficult to use.

Section 101 of the Bill

22. This is in fact the transition provision, the soft pedal to phase out domestic arbitration.

23. Section 101 provides for the automatic opting in of all the Schedule 3 provisions for arbitration agreements entered into before the commencement of the ordinance, which is the subject of this Bill[15].

[15] Section 101(a) of the Bill

24. Further it provides[16] where an arbitration agreement entered into within 6 years of the commencement of the ordinance (subject of this Bill) is designated as domestic, the provisions of Schedule 3 kick in automatically.

25. Herein is the question, why is it necessary to do away with domestic arbitration after a period of 6 years? By section 103 of the Bill, users can in any case opt out of sections 101 or 102 or any of the provisions of Schedule 3.

26. It is certainly more sensible to preserve the distinction for reasons I will go to now: to afford more judicial assistance and supervision to ensure the integrity of the arbitral process of domestic arbitrations and of course, for the development of law.

27. Hong Kong is notorious for being a small closely connected community where everybody knows everybody else. This is particularly true in the construction trade, with architects, consultants, quantity surveyors, experts and contractors serving at different times in various capacities. Not only are there the issues of independence and impartiality, there are the matter of unconscious bias and competency of some to adjudicate in accordance with Hong Kong law. Hence, it is of importance for confidence building that finality of the arbitral award must be tempered with and be subjected to judicial supervision in the context of domestic arbitration. Where the arbitrator fails to apply Hong Kong law, or applies it wrongly,

[16] Section 101(b) of the Bill

it would be wrong to hang the aggrieved party on the cross of party autonomy.

28. Firstly, in view of the disparate bargaining power of say the main contractor and the subcontractor, it is doubtful whether there is real arbitral intent between the parties. Even if arbitral intent exists, in respect of a domestic arbitration, it must have been the intent to have future disputes resolved in accordance with the substantive law of the contract, that is Hong Kong law, and not otherwise.

29. I was personally involved in construction cases in Hong Kong and commodity arbitrations under FOSFA rules (trade association rules) in the United Kingdom. To my dismay, I found that even in UK, the tribunal, whether at 1st tier or at 2nd tier of a number of two tier arbitrations in which I represented one party, that the party appointed or trade association appointed arbitrators had not been truly impartial or independent. As I found out subsequently, the presiding arbitrator in one GAFTA arbitration, was closely connected with one of the parties. Though he was appointed by the trade association, he should have disclosed his connection and recused himself. The same goes for a lady quantity surveying arbitrator, which I would not name, in a construction arbitration in Hong Kong: she was closely connected, as I found out later, with the claims consultant of one party.

30. Herein lies the need for judicial assistance and supervision in the context of domestic arbitration. In international

arbitrations where the place of arbitration was merely chosen for convenience only and not for judicial supervision and the substantive law of the contract is not the law of the place of arbitration, for example an arbitration between a Japanese entity and a US corporation in Hong Kong with the substantive law of contract being the law of Japan, such an issue would not arise. Hence, I concur that for promotion of international arbitration, local court intervention should be minimized as per Art. 5 of Model Law.

Section 102 of the Bill: the insidious deeming provision

31. This is an offending provision that goes squarely against party autonomy.

32. Section 102 provides in a nutshell that where all the provisions of Schedule 3 apply either (1) under section 101(a) or (b) of the Bill, and the whole or part of the main contract between the employer and the main contractor is subcontracted, and the subcontract also has an arbitration clause, then all the provisions of Schedule 3 is deemed to be applicable to the subcontract[17] and by extension, it goes on to be deemed in the arbitration clause between the subcontractor and the sub-subcontractor[18].

[17] Section 102(1) of the Bill
[18] Section 102(3) of the Bill

33. This is the deeming provision that deems the domestic arbitration provisions into the arbitration clauses of the subcontractors and sub-subcontractors all the way down the line. It would not have been necessary to have this deeming provision if the distinction between domestic and international arbitration is maintained.

34. To limit its application only to "domestic situations", section 102(2) of the Bill is introduced to exclude the operation of the deeming provision to foreign entities[19] or where a substantial part of the subject matter of the subcontract is to be performed outside of Hong Kong [20] . This is backdoor resurrection of the distinction between domestic and international arbitration.

35. This deeming provision may end up having applications beyond the situations envisioned by its proponent: those representing the main contractors in Hong Kong. It is strongly suggested that this provision be dispensed with by either maintaining the distinction between domestic and international arbitrations or by making the provisions in Schedule 3 (clauses 1, 2 and 3) opt out provisions instead of opt in provisions.

Clause 1 of Schedule 3- Sole Arbitrator

[19] Sections !02(2)(a) and (b) of the Bill
[20] Section 102(2)(c) of the Bill

36. This provision allows for the opting in of a sole arbitrator instead of section 23 of the Bill, to be 1 or 3 as decided by the HKIAC.

37. This provision is in replacement of section 8 Part II of the Ordinance in which it is deemed that the reference, in every domestic arbitration, is to a single arbitrator.

Clause 2 of Schedule 3 – Consolidation of arbitrations

38. Clause 2(1) of Schedule 3 of the Bill closely mirrors section 6B of Part II "Domestic Arbitration" of the Ordinance to empower the court, upon an application by any party to an arbitration, to consolidate 2 or more arbitral proceedings where it appears to the court that one or more of the three grounds set out in sub-clauses 2(2)(a), 2 (1)(b) or 2(1)(c) of Schedule 3 applies.

39. The three grounds are:

"(a) *that a common question of law or fact arises in both or all of them;*

(b) *that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or*

(c) *that for any other reason it is desirable to make an order under this section".*

40. The court then may (1) order the proceedings to be consolidated or (2) to be heard at the same time; or (3) to be heard one after the other; or (4) order any of the arbitral proceedings be stayed until after determination of any one of them[21]

41. The other provisions at sub-clauses 2(2)-(6) are consequential provisions upon consolidation, necessary following an order to consolidate. They are not controversial.

42. By clause 2 of Schedule 3, section 6B of the Ordinance, which provides for consolidation of arbitrations, has been resurrected as an opt-in option pursuant to section 100(b) of the Bill.

Clause 3 of Schedule 3 – Determination of preliminary question of law by Court

43. Clause 3 largely follows section 23A of Part II of the Ordinance with an additional proviso at clause 3(3) that "*the application shall (a) identify the question of law to be determined; and (b) state the grounds on which it is said that the question should be decided by the court*".

[21] Clause 2 (1)(d) and (e) Schedule 3 of the Bill

44. It is stipulated at clause 3(4) that the court shall not entertain an application unless it "*might produce substantial savings in costs to the parties*". This omits another consideration upon which the court may entertain an application under section 23A(2)(b) of the Ordinance, that is where "*the question of law is one in respect of which leave to appeal would be likely to be given under section 23(3)(b)*".

45. This again is another provision under the Domestic Regime that has been resurrected under Schedule 3 albeit as an opt-in option under section 100(3) of the Bill.

Clause 4 of Schedule 3- Challenging arbitral award on ground of serious irregularity

46. This is a provision that has to be opted-in together with Clause 7 of Schedule: see section 100(d) of the Bill.

47. Two conditions must be met before a party can invoke the court's supervision, they are: (a) an irregularity of one of the kinds stipulated in clause 4(a)-(i) of Schedule 3 and (b) the irregularity has caused or will cause substantial injustice to a party.

48. The irregularities listed in clause 4 of Schedule 3 can generally be classified into the following categories:

(1) lack of independence and partiality of an arbitrator or the tribunal (clause 4(2)(a));

(2) breach of the rule of natural justice (clauses 4(2)(a) and (i));

(3) the tribunal acted outside exceeding or otherwise not in accordance with its jurisdiction (clauses 4(2)(b), (c), (e));

(4) the award was procured by fraud (clause 4(2)(g));

(5) the tribunal failed to give an interpretation of an award that is ambiguous and uncertain (clause 4(2)(f)); and

(6) the tribunal failed to conform as to the form of the award (clause 4(2)(h)).

49. Such irregularities are also identified in the existing Ordinance at Part II for domestic arbitrations and under the Model Law at Schedule 5 to the Ordinance.

50. The power of the court to give relief where the arbitrator is partial is given at section 26 of Part II of the Ordinance.

51. The power of court to set aside an award where (1) the arbitrator has misconducted himself (that is tainted in respect of partiality) or misconducted the proceedings (that is in breach of the rules of natural justice) or the award has been improperly procured is at section 25 of Part II of the Ordinance.

52. Procedural fairness and equal treatment of the parties are mandated at Art. 18 of Model Law and Art 34 of Model Law also provides for an award to be set aside on the grounds of procedural irregularities or where the tribunal acts not in accordance with its jurisdiction.

53. Hence, clause 4(2) of Schedule 3 is a consolidating clause, setting out all the different kinds/types of irregularities which may result in the setting aside of an award.

54. Where serious irregularities tainted the award, clause 4(3) stipulates that the court may (1) remit the award to the tribunal for reconsideration, (2) set aside the award in part or as a whole, or (3) declare the award in part or in whole to be of no effect.

55. This clause is not controversial, in fact it duplicates some of the irregularities stipulated at Art. 34(2) of ML (clause 82 of the Bill) upon which an application can be made to court to set aside the award. But the question is why is it being retained as an opt-in option and not as an opt-out option. Clearly where there are serious irregularities in respect of an

award, whether domestic or international, and a party applies to the court for relief, relief should not be denied on the ground that the complainant had not opted in clause 4 of Schedule 3.

Clause 7 of Schedule 3- Supplementary provisions on challenged to or appeal against arbitral award

56. Clause 7(1) requires that recourse available under the arbitral process must be exhausted before an application is made to challenge or appeal against the award.

57. This may not be apparent under an ad hoc arbitration, but under other arbitral processes such as the two tier arbitration under FOSFA, a party will get a hearing de novo at the 2nd tier before a tribunal of 5 arbitrators, and a challenge or appeal is not to be brought before the arbitral process is first exhausted.

58. Clause 7(2) empowers the court to order the arbitral tribunal to state reasons in its award to enable the court to properly consider an application to challenge or appeal an award. There is nothing controversial here. In fact, Art. 31(3) of Model Law (clause 68(1) of the Bill) states that "*the award shall state the reasons upon which it is based unless the parties have agreed that no reasons are to be given*".

59. Clauses 7(4) and (6) empowers the court to order security of costs of the challenge or appeal and/or order that the sums awarded be secured as conditions for granting leave to challenge or appeal. Again, these supplementary provisions are not controversial.

Clause 5 and 6 of Schedule 3- Appeal against arbitral award on question of Law

60. These two clauses together with clause 7 are bundled together to be opted in jointly in replacement of section 23 of Part II of the Ordinance which provides for judicial review of arbitration awards in respect of domestic arbitrations.

61. Where the parties have expressly opted in for the provision allowing an appeal to court against arbitral award, one cannot but have serious reservation as to the filtering provision of "leave to appeal" which may result in the denial of the express wish of the parties that the award be subjected to judicial scrutiny and supervision where the tribunal is seen to have gotten it wrong on the application of law.

62. There is no similar provision where the parties opt to litigate. The parties can appeal against a judgment at First Instance as of right to the Court of Appeal pursuant to section 14(1) of the High Court Ordinance. It is unsatisfactory, where the parties have expressly opted in to clause 5, to rely upon the

supervision of the court where necessary, that the court, be fettered by clause 6, bundled in with clause 5, from performing its supervisory role unless the stringent requirements of clause 6 are met.

63. The court, if this part of the Bill is passed unaltered, would be fettered by clause 6(4) to grant leave to appeal only if: (1) the determination will substantially affect the right of one or more parties; (2) the question is one which the tribunal was asked to determine; (3) on the basis of the findings of fact: (a) the decision of the tribunal on the question is obviously wrong; or (b) the question is one of general importance and the decision of the tribunal is at least open to serious doubt.

64. The criteria set out in clause 6(4) is subject to the Swire Guidelines[22], formerly the Nema Guidelines[23] and we do not know of many instances where the guidelines have been satisfied. Hence, for all purposes, the effect of bundling of clauses 5 and 6 is the ousting the supervisory role of court, even if it is opted in by the parties.

Section 59 of the Bill- the provision relating to extension of time

65. Section 59(4) of the Bill provides for the circumstances under which the tribunal may extend time to commence arbitral proceedings.

[22] Swire Properties Ltd. V Secretary for Justice [2003] 3 HKC 347
[23] Pioneer Shipping Ltd. V BTP Trioxide Ltd (The Nema) (No. 2) [1982] AC 724

66. The Grounds are: (a) the circumstances are such as to be outside of the contemplation of the parties when they enter into the arbitration agreement and it would be just to extend the period or (b) the conduct of one party makes it unjust to hold the other party to the strict terms of the agreement.

67. This provision is worded similarly to section 2GD of Part IA of the Ordinance, applicable to both domestic and international arbitrations.

Section 57 of the Bill- General power exercisable by the tribunal

68. The wording of this section is similar to section 2GB of the Ordinance, in which the tribunal is empowered to consider ordering the claimant to give security for the costs of the arbitration, to discover documents, to deliver interrogatories etc. Section 2GB is in Part IA of the Ordinance, applicable to both domestic and international arbitrations.

Section 47 of the Bill-Equal Treatment of Parties

69. It is to be noted that this section substitutes Art. 18 of Model Law which stipulates that: "...*each party shall be given a full opportunity of presenting his case*".

70. In place of "full opportunity", section 47(3)(b) provides that the tribunal is required "*to act fairly...giving them a reasonable opportunity to present their cases*".

Section 62 of the Bill- Enforcement of orders and directions of arbitral tribunals whether made in Hong Kong or elsewhere

71. Section 62(1) provides that an order or direction made in or outside of Hong Kong is enforceable in the same way as an order or direction of the court with leave of the court.

72. This is worded similarly to section 2GG of the Ordinance.

73. An issue that has received some attention is whether Hong Kong court should grant/enforce interim measures to assist arbitral proceedings outside of Hong Kong.

74. In the case of Swift Fortune[24] , the Court of Appeal of Singapore ruled against enforcing an order issued by a tribunal in relation to an arbitration not carried out in Singapore. In relation to a mareva injunction where the seat of arbitration is in London the court said: "*...apart from the intrusive effect that section 12(7) would have were it given a plain meaning, we would still have great difficulty in accepting the argument that implies that Parliament had enacted s 12(7) with the intention of permitting the courts to become universal providers of procedural orders and reliefs to assist*

[24] Swift Fortune Ltd Magnifica Marine SA [2006] SGCA 42, [2007] 1 SLR 629

all anticipated or ongoing international arbitrations in any country in the world, whether or not they are Model Law states or signatories to the New York Convention"[25].

75. The Court then continued: *"...this court is entitled to look at the objective of the IAA*[26] *to see whether a literal, purposive, or some other kind of interpretation will promote the objective of the statue rather than hinder its fulfillment. As we have stated earlier, the objective of the IAA is to promote international arbitration in Singapore..."* [27] and the Court continued: *"... if s. 12(7) is read to apply to Singapore international arbitrations only, these difficulties would not arise*[28]*."*

76. As the stated objective of the Bill is to make the Hong Kong Ordinance more user friendly for the purpose of promoting Hong Kong international arbitrations, it must be carefully considered whether it is to Hong Kong's interests and whether there are compelling reasons to enforce foreign arbitral orders and directions.

Views on Proposals

77. At various parts of the Consultation Paper, views are sought on aspects of the Bill.

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[25] See paragraph 55 of Swift Fortune
[26] International Arbitration Act of Singapore 2002 (Cap 143A)
[27] See paragraph 17 of Swift Fortune
[28] See paragraph 52 of Swift Fortune

78. View are sought at para. 2.21 of the Consultation Paper on clause 14(4) of the Bill on extension of time for bringing an action subject of a "Scott and Avery" clause where an award has been set aside by court. The proposal is that the period between the commencement of the arbitration and the date of the court order to set aside the award be excluded in computing the time prescribed by any limitation enactment. As arbitral proceedings had been commenced within the limitation period, an order to extend the limitation period seems justifiable and it is agreed such an order shall not be subject to further appeal.

79. In relation to Clause 32 of the Bill, views are sought at paras 4.25-4.26 of the Consultation Paper whether the Bill should no longer include any provision for the appointment of judicial arbitrators. First, there does not seem to be many incidents of judicial officers being appointed as arbitrators. As such, section 14(1) may no longer be necessary as the parties can easily appoint arbitrators without restriction and difficulties from a large pool of qualified arbitrators in Hong Kong or from overseas. Secondly, it is a matter for the judicial officers whether they are permitted to take on such appointments and whether their fees should be paid into general revenue. Hence, subsections 32(2)-(5) are not matters for this Bill.

80. Views are also sought in relation to paras 6.14-6.16 and para 7.32 of the Consultation Paper on the matter of court ordered

interim measures in relation to foreign arbitral proceedings and the enforcement of foreign arbitral orders and directions. It is necessary to consider whether it is to Hong Kong's interest to assist foreign arbitrations, bearing in mind Swift Fortune. It is not unreasonable to impose the requirement of reciprocity and to limit the scope of any order/direction to a type that may be made in Hong Kong.

81. Views are sought at para 8.19 of the Consultation Paper in relation to clauses 75(3) and (4) of the Bill. It is clear that parties should be discouraged from unreasonably opposing requests for orders or directions, for such opposition would necessarily delay the arbitral proceedings. In this respect, a cost order against a party who opposes without merit is necessary and just: it sends a signal to the parties not to continue with such procedural gymnastics.

82. Views are sought at para 8.43 as to the power of the tribunal to award interest on costs. It is advisable to adopt the "incipitur rule", to have interest on costs to run from the date of the costs award. For the winning party, costs would already have been incurred and out of pocket from the commencement of the arbitration and there is no injustice to the paying party. A fixed date introduces certainty into the equation for both parties.

83. View is also sought at para 9.3 of the Consultation Paper whether the decision of the Court of First Instance to set

aside an arbitral award should be subject to appeal with leave. It is desirable in this case that the requirement of leave be in place to filter out unmeritorious appeals against the decision at First Instance.

84. Comments are also invited on the "opting-in" system at para 11.10 of the Consultation Paper. On this part, it is suggested that it would be more user friendly to have Schedule 3 clauses are opt-out options instead of opt-in options for the reasons stated above.

Concluding remarks

85. Much good work has gone into the preparation of this Bill. But the question remains whether the Bill before us is "**more user friendly**" in the context of attracting more international arbitration to Hong Kong? The answer from reading the Bill is no.

86. One solution is this:

(1) A separate International Arbitration Ordinance be drafted to follow the Model Law as closely as possible, shone of all provisions unrelated or unnecessary to the conduct of an international arbitration in Hong Kong;

(2) The Bill, suitably amended, shall apply to all Hong Kong arbitrations other than an international arbitration as defined in the Model Law;

(3) The offensive deeming provision in the Bill be deleted;

(4) Sections 1, 2, 3 and 4 of Schedule 3 of the Bill be made to be opt-out options instead of opt-in options;

(5) Sections 100(d) and (e) of the Bill be un-bundled;

(6) Where section 5 of Schedule 3 is opted in by the parties alone without section 6, that leave to appeal against an arbitral award to the Court of First Instance be dispensed with;

(7) There be further consultation as to whether Hong Kong should enforce interim measures in support of arbitrations carried out elsewhere.

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Arbitration Bill

Draft Bill Section Nos	Nature				Others
	Non Model Law Provisions	Model Provisions	Supplemental Provisions to Model Law Provisions	Substitute Provisions for Model Provisions	
Part 1 Preliminary					
ss 1 – 6	✓				
Part 2 General Provisions					
ss 7 – 8	✓				
s 9		Art. 2A			
s 10 (1)		Art. 3			
ss 10 (2) – (3)			Art. 3		
s 11		Art. 4			
s 12		Art. 5			
ss 13 (1) – (6)				Art. 6	
ss 14 (1) – (4)	✓				
ss 15 (1) – (2)	✓				
ss 16 (1) – (3)	✓				
ss 17 (1) – (6)	✓				
ss 18 (1) – (2)	✓				
Part 3 Arbitration Agreement					
s 19 (1)	Art. 7 (Option 1)				
ss 19 (2) – (3)		Art. 7			

s 20 (1)	Art. 8				
ss 20 (2) – (7)		Art. 8			
s 21		Art. 9			
ss 22 (1) – (2)	✓				
Part 4 Composition of Arbitral Tribunal					
	Division 1 – Arbitrators				
s 23 (1)		Art. 10 (1)			Art. 10 (2) Not applicable
ss 23 (2) – (3)			Art. 10		
s 24 (1)		Art. 11			
ss 24 (2) – (5)			Art. 11		
s 25		Art. 12			
s 26 (1)		Art. 13			
ss 26 (2) – (5)			Art. 13		
s 27		Art. 14			
s 28		Art. 15			
s 29	✓				
s 30	✓				
ss 31 (1) – (11)	✓				

ss 32 (1) – (6)	✓				
	Division 2 – Mediators				
ss 33 (1) – (3)	✓				
ss 34 (1) – (4)	✓				
Part 5 jurisdiction of Arbitral Tribunal					
s 35 (1)		Art. 16			
s 35 (2) – (5)			Art. 16		
Part 6 Interim Measure and Preliminary Orders					
	Division 1 – Interim Measures Orders				
s 36 (1)		Art. 17			
s 36 (2) – (3)			Art. 17		
s 37		Art. 17A			
	Division 2 – Preliminary Orders				
s 38		Art. 17B			
s 39		Art. 17C			
	Division 3 – Provision Applicable to Interim Measure and Preliminary Order				
s 40		Art. 17D			
s 41		Art. 17E			

s 42		Art. 17F			
s 43		Art. 17G			
	Division 4 – Recognition and Enforcement of Interim Measure				
s 44					Section 62 have the effect of substituting ML Art.17H
s 45					ML Art. 17I does not have effect
	Division 5 – Count Ordered Interim Measures				
s 46 (1)					ML Art. 17J does not have effect
ss 46 (2) – (8)	✓				
Part 7 Conduct of Arbitral Proceedings					
ss 47 (1) – (3)				Art. 18	
s 48 (1)		Art. 19 (1)			
ss 48(2) –(3)			Art. 19		
s 49		Art. 20			
s 50		Art. 21			
s 51		Art. 22			
s 52		Art. 23			

s 53		Art. 24			
s 54 (1)		Art. 25			
ss 54 (2) – (4)			Art. 25		
s 55 (1)		Art. 26			
s 55 (2)			Art. 26		
s 56 (1)		Art. 27			
ss 56 (2) – (5)			Art. 27		
ss 57 (1) – (9)	✓				
ss 58 (1) – (4)	✓				
ss 59 (1) – (7)	✓				
ss 60 (1) – (5)	✓				
ss 61 (1) – (9)	✓				
ss 62 (1) – (5)	✓				
ss 63 (1) – (2)	✓				
s 64	✓				
Part 8 Making Award and Termination of Proceedings					
s 65		Art. 28			
s 66		Art. 29			

s 67 (1) s 67 (2)		Art. 30	Art. 30		
s 68 (1) s 68 (2)		Art. 31	Art. 31		
s 69		Art. 32			
s 70 (1) ss 70 (1) – (2)		Art. 33	Art. 33		
ss 71 (1) – (2)	✓				
s 72	✓				
ss 73 (1) – (3)	✓				
ss 74 (1) – (2)	✓				
ss 75 (1) – (9)	✓				
ss 76 (1) – (4)	✓				
s 77	✓				
ss 78 (1) – (10)	✓				
ss 79 (1) – (4)	✓				
ss 80 (1) – (3)	✓				

ss 81 (1) – (3)	✓				
Part 9 Recourse Against Award					
s 82 (1)		Art. 34			
ss 82 (2) –(3)			Art. 34		
Part 10 Recognition and Enforcement of Awards					
	Division 1 – Enforcement of Arbitral Awards				
s 83					Art. 35 of Model Law does not have effect
s 84					Art. 36 of Model Law does not have effect
ss 85 (1) – (3)	✓				
s 86	✓				
ss 87 (1) – (4)	✓				
	Division 2 – Enforcement of Convention Awards				
ss 88 (1) –(3)	✓				
s 89	✓				
ss 90 (1) – (5)	✓				

ss 91 (1) – (3)	✓				
s 92	✓				
	Division 3 – Enforcement of Mainland Awards				
ss 93 (1) – (3)	✓				
ss 94 (1) – (2)	✓				
ss 95	✓				
ss 96 (1) – (4)	✓				
ss 97 (1) – (2)	✓				
ss 98 (1) – (2)	✓				
s 99	✓				
Part 11 – Provision that may be expressly opted for or automatically apply					
s 100	✓				
s 101	✓				
ss 102 (1) – (3)	✓				
s 103	✓				

s 104	✓				
Part 12 – Miscellaneous					
ss 105 (1) – (2)	✓				
ss 106 (1) – (5)	✓				
ss 107 (1) – (2)	✓				
s 108	✓				
Part 13 – Repeal, Savings and Transitional Provisions					
s 109	✓				
s 110	✓				
s 111	✓				
Part 14 – Consequential and Related Amendments					
s 112	✓				
Schedule 1	UNCITRAL Model Law on International Arbitration as amended on 7 July 2006 reproduced				
Schedule 2	✓	Application of Ordinance to Judge – Arbitrators and Judge Lumpier			
Schedule 3	✓	Provisions that may be expressly	for or automatically applications		
Schedule 4	✓	Savings and Transitional Provisions			

Schedule 5	✓	Consequential Amendments			