Arbitration Practices
Adopted by Hong Kong's Major Competitors

Introduction

1. This paper is prepared in response to members' request for information at the Bills Committee meeting held on 28 July 2009. It seeks to compare Hong Kong as a principal international arbitration centre with our major competitors, namely USA, the Mainland, England and Wales, Sweden, Singapore, Malaysia and New Zealand.

Number of International Arbitration Cases handled in 2006, 2007 and 2008

2. The number of cases Hong Kong and our competitors have handled in 2006, 2007 and 2008 are set out in the 2nd to 4th columns of the attached table ("**Table**").

3. In terms of number of international arbitration cases handled, Hong Kong ranked third among our major competitors in each of 2006, 2007 and 2008, having handled 234, 274 and 449 international arbitration cases respectively.

4. USA ranked first in each of 2006, 2007 and 2008, having handled 586, 621 and 703 international arbitration cases respectively. The Mainland ranked second in each of 2006, 2007 and 2008, having handled 495, 466 and 607 international arbitration cases respectively. Notwithstanding being ranked behind USA and the Mainland, given the significantly larger economies of USA and the Mainland compared with that of Hong Kong, Hong Kong has performed well. It is also noted that Hong Kong has out-performed the fourth ranking competitor, England and Wales by a significant margin in 2006, 2007 and 2008. The latter handled 133, 137 and 213 international arbitration cases only.

Whether the competitors have adopted legislation for international arbitrations based on the UNCITRAL Model Law ("Model Law")

5. Information, based on information in the UNCITRAL's website, on whether a competitor has adopted legislation for international arbitrations based on the Model Law ("**Model Law country**") is set out in the 5th column of the Table.

6. According to UNCITRAL, each of England and Wales, Singapore and New Zealand has adopted legislation based on the Model Law. On the other hand, each of USA (with the exception of California, Connecticut, Illinois, Louisiana, Oregon and Texas), the Mainland, Sweden and Malaysia has not adopted legislation based on the Model Law.

7. It should be noted, however, that the information referred to in the 5th column of the Table and paragraph 6 above is based on information that was reported to the UNCITRAL Secretariat. Such information may not be conclusive on the extent in which a particular country has in fact adopted legislation based on the Model Law. Hence, a 7th column is provided in the Table to describe in brief terms the extent of adherence to the Model Law by each competitor.

8. As indicated in the 7th column of the Table, all the competitors (with the exception of USA) have adopted legislation for international arbitrations largely based on the Model Law. England and Wales, Singapore and New Zealand are Model Law countries. The Mainland is reported to have embraced many fundamental principles of the Model Law for international arbitrations. Sweden is reported to have given utmost attention to each provision of the Model Law for international arbitrations. Malaysia has recently passed the Arbitration Act 2005 based on the Model Law for international arbitrations.

9. USA is the only competitor which has not adopted legislation for international arbitrations based on the Model Law at the federal level. Even then, some states, namely, namely California, Texas, Connecticut, Illinois, Louisiana and Oregon have adopted legislation for international arbitrations based on the Model Law.

A Unitary Regime or Separate Regimes for Domestic and International Arbitrations

10. Information as to whether a competitor has a unitary regime or separate regimes for domestic and international arbitrations is set out in the 6th column of the Table.

11. Among the competitors, the Mainland, England and Wales, Sweden, Malaysia and New Zealand have adopted a unitary regime. Singapore has adopted separate regimes for domestic and international arbitrators. In USA, different states may adopt very different arbitration regimes for domestic and international arbitrations.

Conclusion

12. Given Hong Kong's track records and success as an international arbitration centre (see paragraphs 3 and 4 above), it is important for Hong Kong to keep pace with international practices on international arbitrations to maintain and improve our competitiveness. As can be seen from the above, many of our competitors have in substance already adopted legislation for international arbitrations based on the Model Law. The Arbitration Bill seeks to enhance Hong Kong competitiveness as an international arbitration centre by adopting in perception and in substance the Model Law for international arbitrations.

13. Except for USA and Singapore, all the competitors have adopted a unitary regime for domestic and international arbitrations. A unitary regime for domestic and international arbitrations on the basis of the Model Law would enable Hong Kong to operate an arbitration regime which accords with international arbitration practices and enhance Hong Kong's competitiveness. Parties to an arbitration will be saved from the trouble of having to identify whether any particular arbitral proceeding is "domestic" or "international" and as to the law that is applicable.

Department of Justice
September 2009

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Annex

Country	Number of International Arbitration Cases			Whether International Arbitration is based on Model Law[1]	Unitary regime/Separate regimes for Domestic and International arbitrations	Extent of Adherence to Model Law
	06	**07**	**08**			
Hong Kong[2]	234	274	449			
USA[3]	586	621	703	*Not a Model Law country*, except for the following states:- California, Connecticut, Illinois, Louisiana [4], Oregon and Texas)	*A hybrid regime* State arbitration statutes generally fall into three categories: (1) those states that follow the Uniform Arbitraton Act[5] (e.g. Colorado has added international commercial arbitration statutes based on the Uniform Arbitration Act), (2) those states that adopt the Model Law with only minor changes (e.g. California, Texas, Connecticut, Illinois, Louisiana and Oregon) and (3) "ad hoc"states that do no follow any particular model (e.g. Florida and Hawaii have ad hoc statutes that partially adopt the Model Law and partially draw on other sources). [6]	*The United States has not adopted the Model Law through treaty ratification, court decisions or other enactments on a federal level*[7] *State arbitration statutes generally fall into three categories: (1) those states that follow the Uniform Arbitraton Act, (2) those states that adopt the Model Law with only minor changes and (3) "ad hoc"states that do no follow any particular model*[8] The Federal Arbitration Act of 1925 ("FAA") is the controlling body of arbitration law at both the state and federal level in the United States. However, the FAA is a "bare-bones" statute that primarily ensures that courts give effect to arbitration clauses and sets out limited grounds for vacating arbitration awards. As such, it has led to states enacting their own international commercial arbitration statutes to fill in the gaps of the FAA and attract business.[9]

[1] Information based on UNCITRAL's website. The information is updated whenever the UNCITRAL Secretariat is informed of changes in enactment of the Model Law in any country.
[2] Number of international arbitration cases based on our phone enquiry with HKIAC. According to HKIAC's website, the total number of arbitration cases (both international and domestic) handled by HKIAC were 394 (2006), 448 (2007) and 602 (2008).
[3] Number of international cases based on websites of Singapore International Arbitration Centre and HKIAC.
[4] since 2006.
[5] To provide for state uniformity in general arbitral law, the National Conference of Commissioners of Uniform State Laws completed and approved the Uniform Arbitration Act in 1955. Since 1955, at least 35 states have adopted the Uniform Arbitration Act ("UAA") in its entirety, while at least 14 others have adopted substantially similar legislation. In 2000, the UAA was revised ("RUAA"). A common compliant about the UAA was its lack of rules addressing international disputes. However, despite such complaints, the revisions did not offer a remedy. The Prefatory Note of the RUAA acknowledges this omission and explains that many states had already enacted legislation addressing international disputes or apply the Model Law (per article by Laverne Berry in berryentertainmentlaw.com).
[6] National Report for the United States for the 1st Intermediate Congress of the International Academy of Comparative Law (Mexico, 2008) on Commercial Arbitration.
[7] National Report for the United States for the 1st Intermediate Congress of the International Academy of Comparative Law (Mexico, 2008) on Commercial Arbitration.
[8] National Report for the United States for the 1st Intermediate Congress of the International Academy of Comparative Law (Mexico, 2008) on Commercial Arbitration.
[9] National Report for the United States for the 1st Intermediate Congress of the International Academy of Comparative Law (Mexico, 2008) on Commercial Arbitration.

Country	Number of International Arbitration Cases			Whether International Arbitration is based on Model Law[1]	Unitary regime/Separate regimes for Domestic and International arbitrations	Extent of Adherence to Model Law
The Mainland, PRC[10]	495	466	607	*Not a Model Law country*	*Unitary regime* Before the enactment of the Arbitration Law in 1994, domestic and international arbitration in China operated in two different systems. Now the practice in relation to domestic disputes has brought into line with the practices in relation to international commercial arbitration.[11]	*Many fundamental principles of the Model law have been embraced in the Chinese Arbitration Law* The Model Law, though not formally adopted in China, was taken into consideration during the drafting of the Arbitration Law, and many fundamental principles of the Model law have been embraced in the Chinese Arbitration Law. However, there are also noticeable distinctions between the Model Law and the Chinese Arbitration Law. The most important distinctions relate to a) contents of a valid arbitration agreement, b) competence of arbitral tribunal to rule on its own jurisdiction, c) time limit for challenge to arbitral jurisdiction, d) interim measures and preliminary orders, e) appointment of presiding arbitrator of the tribunal, f) combination of mediation and arbitration, g) decision making by a panel of arbitrators, h) interpretation of the award, i) ground for setting aside an award, j) time period for application for setting aside of an award, and k) re-arbitration of the dispute.[12]
England and Wales[13]	133	137	213	*Model Law Country*	*Unitary regime* The English Arbitration Act 1996 intends to provide a unitary "non-interventionist" regime for commercial arbitration in England, both national and international (abolishing the old distinction under the 1950-1979 Acts between "domestic" and "non-domestic" arbitration[14]	*The philosophy of the Model Law pervades the 1996 Act*[15] Although Model Law exerted a strong influence on the Arbitration Act in both language and structure, the Departmental Advisory Committee ultimately decided that there were cogent reasons why England should not adopt the Model Law in its entirety. The Arbitration Act differs from the Model Law in some important respects. In some respects, the Arbitration Act is less prescriptive than the Model Law. In other respects, the Arbitration Act goes beyond the Model Law.

[10] Number of international arbitration cases based on website of Singapore International Arbitration Centre. According to HKIAC's website, the total number of arbitration cases (both international and domestic) handled by CIETAC were 981 (2006), 1118 (2007) and 1230 (2008).
[11] ICCA, International Handbook on Commercial Arbitration, Supplement 55, June 2009.
[12] ICCA, International Handbook on Commercial Arbitration, Supplement 55, June 2009.
[13] Number of international cases based on websites of Singapore International Arbitration Centre and HKIAC.
[14] ICCA, International Handbook on Commercial Arbitration, Supplement 23, March 1997 (note: minor amendments have been made to the English Arbitration Act 1996 but no updates on such changes are available on ICCA, International Handbook on Commercial Arbitration at this stage).
[15] ICCA, International Handbook on Commercial Arbitration, Supplement 23, March 1997 (note: minor amendments have been made to the English Arbitration Act 1996 but no updates on such changes are available on ICCA, International Handbook on Commercial Arbitration at this stage).

Country	Number of International Arbitration Cases			Whether International Arbitration is based on Model Law[1]	Unitary regime/Separate regimes for Domestic and International arbitrations	Extent of Adherence to Model Law
						The Arbitration Act also differs from the Model Law because s69 of the Arbitration Act allows appeal on a question of substantive law. The Model Law does not contain any general right to appeal an arbitral award for substantive error of law. However, the parties in an English seated arbitration are free to opt out of the application of Section 69. To the extent that the Arbitration Act differs from the Model Law, most of these differences can be opted out of by the parties. The differences between the Arbitration Act and the Model Law do not, therefore, significantly constrain party autonomy[16]
Sweden[17]	64	81	74	*Not a Model Law country*	*Unitary regime*[18] The Arbitration Act of 1999 applies to arbitration taking place in Sweden irrespective of whether the dispute has an international connection. The Act applies equally to domestic and international arbitration[19]	*Utmost attention given to each provision of the Model Law*[20] Although the Arbitration Act 1999 is not identical with the Model law, the utmost attention was given to each provision of the Model Law when drafting the Act, and there are in substance few differences between the Act and the Model Law.
Singapore[21]	65	70	71	*Model Law Country*	*Separate regimes*[22] There are two separate regimes governing the conduct of arbitration in Singapore. The Arbitration Act 2002 applies to any arbitration where the place of arbitration is Singapore. International arbitrations are governed by the International Arbitration Act of 1995. [23]	*The International Arbitration Act of 1995 adopted the Model Law* The International Arbitration Act of 1995 adopted (in the First Schedule) the Model Law. The Act gives the Model Law, with the exception of Chapter VIII thereof, "force of law in Singapore"[24]

[16] per article, "The Arbitration Act Ten Years On" in The International Comparative Legal Guide to International Arbitration 2007.
[17] Number of international cases based on website of Singapore International Arbitration Centre. According to HKIAC's website, the total number of arbitration cases (both international and domestic) handled by SCC were 141 (2006), 84 (2007) and 176 (2008).
[18]No recent updates on Sweden in ICCA, International Handbook on Commercial Arbitration. The last update was Supplement 32 of December 2000.
[19] ICCA, International Handbook on Commercial Arbitration, Supplement 32, December 2000.
[20]No recent updates on Sweden in ICCA, International Handbook on Commercial Arbitration. The last update was Supplement 32 of December 2000.
[21] Number of international cases based on websites of Singapore International Arbitration Centre and HKIAC.
[22] No recent updates on Singapore in ICCA, International Handbook on Commercial Arbitration. The last update was Supplement 38 of April 2003.
[23] ICCA, International Handbook on Commercial Arbitration, Supplement 38, April 2003.
[24] ICCA, International Handbook on Commercial Arbitration, Supplement 38, April 2003.

Country	Number of International Arbitration Cases			Whether International Arbitration is based on Model Law[1]	Unitary regime/Separate regimes for Domestic and International arbitrations	Extent of Adherence to Model Law
Malaysia[25]	1	2	8	*Not a Model Law country[26]*	*Unitary regime* The outmoded Arbitration Act 1952 which was modelled on the English Arbitration Act of 1950 has been repealed in its entirety, and replaced by the Arbitration Act 2005. The Arbitration Act 2005 adopts, with some modifications, the provisions of the Model Law, applying them to both domestic and international arbitrations. Malaysia has now joined the community of nations which have adopted the Model Law to govern their arbitrations.[27]	*The Arbitration Act 2005 is based on the Model Law* The governing law for arbitration is the Arbitration Act 2005 which is based on the Model Law. A departure from the Model Law is the provisions under Section 3 and part III of the Arbitration Act 2005. Part III applies to domestic arbitrations, but there are enabling provisions in Section 3 for parties in a domestic arbitration to exclude or opt out of the application of Part III, and for parties to an international arbitration to agree to opt into Part III of the Arbitration Act 2005, in whole or in part.[28]
New Zealand[29]	-	-	-	*Model Law Country*	*Unitary regime* New Zealand adopted the Model Law for both domestic and international arbitrations in the Arbitration Act 1996[30]	*The Arbitration Act is based on the Model Law* The Arbitration Act is based on the Model Law. The Model Law is incorporated as the First Schedule to the Act, subject to minor amendments. The Model Law has recently been updated to reflect changes in international best practice. These changes were included in the Arbitration Amendment Act 2007.[31] The amendments relate to the confidentiality rules for arbitral and subsequent court proceedings and explain how the Arbitration Act 1996 applies to consumer arbitration agreements.[32]

[25] Number of international cases based on website of Singapore International Arbitration Centre. According to HKIAC's website, the total number of arbitration cases (both international and domestic) handled by KLRCA were 37 (2006), 40 (2007) and 47 (2008).
[26] The classification by the UNCITRAL may change in due course after enactment of the Arbitration Act 2005 by Malaysia.
[27] ICCA, International Handbook on Commercial Arbitration, Supplement 47, November 2006.
[28] ICCA, International Handbook on Commercial Arbitration, Supplement 47, November 2006.
[29] Please note that no information on the number of international arbitration cases handled by New Zealand in 2006, 2007 and 2008 is available from either the website of the Arbitrators' and Mediators' Institute of New Zealand ("AMINZ") or an enquiry with AMINZ directly.
[30] ICCA, International Handbook on Commercial Arbitration, Supplement 25, March 1998.
[31] per article by Clayton Cosgrove, Associate Justice Minster dated 10 Oct 2007, "Arbitration Amendment Bill passed by Parliament" published on beehive.govt.nz (The official website of the New Zealand Government).
[32] ICCA, International Handbook on Commercial Arbitration, Supplement 51, March 2008.