(1) Simplified or Fast Track Procedures of Arbitration Institutions

(2) Breakdown of Arbitration Cases in Hong Kong that Adopted Domestic Arbitration Regime by Industries

and

(3) Dishonesty Test for Arbitrators' Liabilities under Clause 103

I. Introduction

Following requests for information by Members at the meeting of the Bills Committee of the Legislative Council held on 5 November 2009, this paper addresses the following matters:

(a) information on arbitration institutions, if any, which have simplified or fast track procedures;
(b) breakdown of arbitration cases that adopted domestic arbitration regime by industries, if any; and
(c) the relevant court cases regarding arbitrators who were liable for the consequences of doing or omitting to do an act dishonestly in the performance of arbitral functions.

II. Simplified or Fast Track Procedures of Arbitration Institutions

2. As discussed in the previous LC Paper No. CB(2)2546/08-09(03), it is considered essential to grant the parties the greatest possible freedom when choosing the procedural rules for arbitration under the Model Law (see Article 19(1) of the UNCITRAL Model Law set out in clause 47(1) of the Bill)[1]. Dr Peter Binder arrived at the following conclusion after a review of Article 19 of the Model Law and the relevant experience of other Model Law jurisdictions:

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[1] Article 19 of the Model Law provides as follows:
"(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."

> *"The possibility of choosing the procedural rules that are to be applied by the tribunal constitutes one of the major attractions for parties contemplating resolving their disputes via arbitration. It is therefore essential that this freedom is expressed in a clear manner, as is the case in Article 19 of the Model Law. Attempts to restrict this party freedom to protect arbitrators from 'inconveniences' … is counterproductive and demonstrates an inappropriate attitude towards the Model Law and its fundamental concepts, one of the most important of which is party autonomy.*[2]*"*

3. Most mainstream arbitration institutions have therefore decided against the adoption of specific simplified or fast track set of rules. At present, neither the London Court of International Arbitration ("LCIA") nor the International Court of Arbitration of the International Chamber of Commerce ("ICC") has fast track procedures.

4. In fact, "*it is significant that neither the ICC nor the LCIA, both of which gave careful consideration to the question, decided not* [sic] *to include any rules specifically dedicated to "fast track" procedures in the revised version of their rules which in both cases came into effect on January 1, 1998.*"[3]

III. Breakdown of Arbitration Cases that Adopted Domestic Arbitration Regime by Industries

5. We have made inquiry with the Hong Kong International Arbitration Centre ("HKIAC") on the breakdown of arbitration cases opting for domestic arbitration by industries.

6. HKIAC does not keep any statistics for domestic arbitration, but we are informed that those cases are mainly from sectors including building management, construction, insurance, and general commercial transactions.

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[2] Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 2nd ed., (Sweet & Maxwell, London, 2005), at para. 5-031.

[3] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed., (Sweet & Maxwell, 2004), at para 6-45.

7. So far as construction cases are concerned, as known to the HKIAC, the percentage of construction disputes opting for domestic arbitration should not be substantially higher than 1/3. As noted above, there are also quite a number of cases involving disputes in other sectors that were conducted under the domestic arbitration regime.

IV. Dishonesty Test under Clause 103 of the Bill

8. Under clause 103 of the Bill, an arbitral tribunal and a mediator, and their employees or agents are liable for an act done or omitted to be done in relation to the exercise or performance of the tribunal's arbitral functions or the mediator's functions *only* if it is proved that **the act was done or omitted to be done dishonestly**. Clause 103 re-enacts section 2GM of the current Arbitration Ordinance (Cap. 341) and extends the immunity of arbitrators to mediators.

9. No court cases on section 2GM of the current Ordinance can be located after search on the relevant Hong Kong jurisprudence. This section is the equivalence of section 29 of the English Arbitration Act 1996[4]. Section 29 uses the term 'bad faith' which meaning is similar to the term "dishonesty".[5] However, we are not able to find any English case law on the meaning of "bad faith" in section 29.

10. The UK Departmental Advisory Committee on Arbitration Law ("DAC") under the chairmanship of Lord Justice Saville referred to the relevant test for 'bad faith' as found in *Melton Medes Ltd v Securities and Investment Board*[6] in para 134 of its Report of February 1996 in the context of the immunity of arbitrators. Mr Justice Lightman laid down in this case the proper legal test of "bad faith" as follows:

> *"Lack of good faith connotes either (a) malice in the sense of personal spite or a desire to injure for improper reasons or (b) knowledge of absence of power to make the decision in question."*

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4 Section 29 of the English Arbitration Act 1996 provides as follows:
"(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.
(2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself."

5 *Mustill and Boyd on Commercial Arbitration* (2nd Ed) (2001 Companion) (Butterworths) at page 300.

6 [1995] 3 All ER 880 at 890b

11. DAC considered that English law is well acquainted with the expression of 'bad faith' and although the committee considered other terms, it was concluded that there were unlikely to be any difficulties in practice in using this test.

12. On the other hand, commentators such as Lord Mustill and Steward Boyd QC were of the view that it would not be appropriate to import from the field of public law the wider concept of bad faith which involves no more than acting for an extraneous purpose or without taking into account all the relevant circumstances and no others. Instead, they considered that the concept of dishonesty involves "*conscious and deliberate fault on the part of the arbitrator.*" [7]

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[7] *Mustill and Boyd on Commercial Arbitration* (2nd Ed) (2001 Companion) (Butterworths) at page 300.