

立法會 *Legislative Council*

LC Paper No. CB(2)899/08-09(07)

Ref : CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

Background brief prepared by the Legislative Council Secretariat for the meeting on 23 February 2009

Reform of the law of arbitration

Purpose

This paper provides information on the past discussions of the Panel on Administration of Justice and Legal Services (the Panel) on reform of the law of arbitration.

Background

Existing law

2. The existing Arbitration Ordinance (Cap. 341) (the Ordinance) provides separate regimes for the conduct of domestic and international arbitrations in Hong Kong. The regime for domestic arbitrations is largely based on the United Kingdom (UK) arbitration legislation, while the regime for international arbitrations is based on the UNCITRAL Model Law on International Commercial Arbitration (Model Law) adopted by the United Nations Commission on International Trade Law (UNCITRAL). There are provisions in the Ordinance which enable the parties to switch from one regime to another.

3. In comparison with the law for domestic arbitration, the Model Law limits opportunities for judicial intervention and supervision, while granting more autonomy to the parties and the arbitral tribunal. A comparison on the differences between the two arbitration regimes under the existing Ordinance as provided by the Department of Justice (DoJ) is in **Appendix I**.

Proposal for reform of arbitration law

4. The proposal to create a unitary system of arbitration law was first mooted by the Committee on Arbitration Law of the Hong Kong International Arbitration Centre (HKIAC) set up in 1992. In its report issued in 1996 (the 1996 report), the HKIAC Committee was of the view that, to keep pace with the needs of modern arbitration community domestically and internationally, the Ordinance should be completely redrawn in order to apply the Model Law equally to both domestic and international

arbitrations. However, as the unification of the two arbitral systems was a complex issue, the Committee recommended, as an interim measure, that limited improvements be made to the Ordinance to minimize the differences between the two systems. The HKIAC Committee's recommendations were implemented by way of the Arbitration (Amendment) Ordinance 1996, which promoted greater party autonomy, vested primary authority in arbitral tribunals and limited the scope of court intervention during arbitral proceedings.

5. In 1998, the Hong Kong Institute of Arbitrators (HKI Arb) in co-operation with HKIAC established a Committee on Hong Kong Arbitration Law to follow up on the 1996 report. The HKI Arb Committee issued a report in 2003 recommending that the existing Ordinance should be redrawn and a unitary regime with the Model Law governing both domestic and international arbitrations should be created. At its meeting on 27 June 2005, the Panel was consulted on the recommendations of the HKI Arb Committee and the proposals of DoJ to take forward those recommendations. Having obtained the Panel's support, DoJ set up in September 2005 the Departmental Working Group (the Working Group), which was chaired by the Solicitor-General and comprising representatives of the legal profession, arbitration experts and relevant government officials, to formulate legislative proposals to implement the recommendations in the report of the HKI Arb Committee.

Consultation Paper on Reform of the Law of Arbitration

6. On the basis of the legislative proposals prepared by the Working Group, DoJ published a Consultation Paper on Reform of the Law of Arbitration in Hong Kong and draft Arbitration Bill (Consultation Paper) on 31 December 2007 to seek views on reform of the law of arbitration in Hong Kong. The consultation period ended on 30 June 2008.

7. DoJ proposes in the Consultation Paper the creation of a unitary regime for all types of arbitration on the basis of the Model Law, thereby abolishing the distinction between domestic and international arbitrations under the existing Ordinance. The draft Bill adopts the structure of the Model Law as its framework. The purpose of the reform is to make the law of arbitration more user-friendly. As the Model Law is familiar to practitioners from civil law as well as common law jurisdictions, this will have the benefits of enabling the Hong Kong business community and arbitration practitioners to operate an arbitration regime which accords with widely accepted international arbitration practices and development. The reform will also promote Hong Kong as a regional centre for legal services and dispute resolution. The Executive Summary of the Consultation Paper setting out the major issues in the draft Bill is in **Appendix II**.

Discussions of the Panel on the Consultation Paper on 28 January 2008

8. On the concern previously expressed by the construction industry, which represented the largest users of domestic arbitrations in Hong Kong, that certain rights and protections of domestic users of arbitrations would be removed following the

adoption of a unitary regime of arbitration, the Panel was advised that certain provisions under the current Ordinance that only applied to domestic arbitration had been retained as opt-in provisions under Schedule 3 to the draft Bill. These provisions related to determination of a dispute by a sole arbitrator in default of agreement, consolidation of arbitrations, determination of a preliminary point of law by the Court of First Instance, challenging an arbitral award on ground of serious irregularity and appeal against an arbitral award on point of law. Members noted that it was provided under Part 11 of the draft Bill that parties to an arbitration agreement could expressly provide in the arbitration agreement as to whether any of the provisions in Schedule 3 should apply. A deeming provision was also included under Part 11 to ensure that, subject to some exceptions, all the opt-in provisions in Schedule 3 would automatically apply to an arbitration agreement contained in every contract down the line of the subcontracting process.

9. The Panel was also advised that to address the concern raised by the construction industry where users of standard form contracts might continue to use the term "domestic arbitration" in such contracts either before or for sometime after the commencement of the new ordinance, it was provided under Part 11 of the draft Bill that, where an arbitration agreement entered into before, or at any time within a period of six years after, the commencement of the new ordinance, stipulated that an arbitration under that arbitration agreement should be a "domestic arbitration", all the opt-in provisions under Schedule 3 should automatically apply to the arbitration agreement subject to any express agreement to the contrary between the parties.

10. Regarding the legal profession's concern that a right to appeal against arbitral awards was provided in domestic arbitration but not in international arbitration, the Administration explained that given that the global trend was to minimize court's interference in arbitral awards, an appeal mechanism was not provided in the Model Law. To address the concern, section 23 of the existing Ordinance concerning appeal against arbitral awards on question of law was retained as an opt-in provision in Schedule 3 to the draft Bill.

11. As the Consultation Paper had addressed the concerns raised by the Panel and other organizations during previous discussions, members expressed general support for it.

Latest developments

12. According to the Legislative Programme 2008-2009 provided by the Administration on 22 October 2008, the Administration aims to introduce the Arbitration Bill into the Legislative Council in the second half of the 2008-2009 legislative session to reform the law of arbitration based on the 2003 report of the HKI Arb Committee and the results of the consultation exercise conducted by DoJ in the first half of 2008.

Relevant papers

13. A list of the relevant papers available on the LegCo website (<http://www.legco.gov.hk>) is in **Appendix III**.

Council Business Division 2
Legislative Council Secretariat
17 February 2009

Differences between the two arbitration regimes under the Arbitration Ordinance

11. Annex I compares the domestic and international arbitration provisions of the Arbitration Ordinance. The significant differences between the two are as follows:

- (a) There is more scope for court intervention or assistance in domestic cases. Thus, the Court may, in domestic arbitrations but not in international arbitrations:
 - (i) order two or more related arbitrations to be consolidated or heard concurrently if they involve common issues (s 6B(1));
 - (ii) appoint an arbitrator in consolidated proceedings if all parties thereto cannot agree as to the choice of arbitrator (s 6B(2));
 - (iii) where a party fails to comply with an arbitrator's order, extend the arbitrator's powers to continue with the reference in default of appearance or of any other act by that party, for example, by enabling the arbitrator to dismiss a claim peremptorily, or make a default award without risking his removal or his award being set aside on the ground of misconduct (s 23C);
 - (iv) on the application of a party with the consent of either the arbitrator or the other parties, determine any question of law arising in the course of the reference, whether the question relates to the tribunal's jurisdiction or not (s 23A);
 - (v) determine an appeal on any question of law arising out of an award by confirming, varying or setting aside the award, or remitting the award to the reconsideration of the arbitrator (s 23(2)-(4));
 - (vi) order the arbitrator to state the reasons for his award in sufficient detail to enable the Court to consider any question of law arising out of the award (s 23(5)-(6));
 - (vii) where the dispute involves the question whether a party has been guilty of fraud, order that the agreement shall cease to have effect or give permission to revoke the authority of an arbitrator (s 26(2));

- (viii) where an arbitrator refuses to deliver his award except on payment of the fees demanded by him, and the parties believe that the fees are excessive, order that the arbitrator shall deliver the award to the applicant on payment into Court by the applicant of the fees, in which event the fees shall be assessed by the Court (s 21).
- (b) If the parties fail to agree as to the number of arbitrators, there will be only one arbitrator if it is a domestic case (s 8), but may be either one or three arbitrators as decided by the HK International Arbitration Centre if it is an international case (s 34C(5)).
- (c) The parties to a domestic arbitration have a “reasonable opportunity” to present their cases under section 2GA(1)(a), while the parties to an international arbitration have a “full opportunity” to do so under Article 18 of the Model Law.
- (d) The grounds on which an arbitrator may be removed are wider in domestic cases. Whereas the Court may remove an arbitrator in a domestic case if he has “misconducted himself or the proceedings” (s 25(1)), an arbitrator in an international case may be challenged only if circumstances exist that give rise to “justifiable doubts as to his impartiality or independence”, or if he does not possess qualifications agreed to by the parties. (Article 12)
- (e) Whereas section 25(2) sets out the grounds on which the Court may set aside an award in a domestic arbitration in general terms,⁶ the grounds of review applicable to an international arbitration as provided by Article 34 of the Model Law are narrow and exhaustive. The Court in an international arbitration case would not examine whether the arbitral tribunal has acted negligently or incompetently or has produced a badly reasoned award.

⁶ That is, the arbitrator has “misconducted himself or the proceedings”, or an arbitration or award has been “improperly procured”.

- (f) Section 13A provides that a judge, magistrate or public officer may accept appointment as a sole or joint arbitrator by virtue of a domestic arbitration agreement if certain conditions are met. There is no equivalent provision for international arbitration cases.

Source: Paper provided by the Administration on the Report of the Committee on Hong Kong Arbitration Law of the Hong Kong Institute of Arbitrators dated June 2005
(LC Paper No. CB(2)1792/04-05(01))

Comparison between the domestic and international arbitration provisions in the Arbitration Ordinance

(a) Major differences between the domestic and international arbitration provisions

Subject matter	Domestic arbitration regime	International arbitration regime
Death of a party	Arbitration agreement shall not be discharged by death of any party (s 4)	None
Bankruptcy	Provisions dealing with the situation when a party is adjudged bankrupt (s 5)	None
Number of arbitrators	In the absence of any agreement, the reference shall be to a single arbitrator. (s 8)	In default of agreement, the number of arbitrators is to be either one or three as decided by the HKIAC. (Art. 10(2) & s 34C(5))
Umpires	Subject to contrary agreement, a two-arbitrator tribunal may appoint an umpire (s 10)	None
Power of judges to take arbitration	A judge, magistrate or public officer may accept appointment as a sole or joint arbitrator, or as umpire (s 13A)	None
Consolidation of arbitrations	Court may order two or more related arbitrations to be consolidated (s 6B(1))	None
Appointment of arbitrator or umpire in consolidated proceedings	Court may appoint arbitrator or umpire in consolidated proceedings if parties thereto cannot agree as to the choice of arbitrator or umpire (s 6B(2))	None

Party appointment of sole arbitrator in two-arbitrator tribunal cases	Subject to contrary agreement, where the reference is to two arbitrators, one to be appointed by each party, but one of the parties fails to make an appointment, the other party may appoint the arbitrator appointed by him, as sole arbitrator in the reference. The Court may, however, set aside the appointment. (s 9 proviso)	None
Appointment of substitute arbitrator	Court may, on the application of a party, appoint a person to replace an arbitrator who has been removed by the Court under s 15(3) (failure to use all reasonable dispatch in proceeding with reference) or s 25(1) (misconduct), or whose authority has been revoked by permission of the Court under s 26 (question of fraud). (s 27)	Where the mandate of an arbitrator terminates under Art. 13 (doubts as to impartiality or independence) or Art. 14 (failure or impossibility to act), a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. (Art. 15) Hence, where the original arbitrator is appointed by HKIAC under Art. 11(3) & (4), it will be HKIAC which appoints the replacement.
General responsibilities of tribunal	Tribunal required to act fairly and impartially as between the parties. (s 2GA(1)(a))	Arbitrator may be challenged if there are justifiable doubts as to his impartiality <i>or independence</i> . (Art. 12(2))
Opportunity to present case	Tribunal required to give the parties a <i>reasonable</i> opportunity to present their cases. (s 2GA(1)(a))	Each party shall be given a <i>full</i> opportunity of presenting his case. (Art. 18)

Interlocutory orders to deal with party defaults	Where a party fails to comply with an arbitrator's order, the arbitrator or other party may apply to the Court for an order extending the arbitrator's powers to continue with the reference in default of appearance or of any other act. (s 23C)	None
Interim (or partial) awards	Subject to contrary agreement, arbitrator has power to make partial awards (s 16)	None
Specific performance	Subject to contrary agreement, tribunal may order a party to perform a particular act (s 17)	None
Reference of interpleader issues to arbitration	Court may direct interpleader issues to be determined in accordance with arbitration agreement (s 7)	None
Determination of preliminary point of law by Court	A party may apply to the Court to determine any question of law arising in the course of the reference (s 23A)	The power is restricted to the determination of questions of the tribunal's jurisdiction only. (Art. 16(3))
Appeal on a point of law	A party may appeal to the Court on any question of law arising out of an award. On the determination of such an appeal, the Court may confirm, vary or set aside the award, or remit the award to the reconsideration of the arbitrator. (s 23(2) - (4))	None

Order that reasons for award be given	Court may order the arbitrator to state the reasons for his award in sufficient detail to enable the Court to consider any question of law (s 23(5) - (6))	Subject to contrary agreement, tribunal is required to give reasons for award. (Art. 31(2)) However, no judicial remedy is available if it fails to give reasons.
Power of Court to deal with questions of fraud	Court has power to give relief where the dispute involves the question whether a party has been guilty of fraud (s 26(2))	None
Removal of arbitrator for misconduct	Court may remove arbitrator if he has “misconducted himself or the proceedings”. (s 25(1))	An arbitrator may be challenged only if there are “justifiable doubts as to his impartiality or independence”, or if he does not possess qualifications agreed to by the parties. (Art. 12(2) & 13(3)) The concept of misconduct is arguably broader than failing to demonstrate impartiality or independence.
Setting aside of award	Court may set aside award if the arbitrator has “misconducted himself or the proceedings”, or an arbitration or award has been “improperly procured”. (s 25(2))	Court may set aside an award only on the following grounds: (a) incapacity of a party or invalidity of arbitration agreement; (b) failure to give proper notice or inability to present its case; (c) award made in excess of terms of reference; (d) composition of tribunal or arbitral procedure not in accordance with agreement; (e) subject matter of the dispute is not arbitrable; or (f) award is in conflict with public policy. (Art. 34(2))

Assessment of arbitrator's fees	If an arbitrator refuses to deliver his award except on payment of the demanded fees and the parties believe that the fees are excessive, either party may apply to the Court for an order that the arbitrator shall deliver the award to the applicant on payment into court by the applicant of the fees demanded. The fees will then be assessed by the Court. (s 21)	None
Place of arbitration	None	In default of agreement, the place of arbitration shall be determined by the tribunal having regard to the circumstances of the case, including the convenience of the parties. Subject to contrary agreement, the tribunal may meet at any place it considers appropriate. (Art. 20)
Language	None	In default of agreement, the tribunal shall determine the language to be used. The tribunal may order that any documentary evidence shall be accompanied by a translation. (Art. 22)
Hearings and written proceedings	None. Governed by arbitration agreement, agreed arbitration rules, or the common law.	Subject to contrary agreement, the tribunal shall decide whether to hold oral hearings or to conduct written proceedings. Parties shall also be given advance notice of any hearing or meeting of the tribunal, and all information

		supplied to the tribunal by one party shall be communicated to the other party. (Art.24)
Statements of claim and defence	None. Governed by arbitration agreement, agreed arbitration rules, or the common law.	Setting out the basic rules in respect of statements of claim and defence, subject to agreement of the parties. (Art. 23)
Experts appointed by arbitral tribunal	None. Governed by arbitration agreement, agreed arbitration rules, or the common law.	Subject to contrary agreement, tribunal may appoint an expert to report to it on specific issues, and may require a party to give the expert any relevant information. A party may request the expert to participate in a hearing and to be questioned by the parties. (Art. 26 & 24(3))
Rules applicable to substance of dispute	None. Governed by the arbitration agreement, agreed arbitration rules or the common law.	Tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable. Failing agreement, it shall apply the law determined by the conflict of law rules. (Art. 28)
Termination of proceedings otherwise than by final award	None. Governed by the arbitration agreement or agreed arbitration rules.	Tribunal shall terminate proceedings when the claimant withdraws his claim, the parties agree, or the tribunal finds that continuation of the proceedings has become unnecessary or impossible. (Art. 32)

Form and contents of award	None. Governed principally by the common law.	The award shall be made in writing and signed by the arbitrator(s), and shall state its date and the place of arbitration. (Art. 31(1) & (3))
Requirement to give reasons for award	No general requirement to give reasons, but Court may order that reasons be given in sufficient detail to enable it to consider any question of law. (s 23(5))	Subject to contrary agreement and unless the dispute is settled, the award shall state the reasons upon which it is based. (Art. 31(2))
Award <i>ex æquo et bono</i> or as <i>amiable compositeur</i>	None. Governed by the arbitration agreement or agreed arbitration rules.	The tribunal shall decide on the basis that it is “just and equitable” only if the parties have expressly authorised it to do so. (Art. 28(3))
Consent award and award on agreed terms	None. Governed by the arbitration agreement, agreed arbitration rules, or the common law.	If the parties settle the dispute, the tribunal shall terminate the proceedings. An award on agreed terms shall comply with Article 31 and shall have the status and effect as any other award on the merits of the case. (Art 30)
Interpretation of award by tribunal	None	If the parties agreed, a party may request the tribunal to give an interpretation of a specific point of the award. Any interpretation given by the tribunal shall form part of the award. (Art. 33(1))
Additional award	None; but Court may remit an award to the arbitrator for reconsideration under section 24.	Subject to contrary agreement, a party may request the tribunal to make an additional award as to claims presented in the proceedings but omitted from the award. (Art. 33(3))

Waiver of right to object to non-compliance with non-mandatory provisions	None	A party waives objection that certain non-mandatory provisions of the Model Law have not been complied with if he fails to raise objection. (Art. 4)
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(b) Provisions applicable to both domestic and international provisions

Arbitration Ordinance	Subject matter
s 2AA	Objective and principles of Ordinance
s 2AC, Art. 7(1)	Definition of arbitration agreement
s 2AC, Art. 7(1)	Agreement to be in writing
s 2A	Appointment of conciliator pursuant to arbitration agreement
s 2A	Power of conciliator to act as arbitrator
s 2B	Power of arbitrator to act as conciliator
s 2C	Enforcement of settlement agreement as award
s 2D	Proceedings to be heard otherwise than in open court
s 2E	Restrictions on reporting of proceedings heard otherwise than in open court
s 2F	Representation and preparation work
s 2G	Costs in respect of non-legally qualified person
s 2GA	General responsibilities of arbitral tribunal – e.g., act fairly and impartially; give the parties a reasonable opportunity to present their cases; avoid unnecessary delay and expense; and not bound by rules of evidence.
s 2GB(1)	General powers of the arbitral tribunal – e.g., require claimant to give security for the costs of the arbitration; require money in dispute to be secured; direct the discovery of documents; direct the inspection, preservation or sale of the relevant property; and grant interim injunctions or direct other interim measures to be taken.
s 2GB(5)	Power of tribunal to dismiss or stay a claim if the order to provide security for costs has not been complied with
s 2GB(6)	Power of tribunal to act inquisitorially
s 2GB(7)	Power of tribunal to examine witnesses on oath and direct the attendance of witnesses

s 2GC	Special powers of Court in relation to arbitration proceedings – e.g., direct an amount in dispute to be secured; direct the inspection, preservation or sale of the relevant property; grant an interim injunction or direct any other interim measures to be taken; and order a person to give evidence or produce documents.
s 2GD	Power of tribunal to extend time for commencing arbitration proceedings
s 2GE	Dismissal of claim for delay in prosecuting claim
s 2GF	Decision of arbitral tribunal
s 2GG	Enforcement of decisions of arbitral tribunal
s 2GH	Arbitral tribunal may award interest
s 2GI	Rate of interest on money awarded in arbitration proceedings
s 2GJ	Costs of arbitration proceedings
s 2GK	Joint and several liability of parties to pay tribunal’s fees
s 2GL	Arbitral tribunal may limit amount of recoverable costs
s 2GM	Immunity of arbitral tribunal
s 2GN	Immunity of appointing or administrating authority
s 6(1), Art. 8	Stay of legal proceedings and reference of dispute to arbitration where the matter is the subject of an arbitration agreement
s 13B, Art. 16	Power of tribunal to rule on its own jurisdiction

(c) Areas in which the provisions of the two regimes are similar

Subject matter	Domestic arbitration regime	International arbitration regime
Power of HKIAC to appoint arbitrators in certain cases	s 12	Art. 11(3)-(4)
Equal treatment of parties	Tribunal required to act fairly and impartially (s 2GA(1)(a))	Parties shall be treated with equality. (Art. 18)
Removal of arbitrator (or termination of arbitrator’s mandate) for delay	Court may remove, on application of a party, an arbitrator who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award. (s 15(3))	A party may request the Court to decide on the termination of an arbitrator’s mandate where there is a controversy concerning his ability to perform his functions or to act without undue delay. (Art. 14(1))

Power to correct clerical errors	Subject to contrary agreement, arbitrator may correct, in an award, clerical mistake or error arising from accidental slip or omission. (s 19)	A party may request the tribunal to correct any computation, clerical or typographical errors in an award. (Art. 33(1)(a) & (2))
Power to remit award to arbitrator for reconsideration	Court may remit an award to the arbitrator for reconsideration. (s 24)	Court may remit an award to the tribunal for consideration instead of setting it aside. (Art. 34(4))

Note: See generally, Robert Morgan, *The Arbitration Ordinance of Hong Kong – A Commentary* (Butterworths, 1997), Tables 3 and 4.

EXECUTIVE SUMMARY

The Department of Justice published a Consultation Paper on Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill on 31 December 2007 (“Consultation Paper”) to seek views on reform of the law of arbitration in Hong Kong.

A Unitary Regime for Arbitration

2. The current Arbitration Ordinance (Cap 341) (“the current Ordinance”) has created two different regimes for “domestic” and “international” arbitrations. The Consultation Paper and the consultation draft of the Arbitration Bill (“draft Bill”) attached to it propose the creation of a unitary regime of arbitration on the basis of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”) adopted by the United Nations Commission on International Trade Law (“UNCITRAL”) for all types of arbitration, thereby abolishing the distinction between domestic and international arbitrations under the current Ordinance.

3. The purpose of the reform is to make the law on arbitration more user-friendly. As the Model Law is familiar to practitioners from civil law as well as common law jurisdictions, this would have the benefit of enabling the Hong Kong business community and arbitration practitioners to operate an arbitration regime which accords with widely accepted international arbitration practices and development. Hong Kong would be seen as a Model Law jurisdiction thereby attracting more business parties to choose Hong Kong as the place to conduct arbitral proceedings. The reform of the law of arbitration will also promote Hong Kong as a regional centre for legal services and dispute resolution.

The framework and contents of the draft Bill

4. The draft Bill adopts the structure of the Model Law as its framework. The relevant provisions of the Model Law including some of the revised articles recently adopted by the UNCITRAL in 2006 are reproduced in the draft Bill and are supplemented by other provisions

having regard to the proposals made in the *Report of Committee on Hong Kong Arbitration Law* published in 2003 (“*Report*”) and the relevant existing provisions of the current Ordinance that are to be retained. The major issues in the draft Bill are summarised below.

Part 1 Preliminary

5. Part 1 sets out the object and principles of the draft Bill. It gives effect to the provisions of the Model Law as expressly stated in the draft Bill subject to such modifications and supplements as provided for in the draft Bill. Part 1 also defines the scope of application of the draft Bill. It provides that the draft Bill applies to any arbitration agreement and any arbitration to which the Government of the Hong Kong Special Administrative Region is a party.

Part 2 General Provisions

6. Part 2 sets out the principle for the interpretation of the Model Law. It provides for the procedural rules for delivery of written communications including new forms of electronic communications. It further states that the Limitation Ordinance (Cap 347) and any other Ordinances relating to the limitation of actions shall apply to arbitrations as they apply to actions in the court. It is also provided in this Part that proceedings are to be heard in open court. However, upon application of any party, the court shall order those proceedings to be heard otherwise than in open court, unless the court is in any particular case satisfied that those proceedings ought to be heard in open court. The court is also empowered to give directions as to what information relating to proceedings heard otherwise than in open court may be published.

Part 3 Arbitration Agreement

7. Part 3 requires an arbitration agreement to be in writing and defines what constitutes writing for this purpose. It also provides for disputes under an arbitration agreement to be referred to arbitration.

8. In view of the concern that employees with weaker bargaining power could be denied access to the court by standard arbitration clauses in their employment contracts, provision is made under Part 3 to empower the court to decide whether or not to refer to arbitration, not just disputes involving a claim or other matter that is within the jurisdiction of the Labour Tribunal as provided for in the current Ordinance, but also matters involving claims or disputes made pursuant to or arising under any employment contract.

Part 4 Composition of Arbitral Tribunal

9. Part 4 contains provisions relating to the number of arbitrators and their appointment and sets out the grounds and procedures for challenging such appointment. It further provides for the appointment of umpires and their functions in arbitral proceedings and the appointment of mediators. It also specifies that an arbitrator may act as a mediator upon consent of all parties in writing after the commencement of arbitral proceedings.

Part 5 Jurisdiction of Arbitral Tribunal

10. An arbitral tribunal is empowered under Part 5 to rule on its own jurisdiction. Where an arbitral tribunal rules that it has jurisdiction to decide a dispute, a party may, within a 30-day period, request the Court of First Instance to decide on the issue. No appeal lies from a decision of the Court of First Instance on the issue. If an arbitral tribunal rules that it does not have jurisdiction to decide a dispute, the court shall, if it has jurisdiction, decide the dispute.

Part 6 Interim Measures and Preliminary Orders

11. Part 6 empowers an arbitral tribunal to grant interim measures and preliminary orders and to specify the grounds and procedures relating to the application for and the grant, modification, suspension or termination of such interim measures and preliminary orders.

12. It further provides that the Court of First Instance may grant an interim measure in relation to arbitral proceedings conducted in or outside Hong Kong. If the arbitral proceedings are conducted outside Hong Kong, an interim measure may be granted only if those proceedings are capable of giving rise to an arbitral award (whether interim or final) which may be enforced in Hong Kong under the new Arbitration Ordinance (“new Ordinance”) or any other Ordinance and that the interim measure sought belongs to a type or description of interim measures that may be granted in Hong Kong in relation to arbitral proceedings conducted in Hong Kong.

13. An alternative proposal, which we do not recommend, has been made that where arbitral proceedings take place outside Hong Kong, the Court of First Instance should only be able to make an order to grant an interim measure in relation to such proceedings if a court in the corresponding place of arbitration will act reciprocally to grant a similar order in aid of arbitral proceedings conducted in Hong Kong.

Part 7 Conduct of Arbitral Proceedings

14. Part 7 states that the parties may agree on the procedures to be followed, which otherwise are to be determined by the arbitral tribunal. It further sets out the general powers exercisable by an arbitral tribunal when conducting arbitral proceedings.

15. Part 7 preserves the present statutory position in respect of the enforcement of orders or directions, including interim measures, made by an arbitral tribunal in relation to arbitral proceedings conducted in or outside Hong Kong. A new requirement is however added which provides that leave for enforcement of such order or direction made outside Hong Kong shall not be granted by the court in Hong Kong unless it can be demonstrated that the order or direction belongs to a type or description of order or direction that may be made in Hong Kong in relation to arbitral proceedings conducted in Hong Kong.

16. An additional proposal, with which we do not agree, has been made that where an arbitral proceeding takes place outside Hong Kong, leave should only be granted for the enforcement of any order or

direction, including any interim measure, made by such arbitral tribunal in a foreign jurisdiction if a court in the corresponding place of arbitration will act reciprocally in respect of such order or direction made in arbitral proceedings conducted in Hong Kong.

Part 8 Making of Award and Termination of Proceedings

17. Part 8 prescribes the procedures for deciding on the choice of substantive law that is applicable to the substance of the dispute. It sets out the requirements for the form and contents of an arbitral award and provides for the correction and interpretation thereof and the making of an additional award. It provides for the award on costs of the arbitral proceedings including the fees and expenses of the tribunal to be made by an arbitral tribunal. Proposal has also been made to empower an arbitral tribunal to order payment of interest on award of costs in arbitral proceedings. Part 8 further states the circumstances under which arbitral proceedings are to be terminated and the mechanism for doing so.

Part 9 Recourse against Award

18. Part 9 provides that recourse to the court against an arbitral award may be made by a party by an application for setting aside the award. It further provides that the Court of First Instance may set aside an award on the grounds specified in Article 34 of the Model Law but may not set aside an award on the ground of error of fact or law on the face of the award.

Part 10 Recognition and Enforcement of Awards

19. The statutory scheme under the current Ordinance for the enforcement of awards made, whether in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal is retained under Part 10 subject to certain modifications. Leave of the court is required for enforcement of an arbitral award made by an arbitral tribunal whether in or outside Hong Kong.

20. In the case of the enforcement of an arbitral award made outside Hong Kong which is neither a Convention award nor a Mainland award, a new provision is added under Part 10 to provide that no leave shall be granted by the court unless the party seeking to enforce such award can demonstrate that the court in the place where the award is made will act reciprocally in respect of awards made in Hong Kong in arbitral proceedings by an arbitral tribunal. The new requirement proposed is to ensure that the enforcement of arbitral awards made outside Hong Kong, whether a Convention award, a Mainland award or an award which is neither a Convention award nor a Mainland award, is granted on the same principle of reciprocity of enforcement.

Part 11 Provisions that may be Expressly Opted for or Automatically Apply

21. Certain provisions under the current Ordinance that only apply to domestic arbitrations have been retained as opt-in provisions under Schedule 3 to the draft Bill. It is provided under Part 11 that parties to an arbitration agreement may expressly provide in the arbitration agreement as to whether any of the provisions in Schedule 3 shall apply.

22. To address the concern raised by the construction industry where users of standard form contracts may continue to use the term “domestic arbitration” in such contracts either before or for sometime after the commencement of the new Ordinance, it is provided under Part 11 that, where an arbitration agreement entered into before, or at any time within a period of 6 years after, the commencement of the new Ordinance stipulates that an arbitration under that arbitration agreement shall be a “domestic arbitration”, all the opt-in provisions under Schedule 3 shall automatically apply to that arbitration agreement subject to any express agreement to the contrary between the parties.

23. A deeming provision is included under Part 11 to ensure that, subject to some exceptions, all the opt-in provisions in Schedule 3 would automatically apply to an arbitration agreement contained in every contract down the line of the subcontracting process.

Part 12 Miscellaneous

24. Part 12 contains miscellaneous provisions relating to the liability of an arbitral tribunal, a mediator and the relevant bodies, the power to make relevant rules of court and the procedures for making an application under the new Ordinance.

Part 13 Repeal, Savings and Transitional Provisions

25. Part 13 provides for the repeal of the current Ordinance and states that the savings and transitional provisions are set out in Schedule 4.

Part 14 Consequential and Related Amendments

26. Part 14 provides that the consequential and related amendments are specified in Schedule 5.

Schedule 1 UNCITRAL Model Law on International Commercial Arbitration

27. The full text of the Model Law is set out in Schedule 1.

Schedule 2 Application of Ordinance to Judge-Arbitrators and Judge-Umpires

28. The provisions under the Fourth Schedule to the current Ordinance are retained under Schedule 2 to the draft Bill with necessary modifications. This Schedule deals with the application of certain provisions of the draft Bill to a judge who has been appointed as sole arbitrator or umpire.

Schedule 3 Provisions that may be Expressly Opted for or Automatically Apply

29. Schedule 3 contains provisions relating to the determination of a dispute by a sole arbitrator, the consolidation of arbitrations, the determination of a preliminary point of law by the Court of First Instance,

the challenging of an arbitral award on ground of serious irregularity and the appeal against an arbitral award on point of law.

Schedule 4 Savings and transitional provisions

30. The savings and transitional provisions are set out in Schedule 4.

Schedule 5 Consequential and related amendments

31. The consequential and related amendments are set out in Schedule 5. Amendments have been proposed to Order 73 of the Rules of the High Court (Cap 4 sub. leg. A) in respect of the making of an application, request or appeal under the draft Bill to the Court of First Instance. A proposal has been made under section 37 of this Schedule 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 (Cap 341 sub. leg. B).

Consultation

32. The Department of Justice invites comments on the issues raised in the Consultation Paper and welcomes any views generally on the draft Bill.

33. The consultation period will end on 30 June 2008.

Reform of the law of arbitration

Relevant documents

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Question</u>
Panel on Administration of Justice and Legal Services	27 June 2005	<p>Paper provided by the Administration on the Report of the Committee on Hong Kong Arbitration Law of the Hong Kong Institute of Arbitrators [LC Paper No. CB(2)1792/04-05(01)]</p> <p>Submission from the Hong Kong Construction Association Ltd. on the recommendations in the Report of the Hong Kong Institute of Arbitrators [LC Paper No. CB(2)2049/04-05(01)] <i>(English version only)</i></p> <p>Letter dated 21 June 2005 from the Law Society of Hong Kong on reform of the law of arbitration [LC Paper No. CB(2)2049/04-05(02)] <i>(English version only)</i></p> <p>Minutes of meeting [LC Paper No. CB(2)2502/04-05]</p>
	28 May 2007	<p>Administration's paper on "Reform of the law of arbitration" [LC Paper No. CB(2)1941/06-07(01)]</p> <p>Minutes of meeting [LC Paper No. CB(2)2540/06-07]</p>
	28 January 2008	<p>Consultation Paper on Reform of the Law of Arbitration and Draft Arbitration Bill published by the Department of Justice on 31 December 2007 [LC Paper No. CB(2)813/07-08] <i>(English version only)</i></p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Question</u>
		<p>Executive summary of the Consultation Paper [LC Paper No. CB(2)813/07-08(01)] <i>(Chinese version only)</i></p> <p>Corrigenda to the Consultation Paper on Reform of the Law of Arbitration and Draft Arbitration Bill provided by the Administration [LC Paper No. CB(2)916/07-08] <i>(English version only)</i></p> <p>Administration's paper on "Reform of the law of arbitration in Hong Kong" [LC Paper No. CB(2)929/07-08(08)]</p> <p>Minutes of meeting [LC Paper No. CB(2)1141/07-08]</p>

Council Business Division 2
Legislative Council Secretariat
17 February 2009