For discussion
on 27 June 2005

LegCo Panel on Administration of Justice and Legal Services

Information Paper on the Report of the HK Institute of Arbitrators' Committee on Hong Kong Arbitration Law

Introduction

1. The HK Institute of Arbitrators ("HKIArb") set up a Committee on Hong Kong Arbitration Law in co-operation with the HK International Arbitration Centre ("HKIAC") in 1998. The Committee issued a report in April 2003 ("the 2003 Report"), which has been forwarded to the Department of Justice for consideration.[1]

2. One of the Report's recommendations is to abolish the distinction between domestic and international arbitration in the Arbitration Ordinance (Cap 341) and to adopt the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law")[2] for both domestic and international arbitrations in Hong Kong.

3. The object of this paper is to inform Members of the recommendations in the 2003 Report and of the Department of Justice's proposal to take forward these recommendations. We would also like to seek Members' preliminary views on this subject.

Existing law

4. The Arbitration Ordinance provides two regimes for the conduct of arbitrations in Hong Kong depending on whether the arbitration

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1 The Report is accessible at the HK International Arbitration Centre website at <http://www.hkiac.org/main.html>.

2 The Model Law is reproduced in the Fifth Schedule to the Arbitration Ordinance. UNCITRAL stands for the UN Commission on International Trade Law.

agreement is international or not.[3]

5. The regime for domestic arbitrations is largely based on UK arbitration legislation, while the regime for international arbitrations is based on the Model Law. 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.

6. Under the existing Arbitration Ordinance, the parties are free to elect whether to have their dispute arbitrated as if it were a domestic or international one. Thus, the parties to a domestic arbitration agreement may, after a dispute has arisen, agree in writing to have the dispute arbitrated as an international arbitration. Conversely, the parties to an international arbitration agreement may agree in writing, regardless of whether a dispute has arisen or not, to have the dispute arbitrated as a domestic arbitration.[4]

7. An account of the development of arbitration law in Hong Kong since the enactment of the Arbitration Ordinance in 1963 is at Annex 1.

Statistics concerning international and domestic arbitrations in Hong Kong

8. A table showing the number of international arbitration cases involving the HKIAC is at Annex 2. As far as maritime arbitrations are concerned, they are generally international in character either because one of the parties is not from Hong Kong or the place where the relevant contract is to be performed is different from where the parties have their place of business. It is very rare for contracts in the shipping industry to make a specific choice between domestic and international arbitration.

9. The HKIAC and the professional bodies do not have any information about the number of domestic arbitrations in Hong Kong. Nor is there any central body keeping statistics about these arbitrations.

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[3] "International arbitration agreement" is defined with reference to Article 1(3) of the Model Law. An arbitration agreement that is not an international arbitration agreement is a "domestic arbitration agreement". Parts II and IIA of the Ordinance apply to domestic and international arbitrations respectively, while Part IA applies to both types of arbitrations.

[4] See Arbitration Ordinance, sections 2L, 2M, 34A and 34B.

10. It is, however, clear that the main user of domestic arbitration is the construction industry. All arbitrations involving members of the HK Construction Association are conducted as domestic arbitrations.[5] The public sector procurement agencies (including the MTRC and KCRC) also prescribe for domestic arbitration in their standard form contracts, and the local industry usually follow this practice in their associated sub-contracts. The private sector does not prescribe for this but arbitrations conducted under the standard form contracts are likely to be domestic. It is therefore safe to assume that the great majority of construction arbitrations are conducted under the domestic regime. Given that about one-third of international arbitrations in Hong Kong are construction cases, it is likely that a high proportion of arbitrations in Hong Kong are conducted under the domestic regime. The sums involved in a construction arbitration case may or may not be considerable but at least one or two million dollars are involved in each case.

Differences between the two arbitration regimes under the Arbitration Ordinance

11. Annex 3 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

[5] The HK Construction Association has about 400 members comprising local and international contractors carrying out foundations, civil engineering and building contracting.

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.

(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.

Proposal of the HK Institute of Arbitrators Report 2003

12. The HK Institute of Arbitrators' Committee on Hong Kong Arbitration Law ("the HKIArb Committee") agrees with the HKIAC Committee on Arbitration Law set up in 1992[7] that the Arbitration Ordinance should be completely redrawn in order to apply the Model Law equally to both domestic and international arbitrations. This would result in a unitary regime with the Model Law governing both domestic and international arbitrations, thereby abolishing the distinction between the two types of arbitrations in the Ordinance.

13. The HKIArb Committee considers that the new law should adhere, as far as possible, to the exact wording of the Model Law so that Hong Kong would continue to be seen as a Model Law jurisdiction. Where a matter has not been dealt with by the Model Law, additional

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[6] That is, the arbitrator has "misconducted himself or the proceedings", or an arbitration or award has been "improperly procured".

[7] See Annex 1 below on the Report of the HKIAC Committee on Arbitration Law.

provisions should be introduced if there are good reasons for doing so. This includes, for example, situations where a provision has been widely accepted in other jurisdictions, or where the provision was not contemplated at the time when the Model Law was adopted by UNCITRAL.

14. Since there would be only one arbitration regime, the existing provisions enabling the parties to opt into or out of the international arbitration regime would no longer be required. However, users of standard form contracts (for example, those in the construction industry) would be able to "opt-in" to certain provisions of the existing domestic regime which they are now enjoying through such contracts.[8]

15. The recommendations of the HKIArb Committee are summarised in the table at Annex 4. The table follows the structure of the Model Law and provides an overview of the proposed legislation.

Practical significance of the proposal to adopt a unitary regime

16. The impact of the recommendations on the provisions of the Arbitration Ordinance is summarised in the table at Annex 5. This table adopts the framework of the Arbitration Ordinance and indicates how the Committee's proposals would impact on the existing provisions.

17. With the introduction of a unified arbitration regime, the differences between the two regimes highlighted in the preceding paragraphs would be dealt with in the following manner as recommended by the 2003 Report:

(a) the presumption that there is only one arbitrator in default of agreement should be retained but only as an opt-in provision;

(b) the provisions of section 6B(1)-(2) on the consolidation of arbitration proceedings should be retained but only as opt-in provisions so that the proceedings may not be consolidated unless the parties have agreed to opt-in;

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[8] HKIArb Report, para 6.2. Examples of these provisions are: appeal on point of law (s 23), determination of a preliminary point of law by the Court (s 23A), consolidation provisions (s 6B), and one arbitrator in default of agreement (s 8). According to an email from Mr Peard, Chairman of the HKIArb Committee, to the Department of Justice on 4 April 2005, the arrangements agreed with the HK Construction Association were that there would be *automatic* opt-in to the relevant provisions where a standard form of contract choosing domestic arbitration was used.

(c) the requirement under section 2GA(1)(a) that the tribunal should give the parties a "reasonable" opportunity to present their cases should be retained and applied to all arbitrations, thus depriving the parties to an international arbitration of their right to a "full opportunity" to present their cases under Article 18 of the Model Law;

(d) section 23C (interlocutory orders) should be replaced by a new section along the lines of section 41(5) and (7) of the UK Arbitration Act 1996, which would extend the power of the arbitral tribunal in case of a party's failure to do something necessary for the conduct of the arbitration;

(e) section 23A (determination of preliminary point of law by Court) should be replaced by section 45 of the UK Arbitration Act 1996 but only as an opt-in provision so that the parties would not have the right to apply to the Court for a determination on a question of law arising in the course of the arbitration unless the parties have agreed to opt-in;

(f) the right to appeal on any question of law arising out of an award under section 23 (judicial review of arbitration awards) should be retained but only as an opt-in provision so that the parties would not have the right to apply for judicial review unless they have agreed to opt-in;

(g) section 26(2) (power of Court to give relief where the dispute involves a question of fraud) should not be repeated because the question of fraud should be treated in the same manner as any other allegations in the arbitration proceedings;

(h) section 25(1)-(2) (removal of arbitrator and setting aside of award for misconduct) should be repealed on the grounds that (i) the challenge and removal of an arbitrator has been sufficiently dealt with in Article 12 of the Model Law; and (ii) recourse against an award is available under Article 34;

(i) the system for the assessment of an arbitrator's fees under section 21 could be retained but should be subject to review;

(j) section 13A (power of judges to take arbitrations) should be retained and applied to international as well as domestic arbitrations.

Arguments in favour of adopting a unitary regime for both domestic and international arbitrations on the basis of the Model Law

18. The following are arguments in favour of adopting a unitary or unified regime based on the Model Law.[9]

(a) The Model Law has proved effective and relatively trouble free in international arbitrations. It is accessible to the users, both arbitrators and the parties themselves. It is a logically arranged code which may be understood without recourse to extensive case law. It gives a sufficient degree of control to arbitrators whilst respecting the autonomy of the parties. It operates according to principles which are known and respected worldwide. It is therefore regarded as an attractive balance between total party autonomy on the one hand, and protection of the public interest on the other.

(b) UNCITRAL recognises that States are free to adopt the provisions of the Model Law for domestic arbitrations. Any jurisdiction is free to adopt the Model Law as a model for legislation on domestic arbitration and avoid a dichotomy within its arbitration law.[10]

(c) A unified regime would remove the need for the parties and their legal advisers to understand the differences between the two regimes and to examine whether to opt into or out of a particular regime.

(d) The users of arbitration service may find the definition of "international arbitration" in the Model Law not easy to apply in a particular case, and it would be simpler to apply the Model Law to all arbitrations.

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9 See HKIAC Report of the Committee on Arbitration Law (1996), paras 1.1.6 - 1.1.8; Report of the Committee on Hong Kong Arbitration Law (2003), paras 5.4 - 5.7.

10 "Analytical commentary on draft text of a model law on international commercial arbitration", A/CN.9/264, para 22.

(e) Where there is disagreement between the parties about the international character of the arbitration, there would be uncertainty from the very outset about whether the proceedings are governed by the domestic or international regime. Recourse to the court is likely in these circumstances.

(f) There is a general desire for a clear and easily understandable arbitration law which will eliminate expensive and time consuming litigation in cases where a party seeks to appeal against an award on a point of law or attempts to remove an arbitrator on the grounds of misconduct.

(g) The issue of whether the domestic or international regime should apply has been the subject of litigation. Expensive and time consuming litigation could be avoided if one law applies to both regimes.

(h) Creating a unitary regime has the advantage of avoiding dichotomy within the arbitration law and of making it unnecessary to draw a clear line between international and domestic arbitrations. As a result, the arbitration law would be conceptually coherent and consistent.

(i) There is essentially no fundamental distinction between the two types of arbitration: both are based on contract, and both represent an attempt to find a form of dispute resolution which is distinct from court adjudication and requires a certain degree of autonomy to be truly effective.[11]

(j) The adoption of a unified system based on the Model Law is in accord with the international trend in reducing the extent of judicial supervision and intervention in arbitral proceedings, whether domestic or international.

(k) A number of jurisdictions have recently enacted arbitration laws adopting the Model Law for both domestic and international arbitrations.

(l) There are over 30 jurisdictions having a unitary regime, and most of them developed their arbitration laws on the basis of the Model Law.[12]

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[11] Law Commission, *Arbitration* (New Zealand, 1991), Report No 20, para 47.

[12] See Annex 6(c).

(m) A significant portion of the Hong Kong business community is international in character. Business activities conducted in Hong Kong are also likely to continue to become increasingly international in the future. A unified arbitration regime would have the beneficial effect of further enabling the Hong Kong business community and the local legal profession to operate an arbitration regime which accords with international arbitration practices and development.

(n) The existing Arbitration Ordinance already contains many provisions that are common to both types of arbitrations. See Annex 3(b) and (c) for details.

(o) The Arbitration Ordinance in its current form is not user-friendly. It is often difficult to identify what provisions are applicable. Lawyers from other jurisdictions (including Mainland China) find it hard to find their way round the Ordinance.

(p) The pre-1997 Administration accepted the premise that Hong Kong should work towards harmonising the domestic and international regimes. The Arbitration (Amendment) Ordinance 1996 was the first step in that direction.

(q) The overwhelming majority of the respondents to the questionnaire circulated by the HKIAC Committee on Arbitration Law in 1993 were in favour of a reworking of the Arbitration Ordinance to achieve a unitary regime based on the Model Law. The consultation exercise conducted by the HK Institute of Arbitrators Committee on HK Arbitration Law also shows that there was "effectively unanimous support" for a unitary system based on the Model Law.

Arguments against adopting a unitary regime for both domestic and international arbitrations on the basis of the Model Law

19. The following are arguments against the adoption of a unitary or unified regime on the basis of the Model Law:[13]

[13] Masons, a specialist law firm in Europe and the Asia Pacific region, has published an article "HK Arbitration Law Reform: An Alternative View", dated 10 July 2003, at

(a) Domestic parties are less likely to be on an equal footing and the weaker parties may require special protection from the courts.[14]

(b) Parties to domestic arbitrations are not as likely as parties to international arbitrations to be able to select other jurisdictions as the place of arbitration. If a unified system were adopted they would, in practice, be subject to it by default.

(c) The SAR Government may wish to exercise tighter control over domestic arbitrations which involve its own residents, than it would wish to exercise in relation to international arbitrations which may only take place within Hong Kong because of geographical convenience.

(d) Domestic courts might have an interest in the development of arbitration laws that are being used largely by local parties. They might wish to reflect public policy considerations in purely domestic disputes. A dualistic system would allow the courts a greater degree of supervision over the development of domestic arbitration law.

(e) Many jurisdictions recognise that a greater degree of party autonomy may be allowed in an international arbitration than is commonly allowed in a domestic arbitration.

(f) The Model Law is not a complete code of arbitration law. It applies only to international *commercial* arbitration[15] and there are a number of areas which the Model Law left untouched.

(g) It is not self-evident that the elimination of the domestic regime which is otherwise found to be satisfactory would

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http://www.masons.com/php/page.php?page_id=hkarbitra3469, raising doubts as to whether a unified arbitration regime is desirable for Hong Kong.

[14] Note, however, that section 15 of the Control of Exemption Clauses Ordinance (Cap 71) provides protection to consumers who are parties to a domestic arbitration agreement. Concerns about applying the Model Law to domestic arbitrations therefore relate only to business-to-business contracts.

[15] Model Law, Article 1(1). By virtue of section 34C(2) of the Ordinance, the Model Law applies to all international arbitrations in Hong Kong, whether commercial or otherwise.

attract international arbitrations to Hong Kong, or at least prevent them from being driven away.

(h) To the extent that the local business community wishes to operate under the Model Law, it is free to do so now under the existing Arbitration Ordinance. There is no need to create a unified arbitration regime to achieve this. General changes in the existing domestic regime to reflect more modern practice could be achieved either by the adoption of a unified system of arbitration or by amending the existing domestic regime.

(i) To adopt the Model Law for domestic arbitrations when the existing domestic regime is working well, or at any rate not shown to be working badly, could only be justified if the Model Law has been demonstrated to be superior also for domestic arbitrations, or if there are other potent reasons.

(j) Some jurisdictions which have adopted the Model Law merely used it to replace largely obsolete arbitration legislation which had been little used.

(k) The case for adopting the Model Law for both regimes is less strong in relation to jurisdictions which have up-to-date arbitration legislation that has worked well in practice and is familiar to the users of arbitration in the jurisdiction. As far as these jurisdictions are concerned, if the law for domestic arbitration is changed, the body of case-law built upon the old legislation will be rendered irrelevant and the expertise which has been developed in the context of the existing law will have to be relearned in the new situation.

(l) The proposed unified regime includes many opt-in provisions to preserve certain aspects of the existing domestic regime. The result may be an Ordinance that still looks confusing for the users. It would be more user-friendly to keep the regimes separate so as to prevent confusion.

(m) Since parties who prefer domestic arbitration would have to negotiate the opt-in and opt-out provisions on an *ad hoc* basis every time they draft an arbitration agreement under a unitary regime, users of domestic arbitration (mainly members of the construction industry) could find themselves operating under

different arbitration agreements each with effectively a different set of laws. This could be particularly awkward if different provisions applied at the main contract and sub-contract levels on the same project.[16]

(n) The existing domestic regime already reflects a non-interventionist approach by the courts. If changes are to be made to the degree of court intervention in domestic arbitration, these could be implemented either by the adoption of a unified system or by amending the existing domestic regime.

(o) The Model Law is difficult to interpret and apply without the aid of foreign jurisprudence on the interpretation and application of the Model Law, including the documents adopted during the preparation of the Law. This type of exercise may not be practical for arbitrators and users who are involved only in domestic arbitration.

(p) Individual arbitrators in domestic arbitrations may not be familiar with the law. The right to apply for permission to appeal against a domestic arbitration award on a question of law is an important safeguard for cases where an arbitrator gets the law wrong.

(q) Many jurisdictions which have a unitary regime still find it necessary to make some distinction between the two types of arbitration, thus necessitating a definition of international arbitration.

(r) The complications for parties and lawyers posed by a dual system have been exaggerated. Those who are not involved in international arbitrations will only have to work with the domestic regime, while those who represent clients in international arbitrations overseas are accustomed to dealing with different arbitration regimes.

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[16] It is likely that most Government and quasi-Government bodies would continue to specify in their construction contracts that the arbitration agreements are, or should be treated as, domestic arbitration agreements after implementation of the proposals. Members of the HK Construction Association would also include such a provision in their sub-contracts at the first sub-contract level. However, the Association has less control over sub-contractors further down the contract chain.

(s) In practice, it is comparatively rare for problems to arise as to which regime governs a dispute. The issue appears to have been dealt with in no more than ten High Court judgments since 1990.

(t) The existing Arbitration Ordinance is unclear because of the way it is drafted and because of the way it has been revised over the years. It is not unclear because it contains a separate regime for domestic arbitrations. It should not be difficult to draft a clear Ordinance which includes some separate provisions applicable only to domestic arbitrations.

(u) The 2003 Report proposes to abolish the existing court powers to remove domestic arbitrators for "misconduct". The only basis for removal of an arbitrator would become the Model Law ground of "justifiable doubts as to [the arbitrator's] impartiality or independence", which is narrower than that of "misconduct".

(v) The construction industry in Hong Kong largely operates on standard form contracts imposed by the employers (including the Government, the Housing Authority, MTRC and KCRC) whose standard provisions are generally regarded as non-negotiable for reasons of conformity. If the right to apply for permission to appeal against an arbitration award on a point of law is not prescribed by law, there could be a tendency for the employers to exclude it. Where the matter is left to private negotiations, it could result in different positions for main and sub-contracts on the same projects.

Other jurisdictions

20. Jurisdictions with international arbitration legislation based on the Model Law are listed in Annex 6(a). Examples of jurisdictions which have separate regimes for domestic and international arbitrations are given in Annex 6(b). Examples of jurisdictions having a unitary or unified regime can be found in Annex 6(c).

Consultation

21. The proposal to create a unified regime was first mooted by the HKIAC Committee on Arbitration Law set up in 1992. That Committee was chaired by Mr Neil Kaplan, QC, and most of its members were lawyers. The Committee consulted the professionals involved in the practice of arbitration in Hong Kong by sending out a questionnaire in 1993, seeking their views on the question as to whether Hong Kong should adopt a unitary system of arbitration law. There were over 70 responses and 91% of them favoured a unitary system.[17]

22. The HKIArb Committee on HK Arbitration Law established in 1998 did not re-circulate the questionnaire, but a range of bodies involved in arbitration in Hong Kong were represented on that Committee. Members of the Committee were asked to consult the organisations that had nominated them when the draft Report was released for consultation in 2002.

23. The HKIArb Committee had 23 members. The membership list is at Annex 7. It had a seven-member working group to deal with the details of the Committee's work and to make recommendations to the full Committee. The working group met nine times, while the full Committee met on six occasions.

24. The Committee received submissions and comments on the draft Report from: (a) the HK Construction Association; (b) the HK Federation of Electrical and Mechanical Contractors; (c) Mr Matthew Gearing, solicitor; (d) Mr Wyn Hughes, solicitor; and (e) Mr Francis Haddon-Cave, barrister.

25. The HK Construction Association represents probably the largest users of domestic arbitration in Hong Kong. They were concerned that, under the proposals, as many as 20 "opt-in" and "opt-out" provisions have to be considered at the time of entering into an arbitration agreement, when many choices have to be made. They considered it necessary for the Ordinance to retain a separate section containing provisions applicable

[17] The survey also found that 51% of the respondents agreed that there should be a limited right of appeal in a unitary system as in the existing domestic regime; 64% agreed that in a unitary system, there should be one arbitrator unless the parties agreed otherwise; and 87% agreed that there should be provisions for consolidation of arbitrations in a unitary system. The 2003 Report recommends that s 6B (consolidation of arbitrations), s 8 (when reference is to a single arbitrator) and s 23 (judicial review of arbitration awards) of the Ordinance should be retained but only as opt-in provisions.

only to domestic arbitrations, without the need for the parties to "opt-in". In their view, these provisions should include:

(a) the court's power to order arbitrations to be consolidated or heard concurrently (section 6B);
(b) the right to apply to the court for permission to appeal on a question of law arising out of an arbitrator's award (section 23); and
(c) the default number of arbitrators should be one for domestic arbitrations and not left to the discretion of the HKIAC (section 8).

The HK Construction Association also felt strongly about the proposal to abolish the right of a party to apply to the court to remove an arbitrator for misconduct or serious irregularity under section 25. Nonetheless, since the Association failed to persuade the HKIArb Committee to retain a separate section for domestic arbitrations without the need for a party to "opt-in", they agree with the proposals in the 2003 Report "in the spirit of compromise".

26. The report of the HKIArb Committee addressed the concerns of the HK Construction Association by allowing users of standard form contracts to "opt-in" to certain provisions of the former domestic regime which they have enjoyed through such contracts. These provisions are appeal on point of law, determination of a preliminary point of law by the Court, consolidation provisions and one arbitrator in default of agreement.

27. Subsequent to the publication of the Report, the Construction Association has proposed the inclusion of a deeming provision in the draft legislation to the effect that where a contract opts-in to the provisions in the "domestic section", then all sub-contracts below the principal contract as well as all contracts associated with the principal contract would be treated as domestic unless the parties to the sub-contract or associated contract concerned have opted out of the "domestic section" or opted-in to the provisions of the main body of the new Ordinance, depending on how the new legislation would be drafted.

28. The professional bodies in the arbitration sector have been informally consulted on the Association's latest proposal. They pointed out that the proposal would require careful drafting to deal with matters such as the nature of sub-contracts falling within the scope of the deeming provision and whether it would apply to contracts in the construction industry only. However, they considered that the proposed provision could

address the construction industry's concerns and would be acceptable to the profession.

Preliminary views

29. All major bodies concerned with arbitration agree that the Arbitration Ordinance is not user-friendly and should be simplified. The complexity of the Ordinance has been a continuing complaint from lawyers and non-lawyers alike. Foreign lawyers and parties who are involved in Hong Kong arbitrations also find it difficult to identify what provisions are applicable.

30. The Department of Justice considers that the Ordinance should be as user-friendly as possible so that arbitration users in Hong Kong could find their way round the Ordinance as easily as possible. The Department also believes that adopting the HKIArb Committee's proposals, modified in the way set out in paragraph 27 above, could meet many of the objections to a unitary regime stated in paragraph 19 above.

31. Subject to the views of members of the Panel, the Department of Justice therefore proposes to set up a working group consisting of representatives of the profession to assist the Department in preparing drafting instructions and draft legislation to implement those proposals, as so modified. The Department also proposes to issue the draft legislation as a consultative document before deciding on its ultimate form. The Panel will be kept informed of progress and further consulted in due course.

32. Members' preliminary views on the HKIArb Committee's recommendations and the Department's proposals above would be appreciated.

Legal Policy Division
Department of Justice
June 2005

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List of annexes

Annex 1

The development of arbitration law in Hong Kong

Background

1. The current Arbitration Ordinance (Cap 341) was based on the Arbitration Ordinance of 1963. The provisions of the 1963 Ordinance mirrored those of the English Arbitration Act 1950, which provided for a unitary arbitration law applicable to both domestic and international arbitrations.

2. The Ordinance was amended in 1982 to implement the recommendations of the Law Reform Commission Report on *Commercial Arbitration*, which had taken into account the provisions of the Arbitration Act 1979 in the UK. The Ordinance as amended made special provision for international arbitrations in only two situations – when a stay of court proceedings was sought by a party to an arbitration agreement, and when the court's power to review an arbitrator's decision was established. Hence, in international arbitrations, the court was obliged to stay court proceedings, and the parties could by agreement exclude certain powers of the court to intervene. Apart from these exceptions, international arbitrations continued to be dealt with in a way similar to domestic arbitrations.

3. After the HK International Arbitration Centre ("HKIAC") was established in 1985, the Law Reform Commission perceived a need to make our legal rules for international arbitration recognisable and more accessible to the international community. They therefore recommended in 1987 that the UNCITRAL Model Law on International Commercial Arbitration should replace existing Hong Kong law on international arbitration, whether commercial or otherwise, subject only to a very few minor changes.

4. The Model Law aims at establishing a law on international commercial arbitration that is acceptable to States with different legal, social and economic systems. The Law Reform Commission noted that the Model Law substantially reduces the powers of the courts in controlling arbitration proceedings, but does not constitute a dramatic departure from the English tradition. A considerable number of vital

controls remain, and arbitrators operating under it are far from uncontrollable.

5. Nonetheless, the Commission recommended that the existing law relating to domestic arbitrations should remain virtually intact. They were not aware of any serious criticism of the law as it stood. Whereas international parties always have a choice of the jurisdictions in which they wish to arbitrate, domestic parties have less choice. The Commission therefore did not recommend any lessening of the protection of domestic parties under existing law. The Commission's recommendations were implemented in 1989, resulting in separate regimes for the conduct of domestic and international arbitrations respectively.

Report of the HKIAC Committee on Arbitration Law

6. In 1991, there was a proposal in England to reform the English law of arbitration. In the light of that development, the Attorney-General invited Mr Justice Kaplan to set up and chair a committee of the HKIAC to consider whether amendments to the Arbitration Ordinance were required.

7. The Committee was of the view that the Model Law was suitable for domestic arbitrations. They reasoned that the Model Law had proved effective and relatively trouble free in international arbitrations and that its incorporation in the Arbitration Ordinance had assisted in elevating Hong Kong to a prominent position in the global community as a venue favourable to international arbitration. They also hoped that the Ordinance could keep pace with the needs of the modern arbitration community, domestically and globally, and could free Hong Kong from the outdated UK Arbitration Acts 1950-1979 and the case law on which their interpretation depended. The Committee therefore considered that the Ordinance should be completely redrawn in order to apply the Model Law equally to both domestic and international arbitrations, together with such additional provisions as are deemed necessary and desirable.

8. However, the Committee acknowledged that unification of the two arbitral systems would be a complex issue requiring careful consideration. They accordingly recommended, as an interim measure, that limited improvements be made to the Ordinance to minimise the differences between the two systems, remove anomalies, and enhance the efficiency of arbitral tribunals, thus beginning the process of harmonisation of HK's international and domestic arbitration laws.

9. The Administration accepted the need for the suggested improvements on the grounds that Hong Kong had established itself as a leading centre for arbitration in the region and it was essential that Hong Kong maintained that position against growing competition from other regional arbitration centres by removing anomalies and deficiencies and keeping Hong Kong law up-to-date and efficient.

Arbitration (Amendment) Bill 1996

10. The Committee's recommendations were implemented by way of the Arbitration (Amendment) Bill 1996. One of the stated objects of the Bill was to bring certain provisions of the Ordinance relating to domestic arbitrations into line with those relating to international arbitrations and *vice versa* so that the Ordinance would operate more uniformly to both kinds of arbitration. It promoted greater party autonomy, vested primary authority in arbitral tribunals and limited the scope of court intervention during arbitral proceedings. The following are some of the main features of the amendments:

(a) applying Article 8 (arbitration agreement and substantive claim before court) of the Model Law to the stay of legal proceedings to arbitration in most cases under domestic arbitration agreements;

(b) applying Article 16 of the Model Law (competence of arbitral tribunal to rule on its jurisdiction) to a tribunal that is arbitrating under a domestic arbitration agreement;

(c) enabling an arbitral tribunal to extend time for a party to commence arbitration proceedings or to dismiss a claim for unreasonable delay in international as well as domestic cases;

(d) revising Article 7(2) of the Model Law so that arbitration agreements evidenced in writing but not signed by the parties are brought within the meaning of "agreement in writing";

(e) vesting of default powers to appoint arbitrators in the HKIAC instead of the High Court for domestic and international arbitrations.

(f) specifying the general responsibilities of arbitral tribunals with respect to the conduct of arbitration proceedings and the exercise of the powers conferred on them by the Ordinance or by the parties;

(g) specifying the general powers of an arbitral tribunal, both as to conduct of the proceedings and as to the reception of evidence, and reducing the powers of the High Court to make orders during arbitration proceedings, including the repeal of its powers to order discovery of documents and require security to be given for costs of the arbitration;

(h) enabling an arbitral tribunal to award any remedy or relief that the High Court could have awarded in proceedings before that Court;

(i) enabling an arbitration award or an order of an arbitral tribunal to be enforced in the same way as an order of the High Court with permission of that Court;

(j) exempting an arbitral tribunal or an appointing authority from legal liability for an act or omission unless the act or omission was dishonest.

The distinction between the domestic and international arbitration regimes is therefore less pronounced after the enactment of the 1996 Ordinance. The differences between the two regimes are highlighted in Annex 3(a).

11. The Committee had indeed proposed a second Bill which would have further harmonised the domestic and international laws of arbitration.[18] However, due to constraints on available time in the final session of the Legislative Council before its dissolution on 1 July 1997, there was no time for this second Bill. In order to carry forward the recommendations of the Committee set out in the 1996 Report, the HK Institute of Arbitrators established in 1998 the Committee on HK Arbitration Law in co-operation with the HKIAC. The latter Committee issued a report in 2003. They agree that the Arbitration Ordinance should

[18] The Committee suggested that the Bill should, *inter alia*, (a) abolish the right of appeal in domestic cases and apply Article 34 (application for setting aside as exclusive recourse against arbitral award) of the Model Law to judicial challenges to awards; (b) enable the High Court to determine preliminary points of law in both domestic and international arbitrations but only by agreement of the parties; and (c) replace the High Court's power to remove an arbitrator for misconduct (or for delay in proceeding with the arbitration) with the powers in Articles 13 to 15 of the Model Law.

be redrawn and recommend that a unitary regime with the Model Law governing both domestic and international arbitrations should be created, thereby abolishing the distinction between the two types of arbitrations.

Annex 2

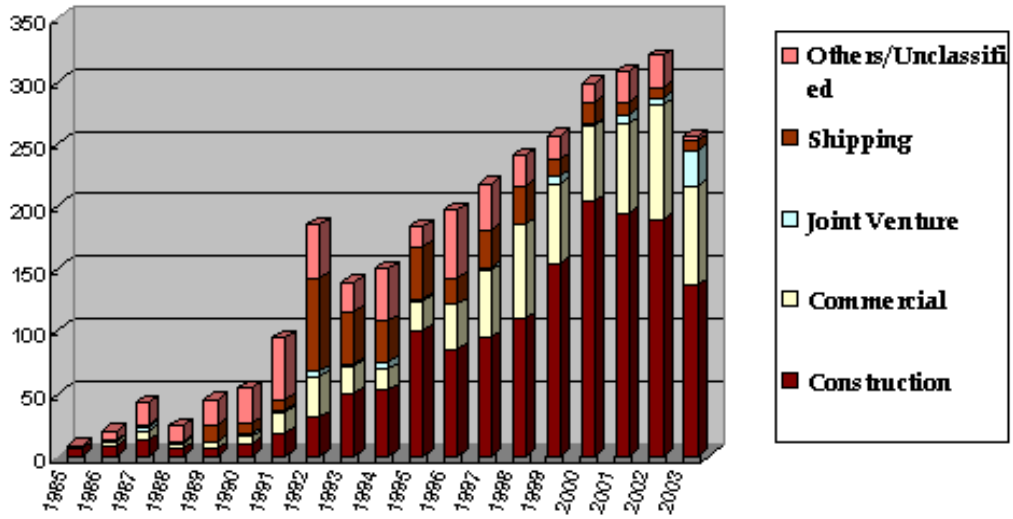
Number of international arbitration cases involving the HK International Arbitration Centre

The following table indicates that the number of international arbitration cases involving the HK International Arbitration Centre has increased steadily since the Centre opened in September 1985. The number increased from 197 in 1996 to 287 in 2003, representing a 46% increase since the enactment of the Arbitration (Amendment) Ordinance in 1996.

	1985	**1986**	**1987**	**1988**	**1989**	**1990**	**1991**	**1992**	**1993**	**1994**
Commercial	1	3	7	5	5	5	16	33	23	17
Construction	5	9	13	5	6	10	19	31	50	53
Joint Venture	0	1	3	1	0	3	2	4	1	5
Shipping	0	0	2	1	14	8	8	74	42	33
Others/Unclassified	3	7	18	12	20	28	49	43	23	42
Totals	**9**	**20**	**43**	**24**	**45**	**54**	**94**	**185**	**139**	**150**

	1995	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**	**Total**
Commercial	24	35	54	76	64	60	71	190	80	769
Construction	101	86	94	109	154	204	195	90	137	1371
Joint Venture	1	0	3	1	6	1	7	6	7	52
Shipping	41	21	30	31	13	18	11	9	28	384
Others/Unclassified	17	55	37	23	20	15	23	25	35	495
Totals	**184**	**197**	**218**	**240**	**257**	**298**	**307**	**320**	**287**	**3071**

Source: Hong Kong International Arbitration Centre website at <http://www.hkiac.org/main.html>.



Source: Hong Kong International Arbitration Centre website at <http://www.hkiac.org/main.html>.

Annex 3

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 *or independence*. (Art. 12(2))
Opportunity to present case	Tribunal required to give the parties a *reasonable* opportunity to present their cases. (s 2GA(1)(a))	Each party shall be given a *full* 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 *ex æquo et bono* or as *amiable compositeur*	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)

(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.

Annex 4

Summary of recommendations in the 2003 Report

UNCITRAL Model Law		Recommendations in the 2003 Report
Chapter I – General Provisions		
-	General	The framework of the new Ordinance should be based on the structure and wording of the Model Law. (paras 6.5 and 6.6) The Model Law chapter headings should also be followed. Both the applicable Model Law provisions and the additional provisions should all be set out in the main body. (Summary, A3)
		The new Ordinance should commence with a section stating expressly that the Model Law, with the modifications as set out, shall have the force of law in Hong Kong in all cases. (para 6.3)
		The relevant recommendations in the Report on Civil Justice Reform should be considered for inclusion in the new Ordinance. (para 7.2)
Art 1	Scope of application	The new unitary regime should apply to all cases, domestic and international, and should not be limited to commercial arbitrations. (para 8.5)
		There should be a provision defining the scope of application in the new Ordinance. It would be particularly important to specify which provisions of the new Ordinance are to be applicable for the purposes of exercising the supportive powers of the court where HK is not the seat of the arbitration. Article 1 should be reviewed in this context. (paras 6.4 and 8.5)
		The existing provisions that enable the parties to opt in or opt out of the domestic regime or the international regime should be repealed and there should be a clear statement that the Model Law is to apply not only to domestic and international arbitrations but also to any type of arbitration under an agreement in writing. (para 8.5)
		See Cap 341, s 34C(1) and (2) (retained, para 13.5).

UNCITRAL Model Law		**Recommendations in the 2003 Report**
-	Ordinance to apply to statutory arbitrations	See recommendation on Cap 341, s 2AB (para 8.13).
-	Government to be bound	See Cap 341, s 47 (retained; para 6.7).
-	Objective and principles of Ordinance	See Cap 341, s 2AA (retained; para 8.11).
Art 2	Definitions and rules of interpretation	Adopted unchanged and apply in all cases. (para 9.7)
		See also recommendation on Cap 341, s 2. (paras 6.2 and 9.9)
-	Chief Executive may amend Sixth Schedule	See Cap 341, s 48 (retained; para 6.7).
-	Saving for certain matters governed by common law	There should be a provision modelled on section 81 of the UK Arbitration Act 1996, which ensures that such of the old common law rules as are relevant will continue to apply. (para 8.31)
Art 3	Receipt of written communications	Adopted unchanged and apply in all cases. (para 10.3)
		Require updating to take into account new forms of electronic transactions. (para 10.4)
Art 4	Waiver of right to object	Adopted unchanged and apply in all cases. (para 11.4)
Art 5	Extent of court intervention	Adopted unchanged and apply in all cases. (para 12.3)
Art 6	Court or other authority for certain functions of arbitration assistance and supervision	Adopted unchanged and apply in all cases; such a provision should follow the existing arrangement along the lines of section 34C of Cap 341. (para 13.5)
-	Arbitral tribunal to be liable for certain acts and omissions	See Cap 341, s 2GM (retained; para 8.37).
-	Appointors and administrators to be liable only for certain acts and omissions	See Cap 341, s 2GN (retained; para 8.37).
-	Limitation Ordinance (Cap 347), s 34	Save that the reference to imperial enactment in section 34(1) of the Limitation Ordinance (Cap 347) should be deleted, section 34(1), (2) and (5) should appear in the new Ordinance instead so as to make it more user-friendly. (para 29.3)

UNCITRAL Model Law		Recommendations in the 2003 Report
		Section 34(3) and (6) of Cap 347 is not compatible with Article 21 of the Model Law and, as such, should not be retained. (para 29.3)
		Section 34(4) of Cap 347 should be repealed and replaced by a provision based on section 76 of the UK Arbitration Act 1996. (para 29.3)
-	Appointment of conciliator	See Cap 341, s 2A (retained; para 38.13).
-	Power of arbitrator to act as conciliator	See Cap 341, s 2B (retained; para 38.13).
Chapter II – Arbitration Agreement		
Art 7	Definition and form of arbitration agreement	Article 7(1) should be adopted unchanged and apply in all cases. (para 14.6)
		Section 2AC of Cap 341 should be retained and amended in view of the enactment of the Electronic Transactions Ordinance and should apply to all cases to the exclusion of Article 7(2). (paras 14.6 and 14.7)
-	Death of party	See recommendation on Cap 341, s 4 (to be replaced by s 8 of the UK Arbitration Act 1996). (paras 8.27, 21.9 and 21.10)
Art 8	Arbitration agreement and substantive claim before court	Adopted unchanged and apply in all cases. (para 15.4)
	Labour Tribunal Ordinance	See Cap 341, s 6(2), referring to claims within the jurisdiction of the Labour Tribunal. (paras 50.1 and 50.2)
	Control of Exemption Clauses Ordinance	See Cap 341, s 6(3), referring to s 15 of the Control of Exemption Clauses Ordinance. (paras 44.9 and 50.1 to 50.2)
Art 9	Arbitration agreement and interim measures by court	Adopted unchanged and apply in all cases. (para 16.6)
-	Scope for interim measures	The Ordinance should provide a definition for "interim measures of protection" in Article 9. (para 16.9)
-	Reference of interpleader issues to arbitration	See recommendation on Cap 341, s 7 (to be replaced by a provision modelled on section 10 of the UK Arbitration Act 1996). (para 16.18)
Chapter III – Composition of Arbitral Tribunal		
Art 10	Number of arbitrators	Article 10(1) should be adopted unchanged and apply in all cases. (para 17.4)

UNCITRAL Model Law		Recommendations in the 2003 Report
		Existing arrangement under section 34C(5) of Cap 341 should be retained and apply in all cases to the exclusion of Article 10(2). (para 17.4)
Art 11	Appointment of arbitrators	Adopted unchanged and apply in all cases (para 18.9) Cf Cap 341, s 12.
-	When reference is to a single arbitrator	See Cap 341, s 8, which would become an opt-in provision. (para 6.2)
-	Appointment of arbitrators where two or more than three arbitrators are required	There should be a provision to deal with the situations where the appointment of two or more than three arbitrators is required. In the case of a two or other even-numbered tribunal, the equal treatment of the parties will permit each side to choose the same number of arbitrators and that when the number of arbitrators is uneven and is five or more, the parties may each choose an equal number of arbitrators, leaving the appointment of the last one to the other members of the arbitral tribunal. (para 18.10)
-	Appointment of joint arbitrators in multiple respondent cases	A power along the lines of Article 7 of the HKIAC Securities Arbitration Rules should be added and exercisable by the HKIAC for the purposes of its function under Article 11 of the Model Law. (para 18.25)
-	Appointment by HKIAC	There should be a provision expressly stating that any appointment by HKIAC under the new Ordinance is deemed to have been made with the agreement of the parties. (para 18.14)
Art 12	Grounds for challenge	Adopted unchanged and apply in all cases. (para 19.2) Cf Cap 341, ss 25 and 26.
Art 13	Challenge procedure	Adopted unchanged and apply to all cases. (para 20.6)
		It should be expressly stated in the new Ordinance that an arbitrator facing a challenge, particularly in the early part of the arbitration, should carefully consider whether it would be in the interests of the parties to resign in order to save unnecessary costs. (para 20.6)
Art 14	Failure or impossibility to act	Adopted unchanged and apply to all cases. (para 21.5) Cf Cap 341, ss 3 and 15(3).

UNCITRAL Model Law		Recommendations in the 2003 Report
-	Power to disentitle arbitrator to his fees	(a) The immunity of an arbitrator from legal action for the parties' loss under section 2GM does not explicitly extend to legal actions for recovering fees already paid to him. It should be made clear that the court can order repayment by the arbitrator of fees already paid. (b) The court should have a discretionary power to disentitle an arbitrator to his unpaid fees where there is a successful application to court pursuant to Articles 13 and 14. (para 21.7) Cf Cap 341, s 15(3). See also the recommendations in para 43.43 (below), which overlap with those in para 21.7.
		Clear grounds based on personal fault of the arbitrator should be shown by the applicant before repayment or disentitlement to fees can be ordered. (para 21.7)
-	Deprivation of fees of removed arbitrator	(a) Where there is a successful application for removal under Article 13 or under the delay provisions of Article 14, the court should have a discretion to disentitle the removed arbitrator to the whole or part of his fees. (b) In respect of the fees of the removed arbitrator, the Court should have a discretion to order repayment of such fees that are already paid. (para 43.43) See also the recommendations in para 21.7 (above), which overlap with those in para 43.43.
-	Death of arbitrator	There should be a provision based on section 26 of the UK Arbitration Act 1996 (authority of arbitrator ceases on his death). (para 21.10)
Art 15	Appointment of substitute arbitrator	Adopted unchanged and apply to all cases. (para 22.3) Cf Cap 341, ss 9 and 27.
-	Umpires	See the recommendations on Cap 341, s 10. (paras 18.17 to 18.22)
-	Power of judges to take arbitrations	See the recommendation on Cap 341, s 13A. (para 18.26)
Chapter IV – Jurisdiction of Arbitral Tribunal		
Art 16	Competence of arbitral tribunal to rule on its jurisdiction	Adopted unchanged. (para 24.6) Cf Cap 341, s 13B.

-	Jurisdiction over claims raised for the purpose of set-off	The Committee is of the view that a claim has to fall within the ambit of an arbitration agreement in order to be raised as a set-off. For the avoidance of doubt, a general provision should be added to reflect limitation on the jurisdiction of the arbitral tribunal for matters referable within the ambit of the arbitration agreement. (para 24.10)
-	Ruling of no jurisdiction by arbitral tribunal	A ruling of the arbitral tribunal that it has no jurisdiction should be final and the court should then have exclusive jurisdiction to decide and resolve the dispute. (para 24.14) There should be a provision modelled on Article 1052 of the Netherlands Arbitration Act 1986 so that the court may try the case if the tribunal declares that it lacks jurisdiction. (para 24.15)
Art 17	Power of arbitral tribunal to order interim measures	Adopted unchanged and apply in all cases. (para 25.10)
-	General powers exercisable by arbitral tribunal	See Cap 341, s 2GB (retained subject to the recommendation below: paras 6.7 and 25.16).
		The parties should be allowed to opt out of the power of an arbitral tribunal to order a claimant to give security for costs (see Article 3(1)(d), Second Schedule, New Zealand Arbitration Act 1996). (para 25.16)
-	Special powers of Court in relation to arbitration proceedings	See recommendations on Cap 341, s 2GC (retained subject to review: paras 6.7(b) and 16.11).
		An arbitral tribunal should be able to direct that a Court order made in support of arbitration proceedings (such as an injunction or an order preserving property) should cease to have effect (see section 31(2) of the Singaporean Arbitration Act 2001). (para 6.7(b))
-	Retention of security where Admiralty proceedings stayed	There should be a provision governing the retention of security, at the discretion of the court along the lines of section 11 of the UK Arbitration Act 1996, in admiralty cases where there is an arbitration agreement. (para 16.15)
-	Payment into Court	The provisions of Order 73 rule 11 of the Rules of the High Court concerning payment into court in arbitration should be abolished. (para 16.22)

Chapter V – Conduct of Arbitral Proceedings		
Art 18	Equal treatment of parties	Amended by substituting "reasonable opportunity" for "full opportunity". (para 26.4) Cf Cap 341, s 2GA(1)(a).
-	General responsibilities of arbitral tribunal	See recommendation on Cap 341, s 2GA. (para 6.7(a))
-	General duty of parties	The general duty on the parties to progress arbitrations and to obey the orders and directions of the arbitral tribunal should be expressly stated in the Ordinance; it would be appropriate to adopt a provision modeled on section 40(1) of the UK Arbitration Act 1996. (para 8.24)
Art 19	Determination of rules of procedure	Adopted unchanged and apply to all cases. It is essential to ensure that provisions in the new Ordinance dealing with procedural and interlocutory matters will not conflict with Articles 17, 19, 23, 24 and 27. (para 27.5)
Art 20	Place of arbitration	Adopted unchanged and apply to all cases. (para 28.4)
Art 21	Commencement of arbitral proceedings	Adopted and apply to all cases except that it should be amended to provide for service of documents in manner provided for by section 76 of the UK Arbitration Act 1996. (para 29.4) Cf Cap 341, s 31 and Cap 347, s 34(3), (4) and (6). (para 29.3)
-	Consolidation of arbitrations	See recommendation on Cap 341, s 6B, which would become an opt-in provision. (paras 6.2 and 23.7)
Art 22	Language	Adopted unchanged and apply to all cases. (para 30.4)
Art 23	Statements of claim and defence	Adopted unchanged and apply to all cases. (para 31.2)
-	Representation and preparation work	See Cap 341, s 2F (retained; para 8.21).
Art 24	Hearings and written proceedings	Adopted unchanged and apply to all cases. (para 32.3)
-	Proceedings to be heard otherwise than in open court	See recommendation on Cap 341, s 2D. (para 8.17)
-	Restrictions on reporting of proceedings heard otherwise than in open court	See recommendation on Cap 341, s 2E. (para 8.17)

-	Confidentiality in arbitration	There should be a provision along the lines of section 14 of the New Zealand Arbitration Act 1996. (para 8.19)
Art 25	Default of a party	Adopted unchanged and apply to all cases. (para 33.3)
		The power of the arbitral tribunal in case of party defaults should be extended along the lines of section 41(5) and (7) of the UK Arbitration Act 1996, replacing Cap 341, s 23C. (para 25.27)
Art 26	Expert appointed by arbitral tribunal	Adopted unchanged and apply to all cases. (para 34.4)
Art 27	Court assistance in taking evidence	Adopted unchanged and apply to all cases. (para 35.4)
-	Power to extend time for arbitration proceedings	See recommendation on Cap 341, s 2GD (retained subject to review: para 16.11).
-	Delay in prosecuting claims	See recommendation on Cap 341, s 2GE (retained subject to review: para 16.11).
-	Terms as to costs, etc	See Cap 341, s 30 (retained; para 43.49).
-	Determination of preliminary point of law by Court	See recommendation on Cap 341, s 23A, which would be replaced by an opt-in provision based on section 45 of the UK Arbitration Act 1996. (paras 6.2 and 35.5 to 35.9)
Chapter VI – Making of Award and Termination of Proceedings		
Art 28	Rules applicable to substance of dispute	Adopted unchanged and apply to all cases. (para 36.4)
-	Time for making of award	See notes on Cap 341, ss 15(1) and 15(2).
-	Decision of arbitral tribunal	See Cap 341, s 2GF (retained; para 6.7).
-	Specific performance	See note on Cap 341, s 17.
-	Enforceability of interim measures of protection	Provide in the new Ordinance that an arbitral tribunal, when granting interim measures of protection, may, on the application of any of the parties, issue an award in doing so. (para 25.43)
Art 29	Decision making by panel of arbitrators	Adopted unchanged and apply to all cases. (para 37.3) Cf Cap 341, s 11.
-	Decisions by "truncated" arbitral tribunals	The matter of decisions by "truncated" arbitral tribunals is more appropriate to be dealt with by arbitration rules rather than a statutory provision. (para 37.13)

Art 30	Settlement	Adopted unchanged and apply in all cases. In case an award on agreed terms had been procured by fraud, it should be capable of being set aside under Article 34(2)(b)(ii) in that it is in conflict with public policy. (para 38.4)
	Settlement agreements	See Cap 341, s 2C (retained; para 38.8).
Art 31	Form and contents of award	Adopted unchanged and apply to all cases. (para 39.7)
-	Awards on different issues	There should be a provision similar to section 47(1) of the UK Arbitration Act 1996 (tribunal may make more than one award at different times on different aspects of the dispute). (para 39.11) Cf Cap 341, s 16.
		The terms "partial final award" and "final award" should be used and defined to avoid possible confusion. (para 39.11) Cf Cap 341, s 16.
-	Enforcement of decisions of arbitral tribunal	See recommendations on Cap 341, s 2GG. (paras 45.11 to 45.14)
-	Arbitral tribunal may award interest	See Cap 341, s 2GH (retained; para 42.7).
-	Rate of interest on money awarded in arbitration proceedings	See Cap 341, s 2GI (retained; para 42.7).
-	Interest on amount payable in consequence of a declaratory award	There should be a provision conferring a power on the arbitral tribunal to award interest on amounts that are the subject matter of a declaratory award, modelled on section 49(5) of the UK Arbitration Act 1996. (para 42.8)
-	Costs of arbitration proceedings	See recommendations on Cap 341, s 2GJ. (paras 43.7 to 43.11)
		There should be an express provision that an appropriate written offer should be taken into account by the arbitral tribunal when dealing with costs. (para 16.22)
-	Power of arbitral tribunal to review award of costs	The arbitral tribunal should have a residual power to review its arbitral award of costs in circumstances where there are matters which had not been revealed in advance thereby preventing it from making an appropriate order on costs. (para 43.14)

-	Assessment of costs for interlocutory hearings	The tribunal's power to assess the costs of an unmeritorious interlocutory application which has resulted in wasted costs and to order these costs to be paid forthwith should be made explicit in the new Ordinance. (para 43.17)
-	Liability to pay fees of arbitral tribunal	See Cap 341, s 2GK (retained; para 43.20).
-	Arbitral tribunal may limit amount of recoverable costs	See recommendations on Cap 341, s 2GL. (para 43.27)
-	Costs in respect of unqualified person	See Cap 341, s 2G (retained; para 43.30).
-	Costs of consolidated arbitrations	The arbitral tribunal should have the power to make costs orders in respect of arbitration proceedings that are consolidated. (para 43.32)
		In respect of arbitrations being heard concurrently, the arbitral tribunal should only have the power to make order as to costs in each arbitration, but not the power to order a party to reference to pay the costs of a party to another reference. (para 43.32)
		The Court of First Instance should have power to make consequential directions as to the payments of costs in such cases when making orders under section 6B (consolidation of arbitrations) of the Arbitration Ordinance. (para 43.32)
	Terminology	The term "assessment" should be used in preference to "taxation" in the new Ordinance wherever appropriate. (para 43.3)
-	Taxation (or assessment) of arbitrator's or umpire's fees	See recommendations on Cap 341, s 21. (paras 43.7 to 43.11 and 43.35 to 43.39)
		Order 5, rule 6(1) of the Rules of the High Court should be amended so that unqualified persons may appear in taxation proceedings in relation to arbitration. (para 43.30)
Art 32	Termination of proceedings	Adopted unchanged and apply to all cases. (para 40.2)
Art 33	Correction and interpretation of award; additional award	Adopted unchanged and apply to all cases. (para 41.7) Cf Cap 341, s 19.
		It should be made clear that Article 33 also applies to other changes to the arbitral award that are necessitated by and consequential upon the correction of any such errors. (para 41.8)

Chapter VII – Recourse against Award		
Art 34	Application for setting aside as exclusive recourse against arbitral award	Presumably would be adopted although no specific recommendation to this effect. (paras 44.1 to 44.6) Cf Cap 341, s 25.
-	Repayment of arbitrator's or umpire's fees	Where arbitration was held in HK, the court should be empowered to deal with the repayment of the arbitrator's or umpire's fees (including the amount to be repaid) if an application under Article 34 is successful. (paras 43.48 to 43.49)
-	Judicial review of arbitration awards	See recommendation on Cap 341, s 23, which would become an opt-in provision. (paras 6.2 and 44.10)
-	Power to remit award	See note on Cap 341, s 24.
Chapter VIII – Recognition and Enforcement of Awards		
Art 35	Recognition and enforcement	Discussed at paras 45.1 to 45.3. (Note: Art 35 does not apply to HK: s 34C(1).)
Art 36	Grounds for refusing recognition or enforcement	Discussed at paras 45.1 to 45.3. (Note: Art 36 does not apply to HK: s 34C(1).)
-	Enforcement of Mainland and Convention awards	Parts IIIA and IV of Cap 341 should be retained in its present form. (paras 46.3 and 47.4)

Annex 5

Impact of the recommendations in the 2003 Report on the provisions of the existing Arbitration Ordinance (Cap 341)

The following table summarises the impact of the recommendations in the 2003 Report on the provisions of the existing Arbitration Ordinance (Cap 341). Unless otherwise stated, all references to an Article in the table are to an Article in the UNCITRAL Model Law on International Commercial Arbitration at the 5th Schedule of the Arbitration Ordinance.

Arbitration Ordinance		**Recommendations of the Committee**
Part I - Preliminary		
s 1	Short title	-
s 2	Interpretation	Retained but should review its wording to reconcile with Article 2 (definition and rules of interpretation). (para 9.9)
		No need to define "domestic arbitration" and "international arbitration". (para 6.2)
s 2AA	Objective and principles of Ordinance	Retained (para 8.11)
s 2AB	Ordinance to apply to statutory arbitrations	Similar section should be enacted but the provisions of the new Ordinance should be carefully considered to expressly exclude those provisions which are not suitable for application to statutory arbitrations. (para 8.13)
s 2AC	Arbitration agreement to be in writing	Retained and apply to all cases to the exclusion of Article 7(2) (para 14.6); section 2AC(4) should be amended in the light of the enactment of Electronic Transactions Ordinance. (para 14.7)
Part IA – Provisions applicable to domestic and international arbitration		
Application of Part		
s 2AD	Application (Part IA)	Repealed (paras 6.2 and 8.5)
s 2A	Appointment of conciliator	Retained despite objections from the HK Mediation Council. (para 38.13)

s 2B	Power of arbitrator to act as conciliator	Retained despite objections from the HK Mediation Council. (para 38.13)
s 2C	Settlement agreements	Retained (para 38.8)
s 2D	Proceedings to be heard otherwise than in open court	Retained and made applicable also to relevant proceedings before the HK Court of Appeal. (para 8.17)
s 2E	Restrictions on reporting of proceedings heard otherwise than in open court	Retained and made applicable also to relevant proceedings before the HK Court of Appeal. (para 8.17)
-	Confidentiality in arbitration	Section 14 of the New Zealand Arbitration Act 1996 deems that, unless otherwise agreed, there is a term in the arbitration agreement that the parties shall not publish, disclose or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings. Its application is subject to exceptions. A provision along the lines of this section should be adopted. (paras 8.18 and 8.19)
s 2F	Representation and preparation work	Retained. (para 8.21)
s 2G	Costs in respect of unqualified person	Retained unchanged. (para 43.30)
		Order 5, rule 6(1) of the Rules of the High Court should be amended so that unqualified persons may appear in taxation proceedings in relation to arbitration. (para 43.30)
Conduct of Arbitration Proceedings		
s 2GA	General responsibilities of arbitral tribunal	Retained but section 2GA(1) should refer to independence as well as impartiality in order to be consistent with Articles 12 and 13. (para 6.7(a))
s 2GB	General powers exercisable by arbitral tribunal	Retained (para 6.7) but the parties should be allowed to opt out of the power of an arbitral tribunal to order a claimant to give security for costs (see Article 3(1)(d), Second Schedule, New Zealand Arbitration Act 1996). (para 25.16)
s 2GC	Special powers of Court in relation to arbitration proceedings	Retained but should be reviewed together with the provisions of the Model Law to ensure no conflict among them. (para 16.11)

		Amended so that an arbitral tribunal may direct that a Court Order made in support of arbitration proceedings (such as an injunction or an order preserving property) should cease to have effect. See section 31(2) of the Singaporean Arbitration Act 2001. (para 6.7(b))
s 2GD	Power to extend time for arbitration proceedings	Retained but should be reviewed together with the provisions of the Model Law to ensure no conflict among them. (para 16.11)
s 2GE	Delay in prosecuting claims	Retained but should be reviewed together with the provisions of the Model Law to ensure no conflict among them. (para 16.11)
s 2GF	Decision of arbitral tribunal	Retained. (para 6.7)
s 2GG	Enforcement of decisions of arbitral tribunal	Amended in the following manner: (para 45.14) (a) Guidance as to the types of orders and directions that can be enforced thereunder and the grounds to be demonstrated in support of such enforcement are required. At most, this section should apply to interim measures of protection and certain evidentiary orders, such as *Mareva* injunctions or *Anton Piller* orders. (para 45.11) (b) The courts in Hong Kong should not have such a wide-ranging discretion to enforce, in general, orders or directions of foreign tribunals and that such enforcement should not be permitted in an individual case unless the party seeking enforcement can demonstrate that: (i) a court in the corresponding place of arbitration will act reciprocally in respect of such orders or directions made in a Hong Kong arbitration; and (ii) that type of order or direction can be made in Hong Kong arbitration. (para 45.12) (c) In keeping with the concept of reciprocity, the court should be given a discretion to refuse enforcement of a

		foreign award which is not covered by Part IIIA or Part IV of Cap 341 if it is not shown that the place in which the award was made extends reciprocal enforcement to Hong Kong awards. (para 45.13)
Interest		
s 2GH	Arbitral tribunal may award interest	Retained without amendment. (para 42.7)
s 2GI	Rate of interest on money awarded in arbitration proceedings	Retained without amendment. (para 42.7)
-	Interest on amount payable in consequence of a declaratory award	There should be a provision conferring a power on the arbitral tribunal to award interest on amounts that are the subject matter of a declaratory award, modelled on section 49(5) of the UK Arbitration Act 1996. (para 42.8)
Costs, Fees and Expenses		
s 2GJ	Costs of arbitration proceedings	(a) Retained but should be reviewed along the lines suggested in paras 43.7 to 43.11 (see below) (para 43.12) and paras 43.35 to 43.38 (see note on s 21 below) (para 43.39). (b) In respect of assessment of costs of the arbitral proceedings, other than its fees or expenses, by the arbitral tribunal, the arbitral tribunal should be obliged to assess such costs but that it should have the power, at its election, to appoint an assessor to assist or, with statutory authority to exercise delegated powers, to assess such costs. (para 43.7) (c) There should be express guidance as to how such costs should be assessed, with the emphasis that the arbitral tribunal is not obliged to follow the costs scales or approaches in court. (para 43.9) (d) It should be made clear that the arbitral tribunal can award costs incurred in the preparation of the case prior to the service of the notice of arbitration. (para 43.9) (e) Only if the parties agree should the

		tribunal be able to direct in its award that a party's recoverable costs of the reference be assessed by the Court. In such a case, there should be provision for the tribunal to make a costs award based on the Court's assessment in view of the relative ease with which awards can be enforced as compared with Court judgments. (para 43.10)
-	Power of arbitral tribunal to review award of costs	The arbitral tribunal should have a residual power to review its arbitral award of costs in circumstances where there are matters which had not been revealed in advance thereby preventing it from making an appropriate order on costs. The mechanism should be modeled upon Article 33. (para 43.14)
-	Assessment of costs for interlocutory hearings	The tribunal's power to assess the costs of an unmeritorious interlocutory application which has resulted in wasted costs and to order these costs to be paid forthwith should be made explicit in the new Ordinance. (para 43.17)
s 2GK	Liability to pay fees of arbitral tribunal	Retained unchanged. (para 43.20)
s 2GL	Arbitral tribunal may limit amount of recoverable costs	Retained but should be amended to: (a) make it in line with section 65(2) of the UK Arbitration Act 1996; (b) make it clear that such a power can be exercised on the own initiative of the tribunal; (c) make it clear that such a power should apply only to the parties' own costs. (para 43.27)
-	Costs of consolidated arbitrations	The arbitral tribunal should have the power to make costs orders in respect of arbitration proceedings that are consolidated. (para 43.32)
		In respect of arbitrations being heard concurrently, the arbitral tribunal should only have the power to make order as to costs in each arbitration, but not the power to order a party to reference to pay the costs of a party to another reference. (para 43.32)

		The Court of First Instance should have power to make consequential directions as to the payments of costs in such cases when making orders under section 6B (consolidation of arbitrations) of the Arbitration Ordinance. (para 43.32)
-	Terminology	The term "assessment" should be used in preference to "taxation" in the new Ordinance wherever appropriate. (para 43.3)
Liability for Certain Acts and Omissions		
s 2GM	Arbitral tribunal to be liable for certain acts and omissions	Retained. (para 8.37)
s 2GN	Appointors and administrators to be liable only for certain acts and omissions	Retained. (para 8.37)
Part II – Domestic Arbitration		
Application		
s 2L	Application to domestic arbitration agreements	Repealed. (paras 6.2 and 8.5)
s 2M	Application to international arbitration agreements	Repealed. (paras 6.2 and 8.5)
Effect of Arbitration Agreements, etc		
s 3	Authority of arbitrators and umpires to be irrevocable	Repealed because the Committee has recommended that Article 14 should be adopted unchanged and apply to all cases. (para 21.6)
s 4	Death of party	Replaced by: (a) section 8 of the UK Arbitration Act 1996 (parties can agree that death shall have the effect of discharging the arbitration agreement) (para 8.27); and (b) section 26 of the UK Arbitration Act 1966 (death of appointing person does not revoke arbitrator's authority). (paras 21.9 and 21.10)
s 5	Bankruptcy	Repealed because the subject is more appropriate to be dealt with by legislation on insolvency. (para 8.29)

s 6	Court to refer matter to arbitration in certain cases	No discussion on section 6(1), which extends Article 8 to domestic arbitration agreements
		Section 6(2) (Labour Tribunal Ordinance) – presumably would be retained. See paras 50.1 to 50.2.
		Section 6(3) (Control of Exemption Clauses Ordinance) – presumably would be retained. See paras 44.9 and 50.1 to 50.2.
s 6B	Consolidation of arbitrations	Retained but only as an opt-in provision applicable to all cases. (paras 6.2 and 23.7) See also para 43.32 (costs of consolidated arbitrations).
s 7	Reference of interpleader issues to arbitration	Repealed and replaced by a provision modelled on section 10 of the UK Arbitration Act 1996. (para 16.18)
Arbitrators and Umpires		
s 8	When reference is to a single arbitrator	Retained but only as an opt-in provision. (para 6.2)
s 9	Power of parties to supply vacancy in a two-arbitrator tribunal case	(a) section 9(a) (one arbitrator refuses to act or incapable of acting) – no discussion; presumably would be repealed because the Committee has recommended that Article 15 (appointment of substitute arbitrator) should be adopted unchanged and apply to all cases. (para 22.3) (b) section 9(b) (one party fails to appoint arbitrator) – no discussion; presumably would be repealed because the Committee is against the inclusion of a provision along the lines of section 17 of the UK Arbitration Act 1996, which is similar to section 9(b) of the Ordinance. (para 18.13) (c) proviso (court may set aside appointment made pursuant to section 9) – no discussion; presumably would be repealed having regard to the above-mentioned.
s 10	Umpires	Retained and added principally to those provisions governing the composition of the tribunal. (para 18.17)
		Provision should be made in the new Ordinance for disagreement to be deemed to arise when one arbitrator is of the view

		that he is in disagreement with the other over any matter relating to the reference. (para 18.18)
		There should be provisions giving specific power to the arbitrators to refer particular issues to an umpire if they disagree while retaining jurisdiction over other issues if they consider this would save costs. (para 18.18)
		A provision modelled on section 21 (umpire) of the UK Arbitration Act 1996 should be considered. (para 18.19)
		The new Ordinance can follow Articles 12 to 15 with respect to the challenge and replacement of umpires. (para 18.19)
		There should be a provision similar to section 16(6)(b) of the UK Arbitration Act 1996 (the two party-appointed arbitrators may appoint an umpire at any time after they themselves are appointed and shall do so before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration). (para 18.21)
		The above recommendations should not only apply when there are two arbitrators but also when there are an even number of arbitrators and, where appropriate, they are equally divided on any issue. (para 18.22).
s 11	Majority award of 3 arbitrators	No discussion; presumably would be repealed because the Committee considers that the adoption of Article 29 (decision making by panel of arbitrators) would suffice. (paras 37.3 to 37.5)
s 12	Power of HKIAC in certain cases to appoint an arbitrator or umpire	Power of HKIAC to appoint an arbitrator – no discussion; presumably would be repealed because the Committee has recommended the adoption of Article 11(3) and (4) and HKIAC is the "court or other authority" competent to perform the functions referred to in that Article under section 34C(3).
		Power of HKIAC to appoint an umpire – no discussion; there are no provisions in the Model Law dealing with the appointment of umpires.

s 13A	Power of judges to take arbitrations	Retained subject to the exact definition of provisions applicable to these arbitrations. (para 18.26).
Jurisdiction of Domestic Arbitral Tribunals		
s 13B	Arbitral tribunal may determine own jurisdiction	No change because Article 16 would continue to apply to domestic as well as international arbitrations. (para 24.6).
Provisions as to Awards		
s 15	Time for making award	Section 15(1) – no discussion as to whether there should be an implied term that an arbitrator or umpire may make an award at any time.
		Section 15(2) – a similar provision should be included and apply in all cases. (para 39.16)
		Section 15(3) – no discussion; presumably would be repealed because the Committee has recommended that: (a) Article 14 (failure or impossibility to act) should be adopted (para 21.5) and (b) the court should have a power to disentitle an arbitrator to his fees if the application to the court under Article 13 (grounds for challenge) and Article 14 is successful. (para 21.7)
s 16	Interim awards	Presumably would be repealed because the Committee has recommended that section 47(1) of the UK Arbitration Act 1996 (based on section 14 of the 1950 Act) should be adopted and that the term "partial final award" and "final award" should be used to avoid confusion. (para 39.11).
s 17	Specific performance	No discussion; presumably would be retained because the Committee has recommended that section 2GF, which is subject to section 17, should be retained. (para 6.7)
s 18	Awards to be final	Repealed because unnecessary. (para 39.14)
s 19	Power to correct slips	No discussion; presumably would be repealed and replaced by Article 33(1) and (2) (correction and interpretation of award). (para 41.7)

Costs, Fees and Interest		
s 21	Taxation of arbitrator's or umpire's fees	Should be reviewed along the lines suggested in paras 43.7 to 43.10 (see notes on section 2GJ above) (para 43.11) and paras 43.35 to 43.38 (see below). (para 43.39)
		There should be a system for the assessment of the fees of the arbitral tribunal along the lines of section 21 of Cap 341, where its fees are disputed and challenged by a party. Sections 56, 63 and 64 of the UK Arbitration Act 1996 can be referred to but the system should be as simple as possible with a strict time limit within which a party has to make a challenge. (para 43.35)
		In case where such an arbitral award has been made, the arbitral tribunal should further be given the power to amend its arbitral award to incorporate the assessment by the court if the court assesses its fees at a different amount. (para 43.35)
		If the award of the arbitral tribunal as to its own fees and expenses is challenged, such part of the award should not be enforceable until the challenge is disposed of. (para 43.35)
		The court should be empowered to request an advisory opinion as to the reasonableness of the fees charged by the arbitral tribunal in the particular case. (para 43.36)
		The arbitral tribunal should be given a power, at its election, to refer the assessment of its fees and expenses to the court and, then, to make an arbitral award incorporating the result of that assessment. (para 43.37)
		Where the court has assessed the fees of the arbitral tribunal and, if the parties so required, the arbitral tribunal should be given the power to convert such an assessment of the court into an arbitral award in order to facilitate enforcement in the international context. (para 43.38)

Judicial Review, Determination of Preliminary Point of Law, Exclusion Agreements, Interlocutory Orders, Remission and Setting Aside of Awards, etc		
s 23	Judicial review of arbitration awards	Retained but only as an opt-in provision. (paras 6.2 and 44.10)
	Rules of High Court, Order 73	A separate recommendation to the High Court Rules Committee that the conflict between Order 73 rule 2(1) and Order 73 rule 3(3) of the Rules of the High Court should be resolved. (para 44.10)
s 23A	Determination of preliminary point of law by Court	Replaced by an opt-in provision based on section 45 of the UK Arbitration Act 1996. (paras 6.2 and 35.5 to 35.9)
s 23B	Exclusion agreements affecting rights under sections 23 and 23A	Presumably would be repealed because of the recommendations concerning sections 23 and 23A above.
s 23C	Interlocutory orders	Replaced by a new section, extending the power of the arbitral tribunal in case of party defaults along the lines of section 41(5) and (7) of the UK Arbitration Act 1996, thus extending the default powers of the tribunal under Article 25 (default of a party). (para 25.27)
s 24	Power to remit award	No discussion as to the court's power to remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire. (Note: s 24 overlaps with Article 34(4).)
s 25	Removal of arbitrator and setting aside of award	Presumably would be repealed because the Committee has observed that: (a) there are relatively few occasions where an arbitrator would so seriously misconduct an arbitration that a party would be justified in seeking his removal; (b) an open-ended provision allowing removal for failing to properly conduct the arbitral proceedings can be used by one party to delay the arbitration; (c) the challenge and removal of an arbitrator is sufficiently covered by Article 12; (d) recourse against an award is available under Article 34. (para 19.3)

s 26	Power of Court to give relief where arbitrator is not impartial or the dispute involves question of fraud	Section 26(1) (power of Court to give relief where arbitrator is not impartial) – presumably would be repealed in the light of the Committee recommending that Article 12 (grounds for challenge) should be adopted unchanged and apply to all cases. (see para 19.2)
		Section 26(2) (power of Court to give relief where the dispute involves question of fraud) – should not be repeated because the question of fraud should be treated in the same manner as any other allegations in the arbitral proceedings. (para 8.8)
s 27	Power of Court where arbitrator is removed or authority of arbitrator is revoked	Presumably would be repealed in the light of the Committee recommending that Article 15 (appointment of substitute arbitrator) should be adopted unchanged and apply to all cases. (see para 22.3)
Miscellaneous		
s 30	Terms as to costs, etc	Retained and made applicable to all cases. (para 43.49)
	Repayment of arbitrator's or umpire's fees	Where arbitration was held in HK, the court should be empowered to deal with the repayment of the arbitrator's or umpire's fees (including the amount to be repaid) if an application under Article 34 is successful. (para 43.49)
s 31	Commencement of arbitration	Section 31(1) (commencement of arbitration) – presumably would be repealed because the Committee has recommended that Article 21 (commencement of arbitral proceedings) should be adopted and applied to all cases. (para 29.4)
		Section 31(2) (service of notices) – presumably would be repealed because the Committee has recommended the inclusion of a provision based on section 76 (service of notices, etc) of the UK Arbitration Act 1996. (para 29.3)

Cap 347, section 34	Limitation period	Save that the reference to imperial enactment in section 34(1) of the Limitation Ordinance (Cap 347) should be deleted, section 34(1), (2) and (5) should appear in the new Ordinance instead so as to make it more user-friendly. (para 29.3)
		Section 34(3) and (6) of Cap 347 is not compatible with Article 21 of the Model Law and, as such, should not be retained. (para 29.3)
		Section 34(4) of Cap 347 should be repealed and replaced by a provision based on section 76 of the UK Arbitration Act 1996. (para 29.3)
s 34	Transitional – Part II	-
Part IIA – International Arbitration		
s 34A	Application to international arbitration agreements	Repealed. (paras 6.2 and 8.5)
s 34B	Application to domestic arbitration agreements	Repealed. (paras 6.2 and 8.5)
s 34C	Application of UNCITRAL Model Law	Existing arrangements as regards the exercise of those functions as set out in section 34C should be retained. (para 13.5)
Part IIIA – Enforcement of Mainland Awards		
s 40A	Awards to which Part IIIA applies	Part IIIA should be retained in its present form. (para 47.4)
s 40B	Effect of Mainland awards	Retained.
s 40C	Restrictions on enforcement of Mainland awards	Retained.
s 40D	Evidence	Retained.
s 40E	Refusal of enforcement	Retained.
s 40F	Publication of list of recognized Mainland arbitral authorities	Retained.
s 40G	Saving	Retained.
Part IV – Enforcement of Convention Awards		
s 41	Awards to which Part IV applies	Part IV should be retained in its present form. (para 46.3)
s 42	Effect of Convention awards	Retained.

s 43	Evidence	Retained.
s 44	Refusal of enforcement	Retained.
s 45	Saving	Retained.
s 46	Order to be conclusive evidence	Retained.
Part V – General		
s 47	Government to be bound	Retained (para 6.7)
s 48	Chief Executive in Council may amend 6th Schedule	Retained (para 6.7)
-	Saving for certain matters governed by common law	There should be a provision modelled upon section 81 of the UK Arbitration Act 1996, which ensures that such of the old common law rules as are relevant will continue to apply. (para 8.31)
Schedules		
Sch 3	New York Convention	Retained as the Third Schedule. (para 48.4)
Sch 4	Application of this Ordinance to Judge Arbitrators	Retained as the Fourth Schedule subject to the exact definition of provisions applicable to these arbitrations to ensure consistency. (paras 18.26 and 48.6)
Sch 5	UNCITRAL Model Law on International Commercial Arbitration	Retained as the First Schedule. (para 48.2) The original text of the Model Law should be annotated to indicate changes. (para 6.3)
Sch 6	-	Retained as the Fifth Schedule, with the Report of the HKIAC Committee on Arbitration Law (1996) and the Report of the HKIArb Committee on HK Arbitration Law (2003) added. (para 48.8)
(New)	Opt-in provisions	Provisions that will apply if the parties agree to opt in should appear in the Second Schedule. (para 49.3)
(New)	Ordinances dealing with or impacting upon arbitration	Ordinances dealing with or impacting upon arbitration (including the Control of Exemption Clauses Ordinance and the Labour Tribunal Ordinance) should be listed in the Sixth Schedule. (paras 8.6 and 50.2)

Annex 6

Other jurisdictions

(a) Jurisdictions with international arbitration legislation based on the Model Law ("Model Law jurisdictions")

1. UNCITRAL reported that legislation (on international arbitration) which is based on the Model Law has been enacted in Australia, Azerbaijan, Bahrain, Bangladesh, Belarus, Bermuda, Bulgaria, Canada, Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hong Kong, Hungary, India, Iran, Ireland, Japan, Jordan, Kenya, Lithuania, Macao, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Paraguay, Peru, Republic of Korea, Russia, Scotland, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Ukraine, the United States (California, Connecticut, Illinois, Oregon and Texas), Zambia, and Zimbabwe.[19] These jurisdictions are commonly referred to as "Model Law jurisdictions".

(b) Jurisdictions with separate regimes for domestic and international arbitrations (covering both Model Law and non-Model Law jurisdictions)

2. Jurisdictions which have created separate regimes for domestic and international arbitrations include Australia (1988), Bermuda (1993), the common law provinces in Canada (1986-1988), France, Greece (1999), Hong Kong (1989), Ireland (1998), Italy (1994), Macao (1998), Malaysia, Malta (1996), Peru, Portugal (1986), Russia (1993), Scotland (1990), Singapore (1995), South Africa, Switzerland (1987), Turkey (2001) and the United States. Out of these jurisdictions, Italy, Malaysia, Portugal, South Africa, Switzerland and Turkey have not adopted the Model Law for their international arbitrations.

Australia

3. The Model Law has been adopted for international commercial arbitrations in the International Arbitration Amendment Act 1989 (Commonwealth) but domestic arbitrations continue to be governed by the uniform Commercial Arbitration Acts enacted in each of the states

[19] UNCITRAL, Status of Conventions and Model Laws as at 16 April 2004.

and territories. The Federal Attorney-General's Department was reported to have advised that "adoption of the Model Law as a basis for domestic arbitration legislation was never considered to be a realistic option in Australia because the uniform legislation, after some years of preparation, had only just been implemented at the time the working group [considering the Model Law] was meeting."[20]

Bermuda

4. Bermuda has two systems of arbitration law. The International Conciliation and Arbitration Act 1993, which has incorporated the Model Law, applies to international arbitrations, while the Arbitration Act 1986 applies to domestic arbitrations.[21]

Common law provinces in Canada

5. All common law provinces as well as the federal Parliament[22] have adopted the Model Law for international arbitration. The Uniform Arbitration Act on domestic arbitration (adopted by the Uniform Law Conference of Canada in 1990) was also based on the Model Law. This uniform domestic arbitration statute was heavily influenced by the law reformers in Alberta. Manitoba, New Brunswick, Ontario and Saskatchewan enacted their domestic arbitration statute using the Uniform Arbitration Act as basis.

6. **Alberta** – In a report published by the Alberta Institute of Law Research and Reform in 1998, the Institute recommended the enactment of a new Arbitration Act governing domestic arbitrations. The new Act would be patterned after the Model Law which has already been adopted as part of the International Commercial Arbitration Act (Alberta), though it would differ in several significant respects to make it more suitable to arbitrations in Alberta and fit better with Alberta law, practice and terminology, and where the needs of domestic arbitrations were different from those of international commercial arbitrations. The Institute gave the following reasons for modelling the draft Act on the Model Law:[23]

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20 Quoted in Law Commission, *Arbitration* (New Zealand, 1991), Report No 20, para 90.

21 International Council for Commercial Arbitration (ICCA), *International Handbook on Commercial Arbitration: National Reports – Basic Legal Texts*, Kluwer Law International, General Editor: Jan Paulsson, "Bermuda".

22 Federal Commercial Arbitration Act, RS, 1985, c 17 (2nd Supp).

23 Institute of Law Research and Reform, *Proposals for a New Alberta Arbitration Act* (Alberta, 1988), Report No 51, p 9.

(a) this would keep Alberta law about domestic arbitrations in as much harmony as circumstances permitted with the Alberta law about international commercial arbitrations;
(b) the Model Law is, in general, a good model; and
(c) there was some value in keeping Alberta law in as much harmony as circumstances permitted with the developing international mainstream of arbitration law.

The draft Act proposed by the Institute has since been enacted without substantial modification as the Arbitration Act 1991.

France

7. The first part of Book IV of the New Code of Civil Procedure regulates domestic arbitration while the second part regulates international arbitration.

Greece

8. Book VII of the Code of Civil Procedure governs domestic arbitration, while the Law on International Commercial Arbitration of 1999 governs international arbitration by incorporating the Model Law into its domestic legal order.[24]

Ireland

9. Domestic arbitration is governed by the provisions of the Arbitration Act 1954 (as amended by the Arbitration Act 1980), while international commercial arbitration is governed by the Arbitration (International Commercial) Act 1998.

Italy

10. Title VIII of Book Four of the Code of Civil Procedure has been amended by Law No 25 of 5 January 1994 (New Provisions Relating to Arbitration and Regulation of International Arbitration), which introduced a special regime for the regulation of international arbitration in Chapter Six of Title VIII.[25]

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[24] ICCA, *International Handbook on Commercial Arbitration*, above, "Greece".
[25] ICCA, *International Handbook on Commercial Arbitration*, above, "Italy".

Macao, China

11. Domestic arbitration is governed by Law No 29/96/M of 1996 while international commercial arbitration is governed by Law No 55/98/M of 1998, which closely follows the Model Law.

Malaysia

12. The Arbitration Act 1952 was modelled on the UK Arbitration Act 1950. It was amended in 1980 by providing for a special regime for two types of institutional international arbitrations.[26]

Malta

13. Part IV of the Arbitration Act 1996 deals with domestic arbitration whereas Part V deals with international commercial arbitration.[27]

Peru

14. Domestic arbitration is governed by Section One of the General Arbitration Law, while international arbitration is governed by Section Two, which follows the Model Law in many respects. The provisions of Section One have also been strongly influenced by the Model Law. There are no significant differences between the laws applicable to international and domestic arbitration.[28]

Portugal

15. Law No 31/86 of 29 August 1986 has a separate chapter on international arbitration.[29]

Russia

16. International commercial arbitration is governed by the Law on International Commercial Arbitration of 1993 which is closely based on the Model Law, while domestic arbitration is governed by the Federal Law of 24 July 2002 concerning arbitral tribunals in the Russian Federation.

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26 ICCA, *International Handbook on Commercial Arbitration*, above, "Malaysia".
27 ICCA, *International Handbook on Commercial Arbitration*, above, "Malta".
28 ICCA, *International Handbook on Commercial Arbitration*, above, "Peru".
29 ICCA, *International Handbook on Commercial Arbitration*, above, "Portugal".

Scotland

17. Subject to the Arbitration (Scotland) Act 1894 and section 3 of the Administration of Justice (Scotland) Act 1972, arbitration law in Scotland is governed by common law. However, the Model Law has the force of law pursuant to section 66 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

Singapore

18. The Sub-committee on Review of Arbitration Laws of the Law Reform Committee in Singapore had addressed in 1993 the issue of whether Singapore should retain any distinction between domestic and international arbitrations.[30] The Sub-committee considered that it was desirable to maintain separate regimes for domestic and international arbitration in Singapore. Following the advice of the Sub-committee that the principles in the Model Law should be adopted as far as possible in the case of international arbitrations, Singapore adopted the Model Law in its International Arbitration Act in 1994. Thereafter, the Attorney-General formed a Committee to review the Arbitration Act for the purposes of "updating the law applicable to domestic arbitration and to narrow, as far as possible, the differences between the international and domestic Acts so that Singapore will have a harmonious and business-friendly regime".

19. In 1997, the Review of Arbitration Laws Committee expressed the view that the legislative regimes applicable to domestic arbitration and international arbitration should be kept separate although to a large extent, the two regimes were harmonised. The Attorney-General agreed with the Committee, as slightly different concerns apply to international arbitration where parties are more sophisticated and highly mobile.[31] The Committee therefore proposed a new Arbitration Bill which was more consistent with the Model Law but retained court intervention to a larger extent than for international arbitrations. These powers include stay of proceedings, powers of the court to order injunctions and hearings of appeals against arbitral awards.

20. There are now two separate regimes governing the conduct of arbitration in Singapore. Domestic arbitrations are governed by the Arbitration Act (Cap 10) 2002, which applies to any arbitration where the

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30 Law Reform Committee Sub-committee on Review of Arbitration Laws, *Report* (August 1993), chapter 2.C.

31 *Review of Arbitration Laws* (Singapore: Attorney-General's Chambers, Law Reform and Revision Div, 2001), LRRD No 3/2001, Executive Summary, Chapter 1 and para 4.1.

place of arbitration is Singapore. International arbitrations are governed by the International Arbitration Act of 1995 (Cap 143A), which adopts the Model Law with minor modifications. The International Arbitration Act was amended recently to achieve consistency with the Arbitration Act and also in response to recent case law.[32]

South Africa

21. The existing Arbitration Act 1965 was designed with domestic arbitration in mind and has no provisions which expressly deal with international arbitration. The South African Law Commission has therefore recommended that international commercial arbitrations should be subject to the Model Law, and that all South African legislation on international arbitration should be embodied in a single statute, the International Arbitration Act.[33] The Commission has also recommended that the Model Law should not be adopted for domestic arbitrations. They suggested instead the enactment of a new statute combining the best features of the Model Law and the UK Arbitration Act 1996, while retaining certain provisions of the South African Arbitration Act 1965 which had worked well in practice.

Switzerland

22. Whereas domestic arbitration is governed by the Intercantonal Arbitration Convention of 1969, international arbitration is governed by Chapter 12 of the Swiss Private International Law Act of 1987.[34]

Turkey

23. Turkey has adopted the Law on International Arbitration of 2001, which is based on the Model Law. Prior to the enactment of that law, there was no law in Turkey dealing with international arbitration.

United States

24. Twelve States have passed arbitration statutes specifically on international arbitration. Seven States have based their statutes on the Model Law. Other States have approached international arbitration in a variety of ways, such as adopting parts of the Model Law together with

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32 ICCA, *International Handbook on Commercial Arbitration*, above, "Singapore".

33 South African Law Commission, *Arbitration: An International Arbitration Act for South Africa* (Project 94, 1998).

34 ICCA, *International Handbook on Commercial Arbitration*, above, "Switzerland".

provisions taken directly from the 1958 UN Convention on Recognition and Enforcement of Foreign Arbitral Awards or by devising their own international arbitration provisions.[35]

(c) Jurisdictions with a unitary or unified arbitration regime (covering both Model Law and non-Model Law jurisdictions)

25. Jurisdictions which have created a unitary regime for domestic and international arbitrations include Austria (1983), Bangladesh (2001), Belgium (1998), Brazil (1996), Bulgaria (1993), Mainland China (1994), Czech Republic (1994), England and Wales (1996), Egypt (1994), Finland (1992), Germany (1998), Guatemala, Hungary (1994), India (1996), Japan (2003), Kenya (1995), Lithuania (1996), Mexico (1993), The Netherlands (1986), New Zealand (1996), Nigeria (1990), Norway (2001), Oman (1997), Quebec (1986), Romania, Spain (2003), Sri Lanka (1995), Sweden (1999), Taiwan (1998), Thailand (2002), Uganda (2000), Venezuela (1998), and Zimbabwe (1996). The unitary regime in these jurisdictions may or may not be based on the Model Law. For example, Austria, Belgium, Brazil, Mainland China, Czech Republic, England and Wales, Finland, The Netherlands, Norway, Romania, Sweden, Taiwan, Uganda and Venezuela are not regarded as "Model Law jurisdictions", though they probably have taken the Model Law into account when updating their arbitration law.

26. We do not have information as to whether the arbitration law in Azerbaijan, Bahrain, Belarus, Croatia, Cyprus, Iran, Jordan, Madagascar, Paraguay, Republic of Korea, Tunisia, Ukraine and Zambia (all of them "Model Law jurisdictions") applies to all arbitrations in these jurisdictions.

Austria

27. Articles 577 to 599 of the Code of Civil Procedure (as modified by Federal Law of 2 February 1983) apply to domestic as well as international arbitrations.[36]

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35 Uniform Arbitration Act 2000 drafted by the National Conference of Commissioners on Uniform State Laws, Prefatory Note.

36 ICCA, *International Handbook on Commercial Arbitration*, above, "Austria".

Bangladesh

28. The Arbitration Act 2001 closely follows the Model Law and consolidates the international commercial arbitration and domestic arbitration regimes in Bangladesh.

Belgium

29. The Law of 19 May 1998 on arbitration does not draw a distinction between domestic and international arbitrations. The legislators concluded that what is valid for international arbitration is also valid for domestic arbitration. The amendments in the Law have taken into consideration foreign arbitration legislation and the Model Law.[37]

Brazil

30. Law No 9.307 of 23 September 1996 applies to both national and international arbitrations. It was inspired by the Model Law but contains certain cultural and technical adjustments.

Bulgaria

31. As a result of an amendment in 1993, the Law on International Commercial Arbitration, which is based on the Model Law, now also applies to domestic arbitration except for the provisions which are specific to international commercial arbitration.[38]

Mainland China

32. Arbitration in mainland China is regulated by the Arbitration Law of 1994. The Law applies to both domestic and foreign-related arbitrations, except that Chapter VII (Articles 65 to 73) makes special provisions for foreign-related arbitration.[39]

Czech Republic

33. The Act of 1 November 1994 on Arbitral Proceedings and Enforcement of Arbitral Awards applies to both domestic and international

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37 "Note: The Law of 19 May 1998 Amending Belgian Arbitration Legislation" (1999) 15 Arb Int 97.

38 ICCA, *International Handbook on Commercial Arbitration*, above, "Bulgaria"; see section 3(1) of the Act (No 60 of 5 Aug 1988 as amended by No 93 of 2 Nov 1993).

39 J S Mo, *Arbitration Law in China* (Sweet & Maxwell Asia, 2001), paras 2.47 – 2.48.

arbitrations, although Part Five of the Act contain provisions relating specifically to international arbitration and foreign awards.[40]

England and Wales

34. Shortly after the adoption of the Model Law by UNCITRAL, the UK Government set up a Departmental Advisory Committee ("DAC") to consider whether the provisions of the Model Law should be implemented in the UK. The Committee concluded that the Model Law should not be enacted for England. They recommended instead a new and improved Arbitration Act, which should in general apply to domestic and international arbitrations alike, although there would be exceptions to take account of treaty obligations. They also suggested that the new statute should, so far as possible, have the same structure and language as the Model Law, so as to enhance its accessibility to those who are familiar with the Model Law.[41] In the end, the Arbitration Act 1996 retains a unitary system of arbitration law governing domestic and international arbitrations, and the Model Law had been used as a yardstick by which to assess the quality of the legislation.

35. However, Part II of the Arbitration Act 1996 (sections 85 to 88) provides separate rules where the arbitration is of a domestic character:

(a) Section 85 defines what is meant by a domestic arbitration.
(b) Section 86 provides that where the arbitration is domestic in character then the court has a discretion to refuse to stay legal proceedings to arbitration.
(c) Section 87 restricts the parties' rights to exclude the court's jurisdiction to determine preliminary points of law and appeals against arbitral awards.
(d) Section 88 provides that the Secretary of State may repeal or amend the provisions of sections 85 to 87.

36. Part II has not yet been brought into force. In February 1996, the DAC commented in relation to the rules for obtaining a stay of legal proceedings that the distinction between domestic and international arbitrations "sits uneasily with the principle of party autonomy and

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40 ICCA, *International Handbook on Commercial Arbitration*, above, "Czech Republic".

41 "A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law" (1989).

amounts to interference with rather than support for the arbitral process".[42] The Committee noted that:

> *"the distinction drawn between domestic and other arbitrations produces odd results. An arbitration agreement between two English people is a domestic arbitration agreement, while an agreement between an English person and someone of a different nationality is not, even if that person has spent all his time in England. Furthermore, we are aware that it could be said that the distinction discriminates against European Community nationals who are not English, and is thus contrary to European law."*

37. Section 87 prevents the parties in a domestic case from effectively agreeing to exclude the jurisdiction of the Court to deal with preliminary points of law or with an appeal from an award on a point of law, until after the commencement of the arbitral proceedings. The DAC was not persuaded of the value or the validity of such a provision and was of the view that that distinction should disappear.[43]

38. In July 1996, the Department of Trade and Industry published a consultation document on the commencement of the Act in which, amongst other matters, views were sought as to whether or not the distinction in English law between international and domestic arbitrations should be maintained. The majority of respondents were in favour of the abolition of that distinction, and the application of the international regime throughout (ie, a mandatory stay of legal proceedings in all cases, and the ability to exclude the right to appeal on a point of law at any stage in all cases).

39. At about the same time as that consultation document was published, the English Court of Appeal upheld the decision of Mr Justice Waller in *Phillip Alexander Securities and Futures Limited v Bamberger*,[44] in which it was held (in the context of the Consumer Arbitration Agreements Act 1988) that the distinction between international and domestic arbitration was incompatible with European Community law because it amounted to a restriction on the freedom to provide services

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42 Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (1996), para 325.

43 Above, paras 329 and 330.

44 [1997] ILPr 73 (15 May 1996, Commercial Court; 12 July 1996, Court of Appeal). The Court of Appeal held that the exclusion of non-domestic arbitration clauses from the protection of the Consumer Arbitration Agreements Act 1988 was a restriction on the freedom to provide services to nationals of other member States of the European Community.

contrary to Article 49 (formerly Article 59) of the Treaty of Rome and/or unlawful discrimination contrary to Article 12 (formerly Article 6) of the Treaty.

40. In the light of the responses to the consultation document, the decision of the Court of Appeal, and the factors they had set out in their February 1996 Report, the DAC decided that the distinction should be abolished. The Department of Trade and Industry decided in January 1997 that the part relating to modifications for the purpose of domestic arbitration shall not come into force. The Corporate and Consumer Affairs Minister, John Taylor, later decided that "all arbitrations, whether domestic or international, should be treated in the same way."[45] There is therefore no real prospect of sections 85 to 87 being brought into force.

Egypt

41. The Law Concerning Arbitration in Civil and Commercial Matters of 1994 covers both domestic and international arbitrations. The original draft legislation followed the Model Law by limiting its scope to international arbitration. When the draft was referred to the People's Assembly, it was suggested that domestic arbitrations could benefit from the new principles contained in the draft. The Assembly decided that the law should apply to all arbitrations, whether domestic or international, at the last legislative stage. However, where it was necessary, the new law provided for special rules for international arbitrations.[46]

Finland

42. The Arbitration Act of 1992 applies without distinction to both domestic and international arbitrations that take place in Finland. The Finnish legislator did not consider it appropriate to provide for two separate regimes, one for domestic arbitration and one for international arbitration. It was felt that a well conceived law would be equally appropriate for both domestic and international arbitration. The Act is to a large extent compatible with the Model Law.[47]

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45 See *Russell on Arbitration* (1997), p 41, fn 84

46 M I M Aboul-Enein, "Reflections on the New Egyptian Law on Arbitration" (1995) 11 Arb Int 75.

47 ICCA, *International Handbook on Commercial Arbitration*, above, "Finland".

Germany[48]

43. Germany has a long tradition of arbitration, which is used widely in the country. In 1998, the Tenth Book of the Code of Civil Procedure was fully replaced by a new text based on the Model Law. The new law does not make any distinction between domestic and international arbitrations. Following the Dutch approach, it was felt that two different sets of rules should be avoided since they would be similar or almost identical and since the rules for international arbitration are mostly also suitable for domestic arbitral proceedings. It has been noted that the development of international arbitration has had such an influence on national arbitration that the answers to most questions applying to both types of arbitration have in the meantime become identical. It was also argued that the definition of "international" and "commercial" is difficult because the notions are not precisely described in the Model Law. As a result of the new law, parties, arbitrators and judges do not have to deal with the sometimes difficult distinction between national and international arbitrations when applying the new law.

Hungary

44. The Arbitration Act of 1994 is based on the Model Law and applies both to domestic and to international arbitral proceedings. The experts in Hungary concluded that there was no reason to include the rules of domestic and international arbitration in two different pieces of legislation as the substantial principles of both proceedings are the same.[49]

India

45. The Arbitration and Conciliation Act 1996 is based on the Model Law and applies to both domestic and international arbitrations.

Japan

46. Japan amended its century-old arbitration law in 2003. The new law adopts the Model Law apart from some minor modifications. Like the German Arbitration Act, the new law applies to both domestic

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48 F Weigand, "The UNCITRAL Model Law: New Draft Arbitration Acts in Germany and Sweden" (1995) 11 Arb Int 397; K Böckstiegel, "An Introduction to the New German Arbitration Act Based on the UNCITRAL Model Law" (1998) 14 Arb Int 19; and K Lionnet, "The New German Arbitration Act – A User's Perspective" (1998) 14 Arb Int 57.

49 E Horvath, "The New Arbitration Act in Hungary", 12 J Int Arb, No 3, 53 at 54-55.

and international arbitrations and makes no distinction between commercial and non-commercial arbitrations.[50]

Kenya

47. The Arbitration Act 1995 replaced the Arbitration Act 1968 with a comprehensive regime closely based on the Model Law. The new Act applies to both domestic and international arbitrations.

Lithuania

48. The Law on Commercial Arbitration adopted on 2 April 1996 as amended on 13 March 2001 was drafted on the basis of the Model Law with some modifications. It applies to both domestic and international arbitrations. Unlike the Model Law, arbitral tribunal may not take any interim measure that it might consider necessary.[51]

Mexico

49. The arbitration law in the Commercial Code, Book V, Title V on Commercial Arbitration (1993) is largely based on the Model Law. Its provisions apply to domestic arbitration as well as international arbitration. The Mexican Congress chose this approach as it wished to avoid a dichotomy in arbitration law.[52]

The Netherlands

50. The Arbitration Act of 1986 is compatible with the Model Law and applies without distinction to both domestic and international arbitrations. The Dutch legislature did not consider it necessary to provide for a separate law dealing with international arbitration. It was felt that a well conceived law for domestic arbitration would be equally appropriate for international arbitration. Moreover, the lack of a distinction avoids disputes as to whether a given case is to be considered international or domestic.[53] The uniform regime does, however, make allowance for cases where at least one of the parties is domiciled or has his actual residence outside the Netherlands.

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50 "New Arbitration Law Enacted in Japan", The Japan Commercial Arbitration Association (JCAA) Newsletter, No 17, April 2004.

51 *Martindale-Hubbell International Law Digest, Republic of Lithuania Law Digest 2004,* Arbitration and Award.

52 ICCA, *International Handbook on Commercial Arbitration*, above, "Mexico".

53 ICCA, *International Handbook on Commercial Arbitration*, above, "The Netherlands".

New Zealand

51. The Law Commission of New Zealand preferred identical statutory provisions to govern both international and domestic arbitrations.[54] That preference was based on two propositions: first, that the inadequacies of the Arbitration Act 1908 made it inappropriate to govern domestic arbitration; and, second, that the fundamental nature of arbitrations is unaffected by the location or nationality of the parties. The Commission argued that there seemed to be no good reason why an Auckland company agreeing to arbitrate a dispute with a Christchurch based company should be subject to rules different from those applicable to a dispute with a Melbourne based company.

52. Most of the submissions received on the Law Commission's discussion paper "heavily supported" the propositions that domestic arbitrations should be based on the Model Law, and that there should be a high degree of consistency between international and domestic arbitration regimes. Nevertheless, the submissions contained consistent suggestions that, at least in the context of domestic arbitrations, there was a need for a greater degree of elaboration of the powers of arbitral tribunals. It was also suggested that domestic arbitrations should be subject to a greater degree of judicial review. The Law Commission therefore concluded that there should not be a separate New Zealand domestic arbitration statute modelled on the Australian uniform legislation. However, it recommended that additional provisions applicable to domestic arbitrations should be contained in Schedule II of their draft statute, while parties to international arbitrations should be able to contract into Schedule II provisions, thus maximising the consistency between the two regimes.

53. The Government Administration Committee affirmed the Law Commission's conclusion that the Model Law should be adopted as the model for arbitral law reform in the country, both with respect to international commercial arbitration and (with some modifications) with respect to domestic arbitration. The policy was that parties to commercial and similar contracts should have the freedom to choose their own method of resolving their disputes involving their own tribunal, procedure and law.[55] As a result, New Zealand adopted the Model Law for both domestic and international arbitrations in the Arbitration Act 1996, which

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54 Law Commission, *Arbitration* (New Zealand, 1991), Report No 20, paras 83 – 92. See Richardson M, "Arbitration Law Reform: the New Zealand Experience" (1996) 12 Arb Int 57 and "Arbitration Law Reform: the New Zealand Experience - An Update" (1997) 13 Arb Int 229-31.

55 "Arbitration Law Reform: The New Zealand Experience – An Update" (1997) 13 Arb Int 229.

emphasises party autonomy and reduces judicial scrutiny whilst increasing the powers of arbitral tribunals.

Nigeria

54. Arbitration is regulated by Part I and Part III of the Arbitration and Conciliation Decree 1990. The provisions of Part III apply solely to cases relating to international commercial arbitration in addition to other provisions of the Decree. Hence, for domestic arbitration, Part I applies; for international arbitration, Parts I and III apply. The provisions of Parts I and III are largely based on the Model Law and the Arbitration Rules of UNCITRAL.[56]

Norway

55. Norway will, in accordance with the Bill on Arbitration that has been presented for enactment (NOU 2001:33), have the same regime for domestic and international arbitrations, and the new law will be based on the Model Law.[57]

Oman

56. The Law of Arbitration in Civil and Commercial Disputes 1997 is closely modelled on the Model Law and applies to all arbitrations taking place in Oman, as well as to international commercial arbitration taking place abroad if the parties have made it subject to the Omani Arbitration Law.[58]

Quebec, Canada

57. Quebec adopted legislation based on the Model Law for both international and domestic arbitrations in 1986.[59]

Romania

58. Book IV, Chapters I – IX, of the Code of Civil Procedure contains, in Articles 340 to 368, the general provisions on arbitration. This

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56 ICCA, *International Handbook on Commercial Arbitration*, above, "Nigeria".

57 G C Moss, "Lectures on International Commercial Law", Publication Series of the Institute of Private Law, University of Oslo, No 162 of 2003, fn 117.

58 ICCA, *International Handbook on Commercial Arbitration*, above, "Oman".

59 Title XIIIA of the Civil Code and Book VII of the Code of Civil Procedure.

is followed by Chapter X (Articles 369 to 369.5) which contains special provisions on arbitrations which are deemed to be international.[60]

Spain

59. The Arbitration Act of 2003 follows the Model Law. It adopts a unitary regime for both national and international arbitrations.[61]

Sri Lanka

60. The Arbitration Act 1995 is modelled on the Model Law and virtually makes no distinction between domestic and international arbitrations.[62]

Sweden

61. Traditionally, Swedish law did not distinguish between national and international arbitrations. The Arbitration Act of 1999 therefore applies to arbitrations taking place in Sweden irrespective of whether the dispute has an international connection. Although the Act is not identical to the Model Law, the utmost attention was given to each provision of the Model Law when drafting the Act. There are in substance few differences between the two.[63]

Taiwan, China

62. The Arbitration Law of 1998, which has adopted the Model Law with some modifications, does not clearly distinguish between domestic and international arbitration, nor is it limited to commercial arbitration.[64]

Thailand

63. The Arbitration Act of 2002 was based on the Model Law. It covers both domestic and international arbitrations. Since both kinds of arbitration in Thailand are governed by the same provisions, arbitrators, lawyers, courts and parties are not faced with the difficulties of

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60 ICCA, *International Handbook on Commercial Arbitration*, above, "Romania".
61 R Mullerat, "Spain Joins the Model Law" (2004) 20 Arb Int 139.
62 ICCA, *International Handbook on Commercial Arbitration*, above, "Sri Lanka".
63 ICCA, *International Handbook on Commercial Arbitration*, above, "Sweden".
64 C Li, "The New Arbitration Law of Taiwan" (1999) 16 J Int Arb, No 3, 127.

distinguishing between domestic and international arbitration when applying the Act.[65]

Uganda

64. The Arbitration and Conciliation Act 2000 applies to both domestic and international arbitrations. Most of the provisions reflect the principles expressed in the Model Law.

Venezuela

65. Venezuela eliminated the distinction between international and national arbitration when it enacted the Arbitration Law of 1998, which applies to both national and international arbitrations.[66]

Zimbabwe

66. The Arbitration Act 1996 has adopted, with modifications, the Model Law for both domestic and international arbitrations.[67]

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65 ICCA, *International Handbook on Commercial Arbitration*, above, "Thailand".

66 J O Rodner, "International and National Arbitration: A Fading Distinction" (2002) 19 J Int Arb 491.

67 ICCA, *International Handbook on Commercial Arbitration*, above, "Zimbabwe".

Annex 7

Membership list of the HK Institute of Arbitrators' Committee on Hong Kong Arbitration Law ("HKIArb Committee")

1. The HKIArb Committee had 23 members in total. They were:

- Mr Robin Peard, JP (Chairman)
- Mr Robert Morgan, also Secretary of the Committee
- Mr Michael Byrne - Works Bureau, HKSAR Government
- Mr Christopher Howse - Law Society of HK
- Mr Fred Kan - Law Society of HK
- Mr Geoffrey Ma, SC (later Mr Francis Haddon-Cave) - HK Bar Association
- Mr Russell Coleman - HK Bar Association
- Mr Timothy Hill - Chartered Institute of Arbitrators (East Asia Branch)
- Mr Neil Kaplan, SC - HK International Arbitration Centre
- Mr Christopher To - HK International Arbitration Centre
- Dr John Luk - HK Institution of Engineers
- Mr K S Kwok - HK Institute of Architects
- Mr Michael Charlton - HK Institute of Surveyors
- Mr Philip Yang - HK Shipowners Association
- Mr Peter Griffiths - HK Society of Accountants
- Ms Alexandra Lo (later Mr Anthony Wood) - Securities and Futures Commission
- Mr Bernard Chan (later Mr Peter Cashin) - HK Federation of Insurers
- Mr Peter Caldwell - HK General Chamber of Commerce
- Mr Ho Sai-chu, JP - Chinese General Chamber of Commerce
- Mr Michael Moser - American Chamber of Commerce
- Mr Colin Wall - The HK Construction Association Limited
- Mr David Sandborg - City University of HK
- Mr Gary Soo (since 2002)

2. The HKIArb Committee had a seven-member working group under the chairmanship of Mr Peard to deal with the details of the Committee's work and to make recommendations to the full Committee. The other members of the working group were Mr Peter Caldwell, Mr Timothy Hill, Mr Christopher Howse, Mr Geoffrey Ma, SC (while he was a member of the Committee), Mr Robert Morgan (later assisted by Mr Gary Soo) and Mr Christopher To.