(1) Referral to Arbitration in Employment-related Cases

(2) Statistics on Commercial and Admiralty Cases Conducted under the Domestic Arbitration Regime

and

(3) Case Law on the Modification, Suspension or Termination of Interim Measure or Preliminary Order under Article 17D of the Model Law

I. Introduction

This paper addresses the following requests for information made by Members at the meetings of the Bills Committee of the Legislative Council held on 3 and 21 December 2009:

(a) information on precedent employment-related cases in which the court had not referred the parties to arbitration in accordance with an arbitration agreement even if the dispute in the matter was the subject of the arbitration agreement;

(b) the number of arbitration cases arising from commercial transactions and admiralty disputes that were conducted under the domestic arbitration regime; and

(c) relevant cases in which the arbitral tribunal had, under Article 17D of the UNCITRAL Model Law, modified, suspended or terminated on its own initiative an interim measure or a preliminary order it had granted and the decision was objected to by the party concerned.

II. Referral to Arbitration in Employment-related Cases

2. Clause 20(2) of the Arbitration Bill ("the Bill") re-enacts section 6(2) of the current Arbitration Ordinance (Cap 341). Section 6(2) provides that if a dispute is the subject of an arbitration agreement and it

involves a claim or other dispute that is within the jurisdiction of the Labour Tribunal, the court before which an action has been brought may, if a party so requests, refer the parties to arbitration if the following conditions are satisfied:

(a) there is no sufficient reason why the parties should not be referred to arbitration in accordance with the arbitration agreement; and

(b) the party requesting arbitration was ready and willing at the time the action was brought to do all things necessary for the proper conduct of the arbitration, and remains so.

3. At the Bills Committee meeting of 3 December 2009, Members inquired about the number of cases where the court had refused to refer the parties to arbitration despite its power to order a stay of the proceedings under section 6(2). We have written to Labour Department and the Labour Tribunal requesting for information with regard to cases in which the Labour Tribunal has exercised the power under section 6(2).

4. The Labour Department and the Judiciary both replied that they do not have such statistics or information. The Department of Justice is also not aware of any such cases.

III. Statistics on Commercial and Admiralty Cases Conducted under the Domestic Arbitration Regime

5. We have requested information from the Hong Kong International Arbitration Centre ("HKIAC") on the number of arbitration cases arising from commercial transactions and admiralty disputes that were conducted under the domestic arbitration regime. The HKIAC replied that they do not keep such statistics. Yet, the HKIAC made a general remark from its experience that a majority of these two types of cases were conducted under the international regime, in particular in the admiralty sector.

IV. Case Law on the Modification, Suspension or Termination of Interim Measure or Preliminary Order under Article 17D of the UNCITRAL Model Law

6. Article 17D is a relatively new addition to the UNCITRAL Model Law. It will be given legal effect in Hong Kong by clause 39 of the Bill. It provides as follows:

> "*The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.*"

7. Member raised a query on whether the party may object to or appeal against such modification after the arbitral tribunal has modified an interim measure on its own initiative. Members wished to know whether there are any cases on the application of Article 17D and whether there is a need to expressly provide for a mechanism to appeal against the tribunal's decision to modify an interim measure that it has granted.

8. As this is a new provision brought in by the 2006 amendments to the UNCITRAL Model Law, our legal research could not locate any cases on the application of Article 17D.[1] According to experienced arbitrators, in practice, a party would have been given a chance to state his views on the proposed modification. If the party wishes to raise objection again, he might ask the tribunal to reconsider its decision or he might make an application under the same clause for the tribunal to modify further, suspend or terminate the interim measure as modified. An unmeritorious application may have costs consequence.

9. Dr Peter Binder has reviewed the divergent views expressed when the amendments to the UNCITRAL Model Law were made in 2006. His conclusion on Article 17D is as follows:

> "*[T]his useful provision safeguards the flexibility of the interim measures process and advises the*

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[1] According to Dr Peter Binder, out of the five Model Law jurisdictions which recognize the 2006 Amendments to the UNCITRAL Model Law, only Ireland and New Zealand have fully adopted all the amendments and others have adopted for certain simplifications. Mauritius, for example, has decided not to adopt the concept of preliminary orders. See *International Commercial Arbitration and Conciliation in the Judicial Model Law Jurisdictions*, Thomson Ltd, 2010 (3rd ed.), at page 258, para 4A-070.

> *arbitral tribunal on the full range of corrective means, should an adjustment of the interim measure become necessary.*[2]"

10. The Administration considers that Article 17D has struck the right balance to achieve flexibility of the interim measures and to protect the interests of the parties. Given the object of the Bill is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expenses[3], we do not consider it appropriate for the Bill to provide for appeal against interim measures ordered by an arbitral tribunal, including modification of such measures by the same tribunal as to do so would have the effect of substantially delaying the arbitral proceedings.

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2 Dr Peter Binder, *ibid*, at page 232, para 4A-003.

3 Clause 3 of the Bill.