# (1) Arrangements in Other Major Model Law Jurisdictions in Respect of the Restrictions on Reporting of Court Proceedings

# (2) Practices in Other Model Law Jurisdictions in Respect of the Disclosure of Information Relating to Arbitral Proceedings and Awards Made in Those Proceedings

# (3) Relevant Extract from the New Zealand Arbitration Act 1996

# and

# (4) Review of the Reference to "Contemplated by this Ordinance" in Clause 18(2)(a) of the Bill

## I. Introduction

Following requests for information by Members at the meeting of the Bills Committee of the Legislative Council held on 19 November 2009, this paper addresses the following matters:

(a) the arrangements in other major Model Law jurisdictions in respect of the restrictions on reporting of court proceedings;
(b) the practices in other Model Law jurisdictions in respect of the disclosure of information relating to arbitral proceedings and awards made in those arbitral proceedings;
(c) the relevant extract from the New Zealand Arbitration Act 1996 under which clause 18 of the Bill was modelled on; and
(d) review of the reference to "contemplated by this Ordinance" in clause 18(2)(a) of the Bill.

## II. UNCITRAL Model Law

2. The UNCITRAL Model Law does not say anything about confidentiality. Indeed, the drafters of the Model Law rejected even relatively narrow proposals to provide for the confidentiality of arbitral awards and hearings for the following reason:

> *"It may be doubted whether Model Law should deal with the question whether an award may be*

> *published. Although it is controversial since there are good reasons for and against such publication, the decision may be left to the parties or the arbitration rules chosen by them."*[1]

3. Likewise, the UNCITRAL Notes for Organizing Arbitral Proceedings caution users of arbitration about the lack of common understanding in respect of confidentiality in arbitral proceedings and make the following points:

> *"(a) There is no uniform answer in national laws as to the extent to which the participants in an arbitration are under a duty to observe the confidentiality of information relating to the case;*
> *(b) Parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality;*
> *(c) Participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected."*[2]

## III. Restrictions on Reporting of Court Proceedings

4. Most jurisdictions which have adopted legislation for international arbitrations based on the Model Law do not provide for confidentiality in their legislation. The Federal Arbitration Act of the Unites States and the English Arbitration Act 1996 make no reference to confidentiality. There is no national legislation on confidentiality in Australia, and the High Court of Australia in *Esso Australia*[3] has declared that there is no general rule of confidentiality except that there is a rule of privacy in arbitration hearings. In Sweden, the Swedish Supreme Court held in *Bulgarian Foreign Trade Bank Ltd v. AI Trade Finance Inc.*[4] that there is no implied duty of confidentiality in private arbitrations.

5. The Singapore International Arbitration Act ("SIAA") allows

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1 See *Report of the Secretary-General on Possible Features of a Model Law on International Commercial Arbitration*, UN Doc. A/CN.9/207, para 17 (1981).
2 *UNCITRAL Notes for Organizing Arbitral Proceedings*, para 31.
3 [1995] 128 ALR 391 (HCA) at p 401.
4 Case T-1881-99.

a party to apply for court proceedings concerning arbitration to be heard otherwise than in open court and restricts reporting of such court proceedings. Sections 22 and 23 of the SIAA[5] are more or less similar to the current sections 2D and 2E of the Arbitration Ordinance of Hong Kong (Cap. 341).

6. Currently, section 2D of Cap. 341 allows a party to apply for court proceedings concerning arbitration to be heard otherwise than in open court. Section 2E of Cap. 341 restricts the reporting of proceedings otherwise than in open court. These provisions were introduced to the current Arbitration Ordinance by way of the Arbitration (Amendment) (No. 2) Ordinance 1989 (64 of 1989). The legislative amendment was based on the recommendations put forward by the Law Reform Commission of Hong Kong ("the Commission") in its 1987 Report on the Adoption of the UNCITRAL Model Law of Arbitration ("the 1987 Report"). The Commission has explained the reasons why reports in law reports and professional journals of court proceedings should be permitted, notwithstanding the general confidentiality requirements, as follows:

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5 Sections 22 and 23 of the SIAA are as follows:

"*22. Proceedings under this Act in any court shall, on the application of any party to the proceedings, be heard otherwise than in open court.*

*23. (1) This section shall apply to proceedings under this Act in any court heard otherwise than in open court.*

*(2) A court hearing any proceedings to which this section applies shall, on the application of any party to the proceedings, give directions as to whether any and, is so, what information relating to the proceedings may be published.*

*(3) A court shall not give a direction under subsection (2) permitting information to be published unless*

*(a) all parties to the proceedings agree that such information may be published; or*
*(b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential.*

*(4) Notwithstanding subsection (3), where a court gives grounds of decision for a judgment in respect of proceedings to which this section applies under considers that judgment to be of major legal interest, the court shall direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall*

*(a) give directions as to the action that shall be taken to conceal that matter in those reports; and*
(b) *if it considers that a report published in accordance with directions given under paragraph (a) would be likely to reveal that matter, direct that no report shall be published until after the end of such period, not exceeding 10 years, as it considers appropriate.*"

> *"As far as the decisions of the courts are concerned we would not like to see the extended confidentiality we have recommended interfere with the access of outside parties to judgments on the law.* ***In most cases confidential information, including the identity of parties can be hidden by judicious editing. In the rare case where the facts so obviously identify the parties that confidentiality is not possible shortly after the event, the passage of time will remedy the problem.*** *We therefore recommend that notwithstanding the general confidentiality requirements, reports in law reports and professional journals be permitted on the following conditions: -*
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> *a) that such steps be taken as are reasonably practicable to hide any matter, including the identity of the parties, that any party reasonably wishes to remain confidential,*
>
> *b) that if the court is satisfied that such matter cannot be hidden, the publication may be embargoed for such period not exceeding ten years as the court thinks appropriate."*[6] (Emphasis added)

7. Clause 17(1)-(5) of the Bill adopts section 2E of Cap. 341 to take into account the starting position of "closed court hearing" in clause 16 of the Bill.

## IV. Disclosure of Information Relating to Arbitral Proceedings and Awards Made in Those Proceedings

8. The UNCITRAL Arbitration Rules do not provide for confidentiality except in relation to an award, which may be made public only with the consent of both parties[7]. Legislation of jurisdictions which is based on the Model Law contains provisions on confidentiality protection. However, those provisions are limited to discrete aspects of the arbitral process, while not addressing more general obligations. For example, Malta adopted the Model Law in its Arbitration Act. Section

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[6] Law Reform Commission of Hong Kong, *Report on the Adoption of the UNCITRAL Model Law of Arbitration*, 1987, pp 36-7, para 4.31.

[7] *UNCITRAL Arbitration Rules*, Art. 32(5).

44(5) of the Arbitration Act states: "The award may be made public only with consent of the parties."

9. Whilst judicial opinion in other parts of the world remains divided as mentioned in paragraph 4 above, an authoritative statement has now emerged from the English Court of Appeal in *Emmott v. Michael Wilson & Partners*,[8] which seems to have settled the juridical basis for the duty. It was held that the obligation of confidentiality in arbitration is implied by law arisen out of the nature of arbitration and is a substantive rule of law masquerading as an implied term. The content of the obligation may depend on the context in which it arises and on the nature of the information or documents in question. The limits of the obligation are still in the process of development on a case-by-case basis. The principal cases in which disclosure will be permissible include where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party.

10. In the absence of legislation, a number of arbitral institutions publish redacted versions of arbitral awards and orders, for the purpose of providing guidance to parties, counsel and arbitrators. The International Chamber of Commerce ("ICC") has for many years published "sanitized" extracts of arbitral awards in various publications (specifically, the ICC Court's Bulletin, the ICCA Yearbook, specialized collections of ICC awards and Journal Du Droit International (Clunet)). When an award is published, it is redacted to remove the names of parties and other identifying facts. Although the parties are not consulted concerning publication, the ICC's practice is not to publish even redacted versions of awards if one party volunteers an objection[9]. Other arbitral institutions also publish arbitral awards, typically in redacted form and only with the parties' consent.[10]

11. The Commission in the 1987 Report has recommended against legislation to enforce confidentiality or to require that arbitral awards be reported for the following reasons:

> *"The situation in respect of arbitral proceedings themselves is, however, different. As arbitration is a matter of contract between the parties the courts*

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8 [2008] EWCA (Civ) 184 (CA)

9 See the discussion of such practice by Gary B Born in *International Commercial Arbitration*, Kluwer, 2009, at p 2269.

10 *Swiss International Arbitration Rules*, Art. 43(3) and *International Center for Dispute Resolution Rules*, Art. 27(4) (permitting redacted publication of selected American Arbitration Association awards, only with the consent of all parties).

> *should not be able to intervene either to enforce confidentiality or to require that arbitral awards be reported. We would like to see some arrangement whereby the Hong Kong International Arbitration Centre sought permission from arbitral parties and subsequently systematically published awards. It is not, however, an appropriate subject for legislation."*[11]

12. The Hong Kong International Arbitration Centre ("HKIAC") provides for such arrangement regarding the publication of awards as follows:

> *"An award may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions:*
> *(a) a request for publication is addressed to the HKIAC Secretariat;*
> *(b) all references to the parties' names are deleted; and*
> *(c) no party objects to such publication within the time limit fixed for that purpose by the HKIAC Secretariat. In the case of an objection, the award shall not be published."*[12]

## V. Relevant Extract of Section 14 of the New Zealand Arbitration Act

13. The Hong Kong Institute of Arbitrators has recommended in its 2003 Report of Committee on Hong Kong Arbitration Law ("the 2003 Report") that a provision to further safeguard the confidentiality in arbitration should be adopted. The 2003 Report recommended that a provision along the lines of section 14 of the New Zealand Arbitration Act 1996 should be adopted in the new Ordinance. Section 14 was as follows:

> *"(1) Subject to subsection (2), an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information*

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[11] Law Reform Commission of Hong Kong, *Report on the Adoption of the UNCITRAL Model Law of Arbitration*, 1987, p 36, para 4.30.

[12] Rule 39.3 of the *HKIAC Administered Arbitration Rules.*

> *relating to arbitral proceedings under the agreement or to an award made in those proceedings.*
> *(2) Nothing in subsection (1) prevents the publication, disclosure, or communication of information referred to in that subsection –*
> *(a) If the publication, disclosure, or communication is contemplated by this Act; or*
> *(b) To a professional or other adviser of any of the parties."*

14. The 2003 Report recommended that a further exception should be added to cover publication, disclosure or communication that a party is obliged to make by virtue of other provisions of the law. Clause 18 of the Bill gives effect to the above proposal.

15. In particular, clause 18(2)(b) of the Bill provides that the parties are not prohibited from publishing, disclosing or communicating any information relating to arbitral proceedings under the arbitration agreement or to an award made in those proceedings, if a party is obliged by law to make such publication, disclosure or communication to any government body, regulatory body, court or tribunal.

## VI. Review of the reference to "contemplated in the Ordinance" in clause 18(2) of the Bill

16. Similar to Section 14(2)(a) New Zealand Arbitration Act 1996, clause 18(2)(a) of the Bill permits the publication, disclosure or communication of information relating to arbitral proceedings and awards made in those proceedings in certain situations to be "*contemplated by this Ordinance*". A list of such situations, which is given by Michael Hwang and Katie Chung[13], includes the following:

> *(a) an application by a party for proceedings to be heard in open court (clause 16);*
> *(b) restrictions on reporting of proceedings heard otherwise than in open court (clause 17);*
> *(c) a challenge of arbitrators (clause 26);*
> *(d) court-order interim measures (clause 45);*

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[13] Michael Hwang and Katie Chung, "Defining the Indefinable: Practical Problems of Confidentiality in Arbitration", *Journal of International Arbitration*: 26(5): pp 609-645, at p 612

*(e) special powers of the court in relation to arbitral proceedings (clause 60);*
*(f) enforcement of orders and directions of arbitral tribunal (clause 61);*
*(g) taxation of costs of arbitral proceedings (other than fees and expenses of arbitral tribunal) (clause 75);*
*(h) applications for setting aside of arbitral award (clause 81);*
*(i) enforcement of arbitral awards (clauses 84, 85);*
*(j) enforcement of convention awards (clauses 87, 88); refusal of enforcement of convention awards (clause 89);*
*(k) consolidation of arbitrations (Schedule 2, section 2);*
*(l) determination of preliminary question of law by court (Schedule 2, section 3);*
*(m) challenging arbitral award on ground of serious irregularity (Schedule 2, section 4);*
*(n) appeal against arbitral award on question of law (Schedule 2, section 5); and*
*(o) application for leave to appeal against arbitral award on question of law (Schedule 2, section 6).*"[14]

17. The Administration has given due consideration to the concerns about the scope of the exception and the meaning of the expression "contemplated by this Ordinance" in clause 18(2)(a) as expressed by Members at the meeting on 19 November 2009.

18. The Administration considered that it would not be advisable to provide a list of the situations to be "contemplated by this Ordinance" because it may not exhaust all the scenarios provided for by the Ordinance. Moreover, after a review of the New Zealand law reform effort to improve the legislation on confidentiality, commentators concluded that:

> "*[t]he most recent authoritative investigation into the problem of confidentiality has conceded that it is not possible to provide a comprehensive list of all*

[14] Michael Hwang and Katie Chung (see above) at pp 630-1 with changes in clause reference to correspond with the Bill.

*the exceptions to confidentiality. It follows that the categories of exceptions are never closed."*[15]

19. On the other hand, the "contemplated by this Ordinance" exception appears to be narrow and it is arguable that it may not permit disclosure for other legitimate reasons, such as those needed to protect or pursue a legal right or interest or to enforce or challenge an award in legal proceedings outside Hong Kong.

20. Research has been conducted on the confidentiality protections under the arbitration institutional rules as well as the exceptions for disclosure. It is found that both the London Court of International Arbitration[16] and the HKIAC[17] make similar reference to the permissible disclosure if such disclosure is needed to protect or pursue a legal right or to enforce or challenge an award in legal proceedings.

21. Such exception is also consistent with the latest statement of the English law on confidentiality and its exception in the case of *Emmott* (at paragraph 9 above "*where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party*").

22. In the light of the above, the Administration proposes to amend clause 18(2)(a) of the Bill to read as follows:

"Nothing in subsection (1) prevents the publication, disclosure or communication of information referred to in

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15 Michael Hwang and Katie Chung (see above), at pp 642-3.

16 Arbitration Rules of the London Court of International Arbitration (effective 1 January 1998) provides as follows:

*"30.1 Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty,* ***to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.*** *"* (Emphasis added)

17 HKIAC Administered Arbitration Rules, rule 39.1 reads as follows:

*"Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all matters and documents relating to the arbitral proceedings, including the existence of the proceedings as well as all correspondence, written statements, evidence, awards and order not otherwise in the public domain, save and to the extent that a disclosure may be required of a party by a legal or regulatory duty,* ***to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a judicial authority****. This undertaking also applies to the arbitrators, the tribunal-appointed experts, the secretary of the arbitral tribunal and the HKIAC Secretariat and Council."* (Emphasis added)

that subsection by a party --

(a) if the publication, disclosure or communication is ~~contemplated by this Ordinance~~ made –

(i) to protect or pursue a legal right or interest of the party; or

(ii) to enforce or challenge the award referred to in that subsection,

in legal proceedings before a court or other judicial authority in or outside Hong Kong;".

Department of Justice
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