Bills Committee on the Arbitration (Amendment) Bill 2016

Government's Response to the Issues Raised by the Bills Committee at the Meeting of 20 February 2017 and Proposed Committee Stage Amendments (CSAs)

At the Bills Committee meeting on 20 February 2017, the Government was requested to provide information on the relevant law and practice of other common law jurisdictions, in particular Singapore, in respect of the power of arbitration parties to limit the arbitrator's power to award final remedies and reliefs in deciding disputes over intellectual property rights ("IPRs").[1] This paper sets out the Government's response on the above issue. Details of the statutory provisions of surveyed common law jurisdictions (Australia, Canada, New Zealand, Singapore, South Africa and the United Kingdom) are set out in **Annex A**.

2. The Government also sets out its proposed Committee Stage Amendments ("CSAs") to clauses 1(3), 7 and 9(2) of the Bill. The proposed CSAs are set out at **Annex B**.

A. Parties' freedom to limit the arbitral tribunal's powers to award final remedies and reliefs

Overview

3. Arbitration is a consensual (contract-based) process for the resolution of disputes. For this reason, upholding party autonomy is a fundamental feature of arbitration. As noted by Gary Born, the learned author of *International Commercial Arbitration* and other arbitration experts,[2] the powers of an international arbitral tribunal to grant remedies

[1] Proposed section 103D(6) in the Arbitration (Amendment) Bill 2016 amends section 70(1) of the Arbitration Ordinance (Cap. 609) ("AO"). Section 70 is concerned with the grant of final remedies and reliefs. As to interim reliefs, section 35 of the AO, which incorporates Article 17 of the UNCITRAL Model Law, provides that unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

[2] Gary Born, *International Commercial Arbitration* (Second Edition, 2014), Volume III, at para. 23.07[A], p.3068. Likewise, Nigel Blackaby and Constantine Partasides, the learned authors of *Redfern and Hunter on International Arbitration* (2015), p.515 also take the view that the basis on

are defined in the first instance by the parties' arbitration agreement, and in principle the parties should be free to confer authority on the arbitrators to grant any form of civil remedy calculated to resolve the parties' dispute. In this regard, it is said to be "well-settled" in most national arbitration regimes that arbitral tribunals have broad discretion to formulate reliefs.[3]

4. Born notes that most arbitration legislation is silent on the arbitrators' remedial powers, generally treating it as a matter for the parties' agreement.[4] In fact, the UNCITRAL Model Law (which has been adopted into the arbitration legislation of many jurisdictions, including the Arbitration Ordinance (Cap. 609) ("AO") of Hong Kong) also does not contain express provisions on the arbitral tribunal's powers to grant final remedies and reliefs in deciding a dispute. Nevertheless, it has been suggested that in those jurisdictions which adopted the UNCITRAL Model Law, the arbitral tribunal's powers to grant remedies may be limited by the parties' agreement.[5]

Jurisdictions which expressly provide for parties to limit the arbitrator's powers as regards remedies and reliefs

5. A few jurisdictions have included express provisions in their arbitration legislation to provide for parties to agree upon (including limiting) the arbitral tribunal's powers as regards remedies.

6. For instance, in the case of the **United Kingdom (England**

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which an arbitral tribunal orders a remedial measure flows from the arbitration agreement and subsequent submission of the dispute to arbitration. Mary Kay Vyskocil and Patricia Taylor Fox are of the view that in considering the scope of an arbitration panel's authority to afford relief, the starting point is the arbitration agreement (Mary Kay Vyskocil and Patricia Taylor Fox, *Available relief in arbitration* (April 10-12, 2003) issued by Simpson Thacher & Bartlett LLP, available at http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub231.pdf?sfvrsn=2). Similarly, Stephen P. Bedell and Louis K. Ebling, consider that it is the general rule that the arbitrator's power is derived solely from the language and intent of the arbitration agreement (Stephen P. Bedell and Louis K. Ebling, "Equitable Relief in Arbitration: A Survey of American Case Law", *Loyola University Chicago Law Journal*, Vol. 20, Issue 1 (Fall 1988) at 40).

[3] Gary Born, op. cit., para. 23.07[A], p. 3069.

[4] Gary Born, op. cit., para. 23.07[A], p. 3069.

[5] Louise Novinger Grant, Valérie Quintal, "International Arbitration 2016 – Canada", *International Comparative Legal Guides* published on 29 July 2016, available at https://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2016/canada.

and Wales and Northern Ireland), section 48 of the Arbitration Act 1996 expressly provides for the parties to agree on the powers exercisable by the arbitral tribunal as regards remedies, but sets out the default powers of the arbitral tribunal in the absence of parties' agreement. In the case of **Scotland**, whilst rule 48 of the Scottish Arbitration Rules in the Schedule to the Arbitration (Scotland) Act 2010 concerning the tribunal's power to award payment and damages is a "mandatory rule" which cannot be modified or disapplied by an arbitration agreement, rule 49 contains a "default rule" on other remedies available to tribunal which is non-mandatory and is subject to the parties' contrary agreement.[6]

7. In the case of **New Zealand**, section 12(1)(a) of the New Zealand Arbitration Act 1996 provides that unless otherwise agreed by the parties, an arbitration agreement is deemed to provide that an arbitral tribunal may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil court proceedings in that court.

Jurisdictions which arbitration legislation is silent on the arbitrator's powers as regards remedies, or which only refers to the remedy of specific performance

8. In **Australia**, international arbitration is governed by the International Arbitration Act 1974 while domestic arbitration is governed by the legislation of individual states. Although the International Arbitration Act 1974 does not have any express provision concerning arbitrator's powers as regards remedies, it has been said that under the International Arbitration Act 1974, there are no limits on the remedies which an arbitrator can award, subject to the parties' autonomy to impose limits by agreement.[7] For domestic arbitration, taking the examples of **New South Wales** and **Victoria**, section 33A of the Commercial Arbitration Act 2010 of New South Wales and section 33A of the Commercial Arbitration Act 2011 of Victoria respectively provides that

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[6] See also sections 7, 8 and 9 of the Arbitration (Scotland) Act 2010.

[7] Michael J. Moser, John Choong, *Asia Arbitration Handbook* (2011), p. 1055; Max Bonnell, Peter Megens, Mark Darian-Smith and Beth Cubitt, *Arbitration procedures and practice in Australia: overview* (Thomson Reuters, 1 March 2012), available at http://uk.practicallaw.com/9-519-4324?source=relatedcontent.

the arbitrator has the power to make an award ordering specific performance of any contract if the Court would have power to order specific performance of that contract, subject to the parties' agreement otherwise.[8]

9. In **Canada**, arbitrations are primarily regulated by provincial rather than federal legislation,[9] and all provinces and territories, other than Quebec, have enacted two arbitration statutes: one for domestic arbitrations and another for international commercial arbitrations.[10] In **British Columbia** for example, section 10 of the Arbitration Act 1996 (Cap. 55) which governs domestic arbitration, provides that an arbitrator has the same power as the court to make an order for specific performance of an agreement between the parties for the sale of goods. On the other hand, the International Commercial Arbitration Act 1996 (Cap. 233) governing international arbitrations in British Columbia is silent as to the arbitrator's remedial power. Similarly, in **Ontario**, both the Arbitration Act 1991 (Cap. 17) and International Commercial Arbitration Act 1990 (Cap. I.9) are silent in relation to the arbitrator's

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[8] An arbitral tribunal's power to award equitable remedies and relief, as in the case of other remedies and reliefs, is primarily a matter for the parties to decide in the arbitration agreement: see Stephen P. Bedell and Louis K. Ebling, "Equitable Relief in Arbitration: A Survey of American Case Law", *Loyola University Chicago Law Journal*, Vol. 20, Issue 1 (Fall 1988) at 40, available at https://pdfs.semanticscholar.org/18f5/171330c7b99afbda394f25b699e6c218f2f0.pdf and Michael E. Schneider, "Non-Monetary Relief in International Arbitration: Principles and Arbitration Practice", *ASA Performance as a Remedy* (JurisNet, LLC 2011), available at http://www.lalive.ch/data/publications/mes_05_Part_I_Chapter_1.pdf. That said, the arbitration legislation of a number of common law jurisdictions has expressly referred to the arbitral tribunal's power to award specific performance. Although there is no direct authority on this point, it seems that the inclusion of an express provision on specific performance might be due to the special nature of specific performance as an equitable remedy which is granted by the court as a matter of discretion under the law of equity, and not derived from common law or contract law. Hence an express provision can serve to make clear that the arbitral tribunal also has power to grant such remedy (subject to the parties' contrary agreement). But the inclusion of such provision does not necessarily mean, *a contrario*, that the arbitral tribunal has no power to grant other remedies, or that the parties have no autonomy to agree on the scope of the arbitral tribunal's power as regards other remedies.

[9] The federal legislation (i.e. the Federal Commercial Arbitration Act) only applies when at least one of the parties to the arbitration is Her Majesty in right of Canada, a departmental corporation or a Crown corporation, or where the dispute is relating to maritime or admiralty matters. (Pierre Bienvenu, Martin Valasek, *Arbitration Guide – Canada* (International Bar Association, February 2013), p. 3).

[10] Pierre Bienvenu, Martin Valasek, *op. cit.*, p. 3. As for Quebec, the Civil Code and Code of Civil Procedure are consistent with the UNCITRAL Model Law: Lawrence E Thacker, *Arbitration Procedures and Practice in Canada: overview* (Thomson Reuters, 1 September 2013), available at http://us.practicallaw.com/0-502-1672 .

remedial power. Despite the absence of an express provision on the arbitrators' remedial power, it has been suggested that at least for international arbitrations conducted under the international arbitration legislation in each of these provinces and territories which incorporates the UNCITRAL Model Law, the arbitral tribunal's power to award remedies may be limited by parties' agreement.[11]

10. In **South Africa**, section 27 of the Arbitration Act 1965 (applying to both international and domestic arbitral proceedings conducted in South Africa) provides that unless the arbitration agreement provides otherwise, an arbitration tribunal may order specific performance of any contract in any circumstances in which the court would have power to do so. Whilst there is no express provision setting out the arbitrator's power to award remedies more generally, there is commentary that the final remedies available from the tribunal can be limited by the arbitration agreement of the parties.[12]

11. In **Singapore**, domestic arbitration is governed by the Arbitration Act (Cap. 10) while international arbitration is governed by the International Arbitration Act (Cap. 143A). Similar to section 48(1) of the English Arbitration Act 1996, section 34(1) of the Arbitration Act of Singapore provides that the parties may agree on the powers exercisable by the arbitral tribunal as regards remedies. Section 34(2) further provides that unless otherwise agreed by the parties, the arbitral tribunal may award any remedy or relief that could have been ordered by the Court if the dispute had been the subject of civil proceedings in that Court. Thus, parties to domestic arbitration have power to limit the remedies or reliefs that could be awarded by an arbitral tribunal by agreement.

12. For international arbitrations conducted in Singapore, section

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[11] Lawrence E Thacker, *Arbitration Procedures and Practice in Canada: overview* (Thomson Reuters, 1 September 2013), available at http://us.practicallaw.com/0-502-1672; Louise Novinger Grant, Valérie Quintal, "International Arbitration 2016 – Canada", *International Comparative Legal Guides* published on 29 July 2016, available at https://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2016/canada.

[12] Nicholas Taitz, *Arbitration procedures and practice in South Africa: overview* (1 June 2016, Thomson Reuters), available at http://uk.practicallaw.com/4-502-0878?q=&qp=&qo=&qe=.

12(5)(a) of the International Arbitration Act provides that an arbitral tribunal, in deciding the dispute that is the subject of the arbitral proceedings, may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court. Although there is no express reference to the parties' autonomy to limit the arbitral tribunal's power to award remedies and reliefs, Gary Born (supra) takes the view that section 12(5)(a) of the International Arbitration Act should be regarded as non-mandatory (i.e. the arbitral tribunal's powers to grant remedies may be subject to limitation or extension by the parties).[13]

Summary

13. In short, based on the above research, we understand that while the arbitration legislation may not always include an express provision on the arbitral tribunal's powers as regards remedies, the general position seems to be that the parties have autonomy to agree on or limit the arbitral tribunal's remedial powers. Furthermore, the United Kingdom and the New Zealand have general provisions on the arbitral tribunal's remedial powers, subject to the parties' contrary agreement (except the power to award payment and damages in the case of Scotland). Australia (New South Wales and Victoria), Canada (British Columbia) and South Africa have express provisions on the arbitrator's power as regards specific performance, subject to the parties' contrary agreement. In the case of Singapore, there is commentary that the express provision on arbitral tribunal's powers is non-mandatory and can thus be modified by the parties.

The situation in Hong Kong

14. In **Hong Kong**, section 70 of the AO currently provides,

> "*(1) Subject to subsection (2), an arbitral tribunal may, in deciding a dispute, award any remedy or relief that could have been ordered by the Court if the dispute had been the subject*

[13] Gary Born, *op. cit.*, para. 23.07[A], p. 3069.

of civil proceedings in the Court.

(2) Unless otherwise agreed by the parties, the arbitral tribunal has the same power as the Court to order specific performance of any contract, other than a contract relating to land or any interest in land."

15. Section 70(1) restates section 2GF of the old Arbitration Ordinance (Cap. 341), which is in turn based on section 12(5)(a) of the Singapore International Arbitration Act.[14] As noted above, a leading expert on international arbitration, Gary Born, has expressed the view that section 12(5)(a) of IAA should be regarded as non-mandatory. On the other hand, the learned authors of the *Arbitration Ordinance of Hong Kong - a Commentary: 1997 Supplement*,[15] when commenting on section 2GF of the now repealed Arbitration Ordinance (Cap. 341), take the view that under section 2GF, "*the parties may not… limit the tribunal's power to order remedies, whether by express provision naming the remedies concerned or by the use of words throwing doubt on the tribunal's jurisdiction to award particular remedies*".[16] The learned authors of *The Hong Kong Arbitration Ordinance: Commentary and Annotations* similarly state that "*[i]t appears from the wording of Article (sic) 70(1) that parties may not limit the power of a tribunal to order remedies or relief to the extent these party-imposed limits are narrower than the orders that can be issued by the Court of First Instance if the dispute had been brought before it.*"[17]

16. The position of section 70(1) based on the comments from the above learned authors appears to be more restrictive than the general international arbitration practice (based on our research) which tends to uphold the parties' autonomy in defining or limiting the arbitral tribunal's powers as regards remedies. Given that the objective of our legislative

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[14] Robert Morgan, *The Arbitration Ordinance of Hong Kong – a Commentary: 1997 Supplement*, (1997), p. 77.

[15] Robert Morgan, *The Arbitration Ordinance of Hong Kong – a Commentary: 1997 Supplement*, (1997), p. 77.

[16] Ibid.

[17] John Choong, Romesh Weeramantry, *The Hong Kong Arbitration Ordinance: Commentary and Annotations* (Second Edition, 2015), p. 393.

exercise is to facilitate and promote the use of Hong Kong as the seat of intellectual property ("IP") arbitration, we believe it would be conducive to our policy objective if we clarify by the proposed new section 103D(6) in the Bill that the arbitral tribunal's powers to award remedies and reliefs under section 70(1) are subject to contrary agreement of the parties. It could provide flexibility to the arbitration parties to resolve their differences through remedies and reliefs agreed by them.[18] During our consultation, this proposed amendment has also been welcomed by an IP practitioner body. We would continue to keep the position under view after passage of the Bill, and would be prepared to consider extending the amendments to other types of arbitration should there be such demand from the arbitration community in future.

B. Proposed CSAs to clauses 1(3) and 7 of the Bill

17. Clause 1(3) of the Bill provides that "Part 2 (except section 5 in so far as it relates to the new section 103J) comes into operation on 1 October 2017".

18. By prescribing 1 October 2017 as the commencement date for the relevant amendments (except new section 103J[19]) concerning the arbitration of IP rights, the Government's policy intention is to allow the IP arbitration community a period of around six months after passage of the Bill to prepare for commencement of the legislative amendments. To better give effect to this policy intention, the Government proposes to introduce CSAs to clause 1(3) to the effect that new Part 11A of the AO (Arbitrations relating to IP Rights) (except new section 103J) will commence on the first day of the seventh month immediately following the month in which the Amendment Ordinance is published in the Gazette. This means, for example, that if the Amendment Ordinance is gazetted in May 2017, new Part 11A of the AO (except section 103J) will commence on 1 December 2017.

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[18] During our consultation, some consultees have raised the question whether the arbitral tribunal has power to order specific performance directing a party to amend the IP register, and whether this affects the general position that an arbitral award has *inter partes* effect only.

[19] The commencement provision on new section 103J is set out in clause 1(4) of the Bill.

19. The date of 1 October 2017 is also stated in new section 1(1) and (4) of Part 3 of Schedule 3 (clause 7 of the Bill). The Government therefore proposes to introduce CSAs to clause 7 of the Bill to make corresponding changes to new section 1(1) and (4).

C. Proposed CSA to clause 9(2) of the Bill

20. Recently, Angola (安哥拉) acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), and the New York Convention will enter into force for Angola from 4 June 2017. Accordingly, the Government intends to propose CSA to amend clause 9(2) of the Bill in order to add Angola (安哥拉) to the Schedule to the Arbitration (Parties to New York Convention) Order (Cap. 609A).

Department of Justice
March 2017

#455514 v8

Annex A

Statutory provisions of other common law jurisdictions concerning the arbitrator's power to award final remedies

Jurisdiction	Statutory provision
Australia	New South Wales Section 33A of the Commercial Arbitration Act 2010 provides that: *"Unless otherwise agreed by the parties, the arbitrator has the power to make an award ordering specific performance of any contract if the Court would have power to order specific performance of that contract."*
	Victoria Section 33A of the Commercial Arbitration Act 2011 provides that: *"Unless otherwise agreed by the parties, the arbitrator has the power to make an award ordering specific performance of any contract if the Court would have power to order specific performance of that contract."*

Canada	<u>British Columbia</u> Section 10 of the Arbitration Act provides that: *"An arbitrator has the same power as the court to make an order for specific performance of an agreement between the parties for the sale of goods."*
New Zealand	Section 12(1)(a) of the Arbitration Act 1996 provides that: *"An arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that an arbitral tribunal –* *(a) may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that court."*
Singapore	Section 34 of the Arbitration Act (Cap. 10) provides that: *"(1) The parties may agree on the powers exercisable by the arbitral tribunal as regards remedies.* *(2) Unless otherwise agreed by the parties, the arbitral tribunal may award any remedy or relief that could have been ordered by the Court if the dispute had been the subject of civil proceedings in that Court."*

	Section 12(5)(a) of the International Arbitration Act (Cap. 143A) provides that: *"Without prejudice to the application of Article 28 of the Model Law, an arbitral tribunal, in deciding the dispute that is the subject of the arbitral proceedings –* *(a) may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court."*
South Africa	Section 27 of the Arbitration Act 1965 provides that: *"Unless the arbitration agreement provides otherwise, an arbitration tribunal may order specific performance of any contract in any circumstances in which the court would have power to do so."*
United Kingdom	<u>England and Wales and Northern Ireland</u> Section 48 of the Arbitration Act 1996 provides that: *"(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.* *(2) Unless otherwise agreed by the parties, the tribunal has the following powers.* *(3) The tribunal may make a declaration as to any matter to be determined in the proceedings.*

	(4) The tribunal may order the payment of a sum of money, in any currency. *(5) The tribunal has the same powers as the court—* *(a) to order a party to do or refrain from doing anything;* *(b) to order specific performance of a contract (other than a contract relating to land); .* *(c) to order the rectification, setting aside or cancellation of a deed or other document."*
	<u>Scotland</u> Section 7 of the Arbitration (Scotland) Act 2010 provides that: *"The Scottish Arbitration Rules set out in schedule 1 are to govern every arbitration seated in Scotland (unless, in the case of a default rule, the parties otherwise agree)."* Section 8 of the Arbitration (Scotland) Act 2010 provides that: *"The following rules, called "mandatory rules", cannot be modified or disapplied (by an arbitration agreement, by any other agreement between the parties or by any other means) in relation to any arbitration seated in Scotland—* *[…]*

	rule 48 (power to award payment and damages) *[…]"* Section 9 of the Arbitration (Scotland) Act 2010 provides that: *"(1) The non-mandatory rules are called the "default rules".* *(2) A default rule applies in relation to an arbitration seated in Scotland only in so far as the parties have not agreed to modify or disapply that rule (or any part of it) in relation to that arbitration.* *(3) Parties may so agree—* *(a) in the arbitration agreement, or* *(b) by any other means at any time before or after the arbitration begins.* *(4) Parties are to be treated as having agreed to modify or disapply a default rule—* *(a) if or to the extent that the rule is inconsistent with or disapplied by—* *(i) the arbitration agreement,* *(ii) any arbitration rules or other document (for example, the UNCITRAL Model*

	Law, the UNCITRAL Arbitration Rules or other institutional rules) which the parties agree are to govern the arbitration, or *(iii) anything done with the agreement of the parties, or* *(b) if they choose a law other than Scots law as the applicable law in respect of the rule's subject matter.* *This subsection does not affect the generality of subsections (2) and (3).”* Rule 48 of the Scottish Arbitration Rules in the Schedule to the Arbitration (Scotland) Act 2010 (which is a mandatory rule) provides that: *“ (1) The tribunal’s award may order the payment of a sum of money (including a sum in respect of damages).* *(2) Such a sum must be specified—* *(a) in any currency agreed by the parties, or* *(b) the absence of such agreement, in such currency as the tribunal considers appropriate.”* Rule 49 of the Scottish Arbitration Rules in the Schedule to the Arbitration (Scotland) Act 2010 (which is a default rule) provides that:

	"The tribunal's award may— *(a) be of a declaratory nature,* *(b) order a party to do or refrain from doing something (including ordering the performance of a contractual obligation), or* *(c) order the rectification or reduction of any deed or other document (other than a decree of court) to the extent permitted by the law governing the deed or document."*

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Arbitration (Amendment) Bill 2016

Committee Stage

Amendments to be moved by the Secretary for Justice

Clause	Amendment Proposed
1(3)	By deleting "1 October 2017" and substituting "the first day of the seventh month immediately following the month during which this Ordinance is published in the Gazette".
7	In the proposed section 1(1), by deleting "1 October 2017" and substituting "the commencement date of this section".
7	In the proposed section 1(4), in the definition of ***pre-amended Ordinance***, by deleting "1 October 2017" and substituting "the commencement date of this section".
9	By deleting subclause (2) and substituting— "(2) The Schedule— **Add in alphabetical order** "Andorra Angola Comoros".".