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HONG KONG STRENGTHENS POSITION AS LEADING JURISDICTION FOR INTERNATIONAL ARBITRATION WITH MAJOR OVERHAUL OF LEGISLATIVE FRAMEWORK

The much-anticipated Hong Kong Arbitration Ordinance (Cap.609) (the "Ordinance") came into effect on 1 June 2011. This new piece of legislation furthers Hong Kong's status as being a prime seat for international arbitration in the region by replacing the complex and fragmented old Arbitration Ordinance (Cap.341) with a clear and straightforward legislative framework based on the internationally recognized UNCITRAL Model Law ("Model Law").

While most provisions in the Ordinance will follow the articles from the Model Law, there will be minor changes and omissions to reflect the local environment, which are discussed in more detail below. Importantly, the distinction between domestic and international arbitrations will be abolished and all arbitrations in Hong Kong will be governed by a unitary regime based on the Model Law.

Given the extensive overhaul of Hong Kong's legislative framework for arbitration, this *Commentary* will highlight and discuss the key features of the Ordinance as well as their practical implications for parties involved in Hong Kong arbitrations.

KEY FEATURES OF THE NEW ARBITRATION ORDINANCE

Drafting Arbitration Clauses in Commercial Contracts. Although the Ordinance is significantly different from the old Arbitration Ordinance, the effect that this has on drafting arbitration clauses is minimal. For instance, section 19 of the Ordinance adopts section 2AC of the old Arbitration Ordinance. Hence the form (*i.e.*, to be in writing) and content requirements remain unchanged.

Since there is no longer any distinction between domestic and international arbitrations, drafters do not, as a matter of general practice, have to expressly state whether the arbitration is domestic or international in the arbitration agreement. The only practical point that drafters should note is that, depending on how the arbitration clause is drafted, certain "opt-in" provisions that are tailored to domestic arbitrations (as discussed below) may automatically apply during the transition period of six years from 1 June 2011. Parties may "opt in" to these provisions either by expressly stating in the arbitration agreement that they wish to "opt in" or state in the arbitration agreement that the arbitration is to be a "domestic arbitration".[1] As such, drafters must understand the parties' intentions regarding these "opt-in" provisions and take note of the above when drafting the arbitration agreement to avoid accidentally including or excluding the "opt-in" provisions.

Transitional Arrangements. To ensure a smooth transition from the old Arbitration Ordinance, Schedule 3 of the Ordinance includes "savings and transitional provisions" which outline circumstances where the old Arbitration Ordinance would still apply. In general, the old Arbitration Ordinance applies to all arbitrations which have already been commenced under it and before the commencement of the new Ordinance. Similarly, appointments of arbitrators under the old Arbitration Ordinance prior to 1 June 2011 will continue to have effect after the commencement of the new Ordinance. Further, settlement agreements which have been entered into under section 2C of the old Ordinance before the commencement of the new Ordinance will continue to be enforced in accordance with the old Arbitration Ordinance.

Although the distinction between domestic and international arbitration is abolished under the new Ordinance, Schedule 2 of the new Ordinance provides "opt-in" provisions that enable parties to domestic arbitrations (*i.e.*, arbitrations that involve Hong Kong parties dealing with disputes arising out of a Hong Kong transaction or project) to adopt certain provisions from the old Arbitration Ordinance that applied only to domestic arbitrations. Schedule 2 deals with the following issues:

- Disputes to be submitted to a sole arbitrator only;
- Consolidation of arbitrations;
- Decisions by the court on a preliminary question of law;
- Challenging an award for serious irregularity; and
- Appeals against an arbitral award on a question of law.

To "opt in" to the above provisions, parties can either (i) agree to do so under section 99 of the Ordinance or, (ii) the provisions may automatically apply to "domestic arbitration" agreements entered into before or within six years after 1 June 2011 pursuant to section 100 of the Ordinance. Despite the automatic application mechanism in section 100, parties may expressly opt out of the Schedule 2 provisions pursuant to section 102. Section 101 of the Ordinance extends the automatic application of the provisions to Hong Kong construction subcontracts.

Confidentiality. Perhaps one of the most prominent attractions to the Ordinance is the express provisions dealing with confidentiality regarding the arbitral proceedings and awards because Hong Kong is one of the few jurisdictions that incorporate such provisions.[2] This is to be contrasted with neighbouring jurisdictions such as Singapore and Mainland China, where confidentiality is either "implied" into the arbitration agreement between the parties (Singapore) or the laws are silent on matters regarding the reporting of the proceedings and the award (Mainland China).

In terms of publication of awards, the Ordinance's default position is that awards will not be published at all unless the parties agree. This is contrasted to other Asian jurisdictions such as India, where the default position is that parties cannot object to the publication of the award if they are published in a redacted form. In Mainland China, there are no provisions in the Arbitration Law or the CIETAC arbitration

1 By stating in the arbitration agreement that the arbitration is to be "domestic", the "opt-in" provisions will automatically apply. This method of automatic application will apply only for "domestic arbitration agreements" entered before or within six years of the enactment of the Ordinance.

2 Other jurisdictions that have expressed provisions for confidentiality are New Zealand, Australia, Scotland, and Spain.

rules restricting the publication of awards. However, under CIETAC the usual practice is to provide redacted and edited reports on cases selected by the Cases Edition Committee. Also, reports on cases will normally not be published until they are three years old.

Section 16 of the Ordinance makes a significant departure from the old Arbitration Ordinance and provides that the court hearings relating to arbitral proceedings are to be heard in closed court. Section 17 provides restrictions for reporting such proceedings, and Section 18 of the Ordinance expressly prohibits parties from disclosing any information relating to the arbitral proceedings or the award unless the parties agree.[3]

Composition of Arbitral Tribunal. Section 23 of the Ordinance adopts part of article 10 of the Model Law whereby parties are free to determine the number of arbitrators. In terms of the default number of arbitrators, the Ordinance deviates from the Model Law position of three and provides that, where the parties fail to agree on the number of arbitrators, the number of arbitrators shall be either one or three as decided by the Hong Kong International Arbitration Centre ("HKIAC") in the particular case. Under the old Arbitration Ordinance, this position applied to international arbitrations only; however, section 23 of the Ordinance provides greater flexibility by applying the default position to all arbitrations.

Equal Treatment. Parties in either domestic or international arbitrations will enjoy the fundamental rights of equality, independence and impartiality of the tribunal, fairness, and due process pursuant to section 46. Although this section was modeled after Article 18 of the Model Law, slight changes have been made. Under article 18, a party is to have a "full" opportunity to present its case. However, under section 46 of the Ordinance, a party is to have a "reasonable" opportunity to present its case. Providing parties with a reasonable opportunity should assist arbitrators to prevent parties from deploying tactics designed to delay arbitrations, such as making unhelpful discovery requests, calling upon unnecessary factual witnesses and/or an excessive number of expert witnesses. Section 46 expands Article 18 of the Model Law by addressing the requirements of independence, impartiality, and fairness of the arbitral tribunal.

Peremptory Orders. To help maintain the effectiveness and efficiency of the arbitral process, the Ordinance has incorporated new provisions that give the tribunal powers to make peremptory orders for compliance with procedural orders as well as the tribunal's powers to deal with parties who fail to comply with such order. Specifically, if a party fails to comply with any order or direction from the arbitral tribunal, section 53(3) empowers the arbitral tribunal to make a peremptory order for compliance within a specified time. If the defaulting party fails to comply with the peremptory order, section 53(4) allows the tribunal to:

- Direct that the party is not entitled to rely on any allegation or material which was the subject matter of the peremptory order;
- Draw any adverse inferences that the circumstances may justify from the non-compliance;
- Make an award on the basis of any materials which have been properly provided to the arbitral tribunal; or
- Make any order that the arbitral tribunal thinks fit as to the payment of the costs of the arbitration incurred in consequence of the noncompliance.

Limited Court Interference. One of the underlying themes of the Ordinance is minimizing the court's interference in arbitral proceedings. As such, the Ordinance contains provisions that vest many powers to the tribunal as well as limit the rights of courts to hear matters arising from arbitral proceedings.

Section 35 of the Ordinance adopts article 17 of the Model Law and empowers the tribunal to order interim measures such as orders to preserve assets or evidence or to maintain or restore the status quo as well as the power to grant injunctions. Applications for interim measures may still be made to the court. However, the court may decline to grant an order if it considers it more appropriate for the arbitral tribunal to deal with the order sought. Pursuant to section 37

3 This is subject to exceptions regarding disclosure to professional advisors or disclosure required by law.

of the Ordinance, Hong Kong arbitral tribunals can also grant preliminary orders to prevent parties from frustrating any interim measure.

Of particular significance, the Hong Kong court may, on application, grant interim measures and/or orders in relation to arbitrations that have commenced or will commence outside of Hong Kong.

Section 108 and section 2 of Schedule 4 in the Ordinance effectively limit the court's interference on arbitral proceedings by removing the jurisdiction of the Court of Appeal to hear appeals on judgments made by the Court of First Instance regarding arbitral proceedings. Parties who want to bring matters to the Court of Appeal may "opt in" to the Schedule 2 provisions or apply to the Court of First Instance to obtain leave. Consideration should therefore be given to this right of appeal during the drafting of the arbitration clause in the parties' commercial agreement.

Enforcement. With regards to enforcement of arbitral awards, the Ordinance is much more localized in this area and departs from the Model Law. Much of the enforcement procedure from the previous regime was adopted. In general, arbitral awards are enforceable in the same manner as a court judgment, but leave of the court is required (section 84). Separate provisions are provided to distinguish between the enforcement of awards under the New York Convention (section 87), Mainland awards (section 92), and non-convention and non-Mainland awards (section 85). Evidentiary evidence to be provided for enforcement is generally the same for all three categories of awards. As such, parties seeking to enforce an award should be prepared to produce an original or certified copy of the award and a copy of the arbitration agreement.

When seeking to enforce a Mainland award, one should take careful note that such an award cannot be enforced in Hong Kong if an application has been made in Mainland China for enforcement of the award (section 93(1)). Enforcement of the Mainland award in Hong Kong can commence only if the award has not been fully satisfied through the Mainland enforcement proceedings (section 93(2)).

In terms of enforcing a non-convention and non-Mainland award (*i.e.*, an award made in Taiwan) one should note that the court may refuse to enforce the award if it considers it just to do so.

Arb-Med. The Ordinance expressly provides that if the parties give their consent, an arbitrator can stay existing arbitral proceedings and act as a mediator for the parties. Alternatively, and subject to the agreement of the parties, a mediator may subsequently act as an arbitrator if a settlement cannot be reached by the parties. These processes are known respectively as Arb-Med and Med-Arb. Although they are not frequently used in Hong Kong, the practice of Arb-Med or Med-Arb is quite common in the PRC. This is due to the nonadversarial nature of the local Chinese culture as well as the desire for preserving harmony between business partners. As such, these processes cannot be ignored, and when parties face Arb-Med or Med-Arb proceedings, they should be aware of the risks involved.

In a recent case[4] regarding the enforcement of a Mainland Arb-Med award in Hong Kong, the Hong Kong courts refused to give an order for enforcement because the judge believed that, given the way in which the Arb-Med proceedings were conducted, the award was tainted with apparent bias. This case warns us that awards may be set aside on grounds of public policy if the conduct of the tribunal in the Arb-Med proceedings gives rise to apparent bias.

4 *Gao Haiyan v Keeneye Holdings Ltd* [2011] HKEC 514. Also *see Jones Day Commentary*, "The Real Risk of Bias in 'Chinese Style' Arbitrations" (May 2011).

Another issue to be aware of is if parties fail to reach a settlement agreement during the mediation, then the arbitral process will resume with the mediator resuming the role of arbitrator. The mediator/arbitrator is required by the Ordinance to disclose all material confidential information that he/she obtained from the parties during the mediation sessions. Although this serves to give some protection to the arbitrator and the parties against claims of bias and breach of natural justice, such an act of disclosure may very well cause the parties to withhold information during the mediation, which in turn may hinder the mediation process.

CONCLUSION

The Hong Kong Arbitration Ordinance has gone through a major but positive overhaul. By being more user friendly, flexible, and definitive in responding to market needs, the new Ordinance should assist Hong Kong in maintaining its place as one of the preferred jurisdictions for international arbitration.

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