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Hong Kong Special Administrative Region, China

The Adoption of the UNCITRAL Model Law on International Commercial Arbitration in Hong Kong

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Introduction

In 1985, the Hong Kong Law Reform Commission was asked to consider whether the UNCITRAL Model Law on International Commercial Arbitration ('ML') should be adopted as part of the law in Hong Kong, and to make recommendations on modifications to the Arbitration Ordinance accordingly.[1] The Commission held the opinion that the adoption of the ML as part of Hong Kong law, subject to a few minor changes (including merely one deletion and four additions to the ML), would bring Hong Kong a great benefit.[2] Their proposal was fully implemented by Arbitration (Amendment) (No. 2) Ordinance in 1989.[3]

Coming into effect in June 2011, the new Arbitration Ordinance Cap. 609 ('AO') established in Hong Kong a unified legal regime for both domestic and international arbitration based on the international principles of the ML.

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[1] The Law Reform Commission of Hong Kong, Report on the Adoption of the UNCITRAL Model Law of Arbitration 1 (1987).

[2] *Ibid.* at 5, 12, 18–26.

[3] See Law Reform Commission of Hong Kong, *Implementation* (last revised 12 May 2015), www.hkreform.gov.hk/en/implementation/#a.

Whilst the AO gives legal effect to a majority of expressly stated provisions of the ML,[4] this is subject to the application of certain interpretational limitations and amendments tailoring the procedure to existing arbitration mechanisms and procedures in Hong Kong. Some of these jurisdictional characteristics are reflected in previous local cases interpreting various ML provisions, which continue to provide guidance as to the proper application of the new Ordinance. Whilst the bulk of the ML provisions were reproduced verbatim or near-verbatim to the AO, provisions relating to the recognition and enforcement of arbitral awards were not included in the Ordinance. These and other minor omissions have, however, been alternatively provided for.

The ML is largely integrated into the new Arbitration Ordinance, in the hope of '[facilitating] the "fair and speedy" resolution of disputes, providing for maximum party autonomy and minimal court intervention'.[5] The new Ordinance has distinguished features, including: (1) abolishing the distinction between 'domestic' and 'international' arbitration; (2) availing interim measures (by both the court and the arbitral tribunal); (3) codifying the new obligation of confidentiality; (4) promoting alternative dispute resolution; and (5) including provisions in regard of the enforcement of arbitral awards.[6]

Prior to the enactment of the new Arbitration Ordinance, under the old dual regime in Hong Kong, there was a distinction between international and domestic arbitration. Legal practitioners had first to analyse within which category the case fell in order to apply the correct provisions to the arbitration. The new Ordinance abolishes such a distinction, and places all arbitration in Hong Kong under the single unified regime on the basis of the ML.[7]

However, under pressure mainly from the construction industry, Schedule 2 to the new Arbitration Ordinance allows parties to opt into some old arbitration provisions of the domestic regime. Section 2 of Schedule 2 allows the court to consolidate arbitral proceedings and hearings. Section 3 of Schedule 2 states the court may decide any

[4] Typically, a section of the AO which adopts an article of the ML without modification would simply state: 'Article X of the UNCITRAL Model Law, the text of which is set out below, has effect: [. . .]', followed by the text of the article of the ML.

[5] Justin D'Agostino, Simon Chapman and Ula Cartwright-Finch for Herbert Smith Freehills, *New Hong Kong Arbitration Ordinance Comes Into Effect*, Kluwer Arbitration Blog (1 June 2011), http://kluwerarbitrationblog.com/blog/2011/06/01/new-hong-kong-arbitration-ordinance-comes-into-effect/.

[6] *Ibid.* [7] *Ibid.*

preliminary question of law. Section 4 of Schedule 2 permits a party to apply to the court challenging an award in the arbitral proceedings on the ground of serious irregularity. Section 5 of Schedule 2 allows a party to appeal to the court on a question of law arising from arbitral awards. However, this greater extent of court intervention would only apply if it is expressly stated in the arbitration agreement, or under an agreement of 'domestic arbitration' entered into before or within six years of the new Ordinance coming into effect.[8]

Part I General Provisions of the Model Law (Articles 1 to 6)

Article 1 Scope of Application

Article 1, concerning the application of the ML and the definition of 'international' arbitration, was not adopted by the jurisdiction of Hong Kong. However, section 7 of the Arbitration Ordinance Cap. 609 does make reference to section 5 as a viable substitute for article 1.[9] Specifically, section 5 only covers the applicabilities of arbitration agreements entered into outside and inside Hong Kong,[10] and appears much less extensive than article 1, which also discusses different interpretations of international arbitration. It seems that the new Arbitration Ordinance did not adopt ML articles 1(3) and (4) which define when an arbitration is 'international' since any such definition is not useful in light of the abolishment of the distinction between 'domestic' and 'international' arbitration under the new arbitration regime.[11]

Article 2 Definitions and Rules of Interpretation

Article 2, concerning the definitions of 'arbitration' and the related interpretation rules, was not adopted verbatim. Section 8(1) of the

[8] *Ibid.*

[9] Section 7 AO:

> Section 5 has effect in substitution for article 1 of the UNCITRAL Model Law.

[10] Section 5(1) AO:

> Subject to subsection (2), this Ordinance applies to an arbitration under an arbitration agreement, whether or not the agreement is entered into in Hong Kong, if the place of arbitration is in Hong Kong.

[11] See Department of Justice, Consultation Paper on the Reform of the Law of Arbitration in Hong Kong and Draft Arbitration Bill 11 (December 2007), www.gov.hk/en/residents/government/publication/consultation/docs/2008/arbitration.pdf.

Arbitration Ordinance Cap. 609 does mention that section 2 has effect in substitution of article 2.[12] In turn, section 2 makes minor adjustments to the original substance of the UNCITRAL definition, such as adding that an arbitral tribunal is defined as 'includ[ing] an umpire' and applying the meaning of 'court' to only mean the Court of First Instance (CFI) rather than the entire judicial system.[13]

However, section 2 mostly does not discuss article 2(d), (e) and (f) of the ML, which deal with authorizing any third party to determine a certain issue as well as granting the same legal provisions to 'claims' and 'counter-claims' the same way.

Notwithstanding the differences between article 2 and section 2, section 8(2) does state that 'a reference to this Ordinance in section 2 is to be construed as including the UNCITRAL Model Law.'[14] Thus it can be said that section 2 is essentially consistent with the intention of article 2.

Section 5(1) states that the Ordinance applies to an arbitration in Hong Kong, whether or not the arbitration agreement is entered into in Hong Kong.[15] There is no other part in this Ordinance regarding the distinction between an agreement entered into in Hong Kong and that entered outside Hong Kong. Hence, the same rules under this Ordinance apply to an arbitration agreement regardless of the place in which it was entered.

Article 2A International Origin and General Principles

This article was adopted verbatim.[16]

Article 3 Receipt of Written Communications

Article 3, dealing with the interpretation of 'received' written communication, was adopted verbatim, but there are several amendments in the form of section 10 of the AO.[17] Most significantly, section 10(2) adds that

[12] Section 8(1) AO:

> Section 2 has effect in substitution for article 2 of the UNCITRAL Model Law.

[13] Section 2(1) AO:

> 'arbitral tribunal' (仲裁庭) means a sole arbitrator or a panel of arbitrators, and includes an umpire; [. . .] 'Court' (原訟法庭) means the Court of First Instance of the High Court.

[14] See section 8(2) AO. [15] See note 9. [16] Section 9 AO. [17] Section 10 AO.

'if a written communication [. . .] is sent by any means by which information can be recorded and transmitted to the addressee, the communication is deemed to have been received on the day it is so sent.'[18]

Article 4 Waiver of Right to Object

This article was adopted verbatim.[19]

Article 5 Extent of Court Intervention

This article was adopted verbatim.[20]

As reflected by section 3(2)(b) of the AO,[21] an objective of this new Ordinance is to minimize court intervention and to give a greater degree of deference to arbitral tribunals in Hong Kong.[22]

Article 6 Court or other Authority for Certain Functions of Arbitration Assistance and Supervision

Article 6, which delegates the functions of arbitration to specific named courts or authorities, was not adopted verbatim. However, this is necessary because the ML asks member states to amend the article to include the courts and bodies of their jurisdiction. Section 13 of the AO stipulates that section 13(2) to section 13(6) have effect in substitution of the ML, which in turn delegate functions to the Hong Kong International Arbitration Centre (HKIAC) and the CFI.[23]

[18] See section 10(2) AO. [19] Section 11 AO. [20] Section 12 AO.

[21] Section 3(2)(b) AO:

> This Ordinance is based on the principles –
> (b) that the court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance.

[22] See D'Agostino, Chapman and Cartwright-Finch, note 5.

[23] Section 13 AO:

> (1) Subsections (2) to (6) have effect in substitution for article 6 of the UNCITRAL Model Law [. . .]
> (2) The functions of the court or other authority referred to in article 11(3) or (4) of the UNCITRAL Model Law, given effect to by section 24, are to be performed by the HKIAC.
> (3) The HKIAC may, with the approval of the Chief Justice, make rules to facilitate the performance of its functions under section 23(3), 24 or 32(1).
> (4) The functions of the court or other authority referred to in –

Part II Arbitration Agreement (Articles 7 to 9)

Article 7 Definition and Form of Arbitration Agreement

Option I of Article 7, which defines and creates requirements for an arbitration agreement, was adopted but amended slightly in the form of section 19(2) of the AO.[24] This section defines an arbitration agreement as having been 'in writing' if the agreement is in a document regardless of signature, or the agreement is recorded by one of the parties or a third party.

Tommy CP Sze & Co. v. *Li & Fung (Trading) Ltd & Ors* [2003] 1 HKC 418 attempted to interpret this section. It ruled that for an agreement to be an arbitration agreement, 'there must be its element of compulsion in the agreement between the parties that any disputes or differences must be arbitration [*sic*]', meaning that an agreement giving an *option* for arbitration but leaving litigation in play is not an arbitration agreement.

> *(a)* article 13(3) of the UNCITRAL Model Law, given effect to by section 26; or
>
> *(b)* article 14(1) of the UNCITRAL Model Law, given effect to by section 27,
>
> are to be performed by the Court.
>
> (5) The functions of the court referred to in –
>
> *(a)* article 16(3) of the UNCITRAL Model Law, given effect to by section 34; or
>
> *(b)* article 34(2) of the UNCITRAL Model Law, given effect to by section 81,
>
> are to be performed by the Court.
>
> (6) The functions of the competent court referred to in article 27 of the UNCITRAL Model Law, given effect to by section 55, are to be performed by the Court.

[24] Section 19 AO:

> (1) Option I of Article 7 of the UNCITRAL Model Law, the text of which is set out below, has effect –
>
> [follows the text of Option I of article 7 of the ML]
>
> (2) Without affecting subsection (1), an arbitration agreement is in writing if –
>
> (a) the agreement is in a document, whether or not the document is signed by the parties to the agreement; or
>
> (b) the agreement, although made otherwise than in writing, is recorded by one of the parties to the agreement, or by a third party, with the authority of each of the parties to the agreement.

Article 8 Arbitration Agreement and Substantive Claim before Court

This article was adopted verbatim.[25] In addition, *Hoo Cheong Building Construction Co. Ltd* v. *Jade Union Investment Ltd* [2004] HKCFI 21 ruled that an 'action' under article 8 does not include an action seeking liquidation of a company. Even where the parties have agreed to refer their disputes to arbitration, the court handling winding up actions would first have to be satisfied that the debt relied upon is bona fide disputed on substantial grounds before leaving the disputes to an arbitrator.[26] The existence of an arbitration clause is neither here nor there in determining whether there is any dispute of substance so as to warrant the court to make a winding up order and refer the parties to arbitration in the first place.[27]

Liu Man Wai and Anor v. *Chevalier (Hong Kong) Ltd* [2002] HKEC 803 ruled that the plaintiff's claim fell outside the scope of the arbitration agreement under clauses 4(a) and (b) thereof; and that the arbitrator did not have the jurisdiction to decide whether there had been an agreement as to quantum.

Article 9 Arbitration Agreement and Interim Measures by Court

This article was adopted verbatim.[28] Furthermore, *'Lady Muriel'* v. *Transorient Shipping Ltd* [1995] HKCA 615 ruled that there is nothing to preclude courts from offering an interim measure of protection. More recently, in *Muginoho Co. Ltd* v. *Vimiu HK Co. Ltd* [2012] HKEC 420, interim measures were requested by a party, granted and affirmed by the court despite the fact that arbitration proceedings had commenced outside Hong Kong.

Part III Composition of Arbitral Tribunal (Articles 10 to 15)

Article 10 Number of Arbitrators

Article 10, dealing with the freedom to choose the number of arbitrators, was not adopted verbatim.[29] There were two significant amendments in

[25] Section 20 AO.
[26] *Hoo Cheong Building Construction Co. Ltd* v. *Jade Union Investment Ltd* [2004] HKCFI 21
[27] *Ibid.* [28] Section 21 AO.
[29] Section 23 AO:

> (1) Article 10(1) of the UNCITRAL Model Law, the text of which is set out below, has effect –

the form of section 23(2) and section 23(3) of the AO.[30] These amendments afforded freedom for the parties to authorize a third party to determine the number of arbitrators, as well as to let the HKIAC decide the number of arbitrators (either 1 or 3) if the parties fail to agree on the number.

Article 11 Appointment of Arbitrators

Article 11, which deals with the procedure of appointing an arbitrator, was adopted but amended.[31] Section 24(2)(a) of the AO adds that, 'In an arbitration with an even number of arbitrators, if the parties have not agreed on a procedure for appointing the arbitrators under article 11(2) of the UNCITRAL Model Law, each party is to appoint the same number of arbitrators.'[32]

Article 12 Grounds for Challenge

This article, dealing with the ability to challenge an arbitrator should there be a factor of impartiality, was adopted verbatim.[33] The article also concerned the arbitrator's duty to disclose any factor of impartiality.

Jung Science Information Technology Co. Ltd v. *ZTE Corporation* [2008] HKCFI 606 ruled that there was a difference between the circumstances on the basis of which an arbitrator may be challenged and the circumstances which fall within the arbitrators' duty of disclosure. An arbitrator's failure to comply with the disclosure requirement may, in

'*Article 10. Number of arbitrators*
(1) The parties are free to determine the number of arbitrators.
(2) [*Not applicable*]'.

[30] Section 23 AO:

> (2) For the purposes of subsection (1), the freedom of the parties to determine the number of arbitrators includes the right of the parties to authorize a third party, including an institution, to make that determination.
> (3) Subject to section 1 of Schedule 2 (if applicable), if the parties fail to agree on the number of arbitrators, the number of arbitrators is to be either 1 or 3 as decided by the HKIAC in the particular case.

[31] Section 24 AO:

> (1) Article 11 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(2) and (3) –
> [follows the text of article 11 of the ML].

[32] Section 24(2)(a) AO. [33] Section 25 AO.

itself, give rise to justifiable doubts as to that arbitrator's impartiality and independence.

Article 13 Challenge Procedure

This article, dealing with the procedure to challenge an arbitrator, was not adopted verbatim.[34] Section 26(4) of the AO states that: 'The mandate of a challenged arbitrator terminates under article 13 of the UNCITRAL Model Law [. . .] if (a) the arbitrator withdraws from office; (b) the parties agree to a challenge; (c) the arbitral tribunal upholds the challenge and no request is made for the Court to decide on the challenge; or (d) the Court, upon request to decide on the challenge, upholds the challenge.'[35]

Article 14 Failure or Impossibility to Act

This article was adopted verbatim.[36] In interpreting this article, *Noble Resources Pte Ltd* v. *China Sea Grains and Oils Industry Co. Ltd* [2006] HKCFI 334 held that an arbitrator having been detained and arrested in a foreign jurisdiction would have his mandate terminated. This is one example of a circumstance giving rise to 'impossibility to act' where a mandate is terminated.

Article 15 Appointment of Substitute Arbitrator

This article was adopted verbatim.[37]

Part IV Jurisdiction of Arbitral Tribunal (Article 16)

Article 16 Competence of Arbitral Tribunal to Rule on its Jurisdiction

Article 16, which deals with the authority of a tribunal to rule on its own jurisdiction as well as the procedure to raise a plea otherwise, was not

[34] Section 26 AO.

> (1) Article 13 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(4) –
>
> [Follows the text of article 13 ML].

[35] Section 26(4) AO. [36] Section 27 AO. [37] Section 28 AO.

adopted verbatim.[38] Section 34(5) of the AO adds that, 'if the arbitral tribunal rules that it does not have jurisdiction to decide a dispute, the court must, if it has jurisdiction, decide that dispute.'[39]

Part IV-A Interim Measures and Preliminary Orders (Articles 17 to 17J)

Sub-Part I Measures and Orders by the Tribunal (Articles 17 to 17G)

Article 17 Power of Arbitral Tribunal to Order Interim Measures

This article was adopted verbatim.[40]

The new Ordinance emphasizes minimal court intervention. The arbitral tribunal is empowered to order interim measures in prescribed circumstances, such as 'to preserve assets or evidence, or to maintain or restore the status quo'.[41]

Article 17A Conditions for Granting Interim Measures This article was adopted verbatim.[42]

Article 17B Applications for Preliminary Orders and Conditions for Granting Preliminary Orders This article was adopted verbatim.[43]

Article 17C Specific Regime for Preliminary Orders This article was adopted verbatim.[44]

Article 17D Modification, Suspension, Termination This article was adopted verbatim.[45]

Article 17E Provision of Security This article was adopted verbatim.[46]

[38] Section 34(1) AO:

> Article 16 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(5) –
> [Follows the text of article 16 ML].

[39] Section 34(5) AO. [40] Section 35 AO.
[41] See D'Agostino, Chapman and Cartwright-Finch, note 5. [42] Section 36 AO.
[43] Section 37 AO. [44] Section 38 AO. [45] Section 39 AO. [46] Section 40 AO.

Article 17F Disclosure This article was adopted verbatim.[47]

Article 17G Costs and Damages This article was adopted verbatim.[48]

Sub-Part II Recognition and Enforcement of Interim Measures (Articles 17H and 17I)

Article 17H Recognition and Enforcement Article 17H ML, which deals with the enforcement of interim measures, was not adopted. Instead, section 61 of the AO has effect in substitute of it.[49] Most significantly, section 61 gives enforceability to any order made, whether inside or outside Hong Kong, in the same manner as an order of the court that has the same effect.[50] It also bars the granting of leave to enforce an order made outside Hong Kong, 'unless the party seeking to enforce it can demonstrate that it belongs to a type or description of order or direction that may be made in Hong Kong in relation to arbitral proceedings by an arbitral tribunal'.[51]

Once again, this reflects the purpose of this Ordinance to minimize court supervision, as the court could no longer refuse to enforce the interim measure awarded by an arbitral tribunal.

Article 17I Grounds for Refusing Recognition or Enforcement The entirety of article 17I does not have effect.[52] This article deals with the refusal of the recognition of interim measures.

[47] Section 41 AO. [48] Section 42 AO.

[49] Section 43 AO: 'Section 61 has effect in substitution for article 17H of the UNCITRAL Model Law.'

[50] Section 61 AO:

> (1) An order or direction made, whether in or outside Hong Kong, in relation to arbitral proceedings by an arbitral tribunal is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court.

[51] Section 61 AO:

> (2) Leave to enforce an order or direction made outside Hong Kong is not to be granted, unless the party seeking to enforce it can demonstrate that it belongs to a type or description of order or direction that may be made in Hong Kong in relation to arbitral proceedings by an arbitral tribunal.

[52] Section 44 AO:

> Article 17I of the UNCITRAL Model Law does not have effect.

Sub-Part III Court-Ordered Interim Measures (Article 17J)

Article 17J Court-Ordered Interim Measures The entirety of article 17J does not have effect.[53] This article deals with the authority for the court to issue an interim measure regardless of the territory where the place of arbitration is, cautioning that the court must consider the features of international arbitration.

Under section 45(2), the court may grant an interim measure, in relation to arbitral proceedings in or outside Hong Kong.[54] However, section 45(4) sets out circumstances where the court may refuse to grant the interim measure.[55]

The court in *Muginoho Co. Ltd* v. *Vimiu HK Co. Ltd* [2012] HKEC 420 ruled that 'the court may grant an interim measure in relation to any arbitral proceedings which have been or are to be commenced outside Hong Kong, if the proceedings are capable of giving rise to an arbitration award that may be enforced in Hong Kong.' Hence, it could be granted regarding the arbitration proceedings commenced in Japan.

In *Ever Judger Holding Co. Ltd* v. *Kroman Celik Sanayii Anonim Sirketi* [2015] HKEC 605, the court granted an anti-suit injunction under section 45 of the AO, restraining foreign proceedings brought in breach of an arbitration clause. Yet, the court was hesitant to draw the conclusion that such an anti-suit injunction was an 'interim measure' that was 'in relation to' actual or contemplated arbitral proceedings, which was provided in section 45(2).[56]

[53] Section 45 AO:
(1) Article 17J of the UNCITRAL Model Law does not have effect.

[54] Section 45(2) AO:
On the application of any party, the Court may, in relation to any arbitral proceedings which have been or are to be commenced in or outside Hong Kong, grant an interim measure.

[55] Section 45(4) AO:
The Court may decline to grant an interim measure under subsection (2) on the ground that –
(a) the interim measure sought is currently the subject of arbitral proceedings; and
(b) the Court considers it more appropriate for the interim measure sought to be dealt with by the arbitral tribunal.

[56] *Ever Judger Holding Co. Ltd* v. *Kroman Celik Sanayii Anonim Sirketi* [2015] HKEC 605, paras 30–33.

Part V Conduct of Arbitral Proceedings (Articles 18 to 27)

Article 18 Equal Treatment of Parties

Article 18, concerning the equality of each party in presenting their cases, was not adopted verbatim.[57] Section 46 of the AO has effect in substitution of article 18. The main difference lies in that the Hong Kong legislation specifically provides that the parties be given a 'reasonable' opportunity to present their case as opposed to the ML provision providing for a 'full' opportunity for case presentation.[58] Here the rationale seems to be to provide the arbitral tribunal with the power to help prevent parties from deploying excessive delay tactics such as unhelpful discovery requests or excessive number of witnesses under the guise of exercising the right to a 'full' opportunity for case presentation.

In *Grand Pacific Holdings Ltd* v. *Pacific China Holdings Ltd (in liq.) (No. 1)* [2012] 4 HKLRD 1, it was stated 'only a sufficiently serious error could be regarded as a violation of article 18' and as long as a party had a 'reasonable opportunity' to present its case, it could hardly establish it had been denied due process. Hence, the 'full opportunity' test is not applicable in Hong Kong cases.

Article 19 Determination of Rules of Procedure

Only article 19(1) has effect, while article 19(2) does not.[59] Article 19(1) concerns the fact that the parties are free to agree on the procedure to be followed by the tribunal in conducting the proceedings. Article 19(2)

[57] Section 46 AO:

> (1) Subsections (2) and (3) have effect in substitution for article 18 of the UNCITRAL Model Law.

[58] Section 46 AO:

> (3) When conducting arbitral proceedings or exercising any of the powers conferred on an arbitral tribunal by this Ordinance or by the parties to any of those arbitral proceedings, the arbitral tribunal is required –
>
> [. . .]
>
> [. . .] *(b)* to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents.

[59] Section 47 AO.

concerns the event of failure to agree on the procedure. Section 47 AO replaces article 19(2) with slightly different wording.[60]

Article 20 Place of Arbitration

This article was adopted verbatim.[61]

Article 21 Commencement of Arbitral Proceedings

This article was adopted verbatim.[62] In interpreting this article, *Fung Sang Trading Ltd* v. *Kai Sun Sea Products & Food Co. Ltd* [1991] HKCFI 190 ruled that a letter, or request for arbitration, is taken to be a sufficient commencement under this article.

Article 22 Language

This article was adopted verbatim.[63]

Article 23 Statements of Claim and Defence

This article was adopted verbatim.[64]

Article 24 Hearings and Written Proceedings

This article was adopted verbatim.[65]

Article 25 Default of a Party

This article was adopted verbatim.[66]

[60] Section 47 AO:

> [. . .]
> (2) If or to the extent that there is no such agreement of the parties, the arbitral tribunal may, subject to the provisions of this Ordinance, conduct the arbitration in the manner that it considers appropriate.
> (3) When conducting arbitral proceedings, an arbitral tribunal is not bound by the rules of evidence and may receive any evidence that it considers relevant to the arbitral proceedings, but it must give the weight that it considers appropriate to the evidence adduced in the arbitral proceedings.

[61] Section 48 AO. [62] Section 49 AO. [63] Section 50 AO.
[64] Section 51 AO. [65] Section 52 AO. [66] Section 53 AO.

Article 26 Expert Appointed by Arbitral Tribunal

This article was adopted verbatim.[67]

Article 27 Court Assistance in Taking Evidence

This article was adopted verbatim.[68] In *Vibroflotation A.G.* v. *Express Builders Co. Ltd* [1994] HKCFI 205, the court ruled that should a party wish to seek a subpoena, the party must obtain express written approval from the arbitrator.

Part VI Making of Award and Termination of Proceedings (Articles 28 to 33)

Article 28 Rules Applicable to Substance of Dispute

This article was adopted verbatim.[69]

Article 29 Decision-Making by Panel of Arbitrators

This article was adopted verbatim.[70]

Article 30 Settlement

This article was adopted verbatim.[71]

Article 31 Form and Contents of Award

This article was adopted verbatim.[72]

Article 32 Termination of Proceedings

This article was adopted verbatim.[73]

Article 33 Correction and Interpretation of Award; Additional Award

This article was adopted verbatim.[74]

[67] Section 54 AO. [68] Section 55 AO. [69] Section 64 AO. [70] Section 65 AO.
[71] Section 66 AO. [72] Section 67 AO. [73] Section 68 AO. [74] Section 69 AO.

Part VII Recourse against Award (Article 34)

Article 34 Application for Setting Aside as Exclusive Recourse against Arbitral Award

Article 34, concerning the procedure to set aside an arbitral award, was not adopted verbatim.[75] A modification in the form of section 81(2) of the AO provides that: article 34(1) does not affect the right of a court to set aside a tribunal award.[76]

In addition, if parties opt into Schedule 2, section 81(2) expressly states that article 34 would not affect the abovementioned rights. Hence, if parties opt into Schedule 2, a party could: (1) challenge the arbitral award on ground of serious irregularity under Section 4 of Schedule 2, or (2) appeal against the arbitral award on question of law under Section 5 of Schedule 2.[77]

Part VIII Recognition and Enforcement of Awards (Articles 35 and 36)

Article 35 Recognition and Enforcement

This article was not adopted at all.[78]

Regarding enforcement of awards, most of the previous regime is adopted. Section 84 gives an arbitral award (with leave of the court) the

[75] Section 81 AO:

> (1) Article 34 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(5) –
>
> [Follows the text of article 34 ML]
>
> Section 13(5) AO simply states that the CFI is the court which has jurisdiction to exercise the power described in article 34.

[76] Section 81(2) AO:

> (2) Subsection (1) does not affect –
>
> *(a)* the power of the Court to set aside an arbitral award under section 26(5);
>
> *(b)* the right to challenge an arbitral award under section 4 of Schedule 2 (if applicable); or
>
> *(c)* the right to appeal against an arbitral award on a question of law under section 5 of Schedule 2 (if applicable).

[77] *Ibid.*

[78] Section 82 AO: 'Article 35 of the UNCITRAL Model Law does not have effect.'

same status as a judgment of the court.[79] According to section 85, the duly authenticated original award or a duly certified copy of it; and the original arbitration agreement or a duly certified copy of it, are required for the enforcement.[80] Different rules apply for the enforcement of Convention awards, of Mainland awards, and of other awards. Note that an outstanding award in the mainland is not enforceable as a Mainland award.[81]

In *樓外樓房地產咨詢有限公司 對 何志蘭* [2015] HKCFI 664, the court applied section 95(2)(c)(i) and suspended two injunctions for the enforcement of the Mainland awards, on the basis that the defendant was not given proper notice of the arbitral proceedings.

Article 36 Grounds for Refusing Recognition or Enforcement

This article was not adopted at all.[82]

[79] Section 84 AO:

> (1) Subject to section 26(2), an award, whether made in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal is enforceable in the same manner as a judgment of the Court that has the same effect, but only with the leave of the Court.

[80] Section 85 AO:

> The party seeking to enforce an arbitral award, whether made in or outside Hong Kong, which is not a Convention award, Mainland award or Macao award, must produce – (Amended 7 of 2013 s. 9)
>
> *(a)* the duly authenticated original award or a duly certified copy of it;
>
> *(b)* the original arbitration agreement or a duly certified copy of it; and
>
> *(c)* if the award or agreement is not in either or both of the official languages, a translation of it in either official language certified by an official or sworn translator or by a diplomatic or consular agent.

[81] Section 93(1) AO:

> A Mainland award is not, subject to subsection (2), enforceable under this Division if an application has been made on the Mainland for enforcement of the award.

[82] Section 83 AO: 'Article 36 of the UNCITRAL Model Law does not have effect.' The AO has its own rules for refusing enforcement of, for example, convention awards, see section 89 AO.

Part IX Additional Provisions in the New Arbitration Ordinance supplemental to the Model Law

Confidentiality

Confidentiality of arbitral proceedings is deemed in the new Arbitration Ordinance. Section 18(1) states that publication, disclosure or communication of any information relating to the arbitral proceedings under the arbitration agreement or an award made in those arbitral proceedings is not allowed, unless it is agreed by the parties.[83]

Mediation-Arbitration/Arbitration-Mediation

The new AO expressly provides for mediation-arbitration or arbitration-mediation proceedings. Section 32 of this Ordinance allows HKIAC to appoint a mediator on application of any party if the mediator appointed in the arbitration agreement is unavailable.[84] Moreover, a mediator could further be appointed as an arbitrator where it is provided in the arbitration agreement under section 32(3)(a).[85] Furthermore, section 33 allows

[83] Section 18(1) AO:

> Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to –
>
> *(a)* the arbitral proceedings under the arbitration agreement; or
>
> *(b)* an award made in those arbitral proceedings.

[84] Section 32(1) AO:

> If –
>
> (a) any arbitration agreement provides for the appointment of a mediator by a person who is not one of the parties; and
>
> (b) that person –
>
> (i) refuses to make the appointment; or
>
> (ii) does not make the appointment within the time specified in the arbitration agreement or, if no time is so specified, within a reasonable time after being requested by any party to make the appointment,
>
> the HKIAC may, on the application of any party, appoint a mediator.

[85] Section 32(3)(a) AO:

> If any arbitration agreement provides for the appointment of a mediator and further provides that the person so appointed is to act as an arbitrator in the event that no settlement acceptable to the parties can be reached in the mediation proceedings –
>
> *(a)* no objection may be made against the person's acting as an arbitrator, or against the person's conduct of the arbitral proceedings, solely on the ground that the person had acted previously as a mediator in

an arbitrator to act as a mediator after the arbitral proceedings have commenced, as long as all parties consent in writing.[86] However, the fact that confidential information obtained by an arbitrator during the mediation proceedings must be disclosed to all other parties if the arbitrator considers it as material to the arbitral proceedings[87] might be a hindrance to effective mediation.[88]

The court in *Chok Yick Interior Design & Engineering Co. Ltd* v. *Fortune World Enterprises Ltd* [2010] HKEC 146 ruled that the court had the inherent jurisdiction to stay the proceedings where necessary. One of the court's powers of case management is to encourage parties to use an alternative dispute resolution procedure where appropriate.[89] This includes the power to stay a case such that it could proceed to arbitration, as in this case.

In *Gao Haiyan* v. *Keeneye Holdings Ltd* [2012] 1 HKLRD 627, the court affirmed that an award pursuant to a mediation-arbitration procedure conducted in mainland China was enforceable in Hong Kong, albeit there was an alleged irregularity. Hong Kong courts would avoid overturning the decision of the supervisory court, unless a case of apparent bias had been established, or the enforcement was contrary to the fundamental conceptions of morality and justice of Hong Kong.[90]

connection with some or all of the matters relating to the dispute submitted to arbitration.

[86] Section 33(1) AO:

> If all parties consent in writing, and for so long as no party withdraws the party's consent in writing, an arbitrator may act as a mediator after the arbitral proceedings have commenced.

[87] Section 33(4)(a) AO:

> If –
>
> *(a)* confidential information is obtained by an arbitrator from a party during the mediation proceedings conducted by the arbitrator as a mediator [. . .]
>
> the arbitrator must, before resuming the arbitral proceedings, disclose to all other parties as much of that information as the arbitrator considers is material to the arbitral proceedings.

[88] *See* D'Agostino, Chapman and Cartwright-Finch, note 5.

[89] *Chok Yick Interior Design & Engineering Co. Ltd* v. *Fortune World Enterprises Ltd* [2010] HKEC 146.

[90] *Gao Haiyan* v. *Keeneye Holdings Ltd* [2012] 1 HKLRD 627.

Conclusion

The new AO adopts verbatim a large number of provisions in the ML on International Commercial Arbitration, concerning both substantive and procedural matters. Whilst the ambit of the procedure in the AO may appear narrower compared to the ML – for instance, the requirement that arbitration agreements must be in writing (s. 19(2)) – other discrepancies between the AO and the ML point to jurisdiction-specific norms, instituted in the light of the existing procedure in Hong Kong. As such, section 13 of the AO is a substitution of article 6 ML, referring specifically to the HKIAC and the Court (of First Instance) in relation to authorities for arbitration supervision. This is consistent with the purpose of the new AO, which was to incorporate the ML into local legislation having regard to Hong Kong's specific circumstances.

In conformity with ML article 2A(1), Hong Kong courts in interpreting the ML have generally acted with regard to its international origin and the need for uniformity in its application. Whilst such cases were largely heard before the Arbitration Ordinance Cap. 609 came into effect in June 2011, they have been instrumental in shedding light upon the proper interpretation of the ML, as well as fleshing out the arbitration rules with respect to the specific situation in Hong Kong. Finally, it is noted that the lack of inclusion of certain ML provisions – namely relating to the recognition and enforcement of arbitral awards (articles 35–36) – does not mark lacunae in the AO, but instead such provisions have been substituted by the inclusion of related provisions from the old Arbitration Ordinance (Cap. 341) and Hong Kong's adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, in force 7 June 1959, 330 UNTS 4739. Whilst these are not inconsistent with the ML, the applicability of the excluded provisions to the local situation may be reconsidered in order to further the need to promote uniformity.