Title: Hong Kong Arbitration: A Decade of Progress - But Where to Next?

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Issued Date: 1999

URL: http://hdl.handle.net/10722/44891

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Robert Morgan provides an in-depth look at the developments in Hong Kong arbitration during the past decade and offers some insight into its future.

Introduction
The 1990s was, and on the eve of the Millennium continues to be, a momentous decade for arbitration in Hong Kong. This period witnessed the success of Hong Kong as both an international and regional arbitration centre and phenomenal growth in arbitration activity. The territory’s arbitration law was transformed, for international cases, from a narrow, English-based system to one based upon an internationally accepted model, the UNCITRAL Model Law on International Commercial Arbitration (the Model Law). Under the influence of that model, the law subsequently underwent further reform so as to introduce the former's underlying concepts and certain of its provisions into Hong Kong’s domestic arbitration law. The territory came into its own as a forum for the enforcement of international arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), particularly after 1987 with regard to Mainland Chinese awards. Existing arbitral institutions thrived and new ones sprang up. Greater emphasis than ever before was given to education and training, not only in arbitration, but also other forms of private dispute resolution, such as mediation and its variants.

A number of initiatives were introduced during this period to promote greater use of arbitration as an alternative to litigation in a number of fields, most notably construction and financial services. These initiatives included procedures co-ordinating arbitration and other procedures, such as mediation and adjudication. Such multi-tiered, or ‘staged’ dispute resolution procedures, rapidly gained acceptance as the norm. Their most high profile use was in connection with the Hong Kong Government forms of construction contracts, those in use for the Airport Core Programme Civil Engineering Works and the Mass Transit Railway forms for the Lantau Airport Railway. At the other end of the scale, a Dispute Resolution Scheme for consumer disputes, which offers any chosen permutation of independent expert appraisal, mediation and arbitration procedures, has been prepared jointly by the Hong Kong International Arbitration Centre, the Chartered Institute of Arbitrators (East Asia Branch), the Hong Kong Institute of Arbitrators and the Hong Kong Mediation Council and will be publicly launched shortly. Such multi-tiered approaches, which combine assisted negotiation with ultimate compulsion in reserve, dovetail neatly into Chinese dispute resolution culture.

Hong Kong’s success as an arbitration centre also manifested itself in ways which were more subtle, but which at the same time showcased its position in the regional arbitration realm and demonstrated the faith of the international arbitration community in the territory’s continuing success. A number of major arbitration conferences were held in Hong Kong throughout the decade and in 1997 the International Chamber of Commerce (ICC) established a foothold in East Asia, setting up office in Hong Kong under the name ICC Asia. Finally, the territory – and indeed, East Asia as a whole – at long last received its own home-grown journal on arbitration and alternative dispute resolution, Asian Dispute Review, the inaugural edition of which was published in June 1999.

Of course, for every positive there is, regrettably, a negative. Arbitration received some of the latter form of
attention during the period under discussion. Much of this centred around the issues of the quality of arbitrators and their awards, the over-formalisation of the arbitral process and the costs of the process, particularly legal costs. It is at least to Hong Kong arbitration’s credit that most criticisms tended to stem from one industry – construction – rather than from across the broad spectrum of users. On the other hand, given the size and importance of the construction industry as a user of dispute resolution services and as a provider of work, these criticisms need to be seriously addressed. Addressing them will, without doubt, be the greatest challenge to arbitration in the opening years of the twenty-first century. Another serious criticism was the length of time taken to negotiate new arrangements for the mutual enforcement of arbitral awards between Hong Kong and Mainland China, necessitated by the Mainland’s resumption of sovereignty over Hong Kong on 1 July 1997. Significantly though this was a criticism more of the long drawn-out inter-governmental negotiation process than of arbitration itself.

This article is an historical review of arbitration in Hong Kong since 1990. In addition to discussing these and other issues, it will examine prospects for further law reform and the prognosis for Hong Kong arbitration in the early twenty-first century.

Hong Kong’s Arbitration Law and Law Reform, 1963-1990

The Arbitration Ordinance (Cap 341) (the Ordinance) was passed in 1963 and has been much amended ever since, in ways both modest and radical. As originally enacted, it was almost identical to the English Arbitration Act 1950. By and large and with few exceptions, subsequent amendments to the Ordinance tended to mirror amendments to the 1950 Act and the passage of the Arbitration Act 1979. The first tentative steps away from the English model came, however, with the enactment of the Arbitration (Amendment) Ordinance 1982, which introduced provisions dealing with (inter alia) consolidation of arbitrations and dismissal of claims for want of prosecution. Indeed, the latter provision stole an eight-year march on England & Wales, no dismissal provision appearing in the 1950 Act until 1990 – by which time Hong Kong’s arbitration law was itself on the verge of moving on to more radical amendment.

To compound the problems, the law was fragmented between statute and common law, making it difficult to access, particularly for foreign users.

In 1987 the LRCHK published its Report on the Adoption of the UNCITRAL Model Law of Arbitration. It regarded the recent establishment of the Hong Kong International Arbitration Centre (HKIAC) in 1985 and the adoption of the Model Law by the United Nations as catalysts for promoting Hong Kong’s position as a leading arbitration centre. Among the rationales given for this view were that the principal legal rules would become more recognisable and accessible to the international community and that the civil law flavour of the Model Law’s drafting would make it appeal to users of arbitration who came from civil law-type backgrounds, such as Mainland China. At the same time, however, because the Model Law was a compromise draft to which experts from both common law and civil law jurisdictions had contributed (including the United Kingdom), common lawyers would not be alienated by it.

The Ordinance as originally enacted, whilst it had generally served Hong Kong well for domestic arbitrations, was, in the LRCHK’s view, suited neither to the territory’s nascent role as an international arbitration centre nor to the needs of the international business community. To begin with, the original provisions were not set out in a logical order and thus they failed to deal with the arbitration process in a systematic or chronological manner, from arbitration agreement through to judicial enforcement or review. Secondly, whilst those provisions were intended to promote party autonomy and to confer fundamental protections on the parties, they were not comprehensive, certainly by comparison with the Model Law. Thirdly, they did not (or did not explicitly) vest fundamental powers in arbitral tribunals to take control of and progress references, including the power to rule on their own jurisdiction. Fourthly, a number of interlocutory powers, in particular those concerned with interim measures of protection, were vested in the former High Court; these could quite appropriately have been exercised by the arbitral tribunal subject to the court retaining a residual jurisdiction with regard to the exercise only of certain of those powers. Lastly, there was a perception (to a greater or lesser degree) that international users of arbitration favoured finality over detailed judicial supervision and were therefore content to see fewer opportunities for judicial control, both during and after the reference to arbitration, than were provided for by the Ordinance. To compound the
problems, the law was fragmented between statute and common law, making it difficult to access, particularly for foreign users.

To adopt the Model Law would, the LRCHK believed, go a long way towards alleviating these concerns. The Model Law goes much further than the original Ordinance in promoting party autonomy, defining the powers of the arbitral tribunal and delimiting the powers of the courts to intervene in live arbitrations and to review awards. It emphasises the primacy of the arbitral tribunal's authority, vests essential powers in it and concomitantly restricts the role of the courts. The general principles of the Model Law governing intervention in arbitrations, which are influenced by and in line with those of the New York Convention, are that (i) the court has no jurisdiction to deal with allegations of procedural injustice during a live arbitration; (ii) the arbitral tribunal should remain free to continue the proceedings and make an award, even pending the outcome of a challenge on the grounds of lack of jurisdiction, qualifications, impartiality or independence; and (iii) allegations of procedural injustice should be raised when resisting enforcement of the award.

It was beyond the LRCHK's terms of reference to examine the Ordinance insofar as it affected purely domestic arbitrations. The adoption of the Model Law was therefore recommended only for international arbitrations conducted in Hong Kong, in order to achieve 'internationalisation in an area of law which must of necessity have an international context'. This did not mean, however, that the domestic arbitration law was irrelevant, for what the LRCHK proposed would lead to a bifurcated system of arbitration law in Hong Kong, with one stream for domestic arbitrations and the other for international. The LRCHK saw no insuperable problems with this approach, although it would necessitate clear criteria to determine what was or was not a domestic or international arbitration agreement. Furthermore, party autonomy would be maximised by giving parties to arbitrations the opportunity to opt into or out of one system or the other.

The Government accepted the LRCHK's recommendation to adopt the Model Law as Hong Kong's international arbitration law, together with a number of 'add on' provisions.

The Model Law, in common with national arbitration laws around the world, does not provide a code of arbitration procedure. That is a matter for detailed arbitration rules agreed between the parties or directed by the arbitral tribunal. Likewise, it does not purport to lay down a complete code of arbitration law. This is not a criticism of the Model Law, but reflects recognition by UNCITRAL that the Model Law is a compromise text containing only core provisions which state commonly accepted principles of international arbitration law with regard to a number of issues. These include such matters as form and content of arbitration agreements (art 7), number of arbitrators (art 10), default appointments of arbitrators (art 11), challenges to arbitrators and revocation of their mandates (arts 12-14), Kompetenz-Kompetenz (art 16), equality of treatment (art 18), powers of arbitral tribunals as to procedure generally (art 19), interim measures of protection (art 17) and hearings (art 24), form of statements of case (art 23), party defaults (art 25), form and content of awards (art 31), court assistance generally (art 6) and in relation to such matters as the taking of evidence (art 27) and challenges to awards (art 34). There would, inevitably, be areas in which individual jurisdictions would differ radically in their approach and for which national legislation would remain appropriate. To give three examples: (i) whilst it is entirely normal for Western jurisdictions and also those of South and East Asia to make provision for the award of interest, Arab and other jurisdictions governed by Moslem Shari'a law would regard this as usurious; (ii) in jurisdictions such as Hong Kong and Singapore, the 'English rule' as to recovery of party costs is the norm, viz that the winning party is entitled to recover lawyers' fees as part of its costs, by contrast with the 'American rule', whereby attorneys' fees are not recoverable from the unsuccessful party; and (iii) many jurisdictions do not entertain appeals against awards on points of law, whereas such appeals lay against both domestic and international awards made in Hong Kong prior to 6 April 1990 and this remains the case today for domestic awards. National jurisdictions adopting the Model Law are therefore entirely free to continue legislating their own provisions on matters outwith its terms. Furthermore, because the Model Law is not an international convention but truly a 'model' law, national jurisdictions are free to adapt it in such manner as they see fit, whether on its face (as in New Zealand) or by enacting 'add on' provisions (as in Hong Kong and Singapore).

The Government accepted the LRCHK's recommendation to adopt
the Model Law as Hong Kong’s international arbitration law, together with a number of ‘add on’ provisions. In order to establish Hong Kong internationally as a Model Law jurisdiction, therefore, there would be no amendments to its face. The relevant legislation was embodied in the Arbitration (Amendment) (No 2) Ordinance 1989 (64 of 1989), which took effect on 6 April 1990. Further such provisions were added by the Arbitration (Amendment) Ordinance 1991 (56 of 1991).

The 1989 amendments brought about the first large-scale restructuring of the original Ordinance of 1963. Part II of the Ordinance, which was retained substantially intact, was henceforth limited in application to domestic arbitrations. A new Part IIA gave effect in Hong Kong to the Model Law, which was incorporated into the Ordinance as the present Fifth Schedule. New Parts I and IA set out provisions of common application to domestic and international arbitrations.

The ‘add on’ provisions of the Ordinance were, and remain, spread between Parts I, IA, II and IIA of the Ordinance. Their objectives were fourfold: (i) to confer complete freedom of choice on parties in deciding whether to arbitrate under the domestic or the international régimes; (ii) to aid the construction and interpretation of the Model Law; (iii) to make provision with regard to a limited number of matters which were not dealt with by the Model Law; and (iv) to allocate arbitral assistance and supervision functions under art 6 of the Model Law. Some of these provisions were brand new, others re-enacted provisions of the 1963 Ordinance. The most significant ‘add on’ provisions of the Ordinance incorporated by the 1989-1991 amendments dealt with the following matters:

1. **Interpretation of the Model Law**: in interpreting and applying the Model Law, regard shall be had to its international origins (s 2(3)). The object of this provision is to promote uniformity of approach to the Model Law as between states and territories that have enacted it and also as between the Model Law and the New York Convention, on which the Model Law is philosophically based and for the monitoring of which UNCITRAL is also responsible. An example of what this means in practice is that case law on art V of the Convention, which sets out limited grounds for refusal to enforce overseas awards, will be persuasive in construing and interpreting art 34 of the Model Law, which sets out limited grounds for setting aside international awards made in Hong Kong and to which art V of the New York Convention is substantially similar. This is important to practitioners dealing with Model Law cases in Hong Kong because there is as yet no local case law on art 34 of the Model Law. Section 2(3) also enacted the present Sixth Schedule of the Ordinance, which lists certain *travaux préparatoires* to which reference shall be made by arbitrators and the courts in construing and interpreting the Model Law.

The **Model Law** has served Hong Kong well in practice, both internationally and domestically.

2. **Enforcement of awards**: s 2H, a verbatim re-enactment of an earlier provision, provided for the summary enforcement of awards. This provision was itself repealed and replaced in 1997 by s 2GG of the Ordinance which, though of wider application than its predecessor, has been demonstrated by post-1 July 1997 case law on the enforcement of Mainland Chinese awards not to be on all fours with it. This is discussed below.

3. **Opting into/out of either régime**: by virtue of s 2L, a party to a domestic arbitration agreement may opt out of the domestic régime (Part II) and into the international (Part IIA). Section 2M has the reverse effect although, by contrast with s 2L, an agreement under s 2M may be made at any time. An opting out agreement under either provision must be in writing. Case law has held that such an agreement must be unequivocal, that is to say, it must reflect exactly the terms of the relevant provision of the Ordinance. Thus, it is not enough that parties to an international arbitration agreement should, without more, agree to adopt domestic arbitration rules, or vice versa (see SOL International Ltd v Guangzhou Dong-jun Real Estate Interest Co Ltd [1998] 3 HKC 493).

A model form of agreement that meets these requirements is available from HKIAC. Furthermore, it is incumbent upon the parties to be clear in their own minds as to which of the régimes governs the arbitration and if necessary to make an opting in/out agreement at the earliest possible stage after a dispute has arisen. Thus, a party to what in all the circumstances is an international arbitration cannot, in an attempt to increase its rights of challenge, reserve until after an award has been made the question of which régime governed the arbitration (Ananda Non-Ferrous
with a definition of 'international virtue of three additions to s 2(1) of Model Law's first tentative foothold. Some further provisions which were internationally and domestically. In
Kong Well in practice, both Food Co Ltd [1992] 1 HKLR 40).

performed or the place with which the substantial part of the parties' international if the place where a Law, whereby an arbitration is as a result of art 1(3)(b)(ii) of the Model international. This has arisen primarily arbitration agreement', which is art 7(1) of the Model Law, together with a definition of 'international arbitration agreement' as one which is not international. As a result of the broad criteria expressed in art 1(3) of the Model Law, many arbitrations that would, prior to 6 April 1990, have been classified as domestic are now international. This has arisen primarily as a result of art 1(3)(b)(ii) of the Model Law, whereby an arbitration is international if the place where a substantial part of the parties' commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected is outside Hong Kong (see principally Fang Sang Trading Ltd v Kai Sun Sea Products and Food Co Ltd [1992] 1 HKLR 40).

The Model Law has served Hong Kong well in practice, both internationally and domestically. In international terms, it has contributed towards substantially raising the territory's profile as an international arbitration centre. Hong Kong case law has been at the cutting edge of the Model Law's development and interpretation and is widely cited in other jurisdictions, both Model Law jurisdictions, such as Singapore and the Canadian provinces, and jurisdictions that have adopted arbitration laws based upon the Model Law, such as England & Wales. In local terms, the Model Law has, for the most part, fitted well into Hong Kong's arbitration superstructure, despite some initial misgivings by practitioners about the practicality of working within a bifurcated system.

So far as arbitration agreements were concerned, the real problem with art 7(2) of the Model Law was what constituted an 'agreement in writing'.

The courts made clear at an early stage how the Model Law should fit into the existing arbitration system so as to minimise the risk of any dislocation brought about by bifurcated laws. Thus, where parties were in dispute about which of the regimes governed an arbitration, and in the absence of an opting in/out agreement under s 2L or s 2M of the Ordinance making the matter clear, it was open to them to bring alternative applications to the court under Parts II or IIA of the Ordinance with regard to such matters as referring to arbitration disputes in respect of which litigation had been commenced and the appointment of arbitrators by the court (Heung Cheuk Kei v Pacific Enterprises (Holdings) Co Ltd [1995] 10 Mealey's Int Arb Rep 7, 11). Furthermore, the courts stated emphatically that, with regard to questions as to jurisdiction of the arbitral tribunal that might arise in connection with such applications (eg as to whether the dispute falls within the ambit of the arbitration agreement), the tribunal should determine this matter first and the role of the court would be very much one of last resort, viz to review the tribunal's jurisdiction rather than to determine it at the outset (Star (Universal) Co Ltd v Private Company 'Triple V' Inc [1995] 2 HKLR 62). This approach was very much in line with art 5 of the Model Law, a core provision of which states that, in matters governed by the Model Law, no court shall intervene except where the Model Law so provides.

Law Reform, 1992-1997
As has already been indicated, the adoption of the Model Law was not all plain sailing. Whilst few problems arose with it in practice, those that did arise were significant. The problems were threefold: (i) the form of arbitration agreements required by art 7(2) of the Model Law; (ii) the number of arbitrators to be appointed in Model Law cases (art 10); and (iii) default appointments of arbitrators by the court (art 11).

So far as arbitration agreements were concerned, the real problem with art 7(2) of the Model Law was what constituted an 'agreement in writing'. Most of the requirements as to form in that provision were uncontroversial. What did cause trouble, however, was the requirement that an agreement should be signed by both parties. Whilst in most commercial cases this was clearly done, there were types of contractual documents containing an arbitration agreement that were not signed, such as bills of lading, shipbrokers' notes and salvage.
agreements (eg the Lloyd's Open Form). The Model Law also did not recognise arbitration agreements made by course of conduct or arbitration agreements which, whilst undoubtedly in writing, did not carry a signature, such as cases where one party failed to sign and return a copy of the other's terms and conditions of contract, including arbitration provisions.

With regard to the number of arbitrators, the parties were, by virtue of art 10 of the Model Law, free to agree this matter. Failing such agreement, however, it was a mandatory requirement of the Model Law that three arbitrators be appointed. Plainly, this would be inappropriate for those international cases involving relatively small or medium-sized claims, as is often the case in shipping. For such cases, a tribunal of three arbitrators would be organisationally and procedurally over-elaborate and, therefore, expensive. In such cases, weaker parties would be discouraged from pursuing or defending their rights in arbitration.

The third matter, default appointments of arbitrators, was not a weakness on the part of the Model Law as such but a result of the allocation to the courts of the appointing function under art 11 of the Model Law. In drafting art 6, UNCITRAL left it free to each adopting jurisdiction to decide which national authority should be responsible for appointing arbitrators, failing agreement by the parties. It was, and is, not a requirement of art 6 that that authority should be a court. In Hong Kong, however, the forum for default appointments with which parties were traditionally familiar was the High Court. Section 34C(3) of the Ordinance allocated this function accordingly. The downside to this was that seeking appointments from the court took time, that judges were not necessarily familiar with whom to appoint as arbitrator and that applications to the court and the court's order had to be served out of the jurisdiction, with all the accompanying difficulties that complying with local legal requirements would involve.

Provided that the parties have made an agreement as to the conduct of the arbitration that would not breach public policy, their agreement is paramount

In January 1992, nearly two years after the Model Law became law in Hong Kong, the Attorney General asked HKIAC to establish a Committee on Arbitration Law (the HKIAC Committee) to consider whether the Arbitration Ordinance should be amended, by reference in particular to emerging draft arbitration legislation in England & Wales. The Committee was a joint body comprising representatives of all interested professional and trade bodies in Hong Kong. In its report to the Government in 1996, which followed a consultation exercise among Hong Kong’s arbitration practitioners, the Committee expressed the view that there should be a two-stage reform of the law. The first stage would (i) implement initial steps to harmonise the domestic and international arbitration laws by reference to the Model Law; (ii) remedy the deficiencies outlined above; (iii) make further common provisions; and (iv) fill a number of gaps in the Model Law. The second stage would comprise root and branch reform, with a new Arbitration Ordinance adopting the Model Law for all arbitrations, both domestic and international, but with a number of ‘add-on’ or exclusionary provisions for domestic arbitration.

Despite the greater emphasis expressly laid by the Model Law on maximising arbitral authority and minimising the role of the courts, the LRCHK had concluded in its 1987 report that there were no great philosophical differences between the original 1963-1982 provisions of the Ordinance and the Model Law. This theme permeated the recommendations of the HKIAC Committee, which were ultimately enacted as the Arbitration (Amendment) Ordinance 1996 (75 of 1996) (the 1996 Ordinance), which took effect on 27 June 1997. For this reason, two provisions of the Model Law were applied directly to domestic arbitrations. Firstly, art 8 was applied by an amended s 6(1) of the Ordinance, with the result that henceforth a court to which application was made to stay legal proceedings to domestic arbitration ceased to have an overriding discretion as to whether to order a stay. Secondly, art 16 was applied by a new s 13B, so that domestic arbitrators were vested with express authority to make binding rulings determining their own jurisdiction, subject to the Court of First Instance having the final say on the matter. A number of the further provisions of common application added to the principal Ordinance by the 1996 Ordinance reflected the same confluence of philosophy, albeit with some refinements:

(i) Party autonomy: s 2A(2) declares that, subject to such safeguards as are necessary in the public interest, the parties are free to agree how their dispute should be resolved. The phrase ‘the parties are free to agree’ permeates the Model Law and UNCITRAL takes the view that the duty of equality laid down by art 18 of the Model Law embraces
fair treatment of each party by its opponent as well as by the arbitral tribunal.

2. **Arbitral supremacy**: s 2GA(1)(b) of the Ordinance imposes an overriding duty on tribunals to use procedures that are appropriate to the particular case in order to avoid unnecessary delay and expense. Provided that the parties have made an agreement as to the conduct of the arbitration that would not breach public policy, their agreement is paramount. Section 2GA(1)(b) underpins the adoption of case management principles and techniques by arbitral tribunals, particularly when read in tandem with the statutory object of the Ordinance declared by s 2AA(1), viz to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense. Furthermore, in tandem with other new statutory powers regarding security for costs, interim measures of protection, evidentiary orders, extensions of time for commencing arbitrations and dismissal for want of prosecution, in relation to which the jurisdiction of the Court of First Instance is either restricted or excluded, this provision emphasises the supremacy of the tribunal's authority and follows the Model Law's philosophy of greatly limiting pre-award challenges to tribunals.

3. **Natural justice**: s 2GA(1)(a) imposes an overriding duty on arbitral tribunals to act fairly and impartially and to give each party a reasonable opportunity to present its case and deal with that of its opponent. Whilst this provision translates the common law rules of natural justice into statutory form, it is essentially little more than the duty imposed on tribunals by art 18 of the Model Law to treat the parties with equality.

4. **Judicial intervention**: s 2AA(2)(b) declares that the court should interfere in an arbitration only as expressly provided by the Ordinance. Though expressed with a different emphasis in wording, the aim of this provision is essentially the same as art 5 of the Model Law. Thus, in relation to a live reference, the court's powers of intervention, whether during or after the arbitration, are limited to the exercise of those powers conferred by the Ordinance, whether under Part IA, II, IIA or the Model Law, as the case may be.

The powers of the courts in respect of the same subject matter were concomitantly severely limited or excluded altogether by ss 2GC, 2GD and 2GE.

The 1996 Ordinance also addressed the three principal criticisms of the post-1990 system discussed above. Thus, s 2AC introduces a new definition of 'agreement in writing' which brings within the ambit of the Ordinance arbitration agreements which (i) though in writing, are not signed; or (ii) have been perpetuated by conduct, or (iii) have been made orally; or (iv) though oral at the outset, have been evidenced in writing. By virtue of a new s 34C(5), a tribunal of three arbitrators is no longer, failing party agreement, to be automatically appointed in Model Law cases; rather, a statutory duty is imposed on HKIAC to determine the number of arbitrators. An amended s 34C(3), a provision inspired by Singapore's International Arbitration Act 1994, imposes an exclusive statutory duty on HKIAC to make default appointments of arbitrators in both domestic and Model Law cases (under, respectively, s 12 of the Ordinance and art 11 of the Model Law). HKIAC's functions under both provisions are performed in accordance with statutory requirements and criteria laid down by the Arbitration (Appointment of Arbitrators and Umpires) Rules 1997 (Cap 341 sub leg B).

Finally, the 1996 Ordinance added a number of other provisions which, whilst filling gaps in the Model Law, were also applied to domestic arbitrations. Thus, powers previously vested either normally or exclusively in the courts were vested in arbitral tribunals. These include security for costs, interim measures of protection and certain evidentiary orders (s 2GB), extending time for commencing arbitrations (s 2GD) and dismissal for want of prosecution (s 2GE). The powers of the courts in respect of the same subject matter were concomitantly severely limited or excluded altogether by ss 2GC, 2GD and 2GE. Case law on ss 2GB and 2GC has since made clear that, in cases where tribunals and the courts have parallel jurisdiction to order interim measures of protection or to make evidentiary orders, a court should not exercise these powers unless the order requested involves a third party or the tribunal is unable for any reason to grant the relief sought within a single order (see Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd [1998] 4 HKC 347). Pre-1997 powers regarding awards of costs and interest were also re-enacted with amendments (ss 2GH, 2GI and 2GJ), the principal one being that henceforth tribunals would have jurisdiction to
award compound interest. The 1996 Ordinance also introduced clarificatory provisions, principally with regard to the remedies that may be granted by arbitral tribunals (s 2GF) and extended the court’s powers of summary enforcement to arbitral orders and directions as well as to awards (s 2GG). The case management function of the arbitral tribunal was underwritten by a new power under s 2GL, enabling it to limit in advance the amount of costs that a party could recover in pursuing its case.

The China Syndrome 1997-2000
Prior to 1 July 1997, Mainland Chinese awards were summarily enforceable in Hong Kong as Convention awards by virtue of ss 2H and 42 of the Ordinance, the People’s Republic of China having acceded to the New York Convention in April 1987. Under s 44, there were a limited number of exclusive defences to the enforcement of Convention awards. Furthermore, the courts applied a ‘pro-enforcement bias’, refusing to set aside leave to enforce such awards unless it could be shown that a party’s rights had been substantially prejudiced. As a result, leave to enforce was rarely set aside, so that the overwhelming majority of Chinese awards were enforced. The fact that between one-half and two-thirds of all awards brought to Hong Kong for enforcement during the period 1987-1997 were Mainland awards speaks for itself.

With the resumption of sovereignty, Hong Kong became part of the PRC, albeit as a separate law district. Clearly, the New York Convention no longer applied to cross-border awards, as they were no longer ‘foreign’. By the same token, because of Hong Kong’s status as a Special Administrative Region under the ‘one country, two systems’ policy, such awards could not be considered to be domestic either. Mainland awards therefore acquired a sui generis status. As early as 1992, and many times since, dire warnings were uttered of an impending legal vacuum if alternative enforcement arrangements were not put in place in time for the transition. The initial warning was given in October 1992 by the Working Party on Legal and Procedural Arrangements between Hong Kong and China in Civil and Commercial Matters (the Edwards Committee), a body which advised the Sino-British Joint Liaison Group on a number of cross-border legal issues, and was echoed by a number of learned commentators, including Neil Kaplan, who was also a member of the Edwards Working Party. Regrettably, replacement arrangements were not made in place on SAR Establishment Day. As events transpired, however, the difficulties that arose were not entirely a function of the transition but very largely a consequence of the enactment of the 1996 Ordinance. Before 27 June 1997, the now repealed s 2H of the Ordinance permitted the summary enforcement of domestic awards and Model Law awards made in Hong Kong. It was needed in order to minimise damage to Hong Kong’s position as an arbitration centre and place of enforcement.

Clearly, urgent action was needed to restore the status quo ante in order to minimise damage to Hong Kong’s position as an arbitration centre and place of enforcement.

With effect from 27 June 1997, however, s 2H was repealed and replaced by s 2GG of the Ordinance, which provides in almost identical terms for the enforcement of awards and, by virtue of s 42, applies to Convention awards. It had been assumed in many quarters that s 2GG would avoid the enforcement of Chinese awards even though they were no longer Convention awards. This impression was dispelled by the decision of Findlay J in Ng Fung Hong Ltd v ABC [1998] 1 HKC 213, in which the learned judge held that s 2GG had to be read subject to s 2AD of the Ordinance, which declared the scope of Part IA of the Ordinance. In Findlay J’s view, Part IA, of which s 2GG was also a provision, when read together with art 1 of the Model Law, applied to domestic and international arbitrations conducted, and therefore to the enforcement only of awards made in Hong Kong. As Mainland awards were no longer Convention awards and s 2GG was narrower in application than its predecessor, they would have to be enforced by action on the award – which takes longer, is more costly and subject to a greater number of defences. The old certainties were, therefore, lost. The judgment carried identical implications for the enforcement of Taiwanese awards.

Findlay J’s judgment, which was rendered in February 1998, confirmed the existence of the long-anticipated legal vacuum in the enforcement of cross-border awards. Clearly, urgent action to restore the status quo ante was needed in order to minimise damage to Hong Kong’s position as an arbitration centre and place of enforcement. Indeed, there is much anecdotal evidence of Hong Kong-PRC arbitrations going to Singapore in
order to get around the problem. Regrettably, swift action was not forthcoming. New arrangements based on the New York Convention were not announced by the Secretary for Justice until November 1998. Despite expressing hope that the necessary juridical assistance agreement under art 95 of the Basic Law would be signed by the end of the 1998, the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region was not in fact signed until 21 June 1999.

Even so, the signing of the agreement is not the end of the story. It requires implementation on both sides of the border. In Hong Kong, an Arbitration (Amendment) Bill was gazetted on June 1999. The Legislative Council will not, however, commence formal consideration of the Bill until October 1999. This means that, subject to the pace at which promulatory measures are introduced on the Mainland, new arrangements are unlikely to be in place much before the end of 1999 or even early 2000.

Whilst seeking to introduce New York Convention-type enforcement arrangements for PRC awards (and finally updating s 73 r 10 of the Rules of the High Court in the process), the Hong Kong Bill requires some fine-tuning to achieve this aim. HKIAC and other interested bodies are coordinating appropriate representations to the Department of Justice. The Bill is also silent on the subject of Taiwan. Whilst the 'renegade province' across the Straits is always a touchy subject, there is no reason why enforcement arrangements carrying no suggestion whatsoever of sovereignty for Taiwan should not be included in the Bill. The simple expedient of a single clause applying s 2GG to the enforcement of any awards made overseas or outside of Hong Kong, other than Convention and Mainland awards, would suffice. Such a provision would, without mentioning the names of any territories, embrace not only Taiwan but also Macau and the few remaining states, such as Pakistan, that have not acceded to the New York Convention.

Hong Kong's profile as an international arbitration centre would benefit from its continuing to be seen as a Model Law jurisdiction ...

Law Reform, 1998 and Beyond

With regard to root and branch law reform in the longer term, the HKIAC Committee, chaired by Neil Kaplan, whilst putting forward a number of specific ideas, was content to state broad principles for the guidance of a future committee. It recommended that:

'The Arbitration Ordinance ... should be completely redrawn in order to apply the Model Law equally to both domestic and international arbitrations, and arbitration agreements, together with such additional provisions as are deemed, in the light of experience in Hong Kong and other Model Law jurisdictions, both necessary and desirable.'

The task of giving detailed consideration to the shape and content of a new Arbitration Ordinance fell to a successor body created by the Hong Kong Institute of Arbitration (HKI Arb) with the encouragement of the Secretary for Justice. The Committee on Hong Kong Arbitration Law (the HKI Arb Committee), like its predecessor, is a joint committee. Its Chairman is Mr Robin S Peard, a solicitor and eminent maritime arbitrator.

The HKI Arb Committee has not yet reported to the Government, but the following is a summary of its conclusions to date. Hong Kong's profile as an international arbitration centre would benefit from its continuing to be seen as a Model Law jurisdiction if and when a new Arbitration Ordinance is enacted. The Committee has therefore endorsed the concept of a unitary system of arbitration law governed by the Model Law, together with any necessary or desirable amendments. Its guiding principle for reform is that any provisions additional to the Model Law should only be recommended where there is good reason for doing so, such as where a domestic provision of the present Ordinance has been widely accepted or where a proposed provision was not contemplated at the time the Model Law was adopted in Hong Kong. The amendments will therefore be relatively few in number, in order that there should not be too great a divergence from UNCITRAL's drafting. Their principal functions will therefore be (i) to provide a corpus of essential provisions without seeking to codify Hong Kong's arbitration law; (ii) to make further necessary provision with regard to matters not dealt with by the Model Law (for example with regard to the seat of the arbitration, the appointment and functions of umpires, a general duty on the parties to progress a reference and to comply with the tribunal's orders and directions, sanctions for party defaults and assessment of the parties' costs and arbitrators' fees); (iii) to clarify certain provisions of the Model Law, such as the power of the court under art 34(4) to remit an international award made in Hong Kong; and (iv) to remove a number of internal
inconsistencies and conflicts between Part IA of the present Ordinance and the Model Law. There are also likely to be a small number of special provisions for domestic arbitrations, in particular rights to opt into determination of a preliminary point of law by the court and appeals on a point of law. The state of play of the HKI Arb Committee’s deliberations is discussed in greater detail by Robin Peard in his article, The Arbitration Ordinance: What Further Changes are Needed? [1999] Asian DR 33.

It is hoped that the HKI Arb Committee will be in a position to report to the Government by the end of 1999 or early 2000 and that Government’s reactions to the recommendations will be positive.

And what of the Future?

Even assuming that the Hong Kong Government is prepared to take forward the next stage of law reform, there must be in place an arbitral infrastructure which ensures that it is implemented effectively, efficiently, fairly and in the public interest. The criteria for determining whether such an infrastructure meets these requirements are conveniently encapsulated by Lord Woolf MR’s basic principles for an accessible civil justice system. For he himself has said that his reforms, and the English Arbitration Act 1996 on which the latest Hong Kong amendments are based, are two sides of the same coin, subject of course to such modifications as are necessary to reflect the voluntary nature of arbitration (Patel v Patel [1999] BLR 227 at 229). These principles, which are addressed to what Lord Woolf MR identified as the triple excesses of cost, delay and complexity, are as follows:

1. The results should be just: substantive justice depends upon adequately trained professionals, both lawyers and non-lawyers, to present their clients’ cases effectively, and on the existence of trained and experienced arbitrators, both legal and lay. Whilst the primary professional bodies are responsible for training their members in substantive law and advocacy skills, it is for the arbitral institutions to provide adequate and up to date training in arbitration law and practice to all those involved in the process.

Arbitrators have a responsibility to avoid ‘over-judicialising’ arbitration procedure... by tailoring it to the needs of the particular case, or encouraging the parties to do so

2. The system should be fair in fact and in appearance: whilst the duty to observe natural justice is now enshrined in statute, that is only part of the picture. Arbitrators must be capable in the first place of exercising judicial capacity, an ability which is arguably more inherent than learned. They must not apply case management techniques in such a way as to prejudice compliance with the rules of natural justice (Diamond Lock Grabowski & Partners v Laing Investments (Bracknell) Ltd [1992] 60 BLR 112). They must also be competent and conversant with what they can and cannot do with a live reference, as failure to do so of itself generates unfairness. Most parties are arguably satisfied with the way in which their cases are handled, even if ultimately they are unsuccessful, if they can feel they have had their ‘day in court’. Regrettably, however, there are arbitrators who, regardless of whether they are legal or lay or of how much training they may have received, are not competent to handle real world references. The failures of such a minority give the arbitral process a bad name. Those who doubt the veracity of this assertion are referred to the decision of Findlay J in Charteryard Industrial Ltd v Incorporated Owners of Bo Fung Gardens [1998] 4 HKC 171 for an object and abject lesson in how an arbitration should not be conducted.

3. Procedures should be proportionate to the issues involved and the process should be reasonably speedy: this principle is enshrined in the object declared in s 2AA(1) of the Ordinance and in the overriding duty on arbitrators to adopt appropriate procedures so as to avoid unnecessary delay and expense. This principle is not limited in application to cases where an arbitrator decides procedure; it applies equally where an arbitrator directs the way in which parties should implement their chosen procedure. One example of this is the use of the power under s 2GL of the Ordinance to limit a party’s recoverable costs and thus achieve proportionality to the issues involved and the amounts at stake.

4. The process should be understandable and responsive to users: foreign users and their lawyers and unrepresented domestic users and lay professionals should, so far as possible, have access to a comprehensible and cohesive corpus of arbitration law. A unified body of arbitration law would go some way towards meeting this objective. Once again, however, this is only part of the picture.
Arbitrators have a responsibility to avoid 'over-judicialising' arbitration procedure (a criticism frequently voiced by the construction industry in particular) by tailoring it to the needs of the particular case, or encouraging the parties to do so. They must ensure that the parties understand what the process involves and the implications of decisions taken, particularly if they are unrepresented. Subject to contrary agreement by the parties, s 2GB(6) of the Ordinance allows arbitral tribunals to adopt inquisitorial procedures, thus liberating them from strict adherence to the adversarial system, provided that natural justice is not compromised. Arbitral institutions must 'sell' their procedures and services to users at large, keep under review their model arbitration clauses, arbitration rules and associated procedural guidance and develop new procedures and services, both generally and for particular sectors, including 'multi-tiered' procedures such as mediation/arbitration or adjudication/arbitration. In so doing, they will also 'sell' Hong Kong as an arbitration centre.

(5) The process should provide as much certainty as the circumstances of the case allow: users should know in advance what they can expect of the process and how it differs from other dispute resolution processes, in terms both of procedural differences and likely outcomes. Arbitral institutions have a role to play in providing such information and helping users to make informed choices. It should not be forgotten that business is the biggest user of arbitration and that business people value certainty above all.

(6) The process should be effective in terms of resourcing and organisation:

Compliance with all of the above criteria will also impact upon the costs of the process, particularly legal costs. Lawyer's fees are a critically sensitive topic in Hong Kong at the moment and the level of fees has come under attack from a number of directions, including by a member of the Bench who sees high fees as threatening to price Hong Kong out of the market as a centre for arbitration or litigation (Glencore International AG v Tianjin Huarong Mineral Products Co Ltd [1998] 3 HKC 68 at 73, per Cheung J). This is, of course, not an issue that is unique to or generated by arbitration per se. The continued health and use of the arbitral process will, however, be gravely threatened if it is not addressed.

Conclusion

Hong Kong arbitration enters the new Millennium in a state of flux, having developed exponentially during the relatively short period commencing in 1985. The territory's experience of the UNCITRAL Model Law has been a beneficial one, in terms both of the development of Hong Kong arbitration generally and of Hong Kong's international image. There is now in place an effective and more modern (if at presently somewhat messily organised) Arbitration Ordinance which expressly aims to promote arbitral efficiency, speed and economy. An unfortunate hiatus in the summary enforcement of cross-border awards will hopefully soon come to an end, perhaps allowing the territory to start winning back business lost to Singapore in the interim. These are positive indicators. If Hong Kong at least enters 2000 with an arbitration community that is better informed of what needs to be done to minimise the triple excesses of cost, delay and complexity, there is good cause for optimism in arbitration's future in the territory. In these circumstances, a new Arbitration Ordinance, if enacted, will be the icing on the cake.

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香港仲裁法制：回顧與前瞻

引言

對很多人來說，九十年代標誌著香港的仲裁制度，開始在當地進行改革，這些改革的結果便是今天香港仲裁法制的崛起。人民民主及自由的發展，以及香港特區政府的政策，推動香港仲裁法制的改革，使之成為世界仲裁法制的政治模式。香港仲裁法制的改革，為香港的發展，為世界仲裁法制的建築立下先河。

本文旨在回顧香港仲裁自 1990 年以來的發展，以及探討進一步法律改革的可行性，同時探討香港仲裁法制的前景。

香港仲裁法制與改革（1963 至 1990）

《仲裁條例》（第 351 章）（以下簡稱《條例》）自 1963 年通過生效起，經歷了數次大小大小的修訂。1990年《仲裁條例》的通過，是香港仲裁法制改革的積極發展。自《條例》通過後，香港仲裁委員會的仲裁，及香港仲裁院的仲裁，亦可以使用香港仲裁委員會仲裁的程序。《條例》規定，香港仲裁委員會的仲裁，及香港仲裁院的仲裁，可以使用《條例》規定的程序。《條例》的規定，是香港仲裁法制改革的積極發展。自《條例》通過後，香港仲裁委員會的仲裁，及香港仲裁院的仲裁，亦可以使用香港仲裁委員會仲裁的程序。《條例》規定，香港仲裁委員會的仲裁，及香港仲裁院的仲裁，可以使用《條例》規定的程序。
1985年成立以及联合国《示范法》的採納，促進了香港律師為首的仲裁中心。法改會的全面推進，是國際社會從而逐漸接受的法律制度和理念；而《示範法》一方面帶來法律特色，亦能吸引來自大陸法系國家（例如中國大陸）的人使用。與此同時，《示範法》是來自普通法國家（包括英國）和大陸法國家專家共同研擬的法律，故此普通法制度下的律師亦不會對此感到陌生。

法改會認為，原本制定的《條例》雖然在香港本土运作良好，但無助於香港發展成國際仲裁中心，亦不能滿足滿足國際商業社會的需要。一個原因是由原本的條文安排欠佳，結果規定的過於系統；第二，沒有系統地為整個仲裁過程（由仲裁協議直至裁決的執行或獲准）作出規定。第二，尽管條文的用意是促進各方的自願及賦予各方基本保障，但至少跟《示範法》比較起來，條文還是未夠全面。第三，條文沒有（或沒有明確地）授權仲裁庭控制仲裁過程，包括對本身管轄作出規定。第四，不少的非正式文件（尤其是關於仲裁程序的條文），並不適用於香港進行的國際仲裁，以至於「一個無可避免地需要有關國際組織的法律規定的國際化」。這並不代表我們可對本地仲裁法律置之不理，原因是法改會的建議獲得接納後，將把香港仲裁法分成兩大部分，分別適用於本地仲裁和國際仲裁。法改會認為這做法要求訂立一套清晰的標準去決定某仲裁協議是否適用本地或者國際仲裁，除此以外，法改會並不覺得上述做法會產生太大問題。此外，參與仲裁的各方可獲給予機會選擇棄用某些制度而使用另一種制度，這會確保各方得到最大的自願權。

跟全球各地的
全國性仲裁法律一樣，《示範法》沒有提供一套仲裁程序守則。這些守則，是藉著各方的協議或仲裁庭的指示而定。

法改會檢討工作的範圍，並不包括檢視《條例》對本地仲裁的影響，因此，有關採納《示範法》的建議，只適用於香港進行的國際仲裁，以及「一個無可避免地需要有關國際組織的法律規定的國際化」。法改會決定取消某些不相應的條文，使用仲裁者亦不會在意。使條文更加嚴密的是仲裁庭既在現行仲裁法文內規定，亦可以在普通法中找到，使有關法律看來文義深奧、複雜難明。

法改會相信，採納《示範法》將大大有助解決上述問題。《示範法》在制定各方自治權、訂明仲裁庭的權力以及界定法定仲裁程序和規定仲裁裁決的權力各方面，均比原本的《條例》來得更加詳盡。《示範法》強調仲裁庭的權威性居於首位，亦向仲裁庭賦予一些重要權力，同時限制了法院的權力。《示範法》內關於法院干预仲裁過程的一般原則，與《紐約公約》的條文大致相同。在仲裁過程中所出現的程序上的問題，法院沒有可取管轄權而管理；（一）除非出現對仲裁庭的指責或異議，例如及時當地指責、質疑、或不滿在離合性；仲裁庭仍可根據指責程序及作出裁決，不須等待
新增了《條例》第 1 及 1A 部，內容包括各項適用於本地及國際仲裁的一般條文。至
於大致上是以完整保留的《條例》第 II 部
分，其適用範圍則被限於本地仲裁。《條例》的「附例」條文，適用於《條
例》第 1、1A、II 及 IIA 各部，其內容如下：

(一) 賦予各方絕對自由，決定在本地仲裁
或國際仲裁下進行仲裁程序；
(二) 協助解釋《示範法》；(三) 為小
部分《示範法》未有處理的事宜作出規
定；及(四) 按照《條例》第 6 條分配
仲裁協助和監察職能。這些條文當中，一
些是新開的，其他則是重新制定原先《條
例》的條文。1988 至 1991 年的修訂中，最
值得注意的「附例」條文，關於以下各
項：

一、《示範法》的釋義：《條例》第 2(3) 條規定，凡解释及引用《示範法》的
條文，須遵守《示範法》的內容，包括《示
範法》的宗旨，是促進各位國家和領土在
處理《示範法》時採取一致做法，以及促
進《示範法》與《紐約公約》間的親近性。《示範法》在理
念上乃根據《紐約公約》，而聯合
國國際貿易法委員會也有責任監察
《紐約公約》。這在實際上的意義
為何？舉例說，依《紐約公約》第 V 條
訂下當事藉助於外國仲裁的有限條
例，而《示範法》第 34 條則訂下當
事人在香港的國際仲裁的稟理，如
於兩項條文內容極為相似，故此有關《紐
約公約》第 V 條的案子，在《示範
法》第 34 條的條文裡具有說服力。

二、裁決的執行：《條例》第 2H 條為簡
易執行裁決一事作出了規定。這條可
說是把原條款複製及伸展，重新制定
的條文，到了 1997 年被《條例》第
2GG 條廢除。第 2GG 條的應用範圍
較第 2H 條為廣，但正如 1997 年 7 月
1 日後當事人執行中國大陸裁決的案子
顯示，該兩項條文並不完全一致。下
文將詳細探討這點。

三、在兩種制度之間選擇：根據《條例》
第 2L 條，本地仲裁及國際仲裁的差
異，以及按《示範法》第 II 部，和
更新了《條例》第 2 條（釋義部
分）新增了以下三個定義：「仲裁協
議」、「仲裁裁決」、「商業仲裁」。此
三項定義在法律上的定義，並沒有未
有商務的案件所贈的東協，而是
香港重要的職能。他也曾

四、可按照《示範法》轉讓仲裁的糾紛：根
據《條例》第 34(2) 條，任何種類
的訴訟（不論是商業糾紛裁決）都可
按照《示範法》轉讓仲裁。這條文
不但限了何謂「訴訟」，而是決定
為商業仲裁的，即不論其裁決
的範圍，而不是一開始便規定仲裁的商務
條例。
Company 'Triple V' Inc [1995] 2 HKLR 62 7 5

1992 至 1997 年的法律改革

正如上文提及，《示範法》的採用過程是

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當您回答問題時，如果不確定某個詞或句子的意義，請不要胡亂猜測。這樣會影響您的表現。
（三）自然公義：《條例》第2G(1)(a)條

向仲裁庭加施另一項首要責任，也

便是在各方之間公平和公正地行

事，並給予各方合適的機會以提出
他們的案件和處理他們的對手所提
出的案件。這條文其實是以法律形
式重申普通法下的自然公義原則，

與《條例》第 18 條施加的「平

等相待」責任沒有大分別。

（四）司法干涉：《條例》第 2A(2)(b)

條指出，只有在《條例》明文規定

的情況下，法院才會干預仲裁的仲

裁。除了所引上的各點不同外，

第 2A(2)(b) 條的目的大致與《示

範例》第 5 條相同。因此，不論在

仲裁前或後，法院的幹預權，僅

限於《條例》第 I.A. II. 或 II.A 各

所給予的或《示範例》所賦予的

（視乎情況而定）。

《1996 年條例》也有正副針對 1990

年以前的仲裁制度的各種批評（見上文）。

《條例》第 2AC 條設立「書面協議」引進了

新的定義，以下亦從仲裁協議均與《條

例》範圍之內：（一）以書面形式作出但

未獲各方簽署的協議；（二）經各方行為

而訂立的協議；（三）以口頭形式訂立的

協議；及（四）起初以口頭形式訂立但以

書面形式記錄的協議。此外，根據新設的

《條例》第 34C(5) 條，若《示範條文》適用

於某仲裁而書面形式未獲各方簽署者或

協議，將不具法律效力而不具法律效力；

而在這種情況下，香港國際仲裁中心有法定

責任決定仲裁程序的最終。此外，若新加坡

1994 年國際仲裁法令的書面形式作出協

議之《條例》第 34C(5) 條，香港國際仲裁

中心將根據有關的法定責任，在本地仲裁

協議及《示範條文》適用的個案中應用仲裁

裁決而填補任何空缺（參見《條例》第 12

條及《示範例》第 11 條）。這些條文賦

予的職能，須按《仲裁（仲裁員及公斷人

的責任）》（第 341 章附例 B）訂

定的規定及程序而行使。

最後，《1996 年條例》新增了許多條

文，既填補《示範例》的漏洞，也適用於

本地仲裁個案。從已正常地或完全歸屬於

法律的權力，包括撤銷申請、撤消仲裁裁

決及某些程序上的命令。延長仲裁程序的

時限及因無人作出裁決而撤銷案件，全都

歸屬於仲裁庭了（分別見《條例》第

2G. 2GD 及 2GE 條）。與此同時，法院

在上訴各項事宜上的權力，亦相應地不

於《條例》第 2GD. 2GE 及 2GE 條

和 2G 及 2GC 的條文，若在某案中仲裁

法庭及法院同時享有並行使有關上訴時

候保護措施及裁決上的命令。根據《條例》

第 44 條列出視情

足以阻止或中止執行《條例》的

裁決的絕對抗辯理由。此外，法院採取了「贊同執

行」的態度，除非可證明執行裁決將令某

方的權益遭受重大損害，否則法院不會隨

即將執行裁決令。當前是國內大陸的中

國內裁決都得以在香港執行。事實上，

1987 年 1997 年間曾經香港執行的裁決當

中，有一至二之三分之四為是由本地裁

決，執行的概況程度可見一斑。

但隨著中英對香港恢復行使主權，香港

作為擁有獨立法制的特別行政區，已經

成為中國的一部分。《紐約公約》固然不

再適用於跨境裁決，原因就是它已不再屬

「海外」裁決。與此同時，香港在「一國

兩制」政策下是一個特別行政區，因此

上訴裁決亦不屬「本地」裁決。換句

話說，中國內地裁決可能是自成一脈。自

1992 年起，有關方面在不少場合上已警

告，若不設仲裁程序裁決的執行另作安

排，嚴重的「法律真空」便會在香港回歸

後出現。首先出現警告的是一個簡稱為

Edwards 委員會的有關中港民事及商業事

宜上的法律及程序安排的工作小組。小組

就一系列的跨域法律爭議向中國香港聯繫

小組提出意見。隨後，不少評論員，例如

身兼 Edwards 委員會成員之一的 Neil

Kaplan，亦相繼發出類似的警告。可惜的

是，到了香港特別行政區成立日，還未有

任何安排出現。但事實顯示，困難的源頭

不在於這個本身，而是在於《1996 條例》

的制定。1997 年 6 月 27 日前，現已廢除

的《條例》第 2H 條，容許本地裁決及

在中國內地的《示範條文》適用的《條例》

第 2H 條適用於《紐約公約》裁決的執行。

而《條例》第 42 條規定 2H 條適用於

於《紐約公約》裁決的執行，至於不屬

《紐約公約》裁決的海外裁決（例如在台

灣地區的裁決），根據上述第 2H 條，法

院亦可酌情容許在香港執行該裁決。這

樣，仲裁的勝敗方便毋須提出普通法訴訟來

執行裁決了。

然而，《1997 年 6 月 27 日》，上述第

2H 條被廢除，取而代之的是第 2GD 條

。這項有關裁決的執行的修為，其內容跟第

2H 條幾乎完全一樣，而根據第 42 條，第

2GD 條亦適用於《紐約公約》裁決。不少

入人儀態，即中國內地裁決已屬不《紐約

公約》裁決，它們的可與第 2GD 條而得以

執行。但此假定已被當時高等法院法官范

達理推翻，他於 1998 年 2 月 10 日的香港

律政司 tying to case 1998 1 HKC 213 案的
仲裁員有責任
防止把程序
「過於司法化」(...),
他們須自行或鼓勵
各方因應個別案件
的需要而「度身訂造」
適當的程序

未來的法律改革

就长远的全面改革而言，以 Neil Kaplan 為
官的仲裁會雖然曾特別提出各項意見，但
仍指出以下的三大原則，作為未來委員會的
指引：

1. 《仲裁條例》(...), 重新規範，
目的在於令《仲裁法》同樣適用於本
地和國際仲裁及仲裁協議，及
根據香港和其他採用《仲裁法》的
司法管轄區的經驗而被視為必需和合事
宜的附加條文。

2. 至於詳細研究新條例形式和內容的任
務，已交給一個由香港仲裁員學會成立並得到
律政司司長支持的委員會。這個獲名為
香港仲裁委員會（藉以簡稱「港仲
會」）, 它與仲裁會的性質同屬聯合委員
會。港仲會的主席是知名事實報導仲裁員
白樂天律師。

港仲會尚未對政府呈交任何報告，但直
至目前為止，它的研究結果大致如下，香港
繼續被認為為採用《仲裁法》的司法管
轄區，將有助香港維持其國際仲裁中心的
形象。港仲會贊同建立一個由《仲裁法》
管治的單一仲裁法典，並作出必要或合宜
的修訂。改革的指導原則是，只有在充分
理由支持下，方可建議制定《仲裁法》以
外的附加條文，這些理由包括：現行《條
例》向某項本地法典已得到妥當接納，又
或香港最初採用《仲裁法》時未有預料需
要有關條文。因此，修訂的數目將較少，
目的是避免太過離隔於國際貿易法
委員會的草案。修訂的主要作用是：
一：在不對現有的香港仲裁制度的情況下
增加必要的條文；二：就《仲裁法》未
有涵蓋的要事作出必要的規定。這些事宜
包括仲裁地所在地，公眾人的責任性職能，
各方進修仲裁過程及遵守仲裁的命令和
指示的一般責任、裁決一方的懲罰，以及
各方費用和仲裁員費用的評估；三：澄清
《仲裁法》內某條條文，例如法院根據
第34(4)條頒還在香港作出的國際裁決的
權力；及四：移除現行《條例》第1A 般
與《仲裁法》之間的不一致和矛盾之處。此
外，修訂有可能包括一些專為本地仲裁
一特別是選擇由法院審理仲裁論點以及就法
律錯誤提出上的訴訟的特別條文。欲
知香港會否考慮進行的詳情，可參閱白樂
天先生著「《仲裁條例》需要哪些進一步改
革？」，載於《亞洲研究評論》(1999
年)第33 頁。
士（不論是否律師）有效地替當事人闡述案件，以及受理訴訟和具備經驗的仲裁員（不論是來自法律界）的存在。專業團體有責任向當事人提供實體法律和仲裁技巧的訓練。仲裁機構則有責任向所有參與仲

裁過程的人提供足夠和最新的仲裁法律及實務訓練。

（二）不論在表面上是實際上，制度都必須公正：遵守成文法例內的有關條文，只是遵從自然公義責任的一部分。仲裁員首先要有能力行使其司

法功能，而這能力可說是與死俱來而不是後天培養而成的。仲裁員運用案件管理技巧的方式，絕不能有損其遵守自然公義原則（見

Dumond Lock Crabbowsk & Partners v Laing Investments (Bracknell) Ltd (1992) 60 BLR 112 - 113）。他們亦必須慎重和謹慎在仲裁判審過程中

可否有任何進一步，否則便會導致不公平裁決的出現。若各方感到他們在仲裁中受到不公平和公正的對待，那麼不論仲裁員如何，他們有

機會不會有什麼怨言，但可惜的是，少數仲裁員，不管他們是否來自法律界或曾接受過多少訓練，都不能在裁

決後重視仲裁案件，亦未保有仲裁制

度聲名雀躍。若讀者不相信這些說

話，請參閱范瑞德法官在Charteryard Industrial Ltd v Incorporated Owners of Bo Fung Gardens [1998] 4 HKC 171 - 172。這對於不知道如何進行仲裁

過程的人來說，是痛苦但真實的一課。

（三）程序須與涉案爭議點相稱。過程亦

須合理地迅速：其實這項原則已載

著《條例》第 2AA(1) 條而得以彰

顯。該文規定仲裁員有首要責任

使用適用程序但不必要延遲和開支。這項原則適用於由仲裁員決定的程序；它亦適用於仲裁員決定各方可進行爭議的程序

的案件。一個例子是行使《條例》第 2CL 條賦予的權力以限制

某方不切實的居高。這樣，經濟與

涉案的爭議點和額頭便可達至相

稱。

（四）過程須易於明確和符合使用者的需

要：在可能的情況下，不論是本地

還是海外的商業或非專業人士，所

使用的仲裁法律都應既清楚又完

整。制定統一的仲裁法，應有足夠

致達成目的。除此之外，仲裁員有

責任作妥當程序「達至司法化」

（這是本地建築業界經常提出的批
評）。他們須自行成設各因應個

別案件的需要而「度身訂造」適

當的程序。他們亦須確保各方明瞭

程序的各個環節以及他們所作的決

定有何含意。在各方沒有律師代表

的時候尤為重要。根據《條例》第 2B(6) 條，除非各方另有協議，

否則仲裁庭可以在不損害自然公義

的情況下採用制式（inquisitorial）

程序，這就是說仲裁庭不再局於

傳統的對峙式（adversarial）程序，

仲裁機構須向廣大使用者「推銷」

它的程序和服務。不斷檢討標準

仲裁條款、規則和相關的程序指引；以及為普通大眾和指定界別發展

新的程序和服務，包括「多重」

程序如願伸裁加仲裁或客裁加仲裁，

這亦可有助它們宣揚香港作為仲裁

中心的形象。

（五）過程須提供案件情況所容許的確切

性；使用者理應先弄清楚他們個

案過程可達致的目標，以及過程與

其他糾紛調解過程之間的分別。不

論在程序上還是在可能結果上，仲

裁機構須提供此等資料和協助使用

者作出選擇上擔當重要角色。

我們要緊記，商務仲裁的最主要

用戶，而商人需要和關心的莫過

於確切性。

（六）過程在資源分配和組織方面都應具

有效率：除了確定標準條款和仲裁

規則外，仲裁機構必須維持和維護

仲裁員名單，以確保預定的仲裁員

能完成調解後的無意地指派仲裁

員來完成調解。仲裁機構亦須為

仲裁案件（特別是國際商業仲裁）

提供足夠的行政和支援服務。經常

檢討仲裁員名單是非常重要的。因

為機構委任仲裁員的過程往往様々

內（特别是建築業人士）指稱為相

當於「碰碰運氣」。另一方面，仲

裁員本身應該量力而為，不要只顧

接受委託人而藐視或忽視自己所應

付的工作量。

遵守上述所有準則，對於過程的費用（特

別是法律費用）也會造成影響。仲裁的收

費水平，現時在香港是一個敏感的問題，

不少人曾批評律師費用過於昂貴，而一位

法官更曾警告，高昂的費用可能會令香港

喪失其作為仲裁或訴訟中心的地位（見

Glencore International AG v Tianjin Huarong

Mineral Products Co Ltd [1998] 3 HKC 68 - 69）。在第 73 頁，高等法院法官張耀明的判

詞，這當然並非仲裁獨有或單由仲裁引

起的問題，但若問題得不到正視，便會對

仲裁過程的使用造成嚴重的負面影響。

結語

香港仲裁制度在過去短短十數年間迅速發

展，不斷變化，預料制度將在這情況下邁

向第二十一世紀。《示範法》在香港的採

用，對於本地仲裁的整體發展及香港國際

形象的提升，均起著積極的作用。現時的

《條例》，旨在提高仲裁的效率和速度並

把過程簡化，但《條例》內容稍有欠

理，但它總能有效地運作。至於簡易行

事務仲裁裁決方面的漏洞，筆者希望

儘快得到填補。而香港與新加坡等國

為了事務和工作，組織仲裁更可為了解

和掌握除訴訟高昂、仲裁延誤和過程複

雜的「三害」的方法，香港仲裁的前景將

會一片光明。這樣，制定新的《仲裁條

例》，便不是鋪路了。