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...
to the Ordinance tended to mirror exceptions, subsequent amendments As originally enacted, it was almost identical to the English Arbitration Act (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 arbitrational 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.

(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
Some further provisions which were technically 'add ons' established the Model Law's first tentative foothold on domestic arbitration. Firstly, by virtue of three additions to s 2(1) of the Ordinance (interpretation), a common definition of 'arbitration agreement' was applied to both domestic and international arbitrations, by reference to 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. 

Metals Ltd v China Resources Metal and Minerals Co Ltd [1993] 2 HKLR 331.

(4) Disputes that may be referred to arbitration under the Model Law by virtue of s 34C(2), any type of dispute, not only one of an international commercial nature, may be referred to arbitration under the Model Law. This provision not only dispenses with sterile arguments as to what is or is not 'commercial' but also promotes complete freedom to arbitrate disputes.
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.

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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). 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:

1) Party autonomy: s 2AA(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
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.

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 interim 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 became part of the PRC, albeit as a separate law district and place of arbitration centre and 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.

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.

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 on 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 indeed not 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 applied to the enforcement of Convention awards because s 42 of the Ordinance said so. Overseas awards which were not Convention awards, such as those made in Taiwan, were also enforceable under s 2H, albeit at the discretion of the court, thus obviating the need to enforce by way of a common law action on the award.

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 both domestic and international arbitrations conducted, and therefore to the enforcement 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 promulgatory 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 O 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 (HKIarb) 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 HKIarb 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 HKIArb 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 HKIArb 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 Laiing 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 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 processual 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 largest user of arbitration and that business people value certainty above all.

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

arbitral institutions must, in addition to producing model clauses and arbitration rules, maintain and review panels of arbitrators from whom they may confidently make default appointments should the parties fail to agree. They must also provide adequate administration and support services for arbitrations, particularly international commercial arbitrations. Keeping panels of arbitrators under review is of critical importance as institutional appointments are regularly condemned as a 'lottery', particularly by the construction industry. For their part, arbitrators must be prepared to accept only so many appointments as they can realistically handle.

Hong Kong arbitration enters the new Millennium in a state of flux, having developed exponentially during the relatively short period commencing in 1985. 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.
香港仲裁法制：回顾与前瞻

引言

对很多人来说，九十年代标志着二十世纪即将结束，但对于香港的仲裁制度来说，这十年光景有著另一种意义，因为它印证了香港普被为亚太区以至国际商界最为重要的仲裁中心的成就，以及仲裁活动在香港的惊人增长。香港的仲裁法制，本是一个起源于英国的法律制度，但为了迎合国际需要，香港把仲裁制度转换为一个建立于全球公认的国际规则委员会《国际商事仲裁示范法》（以下简称《示范法》）的制度，在《示范法》的影响下，香港对本土仲裁法律进行改革，引进了《示范法》背后的基本原则概念及当中的改革。根据1995年在纽约签署的《承认及执行外国仲裁裁决公约》（以下简称《纽约公约》），香港自立门户，成为国际仲裁裁决的执行地。自1987年开始，香港更进一步与中国大陆的仲裁裁决。香港境内的仲裁机构，工作量有增无减：新的仲裁机构，例如香港仲裁中心，相继成立。与此同时，香港被视作立法及人才培训基地，仲裁不单限于仲裁，而是遍布各行各业，呈现多元及变化的倾向。
1985 年的成立以及聯合國《示範法》的採
納，促類了香港弁味為首的國泰西的仲裁中
心。法改會所持的理論，是國際社會從而
更明確的在法律原則和規則；而且《示
範法》一方面美在大員特特色，能性吸引
來自大陸法系背著（例如中國大陸）的人
使用，而此同時，《示範法》是來自普通
法國家（包括美國）和大陸法處國家主
要尊奉的法律，故此普通法制度下的律師
也無須對之感到陌生。

法改會認為，原本在《條例》層層
在香港實地運作良好，但無助於香港發展
成國際仲裁中心，亦不能滿足國家流通
業的需要。第一個原因是原本的仲裁安排
欠公平性，未能形成這樣一個仲裁過程
（由仲裁員會議至裁決的執行或後續）
作出規範。第二，若僅修身的用意是促進
各方的自主權及賦予各方基本保障，但至
少《條例》比較起來，條例還是欠缺
全面。第三，條例沒有（或沒有明確地）
授權仲裁員控制仲裁過程，包括對本身管
辖權作出裁決的權利。第四，不少的非正
當權力特別是關於仲裁程序的權力
一部是關於當事的高等法院；而這些權
力其實他們是可以由仲裁員行使，唯一的規
則是法院在行使這些權力時仍有餘餘的司法管
理權。第五，很多人或多或少覺得國際間
使用仲裁制度的人較著重案件的最終結果
而非程序對過程的管理，因此即使
《條例》沒有強制可執行的機會，使用仲裁
員亦不會在意。此問更新及嚴重的是仲裁
制度在現行的法律框架內，有未能在普通
法律中找到，使得有關法律看來文理破碎、深
遠難明。

法改會查出，採用《示範法》將大大有
助解決以上各被問題。《示範法》在促進
各方自主權、明確仲裁員的權力以及規設
對仲裁過程所應負的責任上，為一無可
取的法律。《示範法》強調仲裁員的權威居
於首位，亦向仲裁員賦予各項重要權力，同
時限制了法院的權力。《示範法》在範圍
內關於法院在仲裁過程的一般條件，與《約見
公約》的規定，它們主要分別是：一）仲裁
過程中的所出現的不公平的做法，法院
沒有有責任管轄受理；二）即在出現
對仲裁過程的其他或異議，例如長時間管
理、資格、不尊重或獨立性等，仲裁庭
仍可根據當地案件及作出裁決，不須等待
跟全球各國的
全國性仲裁法律一樣，
《示範法》並沒有提
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
而訂立的。

法改會檢討工作的範圍，並不想检討
《條例》對本地仲裁的影響。因此，有
意採用《示範法》的建議，只適用於香港進行
的國際仲裁，以期「在一個無國可以避免地
需要有國際層面的法律規則達至國際化」。
這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部分，分別
適用於本地仲裁和國際仲裁。法改會認為
裁決的合約和國際仲裁。法改會認為
這對現要求訂立一套合約原則去決定某
仲裁協議效力於本地及國際協議，但除此
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
機會選擇棄用某一種制度而採用另一
種制度，這會確保各方得到最大的自主權。

跟全球各國的全國性仲裁法律一樣，
《示範法》並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
指示而訂立。同樣地，仲裁員的權力
並不包含在訂立一套完整的仲裁法典。這不
是一個指針，只是反映香港國際貿易
協議會「示範法」是一凡具「妥
協」性質的法律，其法律條文包括各界廣
泛接受的原則訂下的核心條文，這些原則
涉及的事實，包括仲裁協議的形式和內容
（第 7 條）、仲裁員的數目（第 10 條）、仲
裁員的指派（第 11 條），一裁員提出
異議和仲裁員任命的則例（第 12 至 14
條），仲裁員對自己的管轄權作出裁定的
權力（第 16 條），小議保留（第 18
條）。仲裁庭在一般程序上的權力（第 19
條），臨時性保全措施（第 27 條）和開庭
審理（第 24 條），申請書等的格式（第 23
條），仲裁各方不履行責任（第 25 條），
裁決的形式和內容（第 31 條），一般法院
協議（第 5 條），進取證據方面的法院
協助（第 27 條）以及法律仲裁法方面的
法院協助（第 34 條）等。無可避免地，
在某些問題上，不同司法管轄區的處理手
法可以相當迥異，因此各自制定本身的法律
是難免相失厚的。舉幾個例子說：（一）
在香港及日本國家，有關國家利益的規
定相當正常和普遍，但由於香港和商業
國家子承襲自港法及美國等國家而採用
的是「英國規則」，即簡明一方有權回
覆律師會為該方招致的一部分；（二）
關於當地證書費用方面，香港和新加坡等國
所採用的
是「英國規則」，則勝訴一
方不能向敗訴一方索回律師費；（三）
對在香港提出保護令對仲裁裁決提
出的訴訟，不幸司法管轄區不致受這
限制。在臺灣則 1990 年 4 月 12 日仲裁條
的本地及國際裁決以及現時國際的本地裁決而
言，這些上訴不會受到受理。因此，根據
《示範法》的國家，可自行就《示範法》
範圍以外的事宜立法作出規定。此外，並
於《示範法》的國家，即為具備「示範法」，
所以各地可以自由因應本身
的需要而作出修改，這是直接根據
《示範法》條文（此乃現階段等的現狀）
是確定「附加」條文（此為香港和新家
坡等國的現狀）。

政府按接了法改會的建議，採用《示範法》
為香港的國際仲裁法，同時引入一系
列的「附加」條文。政府不按接直接修改
「示範法」條文的建議，因它希望香港成為
國際рен行《示範法》的司法管轄區。首
項插入「附加」條文的條例，是於 1990
年 4 月 1 日生效的《1989 年仲裁（修
訂）第 2 條）條例》（1989 年第 64 
號條例）；其次是《1991 年仲裁（修訂）條例》
（1991 年第 56 號條例），進一步引入了
「附加」條文。

1989 年的修訂，首次對整本書的《條
例》進行大規模重修，該項修訂引進了
《條例》第 11A 條，確立《示範法》在香
港的適用，而《示範法》本身則被納入
《條例》內（見現時的附表 5）。修訂亦
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
於大致上以完整保留的《條例》第 2 部分，其適用範圍則被限於本地仲裁。
《條例》的「附加」條文，遍布《條例》第 1、1A 及 11 部各部，它們的創意如下：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）協助解決《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
仲裁及監察職務。這些條文當中，一
些是創新的，其他則重新制定原先《條
例》的條文。1989 至 1991 年的修訂中，最
值得注意的「附加」條文，關於以下各
項：
一，《示範法》的條文：《條例》第 2 (3)
條規定，凡解釋及引用《示範法》的
條文，須博彩及國際性背景。這些條文
的目的，是促進各個國家和領土在
處理《示範法》時採取一致的解釋做
法，及促進《示範法》與《紐約公
約》間的適用性。《示範法》在理論
上是基於紐約《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》。這些在實際上的意思
為什麼？舉例說，《紐約公約》第 5 條
條文規定執行海外裁決的法律基礎，而
《示範法》第 34 條則有關於香港
的英國法律的條文，對於兩
項條文內容極為相似，故此有關《紐
約公約》第 5 條的條文，在《示範
法》第 34 條的條文上具有說服力。
這些都於香港裁判《示範法》管
理的案件中，由審判及法院在解釋及引用
《示範法》時，考慮及《條例》附表
6 所列明的各種文件。
二，裁決的執行：《條例》第 2H 條為簡
易執行裁決一案作出了規定。這條可
稱是把早前條文按字逐句，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 日後於執行中國大陸裁決的案件
顯示，該兩條條文並不完全一致。下
文將詳細討論這點。
三，在兩個制度之間選擇：根據《條例》
第 2L 條，本地仲裁協議亦可選擇
採用本地仲裁制度（第 11 及 1A 部）、
《條例》第 2M 條則許可任何情況，但
它跟第 2L 條的不同之處，在於第 2M
條下的協議可於任何時間訂立。任何
根據第 2L 或 2M 條的協議，必須以
書面形式訂立。此外，據有關案例指
出，此等協議必須明確，及必須準確
反映《條例》內的有關條文，因此，
國際仲裁各方若無同意採納本地仲裁
規則（或反之亦然），是不許得的
（見 SOL International Ltd v
Guangzhou Dong-jun Real Estate
Interest Co Ltd [1998] 3 HKC 493 一
案）。一符合有關規定的協議格
式，可從香港國際仲裁中心索取。各
方務須清楚確定其仲裁案件受哪個制
度管轄，若有需要的話，更應在開庭
後儘早訂立仲裁制度的協
議。故此，在實務上清晰顯示某個
案屬於國際仲裁案例，這個案的
一方不得未經仲裁庭作出裁決後才
提出有關管轄制度的問題，如為增加該
方提出異議的資格（見 Ananda Non-
Ferrous Metals Ltd v China Resources
Metal and Minerals Co Ltd [1993] 2
HKLR 331 一案）。
1989 年的修訂，
首次對原本的《條例》
進行大規模重修。
該項修訂引進了
《條例》第 11 A 部，
確認《示範法》
在香港的適用。

四，可按照《示範法》轉交仲裁的糾紛：根
據《條例》第 34(2) 條，任何種類
的糾紛（不論是國際商業糾紛）都可
按照《示範法》轉交仲裁。這條文不
但免去了何謂「商業」與否否的糾紛
問題，而且也促使各方選擇仲裁的
自由這個目的互相呼應。

除此以外，也有些條款上屬於「附屬」性
的條文，為《示範法》制定本地仲裁範圍
的衝突。首先，《條例》第 2 條（釋義部
分）新增了以下三個定義：「仲裁協議」
「仲裁機構」，及「仲裁專家」，《條例》
第 1(3) 條訂下的標準程序及本地仲裁
協議」。指非屬國際仲裁協議的仲裁協
議。由於《示範法》第 1(3) 條訂下的標準
程序為範例，不少在 1990 年 4 月 6 日前應被
消化為本地仲裁的，現在都被視為國際仲
裁。原意是《示範法》第 1(3)(b)(ii) 條規
定，若各方履行商業關係的大部分義務
的場合或與仲裁協議的關係最密切的場合是在
香港以外，有關仲裁便屬國際仲裁（見
Fung Sang Trading Ltd v Kai Sun Sea Products
and Food Co Ltd [1992] 1 HKLR 40 一案）。
在香港，不論在本地醫療還是國際壁
面，《示範法》均獲得相當好的反應。在國
際層面上，《示範法》提升香港作為國
際仲裁中心方面業務蒸蒸日上的情況。香港的接近《示範法》的發展和解釋將著重機構
的不同的發展，不論直接採用《示範法》的司法管轄
區（如新加坡和加拿大各省）是採用以
《示範法》為基礎的仲裁的司法管轄區
（如英國和威斯彗士），都廣泛引用香港
的案例。在香港案件中，儘管初時有幾件
律師擔心兩個仲裁制度並存的可行性，而
《示範法》大致上已能讓香港的仲裁架
構互相配合，和諧共處。

法院一早已清楚表明《示範法》應如何
融入現有的仲裁制度，而就避免對整個
法律及仲裁帶來的風險。舉例說，若各方
在仲裁案件受哪個制度管轄的問題上發生
爭議，而他們又未有根據《條例》第 2L 或
2M 條訂立選擇制度的協議，是不可的，
他們可就各種事項，例如把那些已曾
展開的仲裁轉介仲裁，或法院發放
仲裁人一事，按《條例》第 2H 條
部向法院提出另案申請（見 Hung Cheuk
Kei v Pacific Enterprises (Holdings) Co Ltd
案）。此外，法院曾極力強調，關於此
等申請可能引起的仲裁庭管轄權問題（例
如糾紛發生在仲裁協議涵蓋的範圍內），
應先由仲裁庭裁斷，而法院院長的角色應
是最後的協助者，即負責覆核仲裁庭的管
轄權，而不是一開始便斷定仲裁庭的管轄
權（見 Star (Universal) Co Ltd v Private
1992年1月，通寶《示範法》已在香港運作了兩年，當時的律政司要求香港國際仲裁庭中心成立一個關於仲裁法的委員會（以下簡稱「委員會」），在特別信託及英國及加拿大的仲裁案例的基礎上，考慮是否需要修訂《條例》。委員會的成員包括來自有權於仲裁的各國商人及貿易代表。在廣泛諮詢香港的各種仲裁及法律過後，委員會於1996年9月向政府提交報告，認為仲裁法應對規則及程序進行改革。改革包括：（一）更加明確的《示範法》為參考，採取新的腳本把本地與國際仲裁制度協調起來；（二）進一步對立的仲裁程序；（三）第四條的《示範法》的各個條文。改革方案包括撤銷第二階段的改革，制定新的《仲裁條例》。新《仲裁法》將適用於本地及國際的仲裁，但同時為本地仲裁訂立了附加或增強性的條文。

辦事處和律師公會均對《條例》的修訂草案表示贊成，認為新《仲裁條例》的將可能為本地仲裁創造新的環境。
（三）自然公義：《條例》第 2GA(1)(a) 條
向仲裁庭提出另－項首要的責任，
這便是要確保公平公正地行
事，並給予各方同等的機會以提出
他們的要求和處理他們的對手所提
出的案件。這條文實在是法理形
式判言法庭的自然公義要旨，
與《條例》第 18 條施加的「平等
相待」責任沒有太分別。

（四）司法可處置：《條例》第 2AA(2)(b) 條
指出，只有在《條例》第 2A 條規定
的情況下，法院才會干預仲裁的
裁決。除了特定的狀況外，另
第 2A(2)(b) 條的目的及與《示
範條款》第 5 條相同，因此，不論
在仲裁前或後，法院的干渉權力，僅
限於《條例》第 1A、II 或 IIA 各部
所賦予的或《示範條款》所賦予的
視乎情況而定。

《1996 年條例》也有特別針對 1990 年
以前的仲裁制度之各種事故（見上文）。
《條例》第 22A 條列明「書面協議」，確定了
新的定義，以下數條仲裁協議均屬《條
例》範圍之內：（一）由書面形式作出但
未經各方簽署的協議；（二）由各方行為
而訂立的協議；（三）以書面方式訂立的
協議；及（四）起初以書面訂立但以
書面方式訂定的協議。此外，根據新條
《條例》第 34(5) 條，若《示範條款》適用
於某些仲裁而未有此條為約定的仲裁協
議，將不會自動形成三名仲裁員；反
而在這情況下，香港國際仲裁中心有法定
責任決定仲裁員數目。此外，受新加坡
《1994 年國際仲裁法令》的類似條例所作出修
訂的《條例》第 34(3) 條，向香港國際仲
裁中心施加獨特的法定責任，在本地仲裁
個案及《示範條款》適用的個案中委任仲
裁員時填補任何空缺（分別見《條例》第 12
條及《示範條款》第 11 條）。這些條文賦
予仲裁員的職能，須按《仲裁（仲裁員及公斷人
的責任）規例》（第 341 章附例 B）訂下
的規定及程序而行使。

最後，《1996 年條例》新增了多－條
文，既擴張《示範條款》的範圍，也擴充
於本地仲裁案件。從其正常或完全歸屬於
法庭的權利，包括處置權、證人保護措
施及某些證人上的命令，延長仲裁程序的
時限及因無人作證而撤銷案件，全都
歸屬於仲裁庭了（分別見《條例》第
2GC、2GD 及 2GE 條）。與此同時，法院
在上訴各項事宜上的權力，赤相應地被大
幅削減甚至完全廢除：《示範條款》第
2GC、2GD 及 2GE 條。最後關於第 2GB
及 2GC 條的條文表明，若在某個案件仲裁
庭及法院同時享有並行管理權力時應同時保
證保護董事或證人上的命令，除非有關命令
涉及多個仲裁庭基於任何理由而不能
在同一命令內向盧所有有關的同時調查，
否則法院不應行使其管理權（見 Leviathan
Shipping Co Ltd v Sky Sailing Overseas Co
Ltd [1998] 4 HKC 347 — 案）。至於訟費及
利息的裁決，《裁判」年以前的有關權力亦重
新被規定和修訂（見《條例》第 2G、
2GL 及 2GJ 條），當中主要一项是仲裁
庭獲授予管理權項規定。《1996 年條
例》亦引入一些新設立的條文，主要
關於仲裁庭可否對有關的補救（見《條例》
第 2GF 條）及把法院的管理職權伸展到
仲裁庭發出或作出的命令、指示以及裁
決（見《條例》第 2GG 條）、《條例》第
2GL 條是證明仲裁庭擁有案件管理職能的
例子，該條文容許仲裁庭預先限制某方在
追討過程中可討回的訟費額。

自 1992 年起，

在不少案件上已警告，

若不及時替「中國內地」

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

中國內地裁決的問題：1997 至

2000年

中華人民共和國於 1987 年 4 月加入《紐約
公約》為締約國？故此，1997 年 7 月 1 日
前，根據《條例》第 2H 及 42 條，中國內
地的仲裁裁決可視為《紐約公約》裁決在
香港執行。《條例》第 44 條指出仲
裁員可以規定仲裁庭對《紐約公約》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
便將執行許可撤銷。結果是絕大部分的中
國內地裁決都可以在香港執行。事實上，
1987 年 1997 年間帶到香港執行的裁決當
中，佔了一半至三分之一都是來自中國大
陸，執行的普遍程度愈見一斑。

但隨著中國香港恢復行使主權，香港
作為擁有獨立法制的特別行政區，已回歸
成為中國的一部分。《紐約公約》顯然
再不適用於跨境裁決，原因是有它已不再屬
「海外」裁決。與此同時，現時香港在
「一國兩制」政策下是一個特別行政區，
因此上述裁決亦不屬「本地」裁決。換句
話說，中國大陸裁決可能是自成一體。自
1992 年起，有關方面在不少場合上已警告，
若不及時替「中國內地」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。首先發出警告的是一個簡稱為
Edwards 委員會的有關香港民事及商業事
宜上的法律和程序安排的工作小組，它承
就一系列的跨境法律事宜向中國中央聯絡
小組提供意見。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，仍未
有任何安排出現。但事實顯示，困難的源頭
不在於過渡期本身，而是在於《1996 年條
例》的制定。1997 年 6 月 27 日前，現已
被廢除的《條例》第 2HI 條，容許本地裁
決及在香港執行的《示範條款》裁決的簡易
執行，而《條例》第 42 條規定 2H 條適用
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
灣管轄的裁決），根據上述第 2HI 條，法
院亦可酌情容許在香港執行裁決裁決。這
樣，仲裁的騰便無須提出普通法庭訴訟來
執行裁決。

然而，自 1997 年 6 月 27 日起，上述第
2HI 條被廢除，取而代之的是第 2GG 條，
這項有關裁決的執行的「條例」，其內容跟第
2HI 條幾乎完全一樣，而根據第 42 條，第
2GG 條亦適用於《紐約公約》裁決，不少
入假設，即使中國內地裁決已不屬《紐約
公約》裁決，它們亦可第 2GG 條而得以
執行。但假設已就廢棄上述法律規定范
圍重新審查，衛於 1998 年 2 月在 Ng Fang
Hong Ltd v ABC [1998] 1 HKC 213 — 案的

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判例閲，第 2GG 條的解析受到於《條例》第 2A 條的修訂，條文的修正確定了《條例》第 1A 項的適用範圍。范篤法官認為，在
與《示範法》第 1 條相，解讀的氛圍下，《條例》第 1A 項（包括第 2GG 條）適用
至在香港作出的本地及國際仲裁，因也只
適用於在香港作出的裁決的執行。至於
中國內地作出的裁決的執行，而
第 2GG 條的適用範圍則第 21T 條狹窄，
因此執行中國內地裁決的唯一途徑，便是
就是裁決處另行提出訴訟。這方法最費時且昂
貴，可供選用的選擇理由眾多；我們也許
can't speak 的有關法律條文的明確
性及肯定性，現已顯然無存。上述的判
例，對於在台灣作出的裁決的執行，亦帶
有相同意涵。

范篤法官在上述判例中承認，人們早
前普遍的認為裁決所執行的「法律真
空」問題，是為了避免香港作為國
際仲裁中心和裁決執行地失敗的位
置，暫時恢復原來狀況是刻不容緩的。事
實上，已有數國顯示對許多的中港仲裁
裁決至新加坡進行，以避免香港的「法律真
空」問題。但有關方面顯然毫不著急，
直至 1998 年 11 月，律政司長才宣布已
按《香港的約」達成新安排。雖然她曾表
示希望根據《基本法》第 95 條所授權的司
法互助協議可於 1998 年底前簽署，但一份
為《關於香港與香港特別行政區之間的互
 Supervisor 仲裁裁決的協議》，到了
本年 6 月 21 日才正式簽訂。

然而，上述協議的簽訂，並不代表事
件告一段落，問題是中港雙方需確切地實
行協議。在《香港，一份《仲裁（修訂）條
例草案》（以下簡稱《草案》）於本年 6
月 8 日草擬，但立法會到今年 10 月才會
正式研究《草案》內容。這就是說，視乎
中央政府最終協議的進展，新安排可能要
等到本年度或明年初才可正式落實。

《草案》旨在釐中國內地裁決引入類
似《約」的特點及形式的要求範圍，並在過程
當中把《高等法院條例》（第 4 章）第 73
令第 10 條更動。而《草案》內容須作出修
改，方可達成以上目標。據了解，香港國
際仲裁中心與有關有關部門正蹉商意見
以呈律政司司考

此外，《草案》對於台灣裁決的字不
變，誠然，台灣對於中國的地位和海域
兩岸關係，一向都是非常敏感的問題，但
這表示《草案》不能包括任何不涉及
兩岸關係等問題的仲裁裁決的執行。事
實上，只要《草案》包括條文規定
第 2GG 條適用於在海外或香港以外作出
而不適用於《約」的裁決及中國內地裁
決的便，是解決問題，而案解決，這條條
沒有提及任何地區的名字，但亦可包括合
同，澳門以及餘下數個不加入《約」的地區
（例如巴基斯坦）。

仲裁員有責任
防止把程序
「過於司法化」。...，
他們須自我或強
制三方因應個別案件
的需要而「度身訂造」
適當的程序

未來的法律改革
就長遠的法律改革而言，以 Neil Kaplan 為
官的仲裁會雖然曾特別提出各項意見，但
仍選出以下的五大原則，作為未來委員會的
指引：

《仲裁條例》（…）應重新規定，
目的在於《示範法》的風格適用於中
國和香港仲裁會的仲裁會，以及
根據香港和其他國家《示範法》的司
法管轄權的經驗和以及被視為必要和合事
宜的附加條文。

至於詳細研究新條例形式和內容的要求，
已交由一個由香港仲裁員學會成立並與
律政司司長支持的委員會。這個委員會
包括香港仲裁法學會（以下簡稱「仲裁
會」），它與仲裁會的性質和同屬聯合委員
會。仲裁會的主席是知名海外國際仲裁員
白川約瑟夫。

仲裁會尚未向政府呈交任何報告，但至
目前為止，改的結果大致如下。香港
國際仲裁中心若採用《示範法》的司法管
轄權，將有助香港維持其國際仲裁中心的
形象。仲裁會贊同建立一個《示範法》
管治的單一仲裁法，並作出必要或合宜
的修訂。改革的指導原則有，只在充分
理由支持下，方可建議制定《示範法》以
外的附加條文。這些理由包括《現》《條
例》向某項本地裁決已收到妥當接納，又
或香港最初採用《示範法》時未有預料需
要有條例。因此，修改的数目將會較
少，目的是要避免太過離開國際法貿易法
委員會的草案。修訂的主要作用是：
（一）在不引顯著異香港仲裁裁決的
法的新增或可能的條文；（二）就《示範法》未
有涵蓋的專門作出必要的規定，這些事宜
包括仲裁所在地、裁決地的職能、
各方在仲裁過程中遵守仲裁員的命令和
指示的場合、及未到一方的懲罰，以及
各方費用和仲裁員費用的評估；（三）澄
清《示範法》內某些條文，例如法院根據
第 34(4) 條未還在香港作出的國際裁決的權
力；及（四）移除現行《條例》第 1A 項
與《示範法》之間的一致和矛盾之處。
此外，修訂很可能包括一些專為本地仲裁
——特別是指由法院審理的仲裁案以及司法
律師會提供補充的條文。欲
知仲裁會研究進展的詳情，可參見白川約
瑟夫先生著《仲裁條例》需要哪些進一步改
革？》，載於《亞洲研究報告》（1999
年）第 33 頁。

一般期望仲裁會最終可於本年底或明年
初向政府提交，亦希望仲裁會的建議得到
政府的積極回應。

展望未來
即為設立政府會進行下一步的法改革，
我們仍需要一個仲裁架構，確保法律
改革得以有效、公平和符合公共利益的
實施，決定架構是否符合上述的要求，由
與英國法官 Lord Woolf 就一個公眾可更有
效地使用的民事訴訟制度而訂下的基本原
則不諳詳，Lord Woolf 甚至表示，
他倡議的訴訟制度改革與香港仲裁裁決最近
修訂所基礎的《1996 年仲裁法》，其實
是同一制度的兩方面，只是建議應用
仲裁制度草案作出適當修改以反映仲裁
的自願性質。見《Patel v Patel [1999]
BLR 227 一案，在第 229 頁。以上是各
項針對 Lord Woolf 所指的「三害」— 語
言過高，度過延誤及過份複雜的原則。

（一）結果必須公平：實質公義能否達
致，有賴於個案的具體事實

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士（不論是否律師）有效地替當事
人開建案，以及受過訓練和具備
經驗的仲裁員（不論是否來自法律
界）的存在。專業職業有責任向會
員提供合適法律和訴訟技巧的訓
練，仲裁機構則有責任對所有參與
仲裁過程的人提供足夠和最新的仲
裁法律及實務訓練。

(三) 不論在表面上還是實際上，仲
裁庭都必須公正、遵守成文法例內
的有關條文，同時要遵守自然公義
責任的一部分。仲裁員及法庭上其司
法功能，而其功能可是無法獲得的，
而且不能在仲裁庭內再公正以公
正的態度。若各方感到他們
在仲裁庭得到公平和公正的對待，
那麼仲裁庭的結果如何，他們總應
不會有什麼怨言。但可憐的是，少
數仲裁員，不管他們是否來自法律
界或曾遭受過多多少少訓練，都未能
扮演好這個角色，仲裁庭的能
度聲名狼藉。若讀者不相信這些
話，請參閱範哲理法官在
Charteryard Industrial Ltd v Incorporated Owners of Bo Fang Gardens [1998] 4 HKC 171 的判
詞，這對於不知如何進行仲裁
過程的人來說，是痛苦俱實的一課。

(三) 程序須與各方情況相稱，過程必
須合理地迅速，其實這項原則已藉
著《條例》第 2AA(1) 條而得以確
立，法院規定仲裁員有首要責任
使用適當的程序及避け不必要的延
誤和間隔。上述原則不但適用於由仲
裁員決定的程序；它亦同樣適用
於仲裁員在第 2 條未執行其選擇的
程序的案件。一個例子是行使《條
例》第 2C 條賦予的權力以限制
某方拖延的程序。這樣，程序與
涉案的爭議點及金額便可達致相
稱。

(四) 遊程須盡可能公開和符合使用者的需
要。在可能的情況下，不論是本地
還是海外的專業人士或專業人士，所
使用的仲裁法律都應清楚及完整
地制定，以便仲裁員和仲裁庭
員能夠處理個別案件。他們應有
責任確保把程序「公於公義化」
（這是本地仲裁庭經常提出的批
評），他們應自行或設置適當程序
的各個環節。因此仲裁庭的決定
應顧及各方沒有律師代表
的時：候，尤其重要。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
的情形下採用編制制（inquisitorial）
程序，這正是說明仲裁庭必不局於
傳統的對抗式（adversarial）程序。
仲裁機構須向廣大使用者推行公
開的程序及服務，不斷檢討仲裁
條例。威脅地指明仲裁庭正變得
（inquisitorial）程序，這正是說明仲裁庭必不局於
傳統的對抗式（adversarial）程序。