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Brief Comment, Essay and Note

***481** Recourse against Arbitral Awards: How Far Can a Court Go? Supportive
and Supervisory Role of Hong Kong Courts as Lessons to Mainland China
Arbitration

Gu Weixia [FN1]Copyright © 2005 by Oxford University Press; **Gu Weixia****Abstract**

Through a comprehensive comparison of various circumstances of recourse against arbitral awards in both Hong Kong and Mainland China, this article attempts to explore the underlying reasons for different approaches in the two jurisdictions, which traces origins back to the legal system, judicial culture and arbitration environment. Since Hong Kong's experience in the court's supportive and supervisory role regarding arbitral awards is more advanced, it should be borrowed by the Mainland in any future potential reform. The article argues that the reform and modernization of national arbitration legislation, whether in Hong Kong or in Mainland China, demonstrates different translation phases of the UNCITRAL Model Law. Given the special relationship between the two jurisdictions, a perfect arbitration environment in China should be fostered by combined efforts of both sides.

For the statutory framework, arbitration in both Hong Kong and Mainland China divide the mechanism into two regimes, as domestic and non-domestic arbitration. The Hong Kong arbitration system, after the 1996 amendment, [FN1] incorporates the UNCITRAL Model Law [FN2] to govern international arbitration. Arbitration in Mainland *482 China [FN3] includes domestic and foreign-related arbitration, both of which are covered by the China Arbitration Act 1994 (hereafter referred to as the CAA). [FN4]

As far as the recourse against awards is concerned, the power to set aside an arbitral award is commonly found in many jurisdictions as a means to confer upon courts the right to exercise the ultimate supervisory functions over arbitrations conducted in their country. [FN5] The applicant may seek the court to do one of the following:

- to cancel the award --the system of setting aside; or
- to remit the award to the tribunal for modifications--the system of remission [FN6] or re-arbitration. [FN7]

In both Hong Kong and Mainland jurisdictions, the system of setting aside is available to either domestic or non-domestic regime, while remission or re-arbitration could only be invoked in respect of domestic awards.

I. Remitting system**I.A. Remission of award in Hong Kong**

The Court of First Instance is vested by the Hong Kong Arbitration Ordinance, Section 24 with power to remit a domestic award to the arbitrator for reconsideration. [FN8] This power was originally restricted in its ambit but has now come to encompass the following situations:

- (a) where the award lacks the essentials for validity; where a mistake is admitted by the arbitrator which cannot be corrected under Section 19 of the Ordinance; or
- (b) misconduct by the arbitrator; [FN9] or

- (c) discovery of fresh material evidence after the award; or
- (d) "procedural mishap" [FN10] arising from a misunderstanding by the arbitrator (without any misconduct or mishandling of the arbitration); or
- (e) where the arbitrator has not exhausted the substantive reference (under-performance of jurisdiction);
- (f) where the arbitrator has not dealt with the costs of arbitration. [FN11]

***483** Among the above situations, courts give clear guidance as to the so-called "misconduct", where there is "technical misconduct" rather than "legal misconduct", [FN12] which would not be serious enough to justify the setting aside of the award under Section 25(2) of the Ordinance. As case law shows, such misconduct has been held to include, e.g.

- (a) failure to award interests; or
- (b) deciding an unREFERRED or unpleaded issue; or
- (c) inconsistent finding of the award; or
- (d) failure by the tribunal to hear a party in relation to documentary evidence requested from him; or
- (e) purported alterations to the award after the arbitrator became functus officio, etc. [FN13]

Above all, an award may only be remitted if no error of fact or of law is involved. [FN14]

Concerning the "procedural mishap", there must be a genuine and unintended mistake for the establishment or remission that the mishap, caused by a misunderstanding or failure of communication between the parties or between parties and the arbitrator, will lead to a substantial miscarriage of justice unless rectified, such as failure to present relevant evidence because of a matter beyond a party's control or failure to deal with an issue arising from written case submissions because they have not been dealt with in the oral case submissions.

I.B. Re-arbitration in Mainland China

Influenced by Article 34(4) of the Model Law, Article 61 of the CAA 1994 introduces the "re-arbitration" system to China. The People's court that has accepted an application for setting aside an arbitration award will consider whether re-arbitration can be carried out. [FN15]

Different from the "remission" known in most common-law jurisdictions [FN16] and the UNCITRAL Model Law regime, [FN17] under the unique "re-arbitration" system adopted by the CAA, on one hand, it is the court, in a setting-aside procedure, which exercises control over the award through its discretionary power to remit the case back to the tribunal for re-arbitration. On the other, in China, remission is a relief ancillary to the setting-aside procedure. Upon a party's request, the court, where appropriate, may decide to request the tribunal to re-arbitrate the case within a specific time limit. Yet, the tribunal is under no obligation to have such a re-arbitration since the request of the court is not mandatory. If the tribunal refuses to have the case re-arbitrated, the court shall resume the setting-aside ***484** procedure. [FN18] Therefore, the re-arbitration is not an independent remedy to save a defective award, [FN19] which may only be qualified as a subsidiary recourse giving the former tribunal an opportunity to conclude the arbitral procedures and reconsider their award in spite of the setting-aside procedure.

Unfortunately, the "re-arbitration" system is not regulated further in the CAA 1994, nor have any corresponding principles been reached by the court. In practice, some issues still demand clarification. The utmost question remains what the grounds should be of the cases to be re-arbitrated. Obviously, re-arbitration is a subsidiary remedy that allows the former tribunal of the case to eliminate procedural defects of the case in order to save the award from being set aside by the court. As such, Mainland courts can only remit a case

of purely procedural defects for re-arbitration. These grounds shall include:

- (1) no notice to a party to take part in the arbitral proceedings or no opportunity for it to present its case; [FN20] and
- (2) non-compliance of the arbitral procedure with the statutory procedure or the rules of arbitration. [FN21]

I.C. Comparison

I.C.i. Independent recourse

The re-arbitration system is defined as a subsidiary remedy in the Mainland jurisdiction, rather than, as in Hong Kong, an independent recourse. In fact, just like Article 34(4) of the Model Law, Article 61 of the CAA 1994 also "envisages a procedure which is similar to 'remission' known in most common-law jurisdictions ... gives arbitrators an opportunity to conclude the arbitral procedures and reconsider their award in spite of the setting-aside procedures". [FN22]

Meanwhile, since this procedure "should prove useful in that it enables the arbitral tribunal to cure a certain defect and, thereby, save the award from being set aside by the court", [FN23] it is important to clearly set out the applying grounds. Since there is no clear definition of either "technical misconduct" or "procedural mishap" from Mainland courts' guidance, the only two procedural considerations discussed above seem to be exclusively limited.

I.C.ii. Scope of re-arbitrability

Comparing the two jurisdictions, in Hong Kong, the arbitrator's jurisdiction to reconsider the award depends solely on the order of the court. The arbitrator must not exceed or *485 under-perform his/her revived jurisdiction. [FN24] Obviously, from the Hong Kong experiences [FN25] and in accordance with international arbitration practice, it is not necessary for the arbitral tribunal to re-examine the whole case.

However, such scope of re-arbitrability is not clearly spelt out in the CAA 1994, which should be raised as an issue in need of exploration. In the Mainland, the People's court, when remitting a case to the arbitrators, should instruct them on how the award should be amended or supplemented in order to avoid setting aside. [FN26] The arbitral tribunal should then re-arbitrate the case within the scope indicated by the court. Furthermore, parties in a re-arbitration proceeding should not be allowed to make new claims/counter-claims or withdraw former claims/counter-claims in the re-arbitration proceedings, unless otherwise agreed by the parties. [FN27]

II. Setting-aside system

II.A. Hong Kong perspective

II.A.i. Domestic award

For setting aside domestic awards in Hong Kong, the governing provision is Section 25 of the Ordinance, which vests the Court of First Instance with the power on the grounds that:

- (a) the arbitrator misconducted himself or the proceedings; or
- (b) the award was improperly procured. [FN28]

The basic test for whether an award should be set aside is stated by Judge Ackner at the Court of First Instance in *Fox v. PG Wellfair Ltd* [FN29] and affirmed by the Court of Appeal--whether the arbitrator's conduct was such as to destroy the confidence of the parties, or either of them, in his ability to reach a fair and just conclusion. "Misconduct" is not defined by statute, with the result that the courts have given it the

widest possible application. The principal grounds on which the court will set aside an award are as follows:

- (a) where legal essentials for a valid award is lacking, e.g. no arbitration agreement concluded;
- (b) where the award is void, e.g. matters decided in the award exceeding the scope of arbitration agreed or beyond authority of tribunal;
- *486 (c) where the award has been improperly procured by a party, e.g. award procured by perjury, suppression of evidence, bribery, etc.;
- (d) misconduct of the arbitrator personally or of the proceedings.

"Misconduct" was defined by judge Atkin as "such mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice", [FN30] applied by Lord-Justice Dunn to be "legal misconduct" as opposed to "technical misconduct". [FN31] Its ambit is wide, covering the following general categories of conduct:

- (a) lack of probity and judicial capacity, failure to act or appear to act fairly; [FN32]
- (b) honest but misguided attempts by the arbitrator to conduct the arbitration in the way he thinks best; [FN33]
- (c) having an interest in the subject-matter of the dispute;
- (d) outright corruption, e.g. accepting a bribe, etc.

Compared with remission, a clear distinction is drawn between "legal misconduct" and "technical misconduct" as the condition to invoke the respective recourse. Where an award is set aside, the result is far more serious than remission because the parties have to start all over again with a new arbitrator, whereas remission gives the arbitrator a second opportunity to cure an unsatisfactory award. In Hong Kong, generally, the court prefers to remit wherever possible [FN34] rather than to set aside an award for misconduct. [FN35] The court may do either, depending on the seriousness of the matter, i.e. the degree of the mishap or the fault involved.

II.A.ii. International award

By adoption of the Model Law, an international award in Hong Kong may be set aside by the court on application of the party by his/her proving: [FN36]

- (a) incapacity of the party, or invalid arbitration agreement;
- (b) not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or unable to present the case;
- *487 (c) matters decided in the award exceeds the scope of arbitration agreement or beyond the authority of the tribunal;
- (d) arbitral tribunal or procedure not in accordance with arbitration agreement.

Or by the court's own motion if it finds that: [FN37]

- (a) the subject-matter of the dispute non-arbitrable;
- (b) the award in conflict with the public policy of the State.

The Model Law sets out an exclusive list of grounds on which the Hong Kong court may set aside an international arbitration award, including various defects in the arbitral process or scope and a finding by the court that the award contravenes the public policy. Courts have generally been reluctant to set aside arbitration awards, and have respected the exhaustive nature of the Article 34 grounds. There have been cases where an award may be set aside, e.g. where a party has been unable to present its case on the merits at the arbitration hearing. [FN38]

The burden of proving that an application under the Model Law is well founded rests on the applicant. Even if one of the six grounds for setting aside under Article 34 is established, the High Court has an over-

riding discretion whether or not to grant the remedy sought. The aim of this provision is to discourage unmeritorious technical points being raised and to reinforce the principle that arbitration awards are final. [FN39]

II.B. Mainland China perspective

II.B.i. Domestic award

Article 58 of the CAA 1994 provides that where a party can provide evidence proving that the arbitration award involves one of the following circumstances, he/she may apply to the intermediate people's court in the place where the arbitration commission is located to set aside a domestic award where:

- (a) there is no arbitration agreement;
- (b) the matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission;
- (c) the evidence on which the award is based was forged;
- (d) the other party has withheld evidence sufficient to affect the impartiality of the arbitration;
- (e) the arbitrators committed embezzlement, accepted bribes, practised graft or made an award that perverted the law.

***488** Of the grounds for setting aside a domestic award, grounds (a), (b) and (c) concern procedural defects, while grounds (d) and (e) relate to the substantive issues. In addition, the second paragraph of Article 58 of the CAA 1994 provides that the court could rule ex officio to set aside a domestic award if the award is contrary to the social and public interest. [FN40]

Hongshi is a case where the people's court was faced with a challenge to set aside the award on both procedural and substantive grounds. [FN41] For procedural defects, the applicant submitted that the conduct of the arbitration proceedings was in breach of the Arbitration Rules of the Beijing Arbitration Commission and the arbitral award should be set aside accordingly. In the substantive challenge, the applicant alleged both "forged evidence" and "concealment of evidence".

II.B.ii. Foreign-related award

Under Article 70 of the CAA 1994, if the party that initiates the action for setting aside can present to the competent People's Court [FN42] proof that a foreign-related award involved one of the circumstances set forth in the first paragraph of Article 260 of the Chinese Civil Procedure Law (CCPL) 1991, the court shall, after examination and verification, set aside the award. The grounds are stated as follows: [FN43]

- (a) no arbitration clause in the contract nor written arbitration agreement concluded after the occurrence of the dispute by the parties;
- (b) the failure of the respondent to receive the notice of appointment of arbitrators or of commencement of arbitral proceedings or the inability of the respondent to present his/her case for reasons not due to his own fault;
- (c) the formation of the tribunal or the arbitration procedure was not consistent with the arbitration rules;
- (d) the matters decided in the award being out of scope of the arbitration agreement or beyond the authority of the arbitration institution.

It is noteworthy to highlight that "foreign-related award" does not mean foreign awards only. It also covers certain awards made by a domestic arbitration commission which involved a foreign element. [FN44] As Article 260(I) of the CCPL 1991 demonstrates, all the grounds for setting aside a foreign-related award deal with procedural issues and the court cannot review the substance of the arbitral award.

Obviously, the grounds set out in Article 260 of the Civil Procedure Law are significantly narrower than those governing domestic awards in Article 58 of the Arbitration Law, which is a reflection of the policy of minimizing interference with the merits of the award and *489 consistent with the growing international trend. Furthermore, notwithstanding the different grounds for setting aside between the domestic award regime and the foreign-related award regime, it shall be noted that the "social and public interest" ground in the second paragraph of Article 260 of the Civil Procedure Law, is expressly excluded by Article 70 of the Arbitration Law. [FN45]

II.C. Comparison

II.C.i. Lack of arbitration agreement

In accordance with Article 58(1) of the CAA 1994 and Article 260(I)(1) of the CCPL 1991, if the parties have not either included an arbitration clause in their contract or concluded a written arbitration agreement after the occurrence of the dispute, the award resulting from such arbitration will be set aside.

Rigid translation of "in writing". It should be noted that like the law of many other countries, the CAA 1994 requires that the arbitration agreement be "in writing". In Mainland China, however, the court will determine how to interpret the "written form", while in judicial practice, some courts have enforced too strict criteria for the "writing" requirement. To satisfy the rules set out in CIETAC [FN46] and CMAC, [FN47] the requirement has only been interpreted alongside limited exhaustive cases, e.g. by an exchange of letters, telexes and telegrams between the parties. [FN48] However, a tacit act or a mere participation in the arbitration proceedings by the parties does not itself satisfy the "writing" requirement under the Chinese law. [FN49] The narrow criteria for the interpretation of the rigid stipulation requiring the written form of the arbitration agreement have, in practice, become an undue limitation on the development of commercial arbitration. [FN50]

In the case *Hong Kong A Company (Hong Kong) v. Shengzhen B Company (Mainland China)* (the "Hong Kong" case), it involved a co-operation contract and a leasing contract. [FN51] The Hong Kong Company clearly stated in writing that the court had no jurisdiction over the disputes under the leasing contract and that they were to be settled by arbitration according to the arbitration clause in the co-operation agreement. This indicates that the parties, by invoking the arbitration clause in the co-operation contract, had reached an agreement in writing that the disputes under the leasing contract were to be settled through arbitration by CIETAC. However, the Shenzhen Intermediate People's Court was of the opinion that *490 the award must be set aside due to the fact that the parties only included the arbitration clause in the co-operation contract and did not include the arbitration clause in the leasing contract. [FN52]

However, in Hong Kong, the courts have respected the encompassing language of the Ordinance (Section 2AC) by looking into the intent of the parties and have declined to create judicial limitations through narrow textual interpretation. Hong Kong courts generally have held that the spirit of an agreement to arbitrate will prevail over technical limitations on the scope, accepting many different forms of communications in satisfaction of the writing requirement. [FN53]

Thus, Section 2AC, which excluded the definition of an "agreement in writing" in Article 7(2) of the Model Law with effect from 27 June 1997, lays down an exclusive set of circumstances in which an arbitration agreement in writing may come into being for the purposes of the Ordinance and the "in writing" requirement is broadly interpreted as to incorporate, for example, [FN54] the agreement made by an exchange of written communications; or the agreement, though not itself in writing, evidenced in writing; or the parties agreeing otherwise than in writing to terms that are in writing; [FN55] or the agreement made otherwise than in writing but recorded.

Furthermore, under the Model Law-influenced Section 2AC(3), the Hong Kong court will look not only at the words used but also at any other relevant considerations to support the existence of the "written" arbitration agreement, such as the background against which the contract was negotiated and the fact that the contract and the document which is sought to be incorporated were negotiated at arm's length. [FN56]

Mandatory designation of "arbitration commission". In the Mainland China jurisdiction, according to Articles 16 and 18, a valid arbitration agreement shall set forth the subject-matter for arbitration and designate an arbitration institution. An agreement which contains no or unclear provisions concerning the arbitration institution shall be void unless a supplement is made by the parties. [FN57]

This provision will inevitably lead to the following two results: first, it excludes ad hoc arbitration in China and only permits institutional arbitration; [FN58] and secondly, it denies the *491 validity of the arbitration agreement with no clear expression of arbitration institution. [FN59] Such mandatory designation is unique among standard international practice, which states that a court shall always help the parties realize their intention to resolve their disputes through arbitration. [FN60]

Many arbitration rules provide that the arbitration commission may rule on the existence of a valid arbitration agreement. However, it will not prevent a court forum subsequently setting aside an award on the ground that there was no arbitration agreement, [FN61] which, in effect, provides that the decision of a court on the validity of an arbitration agreement takes precedence over the decision of the arbitration commission on the validity of the same arbitration agreement.

To return to Hong Kong, for such "less pathological arbitration clauses or agreements", [FN62] the courts will only take the drastic step of severing an arbitration agreement from a contract where it is plainly impossible to make sense of or give effect to the arbitration clause. They will therefore try to uphold dispute resolution clauses so as to give effect to the parties' intention to opt out of the courts.

Hong Kong courts have shown themselves willing to recognize even awkwardly drafted arbitration clauses that refer to a non-existent arbitral institution and lack reference to a specific arbitral situs. [FN63] Thus, such arbitration clauses or agreements are nevertheless capable of being given effect, which include a reference to a non-existent arbitral body [FN64] and a reference to a misnamed arbitral authority. [FN65]

II.C.ii. Review on the merits of the award

In the setting-aside system of the Mainland, the above discussions make it clear that, with regard to the domestic regime, the court may review the merits of the award, either by invoking the forgery provision, the decisive evidence withholding provision, or the corruption provision of Article 58(I) or the public policy provision of Article 58(II) of the CAA 1994. Nonetheless, as far as a foreign-related award is concerned, as a rule, the court cannot extend its authority to the merits. Review by the court of the merits of the award is limited only to violations of the public policy reasons, as is rarely exercised by the court.

The grounds for setting aside a domestic award are prima facie quite different from those of foreign-related award. In an action for setting aside a domestic award, both the procedural *492 operation and the substantive matters may be subject to the heavy scrutiny of the competent court. [FN66] CAA 1994 employs a "separate track" for supervising domestic arbitration and foreign-related arbitration, while the principle of no review on the merits of the award is unanimously accepted in foreign-related awards. And some observers argue that this model is not in compliance with the usual arbitration practice. [FN67]

For the purpose of facilitating the healthy development of arbitration and the smooth enforcement of arbitral awards, the list of grounds for setting aside under Article 58 of the CAA 1994 and Article 260 of the CCPL should be deemed as exhaustive. Only if an award involves one or more listed statutory grounds can

the court rule to set aside the award. The court should not on its own motion find grounds other than those listed for setting aside an award.

On the contrary, in the Hong Kong jurisdiction, revision of facts and consequent merits of the award is strictly forbidden in the setting-aside system to preserve the principle of finality. To apply the grounds of an establishment to set aside an arbitral award, the courts in Hong Kong will only scrutinize matters relating to serious and deliberate errors in procedure, which would substantially affect the rights of the parties. In general, the court will approach the issue in line with the principle of minimal interference, [FN68] preferring remission to setting aside.

Compared with the obvious priority enjoyed by the foreign-related awards, which can surpass the revision on the merits by Chinese courts, the arbitration mechanism in Hong Kong does not run a "separate track" in the setting-aside system. The awards under both domestic and international regimes will only receive supervision over procedural defects, except for the reservation of public policy or social interest. [FN69] Section 23(1) of the Hong Kong Arbitration Ordinance expressly provides that the court shall not have jurisdiction to set aside or remit an award on arbitration agreement on the ground of errors of fact or more on the face of the award. If it is suggested that there has been an error of law, the proper procedure would be by way of an appeal, and not by application to remit or set aside the award. [FN70]

II.C.iii. Violation of due process

Violation of due process, as a traditional ground for setting aside or refusing to enforce an award, is adopted by most national arbitration laws and almost every international convention (the New York Convention 1958) and the UNCITRAL Model Law.

In the Hong Kong Arbitration Ordinance, for domestic awards, Section 25(2)(ii) employs the setting aside for "violation of due process" with the broadly supportive wording "the *493 arbitrator misconducted himself or the proceedings, or the award was improperly procured"; [FN71] as for international awards, Article 34(2)(a) of the Model Law clearly stipulates the situation that "the award may be set aside if the party making the application was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case". [FN72]

Under the Mainland arbitration mechanism, it is noteworthy that setting aside awards on procedural grounds is different in the two regimes. The procedural grounds for setting aside a foreign-related award are more clearly set out than those concerning domestic awards. Article 260 of the CCPL 1991 does not only provide that "the formation of the arbitration tribunal or the arbitration procedure is inconsistent with the arbitration rules" is a ground for setting aside an award, [FN73] but also provides that "the failure of the respondent to receive the notice of appointment of arbitrators or of commencement of arbitral proceedings or the inability of the respondent to present his case (for reasons not due to his own fault)" would be grounds for setting aside an award. [FN74]

For the domestic regime, Article 58(c) of the CAA 1994 provides for "the formation of the tribunal or the arbitration procedure was not in conformity with statutory procedure". The Hongshi case [FN75] involves the straightforward application of the arbitration rules. More complicated issues may arise when it comes to the application of the fundamental principle of equity and fairness. [FN76] Some commentators are of the view that the technical wording of Article 58 of the CAA 1994 makes "violation of due process" a ground for setting aside only available to foreign-related awards. [FN77] Needless to say, this ground should be equally applied to the setting aside of both regimes. [FN78]

Having said that, the Chinese courts have not adopted a uniform approach to the application of the principle of "due process" or "natural justice" in practice. At present, Chinese courts enjoy very wide discretion

in applying the notions of "due process" or "natural justice", all of which make the outcome of any challenge on the ground of procedural irregularity less predictable. [FN79]

***494** II.C.iv. "Public policy" concerns

In Mainland China, "public policy" carries a delicate and controversial definition, which refers to the concept of "social and public interest". The basic principle of "social and public interest" was first established by the General Principles of Civil Law, which provided that "where this Chapter provides for the application of the law of a foreign country or of international practice, this must not be contrary to the public interest of the People's Republic of China". [FN80]

"Social and public interest" in the Arbitration Law has remained a common criticism which outsiders lay against the Chinese courts that they sometimes try to review the merits of the award under the pretext of social and public interest. In practice, the principle of finality of arbitration in China is often undermined by the application of social and public policy. The Henan case [FN81] shows how a Chinese court applies the notion of "social and public interests" where the Court in this case equated the interests of a State-owned enterprise to "social and public interests".

On the other hand, the "public policy" is clearly defined as the "fundamental conceptions of morality and justice of Hong Kong". [FN82]

Except where the exclusive ground of "public policy" applies, Hong Kong courts are extremely reluctant and have applied the public policy ground sparingly. [FN83] The most obvious example in which the court will set aside an arbitral award due to public policy is where the award has been procured by fraud, criminal, oppressive or otherwise unconscionable behaviour. [FN84]

Bearing in mind that the "public policy" ground under Section 34 of the Arbitration Ordinance is, however, based on the exclusive grounds of "resisting enforcement" provided by Article V of the 1958 New York Convention, [FN85] abundant case laws from the Hong Kong courts decided under this instrument also provide a persuasive authority for the Mainland to learn from. Examples where Hong Kong courts have refused to enforce an award include:

(a) where one party was denied the opportunity to cross-examine experts appointed by the tribunal and to answer their evidence; [FN86]

***495** (b) where the tribunal exercised powers under governing arbitration rules to carry out its own investigations and did not notify the results of its enquiries to the parties, nor invite submissions thereon before making its award; [FN87] or

(c) where an award was improperly procured through unlawful and oppressive conduct by one party. [FN88]

III. Underlying reasons for the different approaches in the two jurisdictions

III.A. Legal system and judicial background

The Hong Kong legal system, based on the common law of the British legal system, is adversarial by nature. [FN89] The high respect of due process has been maintained even after the 1997 handover. The judicial function is to show justice through "fairness and impartiality". As a primary objective, the rule of law is conducted solemnly according to strict rules of procedure and evidence, with no parties condemned or their interests affected without being given notice and a right to be represented and to be heard. "Due process" is the ultimate virtue of the system.

In the field of arbitration, in respect of the recourse against arbitral awards, the court's supportive and

supervisory role is clearly expressed: provided the law is properly ascertained and applied according to due process, justice is done. The parties to a dispute may not be satisfied with the result, but they must be treated fairly. [FN90] Judges will only set aside the award, whether domestic or international, resulting from a defective arbitration proceeding. [FN91]

The legal system of the mainland, on the other hand, reflects the civil law tradition of France and Germany. The court proceeding is in an inquisitorial form, with judges taking an active part, which is known as "ex officio mechanism". [FN92] Consequently, the courts propel the judicial procedure more at their own initiatives that they take so active a role as to frequently intervene in the merits of the award, which is clearly shown by their approaching the arbitral awards through the setting-aside system. Moreover, this tradition is also strictly observed and further reflected in arbitral proceedings where arbitrators appear to be the commanding actors. In the Mainland arbitration, the CIETAC *496 Rules and the CMAC Rules [FN93] both provide that the arbitration tribunal may "undertake its own investigation and collect evidence", including site visit, inspection and expert reports adduced by the arbitrator himself. [FN94]

III.B. Legal culture and philosophy

In contrast to Hong Kong's legal culture, [FN95] the guiding principles of the Chinese legal culture are rooted in a "fact-finding" ideology. This is a fundamental principle of Chinese law and the determination of "the facts" must be based on the evidence.

Reflected in arbitration, it is stated that "Take facts as the basis, and the law as the criterion". [FN96] In practice, this principle is implemented by a devotion, in the first instance, to a minute examination of all of the evidence surrounding the dispute where the fact can be founded. Only after factual issues have been clarified will the arbitrators proceed to an analysis of the legal implications. [FN97] Thus, if the evidence on which the award is based is forged or the other party has withheld evidence sufficient to affect the impartiality of the arbitration, the facts cannot be ascertained properly and the laws cannot be correctly applied. Therefore, the outcome of the arbitration in question may be doubtful. [FN98] Arbitration conducted in such a manner does not ensure that justice has been done.

The court's attitude is no exception, with itself more actively involved in reviewing the merits of the awards rather than supervising the tribunal's due process when exercising its discretion to set aside a domestic arbitral award. Such a high degree of scrutiny is often quoted as too harsh a standard for the recourse against awards by some Chinese commentators. [FN99]

III.C. Arbitration environment

In Hong Kong, following the British legal culture, arbitration is highly respected as an effective dispute-resolution mechanism. The underlying policy from the court is to limit opportunities for judicial intervention, both during and after the reference, whether by way of support or supervisory. Clearly setting out as the objective and fundamental principle of the Ordinance, "[T]he court cannot interfere in the arbitration of a dispute unless as expressly provided by the Ordinance". [FN100]

Known as the international financial centre and embracing a bi-lingual and bi-cultural environment, the pre-arbitration environment is encouraged and arbitration practice *497 proves fairly effective. Meanwhile, the reception of the Model Law in Hong Kong not only modernizes the legislative framework for international commercial dispute resolution, but also advances Hong Kong (HKIAC [FN101] in particular) as a modern arbitration centre operating under internationally accepted rules and within a legal framework which accommodates many legal cultures. [FN102]

Furthermore, the inheritance of the common-law background requires the Hong Kong judges to have

been trained and experienced in law, including the arbitration legislation and its pertaining cases. The judicial personnel are of such a high quality, with profound understanding of international arbitration, that they cautiously exercise their judicial discretion in the interpretation of the Ordinance, reluctant to set aside awards unless specific grounds are satisfied.

Quite differently, like many other developing countries, local protectionism and corruption are two serious problems in China. In fact, they have constituted a serious impediment to the enforcement of arbitral awards [FN103] and caused some arbitral awards to be unduly set aside. The so-called nationalist or regionalist sentiment still lurks in some regional courts, which sympathizes with the national or local entities that most often appear before them seeking to set aside an award. [FN104]

Moreover, the "norm" that arbitration is just an alternative to judicial adjudication and the idea that the rapid development of arbitration will unfairly disadvantage the court's jurisdiction has fostered a hostile attitude and judicial antagonism towards arbitration. It remains a commonly held view that, in China, arbitrators are often more highly qualified than judges to deal with complicated commercial disputes. Eventually, excessive judicial interference with awards made by competent arbitral tribunals will undermine businesses' confidence in the efficacy and integrity of China's arbitration system.

Also, the relevant provisions regarding setting aside of awards are not under uniform judicial interpretation. In the Mainland, the Supreme People's Court interpretations, notices, circulars, etc. relating to arbitration also form a necessary part of the legal framework of the PRC arbitration. [FN105] Unfortunately, some of the judicial interpretations are inconsistent and even contradictory.

Disappointedly, in Mainland China, the lack of a basic knowledge among judicial personnel regarding arbitration and the standard practices of arbitration is a general phenomenon. Most of the local judges still have little understanding of the standards of *498 international arbitration. They do not know how the setting-aside system works, or what the generally accepted judicial interpretations of setting-aside provisions of courts from other states are. [FN106] It is absolutely necessary to strengthen the basic knowledge and practice of arbitration as well as the research of arbitration in theory and practice in Mainland China.

IV. Potential harmonization of the two jurisdictions

IV.A. Hong Kong experience for PRC potential reform

IV.A.i. Clear distinction between "legal misconduct" and "technical misconduct"

As mentioned above, for pursuit of a recourse against an award in the arbitration mechanism of Hong Kong, a clear distinction has been set out between "technical misconduct" (minor mistake of the award) and "legal misconduct" (substantial miscarriage of justice), which clearly distinguishes the ground for remitting an award from that of setting-aside.

Furthermore, abundant practices by the Hong Kong courts have laid down detailed guidelines for the respective scope of either recourse. [FN107] As a lesson to Mainland China, since the question of whether an award should be re-arbitrated or set aside for misconduct is entirely one at the discretion of the court, the People's courts at various levels shall exercise the scrutiny cautiously and remit for re-arbitration wherever possible, unless the award is hopelessly bad or the proceedings have in some way been seriously tainted.

IV.A.ii. Pro-validity attitude towards arbitration agreement

"Writing" requirements interpreted liberally. Pursuant to the specific wording of the CAA 1994 and the strict stipulation by CIETAC and CMAC rules, there have already been adverse commentaries against the ri-

(Cite as: 4 Chinese J. Int'l L. 481)

gid interpretation of the "in writing" requirement. [FN108] Compared with mainland arbitral practice, the Hong Kong Arbitration Ordinance (Cap. 341) embodies a broad list of situations. Section 2AC(4) "writing includes any means by which information can be recorded" even extends the interpretation to electronic means such as e-mail, where pro-arbitration attitude of the court is implied.

"Designation of arbitration commission" curable as less pathological. In a number of cases, i.e. Lucky Goldstar International (H.K.) Ltd. v. Ng Moo Kee Engineering Ltd., [FN109] Hong Kong courts have held that the reference to an unspecified country or a non-existent institution or a misnamed arbitral tribunal did not render the arbitration agreement null and void, and could still be saved as operative. For better commercial dispute resolution, as well as in accordance with international arbitration practice, courts in Mainland China shall also follow suit when determining the existence of the arbitration agreement.

*499 Therefore, the People's Courts shall look into the mutual intent of the parties and refrain from imposing judicial limitations through narrow textual interpretation. Judges should be made aware that the spirit of an agreement to arbitrate will prevail over technical limitations.

IV.A.iii. Restricting revision of merits of arbitration awards in setting-aside procedure

CAA 1994 runs a "separate track" for supervising domestic arbitration and foreign-related arbitration in that domestic awards shall be subject to substantive review by the People's court, apart from the procedural matters. It seems that foreign-related arbitration awards have, under the CAA 1994, been accorded with a special privilege, which is, as stated above, obviously embodied in the setting-aside system. Compared with foreign-related arbitration, provisions for setting aside a domestic award have been interpreted more narrowly and applied more strictly in practice.

What might be suggested is that after China's accession into the World Trade Organization, both regimes should be operated under internationally accepted rules and within a legal framework which accommodates various legal cultures. Thus, the Mainland arbitration mechanism should either unify between the two regimes the grounds of setting aside or adopt the "opt-in/opt-out" system in Hong Kong arbitration for more flexibility. [FN110]

IV.A.iv. Respecting due process in both regimes

From the Hong Kong perspective, the high respect for due process based on the common-law notion of justice being also a good tradition from which the Chinese legal system could borrow. While under the CAA 1994, it is quite strange why the "violation of due process" is not available to domestic arbitral award as a recourse ground, which is unique among modern arbitration practices.

To respect the due process in both two regimes, the grounds of setting-aside should be applied equally to both domestic and non-domestic arbitration. Therefore, Article 58(I) of the CAA 1994 could be amended with the provision "the party against whom the setting-aside is sought was not notified to appoint an arbitrator or to take part in the arbitration proceedings, or was unable to state his opinions due to reasons for which he is not responsible" (CCPL 1991, Section 260(I)(2)) added to accord with the international practice.

IV.B. Harmonization of domestic and non-domestic arbitration in both jurisdictions alongside the Model Law

Compared with the previous PRC arbitration legislation, the CAA 1994 did represent an improvement towards the accepted international practice in arbitration. The basic framework and procedure embraced are influenced by the UNCITRAL Model Law. But the overall assessment of the Arbitration Law will show that the law is too much influenced by local standards. [FN111] As discussed above, the CAA 1994 is short of

the universally accepted *500 notions, by setting out many practical obstacles to arbitration. An ideal proposal is to adopt the Model Law with some local modifications, such as appropriate provisions updating the "writing" requirement, deleting the power of substantive review of domestic awards, and adding "due process" as a ground for setting aside.

For Hong Kong, the complete incorporation of the UNCITRAL Model Law after its 1996 amendment is really a breakthrough for perfecting its arbitration system. Hong Kong is a leading arbitral centre in Asia, not only due to its progressive arbitration legislation, but also the skilled and supportive judiciary as well as the establishment of the Hong Kong International Arbitration Center (HKIAC). Though fairly advanced, it should be noted that special treatment is accorded to the international regime with less stringent procedural constraints and more limited judicial supervision and review. There are less exacting procedural constraints imposed by national legal systems and more limited grounds for judicial supervision and review. [FN112] Obviously, for better commercial dispute resolution, judicial support shall be rendered equally to the domestic arbitration where the harmonization of both regimes alongside the Model Law is at the top of the agenda.

The reform and modernization of national arbitration legislation, whether in Hong Kong or Mainland China, indicate the different phases in adopting the UNCITRAL Model Law. [FN113] In this respect, a diversity of legislative techniques could be used to reform and modernize legislation with regard to the different cultural and legal backgrounds of the two jurisdictions, whilst both shall strive to create smooth harmonization of the two regimes.

Above all, through harmonization of both domestic and non-domestic regimes in the two jurisdictions, considering the special relationship between Hong Kong and the Mainland, a perfect arbitration environment will be created with combined efforts of both sides.

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[FN1]. Hong Kong Arbitration Ordinance (Cap. 341), amended in 1996 and with effect from 27 June 1997; Section 34C stipulates "Application of UNCITRAL Model Law".

[FN2]. UNCITRAL Model Law on International Commercial Arbitration, adopted by UN Commission on International Trade Law on 21 June 1985.

[FN3]. For an introduction to the Chinese arbitration system, see Guiguo Wang, The Unification of the Dispute Resolution System in China: Cultural, Economic and Legal Contributions, 13(2) J Int'l Arb. (1996), 2, 5-43.

[FN4]. CAA 1994, Chapter VII, entitled Special Provisions for Foreign-related Awards.

[FN5]. See, e.g. Hong Kong Arbitration Ordinance, Section 23; CAA 1994, Art. 58.

[FN6]. Hong Kong Arbitration Ordinance, Section 24.

[FN7]. CAA 1994, Art. 61 introduces the "re-arbitration" system in China.

[FN8]. For details, see Hong Kong Arbitration Ordinance, Section 24 (Cap. 341).

[FN9]. See discussion below.

[FN10]. See discussion below.

[FN11]. Though a party may, in the first instance, request an award as to the costs by virtue of the Ordinance, Section 2GJ(4).

[FN12]. *Fox v. PG Wellfair Ltd*, 2 Lloyd's Rep. (1981), 514, 531, per Dunn LJ (Court of Appeal, England).

[FN13]. "Technical misconduct" is described by Mustill and Boyd as "misconduct arising from a misconception on the arbitrator's part as to how the arbitration should be conducted", rather than a "legal misconduct" of more serious consequences.

[FN14]. As one of the conditions for remission that the tribunal is the final arbitrator of fact, errors of fact cannot be reviewed. Errors of law are reviewable only by virtue of an appeal under the Ordinance, Section 23.

[FN15]. For details, see CAA 1994, Art. 61.

[FN16]. I.e. England and Hong Kong.

[FN17]. UNCITRAL Model Law on International Commercial Arbitration, Art. 34(4).

[FN18]. For a detailed analysis, see Dr John Shijian Mo, *Arbitration Law In China* (2001), Sweet and Maxwell Asia, 371, para. 10.04.

[FN19]. Remission is otherwise recognized in Hong Kong as an independent means of recourse against awards.

[FN20]. CCPL 1991, Art. 260(I)(2).

[FN21]. CAA 1994, Art. 58(I)(3) and CCPL 1991, Art. 260(I)(3).

[FN22]. See Chen Jian, *On Re-arbitrability*, 2 Int'l Com. L. Rev. (8/2000), 477-8.

[FN23]. See Seventh UNCITRAL Secretariat Note (25 March 1985), reprinted in Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the Uncitral Mode Law* (1989), 967, para. 13.

[FN24]. Hong Kong's approach comes from the English Arbitration Act 1996, when dealing with remission in case of appeal on question of law, contains the provision that the remission to the arbitrators is accompanied by the court's opinion. See English Arbitration Act 1996, Section 69(7)(c).

[FN25]. A useful discussion of the development of the law relating to remission of awards based on allegations of procedural mishap or technical misconduct is to be found in *A-G v. Shimizu Corp.* 2 HKC (1996), 412, 421E-425E.

[FN26]. The UK Arbitration Act 1996, when dealing with remission in case of appeal on a question of law, contains the provision that the remission to the arbitrators is accompanied by the court's opinion; see the UK Arbitration Act 1996, Section 69(7)(c).

[FN27]. For more details, see Dr John Shijian Mo, *Arbitration Law in China*, above n.18, 371.

[FN28]. Ordinance, Section 25(2).

[FN29]. Above n.12.

[FN30]. *Williams v. Wallis and Cox*, 2 KB (1914), 478. A more modern description is "irregularity in procedure": *London Export Corp Ltd v. Jubilee Coffee Roasting Co Ltd*, 1 WLR (1958), 271, 277, per Diplock J at first instance. The most updated interpretation is "whether there are grounds upon which a reasonable person would think that there was a real likelihood that the arbitrator could not, or would not, fairly determine the issue in question on the evidence and arguments made before him"; see *Modern Engineering v. Miskin*, 1 Lloyd's Rep. (1981), 135; and *The Elissar*, 2 Lloyd's Rep. (1984), 84.

[FN31]. Above n.13.

[FN32]. Judicial capacity, probity and the ability to act fairly are fundamental requirements of justice. For a detailed discussion of examples illustrating failure to comply with the above requirements through judicial irregularities, see Katherine Lynch, *Hong Kong Arbitration Law/Topic 9: The Role of the Courts*, Course Outline, 13-15 (www.hku.hk:8400/law/).

[FN33]. See, e.g. *Town and City Properties (Development) Ltd v. Wiltshier southern Ltd*, 44 BLR (1988).

[FN34]. *Miller's Timber Trust Co v. Plywood Factory Julius Potempa*, 63 LI L. Rep. (1939), 184.

[FN35]. *Kailay Engineering Co (HK) Ltd v. Farrance* 2 HKC (1999), 765 (Court of Appeal).

[FN36]. See Model Law, Art. 34(2)(a).

[FN37]. See Model Law, Art. 34(2)(b).

[FN38]. *Guangdong Overseas Shenzhen Co Ltd v. Yao Shun Group International Ltd*, Court of First Instance (Findlay J), 16 February 1998, published in English: 13(3) International Arbitration Report H-1 (March 1998).

[FN39]. This also accords with the pro-arbitration attitude of the Hong Kong Arbitration Ordinance. The Ordinance expressly restricts the court's role by providing that it "should interfere in the arbitration of a dispute only as expressly provided by this Ordinance" (emphasis added). See Hong Kong Arbitration Ordinance, Section 2AA(2)(b).

[FN40]. See CAA 1994, Art. 58, para. 2.

[FN41]. *Hongshi Foundation Development Company of Beijing v. Wantong New World Commercial Center Company Ltd.* (www.bjac.org.cn).

[FN42]. The competent court for setting aside foreign-related arbitral award is the Intermediate People's Court in the place where the relevant arbitration commission is located; see CAA 1994, Art. 58.

[FN43]. See CCPL 1991, Art. 260(1).

[FN44]. Opinion 1992, Art. 304 (on 14 July 1992, the Supreme People's Court issued the Opinions relating to Several Issues Arising from the Application of the CCPL 1991).

[FN45]. See Li Hu, *PRC Arbitration: Setting Aside Awards*, *American Review of International Arbitration* (2001), 12, 6-8.

[FN46]. China International Economic and Trade Arbitration Commission (CIETAC).

[FN47]. China Maritime Arbitration Commission (CMAC).

[FN48]. For a detailed discussion, see Cheng Dejun, Michael J. Moser and Wang Shengchang, *International Arbitration in the PRC, Commentary, Cases and Materials* (1995), Butterworths, 28-30.

[FN49]. See Wang Shengchang, *Resolving Disputes through Arbitration in Mainland China* (1st edition, 2003), Law Press, 260.

[FN50]. See CIETAC Shenzhen Sub-commission's Award ((1997) shenguozhongjiezi No.07) and Shenzhen Intermediate People's Court's Civil Decision ((1997) shenzhongfajing'erchuzi No.19).

[FN51]. See CIETAC Shenzhen Sub-commission's Award ((1997) shenguozhongjiezi No. 07).

[FN52]. See Shenzhen Intermediate Peoples's Court's Civil Decision ((1997) shenzhongfajing'erchuzi No. 19).

[FN53]. Alvarez, Kaplan and Rivkin: *Model Law Decisions: Cases Applying the UNCITRAL Model Law on International Commercial Arbitration* (1985-2001) (2001), Kluwer Law International, 48-53/Hong Kong cases.

[FN54]. Ordinance, Section 2AC(2)(a)-(f).

[FN55]. *Zambia Steel and Building Supplies Ltd v. James Clark & Barton Ltd*, 2 Lloyd's Rep. (1986), 225 (CA, England).

[FN56]. See *Astel-Peiniger Joint Venture v. Argos Engineering and Heavy Industries Co Ltd*, 3 HKC (1994), 328, which was followed in *Hercules Data Comm Co Ltd v. Koywa Communications Ltd* (unreported, A4627/2000, 23 October 2000, Court of First Instance).

[FN57]. For details, see CAA 1994, Arts 16 and 18. See also *Arbitration Laws of China*, edited by Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, Sweet and Maxwell 1997.

[FN58]. See Art. 27 of SPC Foreign-related Draft Provisions (The Supreme People's Court Draft Provision Regarding the Handling of the People's Courts of Cases Involving Foreign-related Arbitrations and Foreign Arbitrations, issued on 31 December 2003 and open for public comment until 20 February): "An arbitration agreement between the parties that provides for ad hoc arbitration shall be invalid, except where the relevant parties are all nationals of countries that are members of the 1958 New York Convention and the laws of such countries do not prohibit ad hoc arbitration."

[FN59]. See Supreme People's Court Legal Letter No. 36 (1997), 19 March 1997.

[FN60]. See Clive M. Schmitthoff, *Clive M. Schmitthoff's Select Essays on International Trade Law* (1993), 626.

[FN61]. See CAA 1994, Art. 20.

[FN62]. See B. G. Davis, *Pathological Clauses: Frederic Eisemann's Still Vital Criteria*, 7 Arb Int'l (1991), 365.

[FN63]. Craig, Park and Paulsson, *ICC Arbitration* (3rd edition, 2001). Oceana Publications, Inc., 568/Hong Kong Law.

[FN64]. See *Lucky Goldstar International (HK) Ltd v. Ng Moo Kee Engineering Ltd.*, 2 HKLR (1993), 73, reported in abstract form in XX Yearbook 280 (1995) and 1994 Arb. & Disp. Res. J. 49 (March 1994).

[FN65]. See, e.g. *Chung Siu Hong v. Primequine Corp Ltd* (unreported, A10332/1999, 28 September 1999, Court of First Instance).

[FN66]. Wang Shengchang, *Arbitration Law under China's Accession to WTO*, *J. China Law* (August 2002), 73. See also the *Hongshi* case, above n.41.

[FN67]. See Chen An, *On the Supervision Mechanism of Chinese Arbitration Involving Foreign Elements and its Tallying with International Practices*, 14(3) *J. Int'l Arb.* (1997), 39-78.

[FN68]. See *Hong Kong Arbitration Ordinance*, Section 2AA(2)(b).

[FN69]. Above n.37.

[FN70]. There is a procedure of making an appeal to the Court of First Instance on any question of law arising out of an award made on an arbitration agreement; see *Hong Kong Arbitration Ordinance*, Section 23(2).

[FN71]. Above n.27.

[FN72]. Above n.35.

[FN73]. *Hai Zhong Bao Marine Product Trading Ltd. Co. (HZB) v. Hong Kong Tong Heng (Asia) Ltd. Co. (TH)*; see *China Private International Law and Comparative Law Journal* (1998), Law Press, 351-3.

[FN74]. See *Yue Shang Development Ltd. Co. Applies for Setting Aside An Award Rendered by CIETAC*, Supreme People's Court China Law Research Institute, *Laws and Regulations of China*, China Information Center 1998.

[FN75]. Above n.40.

[FN76]. Equity and fairness throughout the arbitral proceedings as a fundamental principle are reflected in the requirements imposed by the CAA 1994; see CAA 1994, Arts 21-57.

[FN77]. See Li Hu, *PRC Arbitration: Setting Aside Awards*, above n.44, 41: "In omitting this important ground, CAA 1994 may be criticized to have an obvious defect in its provisions concerning setting aside domestic awards."

[FN78]. It should be noted that violation of due process is also not adopted as the ground for refusing enforcement of the domestic award under the CAA 1994.

[FN79]. *Beichen Restaurant of Beijing v. Chongxi Cultural and Real Estate Development Company of Beijing*, determined by the No.2 Intermediate People's Court of Beijing; see the Beijing Arbitration Commission's website at [http:// www.bjac.org.cn](http://www.bjac.org.cn).

[FN80]. See General Principle of Civil Law of the PRC, Art. 150, which came into effect in 1987.

[FN81]. *Henan Garment Import and Export (Group) Company v. Kaifeng Dongfeng Garment Factory*, unreported; see Soong Hang, *The Enforcement of Foreign-related Awards in China: Issues in Practice*, Vol. 2, *China Private International Law and Comparative Law Journal* (1999), Law Press, 370.

[FN82]. *Hebei Import and Export Corp. v. Polytek Engineering Co. Ltd.*, 1 HKLRD (1999), 665, 689, per Sir Anthony Mason NP].

(Cite as: 4 Chinese J. Int'l L. 481)

[FN83]. For example, to deal with any conceivable type of procedural error by the arbitral tribunal; see *Werner A Bock KG v. N's Co. Ltd.*, HKLR (1978), 281; *Qinhuangdao Tongda Enterprise Development Co. v. Millions Basic Co. Ltd.*, 1 HKLR (1993), 173.

[FN84]. *JJ Agro Industries (P) Ltd. (a firm) v. Texuna International Ltd.*, 2 HKLR (1992), 402.

[FN85]. New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958, Art. V "grounds for resisting enforcement" are replicated in Section 44(2) of the Ordinance.

[FN86]. *Paklito Investment Ltd. v. Klockner East Asia*, 2 HKLR (1993), 39.

[FN87]. *China Nanhai Oil Joint Service Corp. Shenzhen Branch v. Gee Tai Holdings Co. Ltd.*, 2 HKLR (1995), 215; 3 HKC (1994), 375.

[FN88]. *JJ Agro Industries (P) Ltd. (a firm) v. Texuna International Ltd.*, above n.83.

[FN89]. For a brief discussion of the Hong Kong legal system, see Peter Wesley-Smith: *An Introduction to the Hong Kong Legal System* (3rd edition, 1998), Oxford University Press.

[FN90]. *Ibid.*, Chapter 1: Introduction/Law and Justice.

[FN91]. Above n.37.

[FN92]. For a detailed discussion, see Shen Zongling: *Main Differences between the Mainland and Hong Kong Legal Systems*, in: Wei Zhenying and Wang Guiguo, *Comparative Legal Research between Chinese Mainland and the Hong Kong Special Administrative Region (Zhong Guo Nei Di Yu Xiang Gang Di Qu Fa Lv Bi Jiao Yan Jiu)* (1998), Peking University Press.

[FN93]. Above n.45. Rule 26; above n.46, Rule 27.

[FN94]. The 1994 CIETAC Rules introduced new provisions regarding evidence, set out in Arts 38-41. In a departure from previous practice, these provisions now require that any expert's report or appraiser's report commissioned by the tribunal be provided to the parties "so that they may have the opportunity to give their opinions".

[FN95]. Above n. 89.

[FN96]. See CAA 1994, Art. 7.

[FN97]. Above n. 44, 52.

[FN98]. See CAA 1994, Art. 58(4) and (5).

[FN99]. Above n. 66, 73.

[FN100]. See Ordinance, Section 2AA(2)(b).

[FN101]. Hong Kong International Arbitration Center (HKIAC) is the main arbitration institution in Hong Kong.

[FN102]. Ordinance, Sections 2L and 2M provide an "opt-in/opt-out" system for more flexibility of the party-autonomy to adapt to either regimes, while broadening or limiting the powers of the court to intervene in the arbitration process, whether domestic or international.

[FN103]. For more details in this respect, see Li Hu, Enforcement of the International Commercial Arbitration Award in the People's Republic of China, 14(4) J. Int'l Arb. (1999), 4, 18-19, 22-24.

[FN104]. Notably, efforts have been taken by the Chinese judicial authorities to offset the negative effect of the local protectionism rooted in the courts. Alongside the issuance of Notice 40/1998 by the Supreme People's Court, the pre-reporting system had been established which requires a higher court's approval before a foreign-related award can be set aside.

[FN105]. Above n.3.

[FN106]. Above n.44, 42.

[FN107]. Fox v. PG Wellfair Ltd., above n.12; Guangdong Overseas Shenzhen Co. Ltd. v. Yao Shun Group International Ltd., published in 13(3) International Arbitration Report H-1 (March 1998).

[FN108]. Above nn.48 and 49.

[FN109]. Above n.63.

[FN110]. Above n.101.

[FN111]. Above n.65, 73: Issue 1, Whether or Not China Should Adopt the UNCITRAL Model Law?

[FN112]. See W. Laurence Craig, [Some Trends and Developments in the Law and Practice of International Commercial Arbitration](#), 30 Tex. Int'l LJ 1 (1995), 37.

[FN113]. Katherine Lynch. The Forces of Economic Globalization: Challenges to the Regimes of International Commercial Arbitration (2003), Kluwer International, 269-73.

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