

# ARBITRATION ASIA 21

## CURRENT TRENDS AND PRACTICES

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### CHANGES AND DEVELOPMENTS IN THE LAW : HONG KONG

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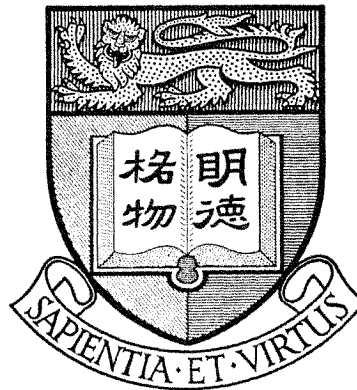
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## CHANGES AND DEVELOPMENTS IN THE LAW : HONG KONG<sup>1</sup>

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### Introduction

The arbitration landscape in Hong Kong underwent radical change on 6 April 1990, when the territory adopted the UNCITRAL Model Law on International Commercial Arbitration as its international arbitration law<sup>2</sup>. Hitherto, under the Arbitration Ordinance (Cap 341)<sup>3</sup>, which had originally been passed in 1963, Hong Kong had had a unitary system of arbitration law which was based on the now-repealed English Arbitration Acts 1950-1979. Henceforth, there would be a bifurcated system, with the old provisions continuing to apply to domestic arbitrations<sup>4</sup>, and the Model Law, together with a number of 'add on' provisions, applying to international arbitrations conducted in Hong Kong<sup>5</sup>. In addition, a number of provisions of common application to the domestic and international régimes<sup>6</sup> were added to the principal Ordinance, both in 1990 and in 1997.

The impetus to adopt the Model Law was the desire to promote Hong Kong as a major regional and international arbitration venue, an aim that came to fruition in 1985 with the opening of Hong Kong International Arbitration Centre<sup>7</sup>. Coincidentally, this was also the year of adoption of the Model Law by the United Nations.

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<sup>1</sup> This paper is based on a lecture by the author, 'Shaking Off the Colonial Legacy: An Arbitration Law for the Twenty-First Century', in F Chan & R Wu (Eds), *Law Lectures for Practitioners 2000* (2000, Hong Kong Law Journal Ltd) at pp 126-162. The principal paper will also be published shortly in *International Arbitration Law Review* and Mealey's *International Arbitration Report*.

<sup>2</sup> Hereinafter 'the Model Law'.

<sup>3</sup> Hereinafter 'the Ordinance' or 'the principal Ordinance'.

<sup>4</sup> Part II of the Ordinance.

<sup>5</sup> Part IIA of and the Fifth Schedule to the Ordinance. In this paper, references to the Model Law should also be read as references to the Fifth Schedule, which sets out the text of the Model Law.

<sup>6</sup> Which may be found in Parts I and IA of the Ordinance and also in the initial provisions of Part II.

<sup>7</sup> Hereinafter 'HKIAC'.

This paper examines briefly the operation of the Model Law in Hong Kong and its influence on further arbitration law reform initiatives, both during the 1990s and currently. It also discusses the enforcement in Hong Kong of foreign awards, Mainland Chinese awards and Taiwanese awards.

### **The importance of the Model Law to international arbitration in Hong Kong**

Hong Kong was fortunate, by virtue of its geographical location, its importance as an *entrepôt* and as a financial centre and its arbitration-friendly judiciary, to be able to take advantage of what has been described as a "veritable explosion in arbitral activity"<sup>8</sup> that has accompanied the huge increase in trade between Asia and the rest of the world, intra-Asian trade and intra-Chinese trade. The Model Law, for its own part, has been critical to the development and the success of Hong Kong as an arbitration centre. Its adoption goes some way towards explaining the upward trend in cases handled by HKIAC since its establishment<sup>9</sup>.

In addition to the facilities that users would normally expect from an established arbitration centre, the application in the territory of an internationally accepted arbitration law is clearly an attraction. The Model Law is compromise between common law and civil law traditions in arbitration, which is significant in a region which, as in other parts of the world, contains jurisdictions based on both traditions. It is also philosophically based on the tried and tested principles of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and Hong Kong courts and arbitral tribunals are enjoined by the Ordinance to have regard to such international origins of the Model Law in interpreting and applying it<sup>10</sup>. The description 'Model Law jurisdiction' is therefore more than a matter of mere nomenclature.

The Model Law has fitted well within the infrastructures of law, arbitration and the courts that preceded its adoption in Hong Kong. It emphasises the principles of party autonomy, primacy of authority of the arbitral tribunal and the back seat rôle of the courts in a way which, whilst present in the Arbitration Ordinance as originally

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<sup>8</sup> N Kaplan, 'New Developments in the Hong Kong Law of Arbitration', in R Glofcheski (Ed), *Law Lectures for Practitioners 1994* (1994, Hong Kong Law Journal Ltd), pp 58-85 at 58.

<sup>9</sup> Cases referred to Hong Kong International Arbitration Centre 1985-1998:

<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999</u>
9	20	43	24	45	54	94	185	139	150	184	187	218	240	257

Source : HKIAC

<sup>10</sup> Section 2(3).

enacted, were somewhat understated or archaically expressed. Furthermore, despite some initial reservations, users and practitioners have encountered no untoward difficulties in working within a system of dual arbitration laws. This has been due in part to clear statements from the courts as to the application of the Model Law<sup>11</sup>, the existence of the 'opting out' provisions of the Ordinance<sup>12</sup> and judicial guidance on the manner<sup>13</sup> and timing<sup>14</sup> of the opting out exercise.

### **The scope of application of the Model Law**

In Hong Kong, the Model Law applies to any type of arbitrable dispute. It is not limited to commercial arbitrations - thus avoiding much sterile argument on the preliminary issue of what exactly is 'commercial' and therefore whether the Model Law applies at all to a particular reference<sup>15</sup>.

Many cases which would, prior to 6 April 1990, have been domestic arbitrations are now international arbitrations. Article 1(3) defines when an arbitration is international. The provisions of article 1(1)(a), (b)(i) and (c) are cases in which one would normally expect a dispute to be international. The most significant wording is, however, in article 1(3)(b)(ii), which makes arbitrations between Hong Kong enterprises international if a 'substantial' part of the parties' obligations, such as delivery of goods, falls to be performed outside of Hong Kong. This is so notwithstanding the preponderance of other indicia connecting the parties and/or the transaction to Hong Kong<sup>16</sup>.

### **Opting out of the Model Law**

Parties to Hong Kong arbitrations may, however, opt out of one régime and into the other by virtue of sections 2L and 2M of the Ordinance. Thus -

- (i) parties to a domestic arbitration agreement may agree in writing, but only after

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<sup>11</sup> *Fung Sang Trading Ltd v Kai Sun Sea Products and Food Co Ltd* [1992] 1 HKLR 40; *Ananda Non-Ferrous Metals Ltd v China Resources Metal and Minerals Co Ltd* [1993] 2 HKLR 331, affirmed [1994] 1 HKC 204 (Court of Appeal).

<sup>12</sup> Sections 2L and 2M.

<sup>13</sup> *SOL International Ltd v Guangzhou Dong-jun Real Estate Interest Co Ltd* [1998] 3 HKC 493.

<sup>14</sup> See the *Ananda Non-Ferrous Metals* case (note 13 above).

<sup>15</sup> Section 34C(2), which excludes statutory note \*\* to art 1(1) of the Model Law.

<sup>16</sup> *Fung Sang Trading Ltd v Kai Sun Sea Products and Food Co Ltd* [1992] 1 HKLR 40.

a dispute has arisen, that Part IIA of the Ordinance should govern the arbitration<sup>17</sup>, and

- (ii) parties to an international arbitration agreement may agree in writing at any time that Part II of the Ordinance should govern the arbitration<sup>18</sup>.

These provisions are a meeting point between party autonomy and judicial policy aimed at limiting court intervention in arbitration in both domestic and international cases. Sections 2L and 2M of the Ordinance enable parties either to maximise or to limit court intervention in the arbitration process, at their election. This is particularly significant for parties to what would otherwise be an international arbitration who want to have a right of appeal against the award. The courts have, however, made clear that in the absence of timeous election, they will not entertain at the post-award stage any argument as to whether the arbitration was in fact domestic or international<sup>19</sup>.

In making such an election, parties must unequivocally choose one régime or the other by following the statutory requirements precisely. A recent decision of the Court of Appeal demonstrates that the only safe way of doing this is to word the 'opt out' agreement in the same terms as the statute, because choosing the applicable procedural rules is *not* the same as choosing the applicable procedural law. Great care is therefore required in drafting 'opt out' clauses<sup>20</sup>.

### Criticisms of the Model Law in practice

For the most part, the Model Law has worked overwhelmingly well in practice in Hong Kong. As previously stated, it has, despite some differences and subtleties of approach stemming from its civil law origins, been well received and has accommodated the needs and practices of common law practitioners. A complete review is beyond the

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<sup>17</sup> Section 2L of the Ordinance. The timing requirement was recommended in the Law Reform Commission of Hong Kong's *Report on the Adoption of the UNCITRAL Model Law of Arbitration* (1987) to protect weaker parties to domestic arbitration agreements from having the less protective international régime imposed upon them by stronger parties: see para 5.6.

<sup>18</sup> *Ibid*, s 2M.

<sup>19</sup> *Ananda Non-Ferrous Metals Ltd v China Resources Metal and Minerals Co Ltd* [1993] 2 HKLR 331, affirmed [1994] 1 HKC 204 (Court of Appeal). An agreement under s 2M may be made at any time, whether or not a dispute has arisen. The parties must, however, be clear as to the applicable procedural régime once the arbitration gets under way, *viz* no later than the preliminary meeting.

<sup>20</sup> Practitioners should note HKIAC's specimen 'opting out of Model Law' clause, which substantially meets the requirements expressed in the *SOL International* case and has in fact been in existence since 1990. See HKIAC, *Hong Kong Dispute Solutions*, (1998 Ed) p 14.

scope of this paper. Ample material on this subject is published elsewhere<sup>21</sup>.

Despite its popularity, the Model Law did not escape some degree of censure. A small number of criticisms, and a larger number gaps in the scope of the Model Law, led to further reform of Hong Kong's arbitration law within a remarkably short time. In January 1992 the then Attorney General of Hong Kong invited HKIAC to establish a Committee on Arbitration Law<sup>22</sup> to consider the desirability of further reform of the Arbitration Ordinance. This was actually before any of the criticisms of the Model Law had manifested themselves; a large part of the impetus for reform was in fact a desire to modernise Hong Kong's domestic arbitration law. Although the domestic law and the law reform process generally are subjects beyond the scope of this paper<sup>23</sup>, it should be said that one of the results of the law reform process of 1992-1996 would be the enactment of further - and critically important - provisions of common application which would impact upon the operation of the Model Law. These provisions were added to the principal Ordinance by the Arbitration (Amendment) Ordinance 1996<sup>24</sup> with effect from 27 June 1997.

The following is a summary of the criticisms made of and gaps identified in the Model Law by the HKIAC Committee.

#### *Agreements in writing*

From an early stage, practitioners and commentators expressed the view that the definition of 'agreement in writing' in article 7(2) of the Model Law was prone to cause difficulty and did not match modern commercial realities in the sense that it ignored

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<sup>21</sup> See Kaplan, *op cit* (note 10 above). See also N Kaplan, *A Model for Arbitration*, 'The New Gazette', February 1996, pp 42-47; N Kaplan, *A good Model Law?*, 'The New Gazette', January 1995, pp 41-42; N Kaplan, *Just how successful is the Model Law?*, 'The New Gazette', December 1994, pp 40-43; N Kaplan, *The Model Law in Hong Kong: Two Years On* (1992) 8 Arb Int'l 223-236; R Morgan *Hong Kong Arbitration: A Decade of Progress - But Where to Next?*, 'Hong Kong Lawyer', October 1999, pp 65-75 (English text) and 76-82 (Chinese text).

<sup>22</sup> Hereinafter 'the HKIAC Committee'.

<sup>23</sup> Although the domestic provisions are of relevance to parties who choose to opt into them: see s 2M of the Ordinance. For discussion of the arbitration law reform process of 1992-1996, including criticisms of the pre-1997 domestic provisions, see Morgan, *op cit* (note 1 above) at 137-141; R Morgan, *The English Arbitration Act 1996 and Reform of Arbitration Law in Hong Kong and Singapore: A Brave New World?* (1997) 63(2) JCI Arb (Supp) 55-66 at 62-65.

<sup>24</sup> Ordinance No 75 of 1996, hereinafter 'the 1996 Ordinance'. This Ordinance resulted from the *Report of the Committee on Arbitration Law*, which was published in April 1996, and public consultation on its recommendations by the then Attorney General's Chambers.

a number of business practices and usages<sup>25</sup>. There were two strands to the criticism of the Model Law in this regard.

Firstly, article 7(2), insofar as it concerned arbitration agreements contained in single documents, contained a strict requirement of signature. All too often this requirement was not complied with, for example where one party required the other to sign and return a copy of the former's terms and conditions of business, including an arbitration clause, but nevertheless proceeded to do business in the absence of a duly signed and returned copy. Although the arbitration agreement may have been in writing, the lack of a signature in these circumstances was fatal<sup>26</sup>. One leading commentator criticised the absurdity of requiring a degree of proof of the arbitration agreement which was higher than that applicable to the basic contractual provisions<sup>27</sup>.

Secondly, article 7(2) of the Model Law also did not recognise a number of other commonly used methods of concluding arbitration agreements, which methods either did not customarily require signature, or were partly oral in nature, or resulted from conduct. These included:

- (i) contractual documents such as bills of lading and shipbrokers' notes;
- (ii) oral acceptance of a written contract containing an arbitration clause (such as a Lloyd's Open Form salvage agreement);
- (iii) oral incorporation of a written arbitration agreement contained in a document other than the principal contractual document<sup>28</sup>, and
- (iv) arbitration agreements arising out of a course of dealing<sup>29</sup>.

### *Number of arbitrators*

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<sup>25</sup> For example, N Kaplan, *Is the Need for Writing as expressed in the New York Convention and the Model Law out of step with Commercial Practice?* (1996) 5 APLR 1, 1-23. See also N Kaplan, *The Essentials of Any New Arbitration Law* (1997) 5 APLR 2, 1-13.

✓ <sup>26</sup> See *H Smal Ltd v Goldroyce Garment Ltd* [1994] 2 HKC 526.

<sup>27</sup> Kaplan (note 32, 1997 article) at p 7.

<sup>28</sup> Cf *Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd* [1986] 2 Lloyd's Rep 225 (Court of Appeal, England), a case decided under the more open-ended wording of the now-repealed English Arbitration Act 1950 s 32. The pre-6 April 1990 definition of 'arbitration agreement' in s 2(1) of the Ordinance was based on this.

<sup>29</sup> See *H Smal Ltd v Goldroyce Garment Ltd* [1994] 2 HKC 526.



International arbitral tribunals traditionally comprise three arbitrators, one appointed by each party, the two so appointed appointing a third. In most cases this system works well, reassuring each party of the system's independence because it is not dominated by an arbitrator of his opponent's nationality. This practice can, however, be procedurally and organisationally over-elaborate, time-consuming and therefore expensive where the claim is small or medium in range, such as in many shipping cases. A weaker party could be deterred from prosecuting or defending its case for fear of the costs being out of all proportion to the amount at stake.

#### *Default appointments of arbitrators by the court*

The former High Court had the ultimate statutory jurisdiction to make default appointments of arbitrators in international cases where the parties had failed to agree contractual appointment machinery or where such machinery had broken down, whether because a party failed to co-operate or a contractually agreed appointing authority failed to make a default appointment.

Unlike the previously identified criticisms, however, the problems which arose in default appointment cases stemmed not from any perceived deficiency in the Model Law but simply from the designation of the court under article 6 of the Model Law to perform the functions required by article 11<sup>30</sup> and the requirements of the then Rules of the Supreme Court. These problems were threefold: (i) the time taken to get an appointment from the court; (ii) the lack of familiarity of some judges with appropriate appointees, and (iii) the need to serve the application and the court's order out of the jurisdiction, with all the time, money and overseas bureaucracy that could entail.

#### *Gaps in the coverage of the Model Law*

The HKIAC Committee identified a number of gaps which in its view should be addressed, in particular -

- (i) enlargement of time for commencing arbitration proceedings;
- (ii) lack of definition of the powers of the tribunal to order interim measures of protection<sup>31</sup>;

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<sup>30</sup> Under the pre-27 June 1997 version of s 34C(3) of the Ordinance.

<sup>31</sup> Cf article 17 of the Model Law.

- (iii) lack of definition of the powers of the court to order interim measures of protection and to make evidentiary orders<sup>32</sup>;
- (iv) dismissal of claims for want of prosecution, and
- (v) immunity of arbitrators and arbitral appointing authorities.

Identifying these gaps, however, amounted less to a criticism than to the recognition that they were a function of how the Model Law came into being. These gaps were not unintentional but deliberate; the drafters of the Model Law had never attempted to produce a model which could address every aspect of the arbitration process and had no intention of doing so. In common with national arbitration statutes the world over, the Model Law did not purport to be a complete code of arbitration law. In any event, the diverse and very different legal cultures represented in UNCITRAL's councils guaranteed that the Model Law would be a compromise text, a *lex specialis* which would leave any subject not covered by it to be dealt with by the procedural law of the place of arbitration.

### **The amending Ordinance of 1996**

As has been already stated, the 1996 Ordinance was driven at least as much by the desire to improve domestic arbitration law and to reharmonise the dual arbitration régimes as to bring about improvements to the Model Law. In addition to addressing the criticisms and gaps identified above, therefore, the purposes of this Ordinance may be summarised as follows:

- (i) to state the overriding objective and governing principles of the principal Ordinance to be observed by parties, arbitral tribunals and the courts at all stages of the arbitration process;
- (ii) to re-emphasise and delimit party autonomy;
- (iii) to vest a greater number of powers in the arbitral tribunal but, in so doing, to make the exercise of those powers subject to overriding statutory duties;
- (iv) to vest exclusive default appointment powers in both domestic and international arbitrations in a specialised arbitration agency, *viz* HKIAC, and
- (v) to redress the balance of power between arbitral tribunals and the courts, limiting judicial intervention in the arbitration process by general reference to

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<sup>32</sup> Cf, respectively, articles 9 and 27 of the Model Law.

the underlying philosophy of article 5 of the Model Law.

There now follows a selection of the provisions of the principal Ordinance added by the 1996 Ordinance.

#### *The object of the Ordinance*

Section 2AA(1) of the Ordinance declares:

*"The object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense."*

This provision should be read together with sections 2AA(2) and 2GA(1) which amplify the statutory object and, respectively, set out the governing principles of the Ordinance and the overriding duties imposed on arbitral tribunals. It is also a provision to which parties should have keen regard, even though, by contrast with the English Arbitration Act 1996, which inspired this provision, parties are placed under no specific statutory duty to meet the object<sup>33</sup>.

#### *Governing principles of the Ordinance*

Section 2AA(2) bases the Ordinance on two overriding governing principles:

- "(a) subject to such safeguards as are necessary in the public interest, parties to a dispute should be free to agree how the dispute is to be resolved; and*
- (b) the Court should interfere in an arbitration only as expressly provided by this Ordinance."*

~~Section 2AA(2)(a) gives primacy to party autonomy and supports the right of the parties to make any agreement as to procedure so long as it is a *bona fide* choice which does not disadvantage one party or offend public policy. It impacts upon section 2GA(1)(b) of the Ordinance in the sense that an arbitrator is bound by any valid agreement as to choice of procedure that the parties may make. If the arbitrator believes that the parties have made an agreement as to procedure which in all the circumstances of the case is disproportionate to the dispute, he may seek to persuade the parties of the error of their ways. If the parties are not to be swayed, the arbitrator~~

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<sup>33</sup> Cf s 40 of the 1996 Act.

must either live with their decision or resign<sup>34</sup>.

Section 2AA(2)(b) relegates the rôle of the court to that of minimal support and supervision in terms based upon article 5 of the Model Law, which makes clear that the power of the court to intervene in arbitrations is restricted only with regard to matters that are the subject of the Model Law<sup>35</sup>. Anything falling outside the scope of the Model Law, whether supportive or supervisory in nature, remains the province of the courts under the relevant municipal law. Section 2AA(2)(b) is similar but by no means identical to article 5, but in a recent case was nevertheless interpreted and applied in very similar terms by the Court of First Instance so as to permit it to restrain an arbitration, under section 181(b) of the Companies Ordinance (Cap 32), pending the approval of a restructuring scheme<sup>36</sup>.

### *Arbitration agreements*

Section 2AC of the Ordinance excludes article 7(2) of the Model Law, so that arbitration agreements contained or evidenced in writing but not necessarily signed by the parties, and agreements made orally but by reference to terms set out in writing, are encompassed by a new definition of 'agreement in writing'. This provision is mandatory. In summary, section 2AC(2) sets out the following six alternative but overlapping criteria for determining whether an agreement is in writing for the purposes of the Ordinance<sup>37</sup>.

- (i) *The agreement is made in writing, whether or not it is signed*. Article 7(2) of the Model Law, by contrast, requires signature of single arbitration agreements. The new provision covers not only documents or a series of documents constituting a contract, but also other forms of document that are not signed by either party or both, eg a bill of lading, a charterparty or an order in one party's

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<sup>34</sup> See art 14 of the Model Law.

<sup>35</sup> Article 5 provides as follows:

*"In matters governed by this Law, [emphasis added] no court shall intervene except where so provided in this Law."*

<sup>36</sup> *Re UDL Contracting Ltd* [2000] 1 HKC 390.

<sup>37</sup> For discussion, see R Morgan, *Arbitration Agreements and the UNCITRAL Model Law* [1999] Asian DR 3, 33-37. Entirely oral arbitration agreements remain outwith the scope of the Ordinance.

standard terms of trading for the supply or manufacture of goods<sup>38</sup>.

- (ii) *The agreement is made by an exchange of written communications.* This includes not only a straightforward exchange of correspondence but also circumstances where correspondence provides a record of an arbitration agreement contained in another document or shows that a party agrees to the terms of such an arbitration agreement, eg in relation to a bill of lading or charterparty.
- (iii) *The agreement, though not of itself in writing, is evidenced in writing.* This provision encompasses (*inter alia*):
  - (a) a contract made over the telephone and followed by written confirmation (provided that arbitration is an agreed term);
  - (b) an agreement made by conduct (provided that it can be shown that at some time the course of dealing began by reference to written terms); and
  - (c) post-contractual correspondence showing the existence of the agreement.
- (iv) *The parties agree otherwise than in writing to terms that are in writing.* This encompasses:
  - (a) oral assent to a document containing standard terms and conditions which include an arbitration clause<sup>39</sup>;
  - (b) acceptance of one party's written terms by conduct;
  - (c) oral arbitration agreements incorporating by reference the terms of a written arbitration clause.
- (v) *The agreement, though made otherwise than in writing, is recorded by one of the parties to the agreement, or by a third party, with the authority of each of the parties.* A party or his representative or a mediator may record the making of an arbitration agreement. After arbitral proceedings have commenced, an arbitrator may record an extension of his jurisdiction agreed by the parties at a

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<sup>38</sup> See *H Smal Ltd v Goldroyce Garment Ltd* [1994] 2 HKC 526 a case in which the absence of a signature was fatal in these circumstances under the pre-27 June 1997 régime.

<sup>39</sup> As in *Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd* [1986] 2 Lloyd's Rep 225 (Court of Appeal, England).

preliminary meeting.

- (vi) *There is an exchange of written submissions, in arbitral or legal proceedings only, in which the existence of an arbitration agreement otherwise than in writing is alleged by one party and not denied by the other in response to the allegation.* This refers to pleadings or other forms of case statement in legal or arbitral proceedings already commenced. The new provision is actually stricter than that which it excludes, for the relevant part of article 7(2), by contrast, required only the exchange of statements of claim and defence in which the existence of an arbitration agreement was alleged by one party and not denied by the other, without any requirement that this exchange should be part of any legal or arbitral proceedings<sup>40</sup>.

Section 2AC(3) provides that a reference in an agreement (ie a written agreement) to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement. The Hong Kong courts will look not only at the words used but also at any other relevant considerations evincing an intention to incorporate an arbitration agreement by reference, such as (i) the background against which the contract was negotiated, (ii) one party's knowledge that the contract would be back-to-back with or referable to the terms and conditions of another contract, and (iii) the fact that the contract and the document which is sought to be incorporated were negotiated at arm's length<sup>41</sup>. This approach is less strict than the English approach, which applied pre-Model Law and requires specific reference to the arbitration agreement in the referring contract, mere general words of reference not sufficing because the arbitration agreement is a separate and distinct obligation. In practice, however, the matter can be put beyond doubt if parties follow the English approach.

#### *Default appointments of arbitrators*

Section 34C(3) of the Ordinance as amended vests exclusive responsibility for making

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<sup>40</sup> Pre-1996 Ordinance case law had held that a claim made under a building contract prior to the commencement of arbitration proceedings (eg a loss and expense claim) and an exchange of letters and affidavits could fall within the ambit of the old wording: see, respectively, *Gay Constructions Pty Ltd v Caledonian Techmore (Building) Ltd (Hanison Construction Co Ltd, third party)* [1995] 2 HKLR 35 at 39 per Kaplan J; *William Co v Chu Kong Agency Co Ltd* [1995] 2 HKLR 139 at 146 per Kaplan J.

<sup>41</sup> *Astel-Peiniger Joint Venture v Argos Engineering and Heavy Industries Co Ltd* [1994] 3 HKC 328.

default appointments of international tribunals in HKIAC *in lieu* of the court<sup>42</sup>. It should, however, be noted that this provision unequivocally vests jurisdiction to perform *any* function that may be required by an agreed appointment procedure that has broken down. This might include, for example, under article 11(4) of the Model Law, determining the appropriate qualifications of the members of the tribunal. This is a mandatory provision.

Whilst HKIAC's new default appointment jurisdiction has undoubtedly streamlined the appointment process and saved costs, however, there is a downside to this change in a minority of cases. HKIAC does not exercise judicial functions and so has none of the powers of a court. By contrast with the High Court's powers under the pre-27 June 1997 legislation, HKIAC has no power to penalise recalcitrant parties with orders for indemnity costs.

#### *Determining the number of arbitrators in international cases*

A new section 34C(5) of the Ordinance empowers HKIAC to decide whether one arbitrator or three should be appointed to an international tribunal in a Model Law case, failing agreement by the parties. This is a mandatory provision. It operates to the exclusion of article 10(2) of the Model Law<sup>43</sup>.

#### *Staying legal proceedings to arbitration*

Under article 8 of the Model Law a stay of legal proceedings to arbitration will be granted unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. The court has no discretion in the matter. The mandatory nature of article 8 would, if recent authority under section 9 of the English Arbitration Act 1996 is followed in Hong Kong, operate to bar parties to arbitration agreements from seeking summary judgment under Order 14 of the Rules of the High Court, on the basis that, having agreed to arbitrate disputes, they should be

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<sup>42</sup> Detailed rules governing the making of applications to HKIAC under these provisions, the manner in which HKIAC shall make decisions and the criteria to be taken into account in making them are set out in the Arbitration (Appointment of Arbitrators and Umpires) Rules 1997 (Cap 341 sub leg B). The procedures are explained in HKIAC's publication, *A Guide to Applying for the Appointment of an Arbitrator or for a Decision as to the Number of Arbitrators* (1997), which may also be downloaded from HKIAC's website at <http://www.hkiac.org/guide.htm>.

<sup>43</sup> For applicable statutory rules and HKIAC guidance on the procedures applicable under this power, see note XX above.

held to their bargain<sup>44</sup>. The mandatory nature of article 8 of the Model Law is also demonstrated by *Westco Airconditioning Ltd v Sui Chong Construction & Engineering Co Ltd*<sup>45</sup>, where it was held that if a 'staged' dispute resolution clause requires a dispute to be referred to the determination of a particular person prior to arbitration (eg the Engineer or Architect under a construction contract) and a dispute has not been so referred, the court may nevertheless stay proceedings to arbitration and in so doing may oblige a party to take the required step.

The proper approach to applications under article 8 of the Model Law was stated in the following terms by the Court of Appeal in *Tai Hing Cotton Mill Ltd v Glencore Grain Rotterdam BV*<sup>46</sup>, summarising earlier case law:

- (i) it is not the function of the court to investigate whether the defendant to the legal proceedings (the applicant for a stay) has an arguable basis for disputing the claim. The merits are for the tribunal alone to decide;
- (ii) it is also not the function of the court to consider in detail whether an arbitrator is likely to have jurisdiction to determine the dispute, as this is a question for the tribunal to decide;
- (iii) if the claim against the defendant (a) is the subject of an arbitration agreement and (b) is denied or not admitted, there is a 'dispute' within the meaning of article 8(1) of the Model Law<sup>47</sup>;
- (iv) the defendant must show that the arbitration agreement complies with the requirements as to form laid down by the Ordinance<sup>48</sup>;
- (v) the defendant must show a *prima facie* case that the dispute is the subject of an arbitration agreement or that an arbitration agreement exists<sup>49</sup>. Party autonomy

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<sup>44</sup> *Halki Shipping Corpn v Sopex Oils Ltd* [1998] 1 WLR 726 (Court of Appeal, England). This appears, however, to have been the approach of the Hong Kong courts for some time: see *Orienmet Minerals Co Ltd v Winner Desire Ltd* (unreported, A No 14689 of 1996, 7 April 1997).

<sup>45</sup> [1998] 1 HKC 254.

<sup>46</sup> [1996] 1 HKC 363.

<sup>47</sup> Any admission, whether as to liability or to quantum, must be unequivocal: see *Louis Dreyfus Trading Ltd v Bonarich International (Group) Ltd* [1997] 3 HKC 597.

<sup>48</sup> As to which, see s 2AC.

<sup>49</sup> This means a reasonably arguable case: see *Oonc Lines Ltd v Sino-American Advancement Co Ltd* [1994] ADRLJ 291.



requires the court, wherever possible, to implement the parties' intention to arbitrate their disputes<sup>50</sup>.

### *Overriding duties of the arbitral tribunal*

Section 2GA(1) requires arbitrators (i) to act fairly and impartially<sup>51</sup>, and (ii) to use procedures that are appropriate to the particular case, avoiding unnecessary delay and expense, so as to provide a fair means for resolving the dispute<sup>52</sup>. This is a mandatory provision, the effect of which is twofold. Firstly, it codifies the common law rules of natural justice for the purposes of arbitration law. Secondly, it imposes an overriding duty on arbitrators to manage cases by adopting appropriate procedures<sup>53</sup>. Thus, an arbitrator may (indeed, shall) dictate the procedure to be adopted where the parties have agreed none or have made an invalid agreement, *viz* one which is unfair to one party or which offends public policy<sup>54</sup>. Where the parties have made a general agreement as to procedure, but no more than that, the arbitrator may dictate the detailed procedure, for example, by dispensing with full discovery or an oral hearing, or by limiting the number of expert witnesses. The procedure to be adopted must be proportionate<sup>55</sup> to the nature of the dispute and the amount at stake. In dictating and applying a procedure, however, the arbitrator must act fairly and considerations of speed, efficiency and economy must never predominate over fairness<sup>56</sup>.

The section 2GA duties arise whatever the source of the arbitrator's procedural authority, whether statute, the common law, the arbitration agreement or arbitration rules.

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<sup>50</sup> *Chung Siu Hong v Primequine Corpn Ltd* (unreported, A No 10332 of 1999, 28 September 1999).

<sup>51</sup> Section 2GA(1)(a).

<sup>52</sup> Section 2GA(1)(b).

<sup>53</sup> For detailed discussion of case management in arbitration, see R Morgan, 'The Woolf at Arbitration's Door?', in M Wilkinson & J Burton (Eds), *Reform of the Civil Process in Hong Kong* (2000, Butterworths Asia, Hong Kong) at pp 291-297.

<sup>54</sup> See s 2AA(2)(a) of the Ordinance.

<sup>55</sup> This is the key catchword for case management under the English Woolf reforms for civil litigation, although it has been recognised that proportionality in this context derives from s 33(1)(b) of the English Arbitration Act 1996, on which s 2GA(1)(b) of the Hong Kong Ordinance is based: see *Patel v Patel* [1999] BLR 227 at 229 per Lord Woolf MR (Court of Appeal, England).

<sup>56</sup> *Damond Lock Grabowski & Partners v Laing Investments (Bracknell) Ltd* (1992) 60 BLR 112; D St J Sutton, J Kendall & M Vitoria, *Russell on Arbitration* (21st Edn 1997, Sweet & Maxwell, London) p 193, n 92.

### *Security for costs, interim measures of protection and evidentiary orders*

Section 2GB of the Ordinance defines the interim orders (including interim measures of protection for the purposes of article 17 of the Model Law) and evidentiary orders the arbitral tribunal may specifically make. Section 2GB(1) empowers the tribunal to:

- (i) order security for costs against a claimant (including a counterclaimant). The principles ordinarily applicable to security for costs in litigation apply, save that such an order must not be made only on the ground that the claimant is ordinarily resident or incorporated outside Hong Kong<sup>57</sup>;
- (ii) order interim measures of protection, ie orders securing sums in dispute, orders for the inspection, photographing, preservation, custody, detention, sale and testing of *property which is the subject-matter of the arbitration*, interim injunctions and other interim measures relating to such property;
- (iii) make orders that are protective of property as evidence in the arbitration, ie orders for the inspection, photographing, preservation, custody, detention and testing of such property and interim injunctions relating to it, and
- (iv) administer oaths and take affirmations, examine witnesses on oath or affirmation and direct the attendance of witnesses before the tribunal.

The list of interim measures is not exhaustive. The tribunal may order any interim measure which is known to Hong Kong law<sup>58</sup> or which it is empowered to order by contract. This provision gives statutory effect to judicial categorisations of what types of remedy could constitute an interim measure of protection, such as a *Mareva* injunction<sup>59</sup>.

The tribunal's powers as to examination and attendance of witnesses are subject to contrary agreement by the parties and are therefore non-mandatory. The remainder are mandatory.

### *Inquisitorial procedure*

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<sup>57</sup> Section 2GB(3) of the Ordinance.

<sup>58</sup> *Bocotra Construction Pte Ltd v Attorney-General of Singapore* [1995] 2 SLR 523 (Court of Appeal, Singapore).

<sup>59</sup> Or, in the post-Woolf era, a freezing order: see **CITE UML HK authorities**.

Section 2GB(6) empowers the tribunal to act inquisitorially. It may do so in respect of the whole or any part of the proceedings. In deciding whether to act inquisitorially, the tribunal must consider, in accordance with its overriding duty under section 2GA(1)(b), whether this is an appropriate and proportionate procedure to adopt. In acting inquisitorially, the tribunal must have regard to its overriding duty to act fairly under section 2GA(1)(a). This means not only that each party should have an equal opportunity to put its case and deal with that of its opponent, but also that the tribunal must not take the parties by surprise by making an award taking into account matters of fact or law or evidence which have not been put to them for comment beforehand<sup>60</sup>. The power to act inquisitorially is subject to contrary agreement by the parties and therefore non-mandatory<sup>61</sup>.

### *Extending time limits for commencing arbitrations*

Section 2GD of the Ordinance empowers the tribunal to extend time limits for commencing arbitrations. Two alternative and mutually exclusive tests apply to such applications:

- (i) whether the circumstances were outside the reasonable contemplation of the parties when they made the arbitration agreement and that it would be just to extend the period<sup>62</sup>, and
- (ii) in any other case, whether the conduct of one party makes it unjust to hold the other to the strict terms of the agreement<sup>63</sup>.

This is a mandatory provision. These alternative tests replace the former 'undue hardship' test provided for by the now-repealed section 29 of the Ordinance, which was considered to have been too indulgently applied by the courts. More cases are likely to arise under the second test, *viz* the conduct of the other party, and cases decided under the former section 29 may continue to have some relevance. There is no decided case law on section 2GD as yet, so this remains a moot point. What is, however, clear is that a party's chances of succeeding on an application under section 2GD will continue to depend on whether that party has taken effective steps to refer

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<sup>60</sup> *Fox v P G Wellfair Ltd (in liquidation)* [1981] 2 Lloyd's Rep 514 (Court of Appeal, England); *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39; *Apex Tech Investment Ltd v Chuang's Development (China) Ltd* [1996] 2 HKC 293 (Court of Appeal).

<sup>61</sup> This provision contrasts with the previous position at common law, whereby an arbitrator required positive sanction by the parties in order to proceed inquisitorially.

<sup>62</sup> Section 2GD(5)(a).

<sup>63</sup> Section 2GD(5)(b).

a claim to arbitration<sup>64</sup>.

What is, however, clear is that the tribunal or the court will apply this power conservatively, on the basis that an extension of time is a variation of the parties' contract. CITE KAPLAN DECISION

### *Dismissal of claims for want of prosecution*

Section 2GE of the Ordinance empowers the tribunal to make orders dismissing a party's claim or counterclaim for want of prosecution and prohibiting that party from commencing further arbitration proceedings on that claim. The tribunal may make such orders if satisfied that that party or its adviser has unreasonably delayed bringing or prosecuting his claim. This is a mandatory provision. The power was previously vested exclusively in the High Court by virtue of the now-repealed section 29A of the Ordinance. The principles applicable to civil litigation by virtue of *Birkett v James*<sup>65</sup> apply also to arbitrations. Thus, where delay occurs after the commencement of arbitration proceedings but within the relevant limitation period, a claim will not normally be dismissed<sup>66</sup>.

### *Limiting the supportive powers of the court*

The vesting of primary powers in arbitral tribunals by sections 2GB, 2GD and 2GE of the Ordinance means that any parallel powers of the Court of First Instance to make orders during the arbitration proceedings are residual only. Accordingly, the 1996 amendments have limited the supportive powers of the court in the following respects:

*interim measures of protection and evidentiary orders*: section 2GC limits the court's powers to make evidentiary orders and to order interim measures of

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<sup>64</sup> There is as yet no decided case law on this matter in Hong Kong. After considerable argument in the English courts on what constitutes commencement of an arbitration in the context of similar statutory provisions, however (s 12 of the Arbitration Act 1996), the balance of opinion has reverted to the straightforward approach of Lord Denning MR in *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] QB 933 at 944 (Court of Appeal, England): see *Allianz Versicherungs AG v Fortuna Co Inc* [1999] 1 WLR 2117 and *Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd* [1999] 1 Lloyd's Rep 225. Lord Denning MR said in the *Nea Agrex* case that all that a party needed to do was to serve a notice of arbitration which made clear that it was invoking the arbitration agreement. The agreement could therefore be invoked by implication as well as by an express requirement that the other party should agree to the appointment of a sole arbitrator or name its arbitrator.

<sup>65</sup> [1978] AC 297 (House of Lords).

<sup>66</sup> *James Lazenby & Co v McNicholas Construction Co Ltd* [1995] 1 WLR 615; *Acme Metal Works Ltd v Shum Shing Construction and Engineering Co Ltd* [1990] 2 HKLR 474.

protection to instances where it would not be appropriate for the tribunal to make them (eg where a third party is affected, or where a tribunal cannot grant all forms of relief sought within the ambit of a single order<sup>67</sup>). It also makes clear the interim measures of protection and evidentiary orders that the court may make for the purposes of, respectively, articles 9 and 27 of the Model Law. By contrast with the pre-27 June 1997 law, the court *cannot* order security for costs at all in connection with an arbitration;

- *extending time for commencing arbitral proceedings*: section 2GD(8) empowers the court to make orders extending time for commencing arbitral proceedings only where no tribunal has yet come into existence;
- *dismissal for want of prosecution*: section 2GE(5) empowers the court to make orders dismissing a claim or counterclaim for want of prosecution only where no tribunal has yet come into existence.

All of these are mandatory provisions.

#### *Awards of interest*

Section 2GH of the Ordinance empowers the tribunal to award compound interest at such rate as it thinks fit from the date on which a sum became legally due up until the date of the award or, where a sum has been paid late but before the date of the award and is the subject of the arbitration, up until the date of payment. This is a non-mandatory provision. It is largely a re-enactment of previous law, save that there is now power to award compound interest<sup>68</sup>. The tribunal must decide, as a matter of judicial discretion,

- (i) whether to award interest at all<sup>69</sup>;
- (ii) whether interest should be simple or compound;

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<sup>67</sup> *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] 4 HKC 347.

<sup>68</sup> It had been argued unsuccessfully that the previous provision, the now-repealed s 22A of the Ordinance, which was silent as to the type of interest that could be awarded, vested arbitral tribunals with power to award compound interest: *Attorney General v Shimizu Corpn (formerly known as Shimizu Construction Co Ltd) (No 2)* [1997] 1 HKC 453 (Court of Appeal).

<sup>69</sup> In a domestic arbitration, it is misconduct justifying remission of the award under s 24 of the Ordinance for interest not to be awarded, having been claimed and an entitlement thereto proved: *Panchaud Frères SA v R Pagnan & Fratelli* [1974] 1 Lloyd's Rep 394; *P J van der Zijden Wildhandel NV v Tucker & Cross Ltd* [1976] 1 Lloyd's Rep 341.

- (iii) the period in respect of which interest is awardable, and
- (iv) the applicable rate. This should be a commercial rate unless some special reason can be shown. In any event, it should be a reasonable rate<sup>70</sup>, the purpose of interest being to compensate the winning party for being kept out of the use of his money, not to punish the other party<sup>71</sup>.

### *Limiting costs in advance during the arbitration*

Section 2GL of the Ordinance empowers the arbitral tribunal to limit a party's recoverable costs of the arbitration to a specified amount in advance of their being incurred. This is a non-mandatory provision<sup>72</sup>. It is a new and unique form of case management device which is intended to encourage parties to be economical in pursuing their rights and not to engage in oppressive behaviour by using or abusing financial muscle, and thus to level the playing field. The power to make a capping order must be exercised sufficiently in advance of relevant costs being incurred, fairly and reasonably and in accordance with the arbitrator's overriding duties under section 2GA(1) of the Ordinance<sup>73</sup>. Though not expressly apparent from the wording, learned commentary on almost identical provisions in section 65 of the English Arbitration Act 1996 suggests that the arbitrator may invoke this power of his own volition as well as on the application of a party<sup>74</sup>. In any event, whilst the arbitrator may limit a party's recoverable costs, he cannot limit what that party actually spends.

### **The Model Law as a catalyst for more fundamental law reform**

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<sup>70</sup> In the context of simple interest, this has been held to mean a rate of 1% above base commercial lending rates: *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd (No 2)* [1990] 1 Lloyd's Rep 441 at 451-453 per Webster J; in the Hong Kong context, however, 2% above base rates has been suggested as reasonable: see N Kaplan, J Spruce & T Y W Cheng, *Hong Kong Arbitration Cases and Materials* (1991, Butterworths Asia, Hong Kong) at p 109.

<sup>71</sup> *Riches v Westminster Bank Ltd* [1947] AC 390 at 400 per Lord Wright (House of Lords).

<sup>72</sup> See generally Morgan (note 79) at pp 297-299; R Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary* (1997, Butterworths Asia, Hong Kong), *1997 Supplement* at pp 95-97.

<sup>73</sup> There is a drafting anomaly, however, in that the duty to exercise this power sufficiently in advance of the relevant costs being incurred appears to apply only the variation of a capping order: cf s 65(2) of the English Arbitration Act 1996, which clearly imposes this duty when both making a capping order and varying it. The absence of an initial duty cannot have been the intention of the legislature.

<sup>74</sup> B Harris, R Planterose & J Tecks, *The Arbitration Act 1996: A Commentary* (2nd Edn 2000, Blackwell Science, Oxford) p 292.

## *Introduction*

As stated earlier, the results of consultations with Hong Kong's arbitration community showed a groundswell of opinion in favour of regaining a unitary system of arbitration, with the Model Law applying to both domestic and international arbitrations and supplemented by a small number of 'add-on' provisions, some of which would be applicable to domestic arbitration only. The 1996 amendments were intended by the Committee on Arbitration Law to be paving provisions, pending more fundamental root and branch reform of the law.

### *A new advisory committee*

The Committee on Arbitration Law was disbanded shortly after the passage of the 1996 Ordinance. Early in 1998 the Hong Kong Institute of Arbitrators took the initiative, with the support of the Secretary for Justice, of establishing a Committee on Hong Kong Arbitration Law to take forward the work started by its predecessor. Like its predecessor, the present Committee is multidisciplinary and comprises representatives from the main arbitral, trade and professional bodies involved in arbitration, including HKIAC, the Chartered Institute of Arbitrators (East Asia Branch), the Bar Association and the Law Society. Its terms of reference, which are based upon a paragraph its predecessor's report of April 1996 to the Attorney General, are stated thus:

*"The [HKIAC] committee therefore proposes that the Arbitration Ordinance, Cap 341, as amended by the 1996 [Ordinance], should be completely redrawn in order to apply the [UNCITRAL] 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. In the process the legislation would keep pace with the needs of the modern arbitration community, domestically and globally, and would free Hong Kong from the outdated and illogically arranged English Arbitration Acts [1950-1979, now repealed], and the large body of case law on which their interpretation depends."*

It is anticipated that the present Committee will report to Government sometime in 2000<sup>75</sup>.

### *Questions of principle*

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<sup>75</sup> For further discussion of current law reform in Hong Kong, see R Peard, *The Arbitration Ordinance: What Further Changes are Needed?* [1999] 1 Asian DR 33-35.

During the course of its deliberations, the Committee has considered and decided a number of fundamental questions of principle about the shape and content of a future Arbitration Ordinance. The main questions, and the Committee's decisions thereon, include the following.

- *The applicable system of arbitration law.* The concept of a unitary system of arbitration law, with the Model Law governing both domestic and international arbitrations, has been endorsed.
- *How a new Ordinance should be structured.* The Model Law should form the body of the new Ordinance and incorporate amendments thereto. This would follow the New Zealand approach to enactment of the Model Law<sup>76</sup> and would also make the Ordinance user-friendly. Hong Kong should continue to be and be seen to be a Model Law jurisdiction proper.
- *Rights of appeal in domestic cases.* Rights of appeal should be retained in domestic cases, but only if parties opt into it, rather than on a mandatory basis. Parties should, furthermore, be able to opt into rights of appeal at any time<sup>77</sup>.

#### *Questions of detail*

The full Committee has established a Principles Working Group to draw up and submit the questions of principle listed above, to examine a large number of detailed proposals for law reform and to make recommendations to the Committee accordingly. The general approach adopted has been to see if the Model Law as it currently stands is capable of dealing with a particular matter. Indeed, where both the domestic provisions and the Model Law apply to a particular issue, preference has consistently been expressed for the Model Law approach. This is of course appropriate in the light of the underlying general principle that the Model Law should form the basis of a new Arbitration Ordinance. This is reflected in the guiding principle adopted by the Committee for reform of the Arbitration Ordinance:

*"That, insofar as a matter had not been dealt with by the UNCITRAL Model Law, the enactment of any additional provision would only be recommended where there was good reason for doing so, for example:*

*"(i) where a domestic provision of the Ordinance was widely accepted, or*

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See the New Zealand Arbitration Act 1996.

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This is subject to the Hong Kong Government's views on the subject being obtained. The reasons for this are twofold: (i) it is the Government's policy not to enter into agreements excluding rights of appeal under s 23B of the current Ordinance, and (ii) arbitrations under all Government forms of contract are deemed to be domestic.



"(ii) *the provision in question was not contemplated at the time the Model Law was adopted.*

"*The [Principles Working] Group would not, therefore, seek to codify Hong Kong arbitration law.*"

In a small number of cases it has been decided that there should either be 'add-on' provisions to accommodate domestic cases or amendments to the face of the Model Law so as to provide equally for domestic and international arbitrations. Among the most important of these decisions are the following.

- *Seat of the arbitration.* A unitary régime would require a 'scope of application' provision, in particular to specify which of the court's supportive powers should apply where the seat of the arbitration is outside Hong Kong.
- *Determination by the court of a preliminary point of law.* A power along the lines of section 45 of the English Arbitration Act 1996 should be considered and, if adopted, should only apply where parties opt into it.
- *Overriding general duty on the parties.* A general duty on the parties to progress arbitrations and obey the tribunal's directions is not explicitly stated in article 18 of the Model Law<sup>78</sup>. It would be appropriate to adopt a provision based on section 40(1) of the English Arbitration Act 1996 and to incorporate it in that part of any new Ordinance dealing with general duties.
- *Ensuring internal consistency.* Existing internal inconsistencies between Part IA of the Ordinance and the Model Law having been identified<sup>79</sup>, care would need to be taken to avoid them in the future. Whilst having a unitary régime would go some way towards promoting consistency, there remains a danger that there could be inconsistency between the Model Law as enacted with amendments in a new Ordinance and any add-on provisions.

Although supportive of the Committee's work, the Government has given no firm commitment to devote administrative resources or legislative time to the root and branch reform of arbitration law.

## **Law reform initiatives by UNCITRAL**

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<sup>78</sup> Broches, *op cit* (note 103), p 95.

<sup>79</sup> See *Internal inconsistencies in the Arbitration Ordinance: caveat practitioner*, above

In closing, it is interesting to note that the UNCITRAL Secretariat has begun to examine ways in which the substance of the Model Law may be improved and its coverage broadened. A document of April 1999<sup>80</sup> sets out a list of possible topics for consideration by the Commission, most of which have been dealt with in Hong Kong by virtue of the 1996 amendments or addressed in the deliberations of the present Committee. These include conciliation<sup>81</sup>, requirements as to agreements in writing<sup>82</sup>, confidentiality of arbitral proceedings, consolidation, liability of arbitrators, awards of interest and costs of arbitral proceedings. The Principles Working Group will make recommendations on these proposals in due course<sup>83</sup>.

## **HEBEI IMPORT & EXPORT CORPN V POLYTEK ENGINEERING CO LTD [1999] 1 HKLRD 665**

### ***Arbitration - Enforcement of Convention award - Application to set aside leave to enforce award - Due process and public policy***

This was an appeal by Hebei Import & Export Corp (Hebei) from a decision of the Court of Appeal<sup>84</sup> setting aside leave to enforce a Convention award and judgment entered in terms of the award. The Court of Final Appeal reversed the Court of Appeal's decision.

### **Background**

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<sup>80</sup> UNCITRAL, *International Commercial Arbitration: Possible future work in the area of international commercial arbitration - Note by the Secretariat*, A/CN.9/460, 6 April 1999 (UNCITRAL, Vienna).

<sup>81</sup> See also UNCITRAL, *Settlement of Commercial Disputes: Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement - Report of the Secretary-General*, A/CN.9/WG.II/WP.108, 14 January 2000 (UNCITRAL, Vienna).

<sup>82</sup> See also UNCITRAL, *Settlement of Commercial Disputes: Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation, interim measures of protection, written form for arbitration agreement - Report of the Secretary-General*, A/CN.9/WG.II/WP.108/Add.1, 26 January 2000 (UNCITRAL, Vienna).

<sup>83</sup> For further discussion of and proposals for reform of the Model Law, see P Sanders, *What May Still be Done in the World of Arbitration?* (1999) 65 JCI Arb (4), 260-265; P Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice* (1999, Kluwer, The Hague), Chs V and VII.

<sup>84</sup> The Court of Appeal's decision was summarised at [1999] Int ALR N-70, *sub nom Hebei Import & Export Corporation v Polytek Engineering Co Ltd (No 2)*.

Polytek Engineering Co Ltd (Polytek) was the respondent in a CIETAC arbitration and in this appeal. It failed to honour an award made against it in March 1996 by the arbitral tribunal. The award was a Convention award. Hebei accordingly applied to the former High Court for leave to enforce the award in Hong Kong and to enter judgment in terms of the award, pursuant to s 42 of the Arbitration Ordinance (Cap 341)<sup>85</sup>. Findlay J granted leave in May 1997 but his order was reversed by the Court of Appeal. The principal questions of law arising in the appeal were as follows:

- (i) *whether Polytek was unable properly to present its case.* Polytek alleged a serious breach of natural justice on the grounds (*inter alia*) that (a) the Chief Arbitrator and tribunal-appointed experts had inspected equipment which was the subject-matter of the arbitration in the presence only of Hebei's technicians and in the absence of Polytek, (b) Polytek's request for a further hearing following the inspection was denied and (c) a request to postpone the award in order to obtain the manufacturer's comments on the experts' report was also denied. In the light of these allegations, leave to enforce the judgment should be set aside, by virtue of s 44(2)(c) of the Ordinance;
- (ii) *whether to enforce the award would breach public policy because of apparent bias on the part of the Chief Arbitrator.* Polytek alleged that there had been unilateral communications between the Chief Arbitrator and Hebei's technicians because the latter had demonstrated the operation of the equipment to the tribunal's experts in the presence of the Chief Arbitrator. This, said Polytek, gave rise to apparent bias, which, by virtue of s 44(3) of the Ordinance, would justify refusal to enforce the award on public policy grounds.

Hebei countered by saying that Polytek must be deemed to have accepted these irregularities because it failed to raise them with the tribunal.

## **Judgment**

The Court restored Findlay J's order granting leave to enforce the award and entering judgment in terms of the award.

On the first question, the Court held that, although the Chief Arbitrator had heard what Hebei's technicians had to say, the evidence showed that his function in attending the inspection was to ensure the independence and impartiality of the experts' inspection. Polytek had had ample opportunity to comment on the experts' report; despite having made three submissions on it, none of them addressed its substance. The tribunal was also entitled to deny Polytek's request to delay the award because it was made very late in the day. There had, therefore, been no breach of natural justice.

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<sup>85</sup> Hereinafter 'the Ordinance'.

On the second question, the Court held that the opportunity for a party to present his case and for an award to be made by a tribunal which was neither influenced nor seen to be influenced by private communications were fundamental to the basic notions of morality and justice in Hong Kong. Whilst the conduct alleged by Polytek in this regard might be regarded as breaching these notions, it was relevant that Polytek had failed to avail itself of ample opportunities to seek correction of the alleged irregularities. Section s 44 of the Ordinance vested the enforcing court with an overriding discretion to allow enforcement even where a ground for refusing it had been made out. Whilst ordinarily the discretion would not be exercised in favour of enforcing the award where a breach of public policy was established, it was appropriate to do so in the present case because Polytek failed to make prompt objection to the tribunal but had kept such objection up its sleeve for future use.

### Commentary

This case emphasises once again the ‘pro-enforcement bias’ applied to Convention awards (*Parsons & Whittemore Overseas Co Inc v Société Générale de l’Industrie du Papier (RAKTA)*<sup>86</sup>), so that enforcement will be ordered unless to do so would give rise to a risk of obvious and substantial prejudice to the party resisting enforcement. A party must therefore establish a clear, material and fundamental violation of his rights in order to justify refusal to enforce a Convention award; such cases are rare indeed: see *Paklito Investment Ltd v Klockner East Asia Ltd*<sup>87</sup>; *JJ Agro Industries (P) Ltd v Texuna International Ltd*<sup>88</sup> and *Apex Tech Investment Ltd v Chuang’s Development (China) Ltd*<sup>89</sup> (the last of which represented a high water mark in judicial interventionism in New York Convention cases).

This case also demonstrates that the court may be persuaded, exceptionally, to exercise leave in favour of enforcing a Convention award, a public policy objection having been made out, where the party resisting enforcement has failed to safeguard his rights at the material time. This is a narrow technical ground for exercising the court’s discretion in this manner. Had Polytek voiced its objections to the tribunal at the material time but unsuccessfully, the result might have been different.

In spite of its adherence to the strict pro-enforcement approach, the Court of Final Appeal’s decision also marks a slight softening of attitude as to the content of s 44

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<sup>86</sup> 508 F 2d 969 (1974) (US Court of Appeals, 2nd Circuit).

<sup>87</sup> [1993] 2 HKLR 39.

<sup>88</sup> [1994] 1 HKLR 89.

<sup>89</sup> [1996] 2 HKC 293 (Court of Appeal).

applications. The due process grounds of challenge to enforcement conferred by s 44(2)(c) and (3) of the Ordinance are, of course, separate and a public policy issue may be raised by the court of its own motion. The courts have traditionally discouraged parties from using public policy objections under s 44(3) merely to lend weight to a case based on s 44(2). However, Sir Anthony Mason NPJ, in his leading judgment, said that there was no reason why a party should not raise a specific s 44(2) ground under the guise of public policy. Naturally, however, the onus rests on the party raising the issue and it is likely that most applications brought on this basis will, as hitherto, fail.

This is the final reported Hong Kong decision involving the enforcement of a Mainland Chinese award under the New York Convention. Mainland awards made on or after 1 July 1997 are no longer Convention awards and since 1 February 2000 have been enforceable in Hong Kong on terms akin to those availing Convention awards, by virtue of amendments made to the Ordinance by the Arbitration (Amendment) Ordinance 2000<sup>90</sup>.

**MEDISON CO LTD v VICTOR (FAR EAST) LTD  
[2000] 2 HKC 502**

*Convention award - Enforcement - Evidentiary requirements in support of application for leave to enforce award - Production of original award at inter partes hearing - Attempt to argue at enforcement stage case not raised in arbitration*

**Background**

The plaintiff obtained *ex parte* leave from the Court of First Instance to enforce in Hong Kong an award made by an arbitral tribunal in South Korea and to enter judgment in terms of the award, pursuant to ss 2GG and 42(1) of the Arbitration Ordinance (Cap 341)<sup>1</sup>. The award was a Convention award. The claim was for breach of a contract of sale and purchase. In the arbitration, the defendant had neither submitted a defence nor appeared at the hearing. In *inter partes* proceedings to set aside the leave to enforce and the judgment, the defendant argued:

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<sup>90</sup> Ordinance No 2 of 2000. This Ordinance is summarised below at p N-XX.

<sup>1</sup> Hereinafter 'the Ordinance'.

- (i) that the plaintiff had failed to comply with the requirements of s 43(a) and (b) of the Ordinance because it did not produce the original award to the court until the *inter partes* hearing. The defendant did not, however, contest the award's authenticity;
- (ii) that the parties had concluded an alleged 'importation agreement' which was intended to be the true agreement governing the parties' relationship. The award therefore contravened public policy because it was based on a contract which the parties did not intend to be binding, so that leave to enforce should be set aside under s 44(3) of the Ordinance.

## **Judgment**

The Court of First Instance (Burrell J) held as follows.

Section 43 of the Ordinance required the court to be satisfied that it was dealing with a proper and genuine award before finally adjudicating on the plaintiff's application. It was therefore sufficient that the original award was produced to the court at the *inter partes* stage.

As to the existence and effect of the 'importation agreement', the defendant had done little more than to assert at enforcement stage the case it had failed to submit to the arbitral tribunal. Save where fraud was alleged, the court would not give the defendant a second chance to argue the merits. This was not the case here, as fraud had been alleged neither in the arbitration nor in the enforcement proceedings. Indeed, the evidence supported the validity of the contract on which the award was based and indicated that the defendant had accepted this.

## **Commentary**

There are few decisions on the scope of s 43 of the Ordinance. The requirement in s 43(a) that the original award be duly authenticated is thought to add nothing to the normal rules governing the proof of documents<sup>2</sup>. The decision of the former High Court of Hong Kong in *Guangdong New Technology Import and Export Corp Jiangmen Branch v Chiu Shing t/a BC Property and Trading Co*<sup>3</sup>, which was considered in this case, holds that only *prima facie* proof of authenticity is required and that the requirement may be met by producing a copy of the award under cover of an affidavit or affirmation by the applicant's Hong Kong solicitors attesting that the copy is a true copy. The *Medison* case confirms this requirement in the particular context

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<sup>2</sup> Mustill & Boyd, *Commercial Arbitration* (2nd Edn 1989, Butterworths, London) p 425.

<sup>3</sup> [1991] 2 HKC 459.

of *ex parte* proceedings to enforce. Thus, in the very rare case that a court is not satisfied as to an award's authenticity at *ex parte* stage, it would be at liberty to refuse the application. In any other case, the court has a wide discretion to consider the application on *prima facie* proof only and leave it to the applicant to meet the strict requirement of s 43(a) at *inter partes* stage.

Fraud is one of only three instances under the New York Convention where the enforcing court will look into the merits of the award<sup>4</sup>, excess of jurisdiction<sup>5</sup> and non-arbitrability<sup>6</sup> being the others. The public policy ground for refusing leave to enforce will be applied sparingly<sup>7</sup> and only where to do otherwise would violate Hong Kong's most basic notions of morality and justice<sup>8</sup>. Having failed to take steps to assert its position in the arbitration, having accepted the authenticity of the award and having apparently accepted the validity of the subject contract, the defendant in the *Medison* case came nowhere near establishing a fundamental violation of its rights.

The *Medison* decision also demonstrates neatly, in relation to both of the defendant's complaints, the underlying policy of Part IV of the Ordinance: to discourage opposition to enforcement based on unmeritorious technical points and to uphold Convention awards except where complaints of substance can be made good<sup>9</sup>.

## **ENFORCEMENT OF CHINESE AWARDS NOW COMPLETE**

### ***New arrangements for enforcement in Hong Kong of Mainland and Taiwanese awards - but with a difference***

#### *Mainland China*

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<sup>4</sup> Section 44(3) of the Ordinance; art V.2(b) of the Convention.

<sup>5</sup> Section 44(2)(d) of the Ordinance; art V.1(c) of the Convention.

<sup>6</sup> Section 44(3) of the Ordinance; art V.2(a) of the Convention.

<sup>7</sup> *Werner A Bock KG v The N's Co Ltd* [1978] HKLR 281 (Court of Appeal).

<sup>8</sup> *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA)* 508 F 2d 969 (1974) (US Court of Appeals, 2nd Circuit), as applied by the former High Court in *Qinhuangdao Tongda Enterprise Development Co v Million Basic Co Ltd* [1993] 1 HKLR 173.

<sup>9</sup> *Werner A Bock KG v The N's Co Ltd* [1978] HKLR 281 at 285, per Huggins JA (Court of Appeal).

Prior to 27 June 1997, Mainland Chinese awards were summarily enforceable in Hong Kong, pursuant to the now-repealed s 2H of the Arbitration Ordinance (Cap 341)<sup>1</sup>. Until 1 July 1997, they were also Convention awards. All this changed with the transition of sovereignty and the amendment of the Ordinance by the Arbitration (Amendment) Ordinance 1996<sup>2</sup>. Section 2H of the Ordinance was repealed and replaced by s 2GG. Unlike s 2H, s 2GG is a provision of Part IA of the Ordinance.

Warnings going back to 1992 about a legal vacuum in cross-border enforcement were vindicated by the decision of the Court of First Instance in Ng Fung Hong Ltd v ABC<sup>3</sup>, where Findlay J in the Court of First Instance refused summary enforcement of a CIETAC award under s 2GG of the Ordinance on the basis that that provision applied only to the enforcement of awards made in domestic arbitrations and in international arbitrations conducted in Hong Kong. Because of 'one country, two systems' under Hong Kong's Basic Law, a Mainland award was not a foreign award but at the same time was not a domestic award either. Mainland awards could therefore only be enforced in Hong Kong by virtue of a common law action on the award, which is subject to a far greater number of defences than summary enforcement of a Convention award<sup>4</sup>.

On 20 June 1999, following protracted discussions, the authorities in Hong Kong and the PRC concluded an Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Mutual Enforcement of Arbitration Awards<sup>5</sup>, a juridical assistance agreement made under art 95 of the Basic Law.

The Arrangement was implemented by further amendments to the principal Ordinance which came into force on 1 February 2000 via the Arbitration (Amendment) Ordinance 2000<sup>6</sup>. The effects of the new provisions are as follows.

- (i) A new Part IIIA (ss 40A-40G) is added to the principal Ordinance to effect the enforcement of 'Mainland awards'.

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<sup>1</sup> Hereinafter 'the Ordinance'.

<sup>2</sup> Ordinance No 75 of 1996, which took effect on 27 June 1997.

<sup>3</sup> [1998] 1 HKC 213.

<sup>4</sup> For detailed discussion of the difficulties, see Robert Morgan, *Mutual Enforcement of Awards between Hong Kong and the People's Republic of China - One Country, Still no System* [1999] Int ALR 29-34.

<sup>5</sup> Hereinafter 'the Arrangement', which was discussed in Peter S Caldwell, *Reciprocal Enforcement of Arbitral Awards between Hong Kong and the Mainland of China* [1999] Int ALR N-33-N-35.

<sup>6</sup> Ordinance No 2 of 2000.



(ii) A ‘Mainland award’ is defined in s 2(1) as amended as -

*“an arbitral award made on the Mainland by a recognized Mainland arbitral authority<sup>7</sup> in accordance with the Arbitration Law of the People’s Republic of China”<sup>8</sup>*

(iii) A party whose application to enforce a Mainland award was refused at any time between 1 July 1997 and 1 February 2000 may nevertheless reapply for leave to enforce the award<sup>9</sup>.

(iv) New York Convention-type arrangements apply, viz provisions as to recognition and enforcement<sup>10</sup>, enforcement mechanisms<sup>11</sup>, evidentiary requirements<sup>12</sup> and exclusive grounds for refusing enforcement<sup>13</sup>.

(v) A Mainland award may not generally be enforced in Hong Kong if application has been made to enforce it on the Mainland<sup>14</sup>. Where, however, an award has been only partially satisfied on the Mainland, an application to enforce payment of the balance may be made in Hong Kong<sup>15</sup>.

#### *Taiwanese and other foreign awards*

Prior to 27 June 1997, Taiwanese awards were summarily enforceable in Hong Kong, pursuant to the now-repealed s 2H of the Ordinance, at the discretion of the former

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<sup>7</sup> As also defined by s 2(1) of the principal Ordinance as amended.

<sup>8</sup> The Arbitration Law of 31 August 1994, Chapter II. The list of domestic and foreign-related arbitration commissions whose awards may be enforced in Hong Kong pursuant to the new provisions was gazetted by the Secretary for Justice as GN 768 of 3 February 2000 (*Gazette* No 6/2000) in accordance with s 40F of the Ordinance.

<sup>9</sup> Section 40G. Although the drafting is not entirely clear and the requirement has not been enacted in the local legislation, art 10 of the Arrangement appears to limit the right to reapply to 6 months from 1 February 2000 in the case of legal persons and 12 months in the case of natural persons.

<sup>10</sup> Section 40B of the Ordinance.

<sup>11</sup> *Ibid*, s 40B(1) (applying s 2GG) and s 15 of Ordinance No 2 of 2000, which consequentially amends RHC Ord 73 r 10.

<sup>12</sup> Section 40D of the Ordinance.

<sup>13</sup> *Ibid*, s 40E.

<sup>14</sup> *Ibid*, s 40C(1).

<sup>15</sup> *Ibid*, s 40C(2).

High Court. The construction of s 2GG of the Ordinance enunciated in *Ng Fung Hong Ltd v ABC*, however, applied equally to Taiwanese awards, leaving them also enforceable only by an action on the award.

New arrangements for Taiwanese awards were implemented by the Arbitration (Amendment) (No 2) Ordinance 2000<sup>16</sup>. The effects of the new provisions are as follows.

- (i) The principal Ordinance is amended by the addition of a new s 2GG(2).
- (ii) Awards made in Taiwan are henceforth enforceable once again at the discretion of the court - though Taiwan itself is not named in the legislation.
- (iii) Foreign awards other than Convention awards are also enforceable under s 2GG - for example, awards made in Pakistan<sup>17</sup>.
- (iv) Defences available to domestic awards or under an action on the award apply, however, to awards made in Taiwan and in other non-New York Convention States and territories, because the Convention has no application to them.

One effect of these amendments is, however, startling. Section 2GG(2) also has the effect of applying s 2GG to the enforcement of interlocutory orders and directions of an arbitral tribunal, *even one sitting overseas*. This provision appears to apply as much to a Convention award as to a Taiwanese or other foreign award. Hong Kong has therefore unilaterally undertaken to facilitate the enforcement in the Special Administrative Region of interlocutory orders and directions made by any Chinese, Taiwanese or foreign arbitral tribunal in the absence of any reciprocal agreement to this effect. This legislation flies in the face of strong case authority under the New York Convention (albeit not of Hong Kong origin) which holds that non-final orders cannot be enforced overseas<sup>18</sup>. It is unlikely to be copied in other jurisdictions.

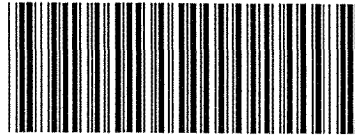
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<sup>16</sup> Ordinance No 38 of 2000, which took effect on 23 June 2000.

<sup>17</sup> Pakistan has signed but not ratified the New York Convention. It therefore remains a party to the (Geneva) Convention on the Execution of Foreign Arbitral Awards 1927, which lapsed in Hong Kong on 1 July 1997 - although this was not legally confirmed until 1 February 2000, when ss 4 and 11 of Ordinance No 2 of 2000 took effect.

<sup>18</sup> *Resort Condominiums International v Bolwell* (1993) 118 ALR 655 (Supreme Court of Queensland).

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